ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

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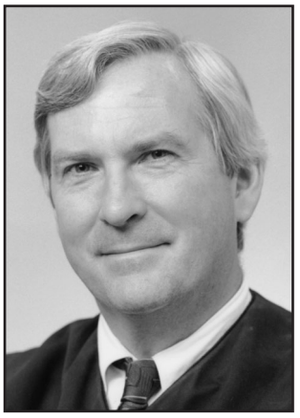
Ten Things I Wish I Had Known When I Was a Lawyer

Judge William F. Highberger practiced labor and employment law at Gibson, Dunn & Crutcher LLP for 22 years prior to his appointment to the Superior Court in 1998. He is currently assigned to a "fast track" civil, general jurisdiction calendar in the Central District. From the vantage point of the bench, Judge Highberger now shares with us ten things he wishes he knew when he was in private practice.



Hon. William F. Highberger

• It's permissible to use "lawyer tricks" unless and until someone calls you on it.

Most trial lawyers believe that they should avoid engaging in tactics that are generally considered objectionable in the courtroom. However, letting your adversary use disfavored trial techniques may privilege you to do similar things, such as: using argument in your opening statement; leading your own witness; restating a hostile witness' prior testimony in posing follow-up questions; or arguing the law outside of closing argument, especially in examining any witness willing to talk about legal duties, issues and conclusions. You may determine that letting your adversary open the door to otherwise objectionable testimony presents a greater advantage to you than to your opponent.

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The Art of Oral Argument on Appeal

Once upon a time, the spoken word was the centerpiece of any appeal. The parties filed briefs that were indeed brief, little more than outlines of points and authorities. The parties presented their cases in full — the facts, the law, the argument — in oral argument to an appellate court that until then knew little about the case. Oral arguments could take days.

Today, the written word predominates in the appellate process. Court rules require that the briefs present all the facts, the law and the argument, with detailed record citations and supporting legal authorities. Oral argument is the last rather than the first meaningful opportunity for the parties to address the court. Generally, oral argument is short, measured in minutes rather than days, and there may be a dozen cases on a single day's calendar. The parties thus have little time to do anything more than emphasize their most important points and answer any questions the appellate court may have. In federal appeals, the court may choose not to hear oral argument at all.

Marc J. Poster

Nevertheless, oral argument remains a potentially important part of the appellate process. Appellate judges report that on occasion, oral argument has changed their minds about an appeal or at least altered the grounds upon which they decided the appeal. In addition, some lawyers are better at presenting their cases orally than in writing, and some appellate judges learn better by listening than reading. And some appellate judges use oral argument as a proving ground for their ideas about the case or as a vehicle to persuade other judges on the panel to vote their way.

Oral argument has been in the news lately. The California Supreme Court has issued a decision reaffirming that appellate courts may not unreasonably discourage the presentation of oral argument on appeal. *People v. Pena*, 32 Cal. 4th 389 (2004). In *Pena*, after briefs were filed, the Court of Appeal sent the parties a tentative opinion and a notice stating that (1) oral argument would not aid in the decision-making process, (2) if oral argument is requested, counsel must not repeat arguments made in the briefs, and (3) sanctions could be imposed for noncompliance with the notice.

The Supreme Court in *Pena* praised the Court of Appeal's experimentation with innovative methods to streamline the appellate process, including the use of tentative opinions.

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Ten Things I Wish I Had Known

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• *Trials are often boring to juries and judges.*

Trial lawyers are by nature enthusiastic about their clients' case, unreasonably thinking that everyone else will find their case equally absorbing. However, having now presided over a number of trials, I have come to realize that trials can be boring. Lawyers love to hear themselves talk and do not realize how repetitive it quickly becomes for the listener. Lawyers get tremendous benefits by use of good graphics — this cannot be overemphasized. Don't keep jurors waiting during sidebars, 402 hearings, debates over jury instructions and the like. One sitting judge commented after a voir dire session, "Jurors are especially bored by jury selection and the lawyers' oily efforts to ingratiate themselves with the jury. " Another sitting judge has commented that efforts to tell the jury panel about what the lawyer thinks is important is sometimes worthwhile, so long as the lawyer does not overdo it; *i.e.*, restating the same point every time new prospects are seated in the box.

• *Being considerate to courtroom staff pays big dividends.*

Many lawyers ignore courtroom staff, underestimating their importance. It is critical to understand their needs and expectations and competing time demands. Don't loiter during lunch breaks and at the end of the day; they're not free to leave the courtroom until you leave. A call at 8:40 in the morning during law and motion is not the time to solicit general information; try 3 p.m. instead. From clerks and courtroom attendants/bailiffs, you can often learn invaluable information, such as: (a) Is the courtroom really going to be open for trial for your case? (b) Does the judge ever grant motions for summary judgment/summary adjudication? (c) How does the judge render tentatives? Does he listen to extended argument on law and motion? (d) Do motions in limine need to be filed 21 days in advance? (e) How does the judge conduct voir dire?

Courtroom staff will be less likely to share this information if you are not sensitive to their time constraints.

• *Jury panels will vary tremendously in the same courthouse.*

Even in a large courthouse where the law of averages would suggest predictability, there are large ethnic variations, which is also indicative of large socio-economic, educational and geographic variations in the panels which actually appear in courtrooms. Some weeks and months seem to be skewed towards or against the presence of teachers and students — for the obvious reasons.

• *How much does the judge rely on law clerk work-ups? How good is the law clerk — for this case?*

Some law clerks are career employees; some are new admittees. Their education, outlook and work product are not necessarily the same. Given the real world press of trials and law and motion competing for the same precious time, judges often have very little time during a normal working day for motion preparation. Individual judges react to such pressures in different ways: motion continuances, or reliance on law clerks, norms or benchmarks for handling certain types of motions. Just as most lawyers are good at some subjects and lost at sea on other subjects, the same is often true for even the most hard-working and smart law clerk. Ask for the judge's basis for his tentative ruling and be prepared to educate him if you believe it does not take into account competing principles of law.

• *How do you get the judge you have and why do you lose her/him?*

Assignments are controlled by the Presiding Judge countywide and also by the District Supervising Judge. Retirements and disability changes typically occur on very short notice, especially as the last period before formal retirement is often taken as vacation. Reassignments create opportunities to file § 170.6 challenges if you act promptly. Don't be afraid to use them if you think the judge is not the right one for your case.

• *What law books does the judge have in chambers?*

The following is a list of what is normally issued to each Los Angeles Superior Court judge:

Witkin, Summary of California Law
Witkin, California Procedure
Witkin, California Evidence
Jefferson, California Evidence Benchbook
Weil & Brown, California Practice Guide: Civil Procedure Before Trial (The Rutter Group)
California Appellate Reports (Cal. 4th & Cal. App. 4th)
West's Annotated California Codes
Judicial Council Civil Jury Instructions ("CACI")
BAJI, California Jury Instructions — Civil
California Center for Judicial Education and Research ("CJER") publications:
- California Judges Benchbook, Civil Proceedings: Before Trial, Discovery, Trial and After Trial (four different texts with annual supplements)
- California Judges Benchguides (e.g.#20 "Injunctions Prohibiting Civil Harassment or Workplace Violence")

LEXIS
Westlaw
Daily Journal subscription
Metropolitan News subscription

In addition, the following texts may be found in some chambers:

Wegner *et al.*, California Practice Guide: Civil Trials and Evidence (The Rutter Group)
Casselman *et al.*, California Practice Guide: Insurance Litigation (The Rutter Group)
Chin *et al.*, California Practice Guide: Employment Litigation (The Rutter Group)

• *The plaintiff's bar is much better organized than the defense bar.*

The Consumer Trial Attorneys Association of Los Angeles rates judges on a scale of 1-5. The plaintiff's bar compares notes about experts. They watch each other's closing arguments and share trial strategy. They share legal briefs.

