

ABTL REPORT

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Letter from the President

As this year's President of the ABTL's Northern California Chapter, I take this opportunity to welcome all of our members — new and old — to what I hope will be an exciting and innovative 2001. The ABTL's focus and purpose remain that of an organization dedicated to enhancing and improving skills for litigating and trying complex civil cases. In so doing, the Association

is dedicated to creating opportunities and an open forum for judges, litigators, business lawyers and other legal professionals to present and discuss a variety of issues that go to the very heart of the practice of legal advocacy.

This year the ABTL will continue to offer programs every other month that will provide members of the Northern California bench and bar with an opportunity to visit with one another in a social setting. At the same time we will focus on specific ideas for the successful handling of complex business

cases in our ever-changing judicial system. At these programs participants can discuss among themselves and with jurists the "mechanics" of litigation practice — what

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More Impression Formation and Management for Lawyers

As "politically incorrect" as it is to harbor biases, prejudices and stereotypes about others, it is equally foolhardy to pretend they don't exist — at least if your objective is to influence favorably your impression on others.

We all form impressions of others based upon a host of biases, prejudices and stereotypes, because we don't have the time, inclination or awareness to evaluate how each of the person's traits truly reflects upon his or her individual character. The process we follow is no different than that we use to select among competing packages of taco seasoning on the shelf of our neighborhood supermarket. We may be influenced by what we have heard in the media or from family or friends about the product (Shillings is a great brand), by our personal experience (I've always had good results with Shilling products) or by emotional responses (the packaging is so attractive that the taco seasoning inside must be great). The same combination of myth, experience and emotional response is applied in every encounter in which one person judges another.

In the last issue of the *ABTL Report*, I discussed how our emotional brains influence, and often control, our rational brains and how we project an impression of ourselves through the Seven Colors (personal appearance, body language, voice, communication techniques, content, actions and environment). I also listed what our research found to be the five most prevalent of the "Magic Pills" that always enhance impressions without risk of diminishing them (good eye contact, smiling, hand shakes and greetings, good posture and enthusiasm), as

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Stephen E. Taylor



Mark C. Mazzarella

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Impression Formation and Management

well as the five leading "Toxic Traits" that add nothing positive to the impression formation process (offensive physical acts, unappealing word usage, insensitive communication, aggressive behavior and pettiness).

In the balance of this article, I'll describe how to "manage" the impression you, your clients and your witnesses make on others by using a simple five-step process to create the best possible impression.

STEP 1 — Make a list of the traits and characteristics of the person whose impression you're seeking to manage. Include all of the significant traits manifested by any of the Seven Colors. To avoid information overload, pare the list down to the five or six most prominent traits.

STEP 2 — Make a list of stereotypes normally attached to each of these traits. Allow yourself to yield to political incorrectness. After three years of research, Jo-Ellan Dimitrius and I found that the stereotypes typically portrayed in the media, capitalized upon by comics, and otherwise recognized by the average person, are in fact fairly universal.

STEP 3 — Emphasize each of the Magic Pills. If your subject is fortunate enough to employ them already, try to accentuate them. If not, make a concerted effort to develop them.

STEP 4 — Eliminate all of the Toxic Traits. It's human nature to focus on the negative. One offensive characteristic can overshadow a handful of positive ones.

STEP 5 — "Manage" those traits to which both positive and negative stereotypes apply by using counter-balancing positive traits as antidotes for those traits that have negative aspects. It is this step that usually makes the difference between a good impression and a great impression.

As you seek to manage the impression formation process, it is important to keep in mind what the average person finds most important in others. After conducting over 10,000 interviews and reviewing thousands of survey questionnaires, we found that the four qualities that are most essential to a positive impression are what we call the "Compass Qualities" — trustworthiness, caring, humility and capability. People need to believe in you, like you and have faith in your abilities.

Trustworthiness is always paramount. Depending upon the circumstance, likeability (reflected by caring and humility) and competence may be given different weight. Many traits that lead to likeability can detract from the impression of capability, and vice versa. Consequently, while neither likeability nor capability should be sacrificed, there are many occasions when one should be emphasized more than the other; but in every case, a reasonable balance should be sought.