• *Practice law with pattern jury instructions (e.g., CACI and BAJI) in hand and firmly in mind.*

These are the controlling statements of the needed "elements" of a plaintiff's case and of affirmative defenses. Many subtle legal questions are obscured or masked by the way issues are stated in typical jury instructions. These formulations are familiar to most judges and so they succinctly state the "factual issues" which a court is typically looking for when passing on a motion for summary judgment/summary adjudication. Carefully review the likely instructions which will be given (not your "best case" special instructions) as you outline your anticipated proof at trial.

• *"KISS" — Keep It Short & Simple. If it's too complicated, something is very wrong.*

This principle applies to both trials and law and motion practice. Judges suffer from a huge information overload — "like drinking water out of a fire hydrant." How much time a given judge will have to comprehend your arguments often varies greatly depending on competing work demands. Is the judge in trial at the time your motion is being heard? Are there other motions on calendar that may be time-consuming? For different reasons, jurors suffer their own kind of information overload and thus are at risk of focusing on irrelevancies if you give them too many issues from which to choose. The real challenge of advocacy — in both motion practice and trial — is to take complicated factual and legal propositions and package and present them in ways which seem simple, comprehensible and eminently reasonable. Put differently, the lawyer who focuses on the key factual and legal issues in the case and avoids the "sideshow" issues is way ahead of his or her adversary.

— Hon. William F. Highberger

The Art of Oral Argument on Appeal

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However, the Supreme Court ruled that Court of Appeal's notice improperly discouraged oral argument. Unlike federal practice, California law recognizes that a party has a right to present oral argument on a direct appeal. An appellate court should therefore keep an open mind until oral argument is over. In *Pena*, the Court of Appeal's notice improperly implied that its tentative opinion was not merely tentative and that oral argument could have no impact on the final decision. Furthermore, the admonition that parties must not repeat arguments made in their briefs was a Catch 22, because the rules of practice also say that an appellate court need not consider points made for the first time at oral argument. The Supreme Court directed the Court of Appeal not to use the challenged notice in the future.

Usually, lawyers fight for the opportunity to orally argue a case in the California or United States Supreme Court. However, in another recent case, a party's lawyers failed to appear in the California Supreme Court for oral argument of their appeal. *Lerner v. Aguilar*, 32 Cal. 4th 974 (2004). The non-appearing party was deemed to have waived oral argument, and the opposing party got to argue its case without rebuttal. A few days later, the Supreme Court issued an order to show cause why the non-appearing lawyers should not be held in contempt.

If you are going to orally argue an appeal, here is some practical advice:

• *Plan ahead*. Once the written briefs are in, the court clerk's office often can provide information about how long the court usually takes to schedule a hearing and what days of the month arguments are usually heard. If you have a potential conflict due to vacation plans or other pressing business, let the appellate court know well in advance. A last-minute request for postponement of oral argument might not be granted.

• *Keep the appellate court informed of case developments*. If the case settles, or is on the verge of settling, let the court know. Nothing ruffles the feathers of an appellate court and its staff of hard-working research attorneys more than to learn that a case they have diligently worked up for oral argument actually settled weeks ago.

• *Be there*. Do not request oral argument and then call in a waiver on the morning of argument. This is rude to the court and to the opposing party's lawyer, both of whom will have taken time to prepare for the argument.

• *Be prepared to answer questions*. Appellate judges' biggest gripe is that lawyers dodge their questions. Asking questions does not necessarily indicate disagreement with your argument. If you have prepared properly, you should not be surprised by any of the questions, and if the questions are off base, then you have the opportunity to explain why they are off base. And don't tell the court you will get to the answer later in your argument. This is the opportunity you have been waiting for, to engage in a dialogue with the appellate judges who will decide your appeal about the issues that they think are important. Of course, if you don't know the facts of your case and the main cases on your legal points, you should not bother with oral argument. But if you are really caught off guard by a question, you can request the opportunity to provide the court with the answer in a letter brief.

• *Don't make a closing argument to the jury*. Emotion plays a factor in deciding appeals, but the court must follow the rules of appellate review. The appellate court cannot reweigh the evidence on disputed factual issues. The court will reverse a judgment only if it is convinced that there was prejudicial legal error. Argument should focus on convincing the court of such error.

• *Don't read your oral argument*. Have notes, but talk to the court. Your goal is not to lecture, but to engage the court in a dis-

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Keys to Successful Mediation

Business people and their attorneys recognize that mediation is low-risk, cost-effective, and confidential and that it enjoys a 90 to 95 percent success rate when conducted by an experienced mediator. The mediation process is far less expensive than litigation, both in terms of attorneys' fees and costs and of downtime for company employees involved in discovery and trial preparation.

Through mediation, it is possible to preserve business relationships. Perhaps even more important, mediation makes it possible to maintain some control over the risk of a stunning loss resulting from relinquishing the determination of the case to an arbitrator, judge, or jury. Especially when a dispute could give rise to dire consequences for a business, officers of a company often prefer to retain control of the outcome and opt for the certainty of a mediated resolution.

Zela G. Claiborne

Nevertheless, even experienced counsel may fail to take the steps that will increase the chances of settlement and provide a positive benefit to their clients. Here are some suggestions for a successful mediation:

Exchange Briefs

When attorneys submit confidential briefs to the mediator without exchanging them, the opposing side will often come to the mediation table without a clear idea of the opposition's view of the case and what it hopes to achieve at mediation. Even worse, the mediator may have to spend the first half of the day clarifying basic information. Although one purpose of writing a brief is to educate the mediator, an equally important goal is to educate the opposing party and impress them with the strength of your client's position.

Outline your client's view of the facts and the law relating to the main issues and list the damages along with the rationale for the calculation. Opposing counsel will need to review your key documents in order to accurately evaluate the case, so attach those. There is no point in concealing documents that can be obtained in routine discovery. Remember that the decision-maker on the other side, perhaps the company president who has flown in from another state, may not be up to speed on the details of your claim or defense. Exchanging briefs helps the parties come prepared to move promptly into meaningful negotiations.

If there is specific, confidential information that you need to raise only with the mediator, address it in a separate letter for the mediator's eyes only, as a supplement to your mediation brief. Or, since ex parte communication with a mediator is allowed, you may call the mediator in advance to discuss sensitive issues.

Consider a Range of Options

Before the mediation, you will no doubt discuss a range of settlement possibilities with your client. Sometimes, parties decide in advance on a specific dollar range, including the very highest amount to be offered or the lowest to be accepted. That approach is a mistake.

At mediation, your client will have an opportunity to hear about the weaknesses of your case from the point of view of the opposition. And the mediator's job is to create doubt in your

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Keys to Successful Mediation

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client's mind. Stay flexible and be willing to take a fresh look at the case. Be prepared to learn something new that will cause your client to re-evaluate his or her settlement position. Then, you may want to reconsider your bottom-line and even explore options that include something other than money, such as an agreement to do business with the other party in the future or to accept services in trade. Such arrangements may be far more valuable to your client than a monetary settlement and may be the only way to bridge the gap between the parties.

Make an Opening Statement

At the beginning of the joint session, counsel are invited to, and frequently do, make an opening statement. Some attorneys, anxious to cut to the chase, feel that an opening is not necessary because opposing counsel is familiar with their position and/or because they have outlined the key points in the mediation brief. Do not miss this valuable opportunity.

Deborah Rothman

Unfortunately the mediator, opposing counsel, and the opposing party do not always appreciate the strength and rectitude of your client's position. Making an opening allows you to use (and your client to see you use) your best advocacy skills to force the other side to take a hard look at the case from your client's point of view and to give them a taste of how the case might look at trial. So take the time to outline your client's view of the case orally. This is your chance to look the President or CEO of the opposing company in the eye and use your persuasive powers to point out the strengths of your case and the vulnerabilities of theirs.

If your client is articulate and familiar with the details of the dispute, you may want him or her speak to some points. You can demonstrate your client's strength as a trial witness. On another level, too, your client is in the best position to send the message that the company is interested in a reasonable resolution and open to discussing a variety of possibilities.

Stifle the Impulse to Insult

A cautionary word about "advocacy skills:" there is a world of difference between litigation advocacy and mediation advocacy. Litigation advocacy can be successful even if it is aggressive and non-conciliatory. By contrast, mediation advocacy is most likely to be successful when all participants openly discuss the factors contributing to the dispute, the merits of each party's legal and factual position, and potential solutions. Show respect for the opposition and work toward a deal that makes business sense.

That is not to say that there will not be strong expressions of negative opinions and emotions. And this "venting" is not necessarily bad. A good mediator understands the transformative potential of acknowledging and validating negative feelings, and is expert in the art of handling outbursts.

But participants should stifle the impulse to announce that the people on the other side of the table are crooks or bigots or have "cooked the books." Insults are likely to harden the other side's resolve, thereby preventing your client from obtaining a successful resolution; they may even cause the other side to walk out of the mediation. Keep your eye on the ultimate goal: helping the parties put their differences behind them.

Bring the Right Participants

Mediation is a dynamic, multi-sensory process the nuances of which cannot be accurately conveyed, much less summarized, to an absent decision-maker. The ideal mediation process involves the dismantling of mistrust and enables the participants to hear, not just listen to, each other with more empathy and less skepticism. This process enables participants eventually to soften their positions and find a resolution that puts an end to uncertainty and is far superior, business-wise, to a litigated result. The absence of a decision-maker undermines the process.

A "decision-maker" is a person without whose participation the dispute cannot be resolved. Though that definition sounds straightforward enough, in actuality it can be tricky for counsel to identify the true decision-makers. In a sexual harassment case, for example, the employee's husband may have a significant investment — emotional, financial, and perhaps even religious — in the way the matter is resolved. If the couple has agreed in advance on conditions, such as a dollar amount, the immediate termination of the alleged harasser, and an apology from the HR Director, the wife will find it difficult to deviate from those terms. Therefore, consider whether spouses, adjusters, CFO's, HR Directors, and/or department heads from whose budgets the settlement will be deducted, should be part of the mediation team.

Sometimes, counsel invite too many people to participate. It is difficult to negotiate with a group of eight or ten or more. The representatives tend to adopt a group mentality regarding the case and to reinforce each other in that view, thereby preventing the decision-makers from re-evaluating the case in the light of new information. Also, some of the participants may have been involved in the disputed transaction and may be more concerned with defending their actions than with finding a business resolution. The Project Manager in a construction case may focus on trying to explain why it is not her fault that there were cost overruns and delays rather than finding a way to save the company from the risk and cost of trial.

In many complex commercial cases, such as partnership dissolutions, the testimony of an accountant or other expert will be central. Consider inviting your expert to the mediation. Be sure to contact opposing counsel in advance and agree that both sides will bring experts. If only one side presents its expert, the other side may be reluctant to negotiate in a belief that it has been put at a disadvantage. If both experts are present, they may be able exchange views and then assist in outlining a workable settlement.

Prepare Your Client

In an effort to maintain control, some attorneys may tell their clients to remain silent at mediation. Silencing an informed and articulate client can be a big mistake. Your client actually may be the best person to outline the facts and may be more credible than counsel. Also, your client's sincere expression of a desire to find a resolution can soften the other side's settlement posture. Finally, after a long negotiation, it often is in a private meeting of both sides' decision-makers with the mediator that the party representatives are able to outline a resolution that can be firmed up after consulting with counsel.

Since your client should be an active participant, you must do some advance preparation. Prepare him or her for a dynamic process where participants will express many opposing points of view and where expressions of outrage, and even some yelling, are likely. There may be boredom while the mediator caucuses with other parties and there may be no real breakthrough until late in the day. The mediator will ask some challenging questions, offering little comfort to your client, and undoubtedly will spend some time focusing on the weak points of your case. The first demand may be very high or the first offer far too low. When the parties are prepared in advance for these events and understand that they should do some thinking about a persuasive rationale for each demand or offer, they will be in a good position to get the most from the process.

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Keys to Successful Mediation

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Finally, having your client actively participate in the mediation may allow him or her emotionally to move free of the dispute, towards resolution and closure. Constructive interaction with the mediator and the other parties often provides clients with an important sense of having their "day in court," allowing them to better weigh and become comfortable with the various settlement options.

Be Candid With the Mediator

Be frank in your discussions with the mediator in the privacy of a caucus. That is not to say that you should necessarily reveal your bottom line to the mediator, but you enhance your credibility and get the best assistance the mediator has to offer if you speak honestly. Be candid about the facts and the law, about the players and their personalities, and about the psychological, organizational, and emotional dynamics of the case. By all means, tell the mediator what you want to accomplish and outline your ideas for persuading the opposing side to move in that direction. As the negotiations progress, ask the mediator for some evaluation. You may be pleased to find that the mediator will reinforce what you have already told your client and that your client will be able to hear it better from an objective third party. If the mediator's evaluation is different from yours, you will at least gain an opportunity to see the case from a neutral perspective. And your client may appreciate hearing the bad news from an outsider rather than from you.

Assume that the mediator will use some of what you say to push the other side to soften their position. If there are points that you want kept confidential, mention those specifically. Also, early on, you should advise the mediator of any special settlement requirements, such as a confidentiality provision or making the deal contingent upon Board approval. After you give your offer or demand to the mediator, be sure to review what is going to be presented. That way, there will be no embarrassing miscommunications.

Draft the Final Agreement Later

Before leaving the mediation, be sure to draft a comprehensive memorandum of understanding outlining the key points of the agreement, including every issue that could foreseeably result in a dispute that might undo the settlement, and have the parties sign off on it. The document should state that it is meant to be enforceable under California Code of Civil Procedure, section 664.6 or its equivalent, and that counsel will draft a final agreement within a week or ten days. Be aware that, although counsel and clients are likely to be battle-weary after an exhausting day of negotiations, the parties and the mediator should focus their remaining energy on preparing a thorough confirmation of their settlement before departing.

Consider also whether to bring an agreement drafted in advance with blanks to fill in. That is fairly standard in personal injury suits or in straightforward employment matters. But in a complex, one-of-a-kind commercial matter, such an agreement is likely to be perceived as one-sided. Draft the final settlement agreement later, submit it to opposing counsel, and negotiate over the final version so that both sides make contributions. This "buy-in" will help ensure compliance by both parties.

Conclusion

Mediation is an opportunity to maintain control of the dispute and reach a resolution that makes more business sense than a litigated outcome. Use your best professional skills to help your client make the most of the mediation process.