The recent presidential debates, and their impact on the polls, should send a clear message to those of us who must manage the Compass Qualities in our presentations to others. In Gallup polls taken during every presidential campaign since 1960, the candidate who was deemed

most likable has prevailed. Prior to the Gore — Bush debates, Bush had a 2% lead over Gore in the likeability department. Gore, however, was deemed more knowledgeable on the issues, more articulate and more intelligent. During the debates, Gore's much more aggressive behavior (interruptions, violation of the debate rules, sighing, etc.) caused his likeability ratings to drop precipitously. Even though most viewers continued to believe Gore was more knowledgeable on the issues, articulate and intelligent, Bush picked up a few points in the polls.

The presidential candidates' debating style and presentation serve as an excellent illustration of how favorable impressions can be managed, or mismanaged. Bush's handlers apparently recognized that his impression was hurt by his verbal miscues and lack of knowledge in several key areas, including foreign policy.

Bush also suffered early in the primaries from criticism that he was aloof, possibly even arrogant — a conclusion that was reached in part because of a weak smile that was perceived as a smirk.

During the months before the debate, Bush all but eliminated the smirk and replaced it with frequent humor and a decidedly homespun delivery, which emphasized his likeability, and compensated for those traits that were detracting from his overall image. On the capability front, perhaps recognizing that even weeks of practice before the debates would never allow him to compete toe-to-toe with Gore in a test of statistical knowledge (or even the names of foreign leaders), Bush simplified his message, emphasized his record in Texas and harped on the simple theme that he trusted people to make their own decisions, and opposed a big government that made decisions for them. The effect was to avoid a direct comparison in the capability arena where Bush showed the greatest weakness.

Gore, on the other hand, continued to emphasize his strengths, but failed to effectively manage his weaknesses. His assertiveness, competence, and knowledge came through loud and clear, establishing him in the eyes of most as the more capable of the two candidates. But for reasons which themselves could be debated, he managed his audience's perception of his trustworthiness, caring and humility poorly. In his zeal to make substantive points, he made statements that were later shown to be untrue. In his effort to exert control, he interrupted, exceeded his time limits and posed questions directly to Bush in violation of the debate rules. In an apparent attempt to communicate criticism of what Bush was saying, from time to time he rolled his eyes, sighed and waved his hands in the air. In so doing, Gore demonstrated several of the Toxic Traits that I discussed in the last issue of the ABTL Report. He came across as aggressive, rude and arrogant. Whatever points he scored in the capability department were offset by those he lost in the trustworthiness, caring and humility departments. Hence, a decline in the polls.

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As trial lawyers, if we use the five-step approach that I previously outlined, we can enhance the impression that we make both in and out of the courtroom. Two examples will demonstrate the process. Both examples are taken from real-life experiences. In the first the subject is a businessman, but just as well could have been a lawyer seeking to enhance his relationship with his partners and employees. In the second example, the subject is a witness, but the impression management approach would not have been significantly different had the woman been the lawyer in the case, rather than the key witness.

One of my friends, John, is a huge man with a booming voice and hands like paddleball racquets. He is extremely intelligent, assertive, blunt, energetic and competent. Though relaxed and outgoing, John is frequently impatient, and often confrontational. John recently formed a publishing company and hired several employees. John asked us to help him create an effective "impression management plan" to use with his employees.

An abbreviated summary of our advice to John will demonstrate the impression management technique: John's outgoing and energetic nature are pure positives. They enhance other's perception of all four Compass Qualities and have no drawbacks. John should maintain those positives: even expand on them, as long as he doesn't go off the deep end.

Obvious displays of impatience and confrontation are toxic, and have no redeeming value in any but the most exceptional circumstances. John should resolve to eliminate them, except as a last resort.

John's size, powerful voice, assertiveness, direct communication style, and obvious confidence are all double-edged swords. They enhance others' impressions of his trustworthiness and capability, but they are likely to create the impression that he is neither caring nor humble. They can make him appear intimidating, overpowering, unfriendly and arrogant. John should apply other traits as antidotes to remove the toxic side effects of those double-edged swords.

Among many other ways to blunt his sharp edges, John can: lower his voice a bit; smile more; engage in warmer, more frequent eye contact; make a point to say "Good morning," and ask his employees about their lives and passions; wear warmer and more approachable colors and clothing styles; occasionally touch his employees arms or hands in a non-sexual way; go to their offices when he wants to speak to them, rather than call them into his; remember their birthdays and their children's names and interests; listen intently as they talk; praise them more; and even bring in donuts on Friday mornings.