— Zela G. Claiborne and Deborah Rothman

Sarbanes-Oxley and the New Nondischargeable Debt: Settlement Agreements in Bankruptcy

The Sarbanes-Oxley Act of 2002 has received much attention in these times of corporate scandals. What has received relatively little attention, however, is the impact of its provisions in bankruptcy proceedings. This article focuses on one such provision, which amended 11 U.S.C. § 523(a) to include among nondischargeable debts those resulting from a judgment, order, consent order, decree, or settlement agreement for a violation of federal or state securities laws or for common law fraud, deceit, or manipulation in connection with the purchase or sale of any security. This article discusses this amendment and its application in a recent bankruptcy case involving a securities-related settlement agreement. It also provides some drafting tips for plaintiffs to consider when drafting such an agreement. The drafting tips contemplate the defendant's future bankruptcy and propose certain provisions that should be construed as evidencing an intention by the parties for the settlement debt to be nondischargeable in bankruptcy.

James P. Menton, Jr.

Sarbanes-Oxley and Nondischargeability

Bankruptcy affords "honest but unfortunate" debtors an opportunity to reorder their financial affairs and get a fresh start. *Cohen v. de la Cruz*, 523 U.S. 213, 217 (1998). This is accomplished through the statutory discharge of pre-existing debts, with exceptions provided for certain categories of nondischargeable debts that Congress has deemed should survive bankruptcy. *See* 11 U.S.C. § 523(a). One exception to discharge pertains to the purchase and sale of securities, as provided by 11 U.S.C. § 523(a)(19), which was enacted on July 30, 2002, as part of the Sarbanes-Oxley Act of 2002. The section provides that a discharge does not discharge an individual debtor from any debt (19) that —

(A) is for —

(i) the violation of any of the Federal securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934), any of the State securities laws, or any regulation or order issued under such Federal or State securities laws; or

(ii) common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; and

(B) results from —

(i) any judgment, order consent order, or decree entered in any Federal or State judicial or administrative proceeding;

(ii) any settlement agreement entered into by the debtor; or

(iii) any court or administrative order for any damages, fine penalty, citation, restitutionary payment, disgorgement payment, attorney fee, cost, or other payment owed by the debtor.

11 U.S.C. § 523(a)(19). The section, by its terms, applies to claims for violation of securities laws and common law fraud in connection with the purchase or sale of a security. It is intended

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to apply as broadly as possible to existing bankruptcies. *Smith v. Gibbons* (*In re Gibbons*), 289 B.R. 588, 592-593 (Bankr. S.D.N.Y. 2003).

Application of 11 U.S.C. § 523(a)(19)

The applicability of 11 U.S.C. § 523(a)(19) arose recently in the case of *Peterman v. Whitcomb* (*In re Whitcomb*), 303 B.R. 806 (Bankr. N.D. Ill. 2004). In *Whitcomb*, the plaintiffs filed a state court complaint alleging that the debtor defrauded, fraudulently induced and made false representations that induced their purchase of certain securities. The plaintiffs and the debtor subsequently entered into a settlement agreement that settled the state court complaint. The state court entered an agreed judgment order that settled the state court complaint and provided that the debtor agreed that he had damaged the plaintiffs and was indebted to them in the amount of $300,000 plus interest and costs.

The debtor subsequently filed chapter 7. The plaintiffs filed a nine-count amended complaint against the debtor in the bankruptcy court. The third count of the amended complaint alleged that the debt owed to the plaintiffs by the debtor was nondischargeable pursuant to 11 U.S.C. § 523(a)(19). The debtor filed an answer to the amended complaint, wherein he admitted that the state court lawsuit had been filed, that the state court complaint alleged his fraud in connection with the sale of certain securities, and that he entered into the settlement agreement that settled the state court complaint. The plaintiffs then filed a motion for judgment on the pleadings regarding the third count of the amended complaint. The bankruptcy court granted the motion, holding that the debt owed by the debtor was nondischargeable under 11 U.S.C. § 523(a)(19).

In rendering its decision, the bankruptcy court stated that the debtor admitted and it found that the state court complaint alleged that the debts resulted from fraud, fraudulent inducement and fraudulent misrepresentations made by the debtor and others that induced the purchase of the securities at issue. The bankruptcy court also stated that the debtor admitted and it found that the debt resulted from the settlement agreement entered into by the debtor for the payment of damages. *In re Whitcomb*, 303 B.R. at 810.

Whitcomb provides guidance in the application and implementation of § 523(a)(19) to a securities-related settlement. Decisions involving other exceptions to discharge emphasize the importance of discerning whether the contracting parties intended to create a dischargeable debt with a settlement and therefore provide further guidance in the application and implementation of § 523(a)(19).

In *Archer v. Warner*, 538 U.S. 314 (2003), the creditors and the debtors entered into a settlement agreement regarding a state court action for, among other things, fraud. Under the settlement, the debtors executed a $100,000 promissory note, the parties exchanged general releases, and the creditors dismissed the action with prejudice. The debtors made no payments on the promissory note and filed bankruptcy. In addressing whether the settlement debt was non-dischargeable under 11 U.S.C. § 523(a)(2)(A), the United States Supreme Court held that the settlement agreement and releases may have worked a kind of novation but that fact does not bar the creditors from showing that the settlement debt arose out of fraud and consequently is excepted from discharge. Archer, 528 U.S. at 323. (11 U.S.C. § 523(a)(2)(A) excepts from discharge any debt for money, property and services obtained by false pretenses, a false representation or actual fraud.)

In *Bank of China v. Huang* (*In re Huang*), 275 F.3d 1173 (9th Cir. 2001), the bank and the debtor entered into a settlement agreement resolving a district court action for fraud and other claims. Under the settlement, the debtor admitted that he and the other defendants jointly and severally owed the bank specified amounts, stipulated to entry of judgment in the bank's favor, agreed to a schedule of payments, and represented and promised that the debt and judgment, and all other amounts owing to the bank, were not dischargeable in bankruptcy. The district court approved the settlement and entered judgment in the bank's favor. The debtor subsequently filed chapter 7. The bank filed a complaint in the bankruptcy court objecting to discharge of the debt owed it.

The bank moved for summary judgment on the basis of the provision in the settlement agreement that the debt was nondischargeable. The bankruptcy court agreed and granted the motion. On appeal, the district court reversed, reasoning that the settlement agreement and judgment did not include any of the underlying facts regarding the debtor's alleged fraudulent activities, the debtor's fraud liability was thus not an essential part of the judgment, and therefore, collateral estoppel did not apply. On appeal, the Ninth Circuit affirmed, finding that the debtor's alleged fraud had not been actually litigated and determined in the original district court action and that fraud or facts showing fraud were not mentioned in the settlement agreement or in the judgment enforcing it. *In re Huang*, 275 F.3d at 1177-1178.

In *Fifth Third Bank of Northwestern Ohio, N.A. v. Baumhaft* (*In re Baumhaft*), 271 B.R. 523 (Bankr. E.D. Mich. 2001), the bank and the debtor entered into settlement agreement resolving the bank's civil action for fraud. In the settlement agreement, the debtor agreed not to challenge the nondischargeability of the obligations created by the settlement agreement through a bankruptcy proceeding. In addition to the settlement agreement, the debtor executed a verified statement in which he stipulated to certain facts regarding the bank fraud. The verified statement also contained the elements of nondischargeability and provided that it may be used for the purposes set forth in the settlement agreement, including the nondischargeability of the obligation.

After the debtor filed chapter 7, the bank filed a complaint for a determination that the debt owed it was nondischargeable. The bank moved for summary judgment, asserting, among other things, that the settlement agreement and verified statement should be given preclusive effect. The bankruptcy court granted the motion, reasoning, in part, that the settlement agreement and verified statement manifested the parties' intention that the debt would be nondischargeable in a future bankruptcy and were entitled to preclusive effect. *In re Baumhaft*, 271 B.R. at 525-527. *See also Hayhoe v. Cole* (*In re Cole*), 226 B.R. 647 (9th Cir. B.A.P. 1998)("[I]f the parties stipulated to the underlying facts that support a finding of nondischargeability, the Stipulated Judgment would then be entitled to collateral estoppel.").

Drafting Tips for Securities-Related Settlements

Based on *Whitcomb* and the other decisions cited, practitioners representing plaintiffs may wish to consider the following drafting tips when drafting a securities-related settlement agreement. The drafting tips contemplate a future bankruptcy by the defendant and endeavor to deal with the issue of the dischargeability of the settlement debt in the bankruptcy under 11 U.S.C. § 523(a)(19).

First, the settlement agreement should identify the claim(s) in the underlying action pertaining to securities act violations or fraud, deceit or manipulation in connection with the purchase of sale of securities being resolved in the settlement agreement and should identify the elements of the claim(s).

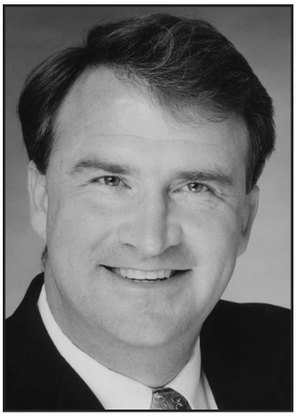
Second, the settlement agreement should provide a factual foundation to support the securities fraud claim(s) through specific recitals or stipulated facts or a verified statement. This factual foundation may include or identify admissions made by the defendant in answering the complaint or in discovery or in proceedings before the court.

Third, the settlement agreement should make clear that pay-

(Continued on page 11)

The Terminator's California Case Against Ohio Dealer Comes to an End for Lack of Jurisdiction

In *Arnold Schwarzenegger v. Fred Martin Motor Company*, Case No. CV-02-06354-FMC, filed June 30, 2004, the Ninth Circuit affirmed the district court's dismissal for lack of personal jurisdiction of an action brought by Schwarzenegger alleging that an Ohio car dealership's use of Schwarzenegger's photo in an advertisement infringed his right of publicity. Since the ad ran in an Ohio newspaper and was expressly aimed at Ohio, not California, the Court held that the conduct did not support personal jurisdiction over the Ohio dealership in California.



Michael K. Grace

Noting that "there is no evidence in the record that Fred Martin has any operations or employees in California, has ever advertised in California, or has ever sold a car to anyone in California," the Court held that California had no general jurisdiction over Fred Martin. The Court further held that Fred Martin's acts of purchasing services from California companies and cars imported by California entities "fall well short of the 'continuous and systematic' contacts required to constitute sufficient "presence" to "warrant general jurisdiction."

The Court also declined to find specific personal jurisdiction in this case. The Court determined that Schwarzenegger failed to show that the placing of an Ohio ad using Schwarzenegger's likeness constituted an act "expressly aimed" at California, by noting that the aim of the ad was to convince Ohioans, not Californians, to buy or lease cars from Fred Martin. The Court buttressed this reasoning by noting that the ad was never circulated in California, and that Fred Martin had no reason to believe that any Californian would see the ad or visit Fred Martin.

Punitive Damages Award Remitted

In *Bardis, et al. v. Oates, et al.*, 119 Cal. App. 4th 1, 14 Cal. Rptr. 3d 89 (2004), the California Court of Appeal for the Third Appellate District affirmed a jury's compensatory damages award of $165,527.63 but remitted a punitive damages award from $7 million to $1.5 million under the federal due process analysis set forth in *State Farm v. Campbell* (2003) 538 U.S. 408.

Bardis involved allegations of self dealing and breach of fiduciary duty arising from kickbacks, markups and concealed commissions by certain partners of a real estate development. Applying *Campbell*, which "tightened the noose considerably" on punitive damages, *Bardis* focused on reprehensibility of the conduct and the ratio of the punitive damages award to the compensatory damages award (*i.e.*, few awards exceeding a single-digit ratio would satisfy due process) as the two main factors to consider in evaluating the excessiveness of punitive damages awards. The *Campbell* court noted that few awards should ever exceed single digit multiplier of actual damages to determine punitive damages without violating the due process clause.

To determine reprehensibility, *Campbell* listed five factors, whether: (1) the harm caused was physical or economic; (2) the tortious conduct evinced a reckless disregard of health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of intentional malice, trickery or deceit, or mere accident. The Court of Appeal found that the first three *Campbell* factors did not support a large award because the harm caused by the defendants was economic and because plaintiffs, investors in a multimillion-dollar land speculation deal, could not be characterized as financially vulnerable. Conversely, the fourth and fifth factors warranted a high award because the court concluded the jury could have found that the kickbacks, markups and concealed commissions were a pattern of defendant's systematic pattern of defendant cheating his partners out of funds belonging to the partnership.

Jeanie Kim

Turning to the ratio test, the Court found that the 42 to 1 ratio of punitive damages to the actual harm suffered could not stand "unless extraordinary factors (were) present." Finding that these extraordinary factors were not present in this case, the Court held that the punitive damages award should be reduced to a single-digit ratio. However, since the amount of compensatory damages did not reflect the outrageousness of the defendants' behavior, the court modified the award to $1.5 million: a 9 to 1 ratio.

Second Bite at the Summary Judgment Apple Upheld

In *Abassi v. Welke*, 118 Cal. App. 4th 1353, 14 Cal. Rptr. 3d 336 (2004), the California Court of Appeal for the Second Appellate District held that a trial court may *sua sponte* entertain a second summary judgment motion following its denial of a previous summary judgment motion, notwithstanding subdivision (e) of Code of Civil Procedure section 1008, which governs the court's jurisdiction for applications for reconsideration of its orders. Reasoning that the court's consideration of such a motion involves a "core judicial function" and "fosters the fair and efficient administration of justice," the Court held that a trial court has jurisdiction to entertain and rule on a second summary judgment motion.

The Court of Appeal affirmed, relying upon *Case v. Lazben Financial Co.* (2002) 99 Cal. App. 4th 172. In *Case*, the Court held that subdivision (e) of Code of Civil Procedure section 1008 did not restrict a trial court from sua sponte reconsidering its own interim orders, but found instead that trial courts have the inherent authority to review their prior rulings. *Id*. at pp. 175, 179, 185. Case reached this conclusion by reasoning that Section 1008 was designed to conserve the court's resources by constraining *litigants* from bringing the same motion repeatedly. On the same token, judicial resources would be wasted if the court could not, on its own motion, review and change its interim rulings. In this case the trial court had discretion to reconsider its past ruling denying Welke's summary judgment motion based on subsequent events. The Court went to state that "even if no new evidence were presented, the trial court was not precluded from entertaining and ruling upon the second summary judgment motion brought by Welke."

— Michael K. Grace and Jeanie Kim

Electronic Briefs: By Any Other Name, Its Time Has Come

In "Electronic Briefs: A Peek At the Future" (ABTL Report, Spring 2002), Robert Wrede discussed the appellate courts' growing acceptance and encouragement of electronic briefs. That trend has continued. Recently, the Second District Court of Appeal began a pilot program inviting parties to file electronic briefs and records for appeals filed in that district and implementing guidelines for the submission of "e-briefs" and "e-records." Thus, appellate counsel should give serious consideration to whether an electronic brief will bolster the persuasiveness of their arguments and assist the court in reviewing and deciding an appeal.

Raymond B. Kim

Electronic briefs (also known as "CD-ROM briefs," "hypertext briefs," or "hyperlinked briefs") are electronic versions of paper briefs that are stored on a compact disc. In addition to the briefs themselves, the CD-ROM also contains the text of authorities cited in the briefs and the entire appellate record. These authorities and records are hyperlinked to citations contained in the briefs. As a result, a simple click of the mouse allows readers to jump from a brief citation to the actual legal authority or relevant portion of the record, making access to relevant information quick and easy.

Electronic briefs first gained attention in 1997 when the United States Supreme Court accepted submission of a CD-ROM *amicus curiae* brief in *Reno v. ACLU*, 520 U.S. 1102 (1997). In *Reno*, the Supreme Court found that certain provisions of the Communications Decency Act of 1996 criminalizing "indecent" and "patently offensive" communications on the internet unconstitutionally abridged free speech protections afforded under the First Amendment. The electronic brief filed in the *Reno* case on behalf of a group of internet content providers made creative use of electronic media technology by including images of works by Michelangelo and other artists that would violate the Communications Decency Act, as well as links to actual materials available on the internet, such as video clips and music clips, that also would be prohibited under the Act.

Later that year, an opinion discussing electronic briefs was published by the Federal Circuit in *Yukiyo v. Watanabe*, 111 F.3d 883 (Fed. 1997). In *Yukiyo*, the Federal Circuit granted a motion to strike an electronic brief that had been unilaterally filed by the plaintiff-appellant, without leave of court, because such a filing was thought to prejudice the opposing party. However, the court noted that its ruling was not meant to discourage future efforts to file electronic briefs and enunciated general guidelines to be followed by parties for such filings. First, the *Yukiyo* court stated that a party wishing to file an electronic brief as a counterpart to the official paper brief must seek consent of the other parties prior to submitting an electronic brief with the court. 111 F.3d at 886. Second, the court stated that such consent would be a substantial factor favoring acceptance of the brief, and that prejudice to another party could be an important factor favoring rejection. *Id*. Finally, the court stated that a party seeking to file an electronic brief needed to seek leave of court and provide information about the computer equipment necessary to view the electronic brief to ensure compatibility, and directed parties to file twelve CD-ROM copies of the electronic brief along with the motion for leave. *Id*.

Among the federal courts of appeal, the First, Seventh, Eleventh, and Federal circuits have adopted local rules governing the submission of electronic briefs, and the Second Circuit has issued an administrative order permitting electronic briefs to be filed (the Ninth Circuit is among the circuits that have not yet adopted rules or guidelines concerning electronic briefs). Among state appellate courts, the New York Court of Appeals and Washington Supreme Court and Court of Appeals have adopted rules permitting electronic briefs, and appellate courts in California, Delaware, Florida, Texas, and Wisconsin have allowed parties to file electronic briefs (although those courts do not yet have formal rules governing such briefs).

The Second District Court of Appeal's pilot program represents the first step taken by the California appellate courts to encourage parties to file electronic briefs and records by providing guidelines on how to submit such briefs and records. In its "Invitation to File Electronic Records and Briefs in the Second District Court of Appeal," (found in PDF format on the Second District Court of Appeal's website at www.courtinfo.ca.gov/courtsofappeal/2ndDistrict/efile.htm), the Second District Court of Appeal directs that a party interested in filing electronic briefs and electronic records first confer with opposing counsel and cooperate in preparing the brief and record. If all parties agree to such a filing, the parties must submit a written proposal describing what they propose to file with the Clerk's Office. If the Court approves the proposal, the Court will then set time frames and "will work with counsel to minimize delay and maximize the effectiveness of the e-filing." Electronic briefs and records should be filed as early as possible, and in any event no later than 15 days after the last paper brief is filed.

The Second District Court of Appeal's pilot program encourages the filing of five copies of a CD-ROM containing: (1) the reporter's transcript (searchable), (2) a joint appendix in lieu of a clerk's transcript (searchable), (3) copies of all cited authorities, and (4) all briefs, hyperlinked to each other, to the record, and to the full text of all cited authorities. This CD-ROM is filed in addition to, and not in lieu of, paper briefs and records. Those paper filings are still required.

As noted by the *Yukiyo* court, one of the principal benefits that electronic briefs provide to the court is the ability to "allow the reader to view the text of the brief and hypertext almost simultaneously, obviating the need for the reader to refer to the paper brief and appendix or to engage in viewing videotapes through the usual means." 111 F.3d at 885. While such convenient access to the relevant authorities and records is extremely helpful in all appeals, electronic briefs may be especially effective when an appeal requires the court to review lengthy trial proceedings or voluminous records. Moreover, as shown in the *Reno* case, cases involving new technologies or visual and/or audio components, such as charts, graphs, videotapes, and recordings, also may lend themselves to the user-friendly integration of such materials that electronic briefs can offer.

In addition to assisting the court, electronic briefs and records also can help appellate counsel save time and effort preparing their briefs. Once the appellate record is stored electronically in a searchable format prior to briefing, electronic search tools make it far less cumbersome to accurately locate necessary record citations than thumbing through volumes of paper transcripts and exhibits. As a consequence, countless hours spent searching for that one damning letter written by the defendant that you are sure you saw before but can't remember when, or that devastating admission made at some point during cross examination at trial (or was it during a deposition?), can be avoided through the use of simple and easy to use electronic search tools.

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The Art of Oral Argument on Appeal

Continued from page 3

cussion about your case.

• *Get to the heart of the matter*. Before the hearing, the appellate judges usually have read the briefs and a bench memo prepared by experienced staff attorneys addressing the facts and issues. Repeating the procedural history and background of the case is generally a waste of your very limited time.

• *Don't interrupt*. The temptation to jump in can be almost overwhelming, but let the appellate judge finish his or her question or comment, and let opposing counsel finish his or her entire argument.

• *Don't overstay your welcome*. If the court says it understands your points and would prefer to hear from the other side, this is almost always a good omen. Thank the court and save your time for rebuttal.

• *Don't fret too much afterwards*. Experienced appellate practitioners know there are really three oral arguments in every case: the one you plan to make, the one you actually make, and the one you make on the way home.

— Marc J. Poster

abtl REPORT

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Did I Just Say My Client Was Liable? The Binding Effect of Judicial Admissions

An attorney's role in litigation necessarily involves making factual assertions concerning his or her client's case. These factual assertions are sometimes incorrect or inconsistent with his or her client's previously asserted position. An attorney's inadvertent or mistaken admission, in addition to potentially causing serious client relations problems, can have a tremendous impact on the outcome of a case.

Not all attorneys' factual admissions are deemed binding or consequential to the case. Indeed, courts give varying significance to attorney factual statements depending on whether or not they are made in pleadings, in briefs or in open court. Essentially, the court will be evaluating if the admission was made improvidently or was in any way ambiguous. Admissions in pleadings will rarely be considered improvidently made; similarly, admissions in briefs are often seen as a statement of the party's position on the facts. The courts appear to give greater latitude to attorneys' oral statements, guided by the principle that there is greater likelihood that such statements were made unguardedly. Nevertheless, attorneys should always be mindful when they make factual assertions involving their clients and avoid making gratuitous factual statements that are not necessary to advance their client's position.

Lynn J. Harris

Judicial Admissions in Pleadings

Statements made in pleadings are logically the most common type of judicial admission. A judicial admission is considered a conclusive concession of the truth of a matter that has the effect of removing it from the issues. *CRE Smith v. Walter E. Heller & Company, Inc.*, 82 Cal. App. 3d 259, 270 (1978). Given the great weight that courts give to admissions in pleadings, it is especially important that great care be given to factual allegations.

For example, in *Valero v. Andrew Youngquist Construction*, 103 Cal. App. 4th 1264 (2002), the plaintiff admitted the existence of a written contract in his answer to the defendant's cross-complaint. Thus, as to the cross-complaint, the admission had the effect of establishing the truth of the existence of the written contract. *Id. See also CRE Smith v. Walter E Heller & Company, Inc.*, 82 Cal. App. 3d 259, 270 (1978) (plaintiffs' admissions in their complaint and in oral argument on appeal — that they were in "active concert or participation with" parties with whom they had been previously enjoined from participating in litigation — established same as a matter of law).

However, a court is not likely to draw inferences from party statements to create admissions of fact. In *Halpern v. Raville*, 176 Cal. App. 3d 765 (1986), the court held that allegations in the answer to the complaint that a business was a "partnership" and a "family operation" did not constitute a judicial admission conclusively establishing that one of the plaintiffs was a partner in the business because the answer did not identify the partners to the partnership. *Id*. at 773-774.

Finally, it is important to note that a judicial admission can only arise from pleadings by a party in the case being litigated.

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Did I Just Say My Client Was Liable?

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Fireman's Fund Insurance Co. v. Davis, 37 Cal. App. 4th 1432, 1441 (1995). An admission by a party in a case other than the case being litigated may be addressed by the doctrine of judicial estoppel. *See, e.g., Jackson v. County of Los Angeles*, 60 Cal. App. 4th 171, 181, 183 (1997) (holding that the doctrine is applicable when: "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position… (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.")

Oral Statements of Counsel as Judicial Admissions

Oral statements of counsel will be judicial admissions if they were reasonably intended to be an admission or reasonably construed by the other side as such. *See, e.g., Bell v. Stake*, 159 Cal. 193 (1911) (statement of counsel made prior to trial); *Scafidi v. Western Loan & Bldg. Co.*, 72 Cal. App. 2d 550 (1946)(statement of counsel in argument at trial); *DeRose v. Carswell*, 196 Cal. App. 3d 1011, 1019 n.3 (1987) (statements at oral argument before one reviewing court deemed admissions before the next reviewing court); *Mangini v. Aerojet-General Corp.*, 12 Cal. 4th 1087, 1097-1098 (1996) (concessions as to lack of evidence by counsel, in closing argument to the jury and in appellate brief, taken as admissions against the party).

There is no litmus test for determining when an oral statement will be treated as a judicial admission. The court examines the circumstances under which the statement was made, giving greater weight to statements made in opening statements and closing argument or before appellate courts than to statements made in law and motion argument. Essentially, the court is trying to determine whether the statement was knowingly made with an understanding of its consequences.

As illustrated by the following cases, errors made in opening and closing arguments can have a disastrous effect on the outcome of a case. In *Horn v. Atchison, Topeka, & Santa Fe Railway Co.*, 61 Cal. 2d 602 (1964), defendant's counsel admitted liability to the jury in both opening statement and oral argument. On appeal, defendant contended that certain errors were made in admitting testimony pertaining to defendant's liability, over its objections. However, because of defendant's counsel's unequivocal concessions of liability to the trier of fact, the court of appeal concluded that any errors in admitting testimony pertaining to liability were immaterial because defendant was bound by the statements and concessions made by his counsel. *Id*. at 605.

In *Irwin v. Pacific Southwest Airlines*, 133 Cal. App. 3d 709, 714 (1982), the plaintiff contended that defendant's admission of liability at the damages phase of the trial should preclude defendant from appealing issues pertaining to the liability phase of the trial, relying on *Horn*. The *Irwin* court distinguished *Horn* because in *Horn*, liability was an issue before the court at the time the concession was made, whereas in *Irwin*, liability had been established in a separate trial. Thus, the *Irwin* court considered the admission to be extraneous and lacked "the gravity of a complete relinquishment of rights on the issue of liability, particularly in light of the inappropriateness of a denial of liability at a trial for damages…."

There are few reported decisions dealing with oral statements made at pre-trial hearings. Essentially, courts have been loathe to deem such statements as judicial admissions. For example, in *Adelstein v. Greenberg*, 77 Cal. App. 548, 552 (1926), the statement of counsel for respondents made before the trial court during the course of the argument on demurrer indicating that there had been an assignment of the lease was not binding on respondents because it was not made during the trial of the action on the merits as an admission or stipulation of fact. Similarly, in *Warfield v. Peninsula Golf and Country Club*, 214 Cal. App. 3d 646, 653 n.4 (1989), an oral statement made at the hearing on a demurrer that a club is "truly a private membership club in the view that people cannot walk in and use the club" was not deemed an admission of the club's status. The court of appeal held that judicial notice of defendant's "private" status was inappropriate because counsel's statement in another context during the hearing on demurrer below does not constitute a judicially noticeable fact. Having examined the purported admission, the court concluded that counsel's statement was at best ambiguous and could not serve as a factual substitute for the vigorously contested question of the club's status.

Statements in Briefs, Legal Memoranda, and Correspondence as Judicial Admissions

Most attorneys do not often consider statements made in briefs and legal memoranda as potential judicial admissions. This is especially true with regard to statements made in everyday correspondence to opposing counsel. Statements made in any of these documents could potentially be deemed binding judicial admissions.

Many courts consider memoranda of points and authorities to be reliable indicators of a party's position on the facts and will treat statements of facts in briefs as judicial admissions. *See Monzon v. Schaefer Ambulance Service, Inc.*, 224 Cal. App. 3d 16, 23 n.1 (1990); *Franklin v. Appel*, 8 Cal. App. 4th 875, 893 n.11 (1992). *But see Sichterman v. R.M. Hollingshead Co.*, 117 Cal. App. 504, 507 (1931)(statement in appellate brief deemed to be "the conclusion of counsel," and not an "admission").

Even letters to opposing counsel can be treated as judicial admissions. In *Bell v. Stake*, 159 Cal. 193 (1911), the attorney for plaintiffs was served with a notice of motion for a writ of assistance. In response, he wrote a letter to the attorney for the moving party stating that there was no defense to the motion. The letter was introduced into evidence and was deemed a judicial admission.

Conclusion

Although application of the doctrine of judicial admissions may have the positive effect of keeping overzealous advocacy under control and holding attorneys accountable for their assertions, it can also serve to punish innocent clients for attorney errors. Considering the significant ramifications judicial admissions can have on each client's case, counsel would be well advised to take extraordinary care when making any factual representations on his or her client's behalf and be mindful of how statements or admissions made early on in the litigation could be used as admissions by future parties who later join the case. In doing so, counsel should be able to avoid binding his or her client to factual assertions that are incorrect or inconsistent with the client's previously asserted position.

— Lynn J. Harris

Electronic Briefs

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Furthermore, with advances in technology, costs continue to decrease, making electronic briefs more broadly available and suitable options for a wider range of appeals.

While oral argument remains an important aspect of appellate practice, it is widely noted that written briefs are usually the focal point of appeals and one's best opportunity to persuade the appellate court that it should decide the case in your favor. With the increased awareness and acceptance of electronic briefs by the appellate courts, the creative use of electronic briefs is one way to maximize that opportunity and ensure that your arguments are presented in a clear and compelling manner.

— Raymond B. Kim

Settlement Agreements in Bankruptcy

Continued from page 6

ments due under the settlement agreement are to resolve the creditor's losses due to the debtor's securities fraud, and that the debt owed will not be dischargeable in any bankruptcy or similar proceeding. This provision evidences that the debt results from the requisite settlement for the payment of damages. This provision also evidences of the parties' intent for the settlement to be given preclusive effect in a future bankruptcy proceeding and should be construed in such manner rather than as an invalid waiver of the debtor's right to have a bankruptcy court determine the dischargeability of the debt. *See, e.g, In re Cole*, 226 B.R. at 651-654 (debtor's pre-petition waiver of the dischargeability of debt is against public policy and unenforceable); *Klingman v. Levinson*, 831 F.2d 1292, 1296 fn. 3 (7th Cir. 1987)("For public policy reasons, a debtor may not contract away the right to a discharge in bankruptcy. However, a debtor may stipulate to the underlying facts that the bankruptcy court must examine to determine whether a debt is dischargeable.").

Fourth, the settlement agreement should state the parties' intent for the settlement agreement to satisfy the requirement of 11 U.S.C. § 523(a)(19)(B)(ii). This provision provides further evidence of the parties' intent to be bound by the settlement and for it to be given preclusive effect in a future bankruptcy proceeding.

Conclusion

Practitioners involved in securities litigation are well advised to acquaint themselves with the provisions of 11 U.S.C. § 523(a)(19), which concerns the newly enacted exception to discharge pertaining to the purchase and sale of securities. A debt resulting from a settlement agreement entered into by the debtor is nondischargeable under § 523(a)(19). As discussed in this article, provisions may be included in the settlement agreement in an effort to address the dischargeability of the settlement debt in a future bankruptcy by the defendant. The provisions discussed are meant to suggest ways in which an intention to create a nondischargeable debt may be shown in the settlement agreement, which may, in turn, result in the settlement being given preclusive effect in the future bankruptcy. Whether a bankruptcy court would construe the provisions as doing so and give preclusive effect to the settlement depends on the circumstances of each case and remains to be seen, but the cases seem to suggest the possibility of such a result.

— James P. Menton, Jr.

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Brown-Bagging It with Justice Daniel Curry

One of the ABTL's newer programs is the opportunity to share a "brown bag lunch" with local judges. Any member of the ABTL may sign up and have lunch with a judge and other members in a more intimate, informal setting—usually the judge's chambers. There are no pre-set topics or agendas. The lunches provide an excellent opportunity, especially for "less-seasoned" lawyers, to communicate more directly with individual judges about issues of importance to the bench and bar or just to share a good "war story." An example of what may be discussed at a typical lunch is described below in a summary of a recent lunch with Justice Daniel Curry.

On May 18, 2004, approximately fifteen attorneys had the pleasure and privilege of attending a brown bag lunch with the Honorable Daniel A. Curry, Justice of the California Court of Appeal, Second District, Division Four. Justice Curry began the lunch having each attorney introduce himself or herself and it was clear that Justice Curry was making a real effort to remember each name. He then provided us with an overview of his legal career. Justice Curry began his career in 1961 as an assistant staff judge advocate in the United States Air Force. In 1964, he went into private practice in the Los Angeles area, first as a law firm associate and later as counsel for Technicolor, Inc. In 1970, he became general counsel for Amfac, Inc., a Hawaii corporation, and moved to Hawaii. During his tenure at Amfac, the company became involved in litigation that ended up before the Hawaii Supreme Court. Amfac hired counsel from the mainland to argue the case, and Justice Curry went to the Supreme Court hearing just to observe the argument. When the mainland attorney stood up to present Amfac's argument, he was seized with panic and couldn't say a word. Justice Curry rose to his aid and presented the argument. Thus was Justice Curry's appellate career born.

Justice Curry provided an overview of the California Court of Appeals, as well as an insider's tips for both beginning and advanced practitioners. For example, Justice Curry urged the attorneys to make the most of their opening briefs, informing the court what they want it to do. He said that attorneys do not need to quote William Shakespeare or Oscar Wilde but, instead, should just get to the point and explain what went wrong in the trial court. Justice Curry warned that attorneys must not be afraid to deal up front with the difficult issues because the justices will spot those issues even if the opponent fails to spot them. He also stressed professionalism and advised counsel to refrain from engaging in personal attacks on the trial judge or opposing counsel even if the clients want such an attack. Justice Curry also stated that attorneys should not waive oral argument. He explained that engaging in oral argument makes it appear that you believe your appeal is meritorious, and the argument may even influence the outcome. Justice Curry also stressed that attorneys should file extraordinary writs in a timely manner. Although the rules give attorneys a certain amount of time to file an extraordinary writ, he explained that the sooner the writ is filed, the more likely the court will believe time is of the essence and, possibly, grant the writ.

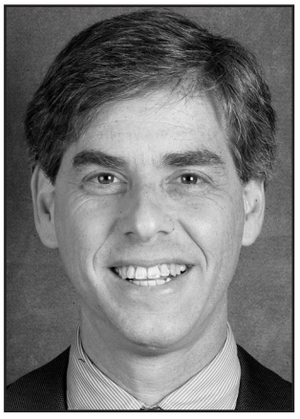
After answering numerous questions from the group, Justice Curry ended the lunch with a tour of his chambers and some amusing war stories.

The above is merely one example of the successful lunch programs arranged by the ABTL. We encourage you to sign up for future lunches and get to know your local judges.

— Andre Cronthall, Darren Franklin and Catherine La Tempa

Letter from the President

In 1998, I attended the ABTL Annual Seminar in Maui. I spotted an opposing counsel's name tag in the Luau buffet line and introduced myself. We had previously talked on the phone a few times, but never met. When we returned to California, the case we were litigating settled quickly. Similarly, numerous scheduling and discovery issues are resolved between ABTL members because there is a line of communication based on personal contacts that does not often result from phone calls with faceless adversaries playing their expected roles.



Jeff S. Westerman

This is only one of many reasons that the flagship Los Angeles Chapter of the ABTL enters into its 31st year as the *premier* organization for business trial lawyers in the state of California. The organization has more than 860 members and is growing. Attendance at our last five dinner programs averaged 382, including 673 for the dinner program featuring all six judges from the Superior Court's Complex Litigation Program. Attendance at our last four lunch programs averaged 255, split between the downtown and Westside presentations. Speakers with national reputations travel to participate in our programs. Approximately 15-30 federal and state judges attend each of our programs, and many of them will talk to you on a first name basis at the pre-program receptions and during the program.

ABTL's Board of Governors and officers consist of 37 business litigators from firms of all sizes, without regard to plaintiff or defense orientation. Our current Board of Governors includes the Chief Judge of the United States District Court for the Central District of California, and the Assistant Presiding Judge (who will be the Presiding Judge January 1) of the Los Angeles Superior Court and a total of four federal and four state court judges. Current and past members of the Board of Governors serve as Presidents or Board members of other organizations, and author some of the leading publications on California law and practice. Our annual seminars routinely feature keynote speakers from the United States and California Supreme Courts, along with participants and attendees from throughout the United States, the California judiciary and the California Bar.

ABTL is a uniquely nonpartisan, nonpolitical, nondenominational organization, dedicated to high quality programming and networking for California's business trial bar and the judiciary. This is what we do. We do it well.

If you attend the programs, the quality and usefulness of the programs are self-explanatory. Yet, if you stop there, you will miss out on the value of personal relationships with members of the bench and bar in your practice. There is value in meeting the judges, your co-counsel or your adversaries (present and future) in the informal setting of the receptions, programs or committee work.

We welcome your participation and will be happy to help you meet people at our events. If asked, we will talk to your firm management about the benefits of you attending this year's Hawaii annual seminar in October titled *Corporate America on Trial*. Details of the all star Hawaii lineup from the bench and bar, our other upcoming events and a listing of the officers and Board members can be viewed at www.abtl.org. You can call me at (213) 617-1200 or e-mail me at jwesterman@milbergweiss.com. The officers, board members and I will help you "break the ice" at our programs, or put you in touch with our committee chairs in the areas of Programming, Courts, Membership, ABTL Reports, Public Service/ADR, the Web Site, Discovery and the Annual Seminars.

Start your ABTL network now.

— Jeff S. Westerman

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