None of these suggestions will diminish his employees' positive impression of John's trustworthiness or capability. But collectively they will soften his otherwise intimidating persona in ways that will let his employees know that he is also caring and humble.

The second example comes from a recent trial in which the key defense witnesses was a "forty-ish" woman who is among the most wealthy and powerful women in

Efficient Practice or Malpractice: Disclosing Privileged Information

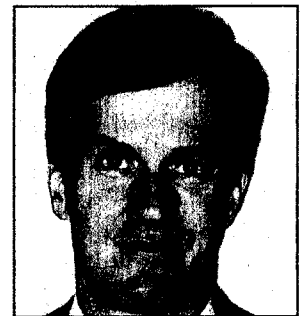
You've been worried since the phone call last week. Management was pressing the general counsel to do everything possible to head off a formal SEC investigation. The general counsel stated he wanted to send the SEC the report of your law firm's investigation of the company's conduct. You both knew that investigation was confidential work product written to provide a candid assessment and advice to the company. It wouldn't look good in front of a jury in the pending class action. How could the general counsel expect you to find a way to disclose a confidential document without waiving the privilege?

Your advice now to the general counsel is not what he wants to hear, but you feel you must advise him to preserve the privilege. After an uncomfortably long pause, the general counsel responds, "John, I'm disappointed in you. It seems to me we ought to at least consider what I heard Columbia/HCA's legal department had done. I understand their outside counsel got the SEC to agree that disclosure would not waive any privileges. Why can't you do that?"

You quickly need some answers: What are the pros and cons of limited production of arguably privileged information even if it is subject to a protective order or stipulation to preserve the privilege? Would such a protective order be legally effective to preserve the privilege? In the absence of a protective order, would either a stipulation or a reservation of privilege rights suffice?

While courts commonly enter protective orders to allow limited disclosure of trade secrets while preserving confidentiality, such orders can also be applied to preserve the attorney client and work product privileges. Such limited disclosures of privileged information may be beneficial or even mandatory in cases involving coverage and indemnity issues, advice of counsel defenses, attorney fee disputes, and other conduct of attorneys, such as patent cases. Limited disclosure may also be beneficial in defending regulatory agency investigations and in some multi-jurisdictional disputes. In other cases, limited disclosure may be tactically advantageous or simply a cost-saving measure.

The Ninth Circuit has upheld the entry and presumably the legal effectiveness of a protective order preserving the attorney client communication privilege following a limited disclosure. Nonetheless, the brevity of the court's analysis and the unusual procedural posture of the case indicates that caution should be exercised in relying on it.



Laurence Jackson

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Efficient Practice or Malpractice

Presumably, its rationale would apply with equal or even greater acceptance to the work product privilege. Few other courts have addressed the issue. There does not appear to be any precedent from the California State courts.

In a few cases, limited disclosure, even in the absence of a protective order, has not been found to result in a complete waiver of privilege. In these cases, the disclosing party entered into a stipulation preserving privilege or unilaterally reserved privilege claims. However, the overwhelming majority view is that such stipulations and reservations are not legally effective — the confidentiality of any documents would be irretrievably lost due to even a limited disclosure.

Why Disclose Confidential Attorney-Client Communications?

In a host of circumstances disclosure of privileged information may be beneficial, cost effective, or both. Some disclosure is likely to be beneficial or mandatory in matters in which the conduct of counsel has been placed in issue. For example, in coverage litigation, the insured may be required to establish the reasonableness of the insured's settlement of an underlying

case. Insureds in such cases have been required to disclose work product and attorney client communications. See, *Conoco, Inc. v. U. S. Bob Brothers Construction Co.*, 191 F.R.D. 107 (W.D. La. 1998). Even where limited disclosure is not mandatory, the insured may determine that it is beneficial to do so or appropriate to satisfy its duty of cooperation with its insurer. See, e.g., *North River Ins. Co. v. Columbia Cas. Co.*, 1995 U.S. Dist. Lexis 53 (S.D.N.Y.) (Insured's limited disclosure to an apparently friendly carrier later held to have been a complete waiver allowing a hostile carrier access to the previously privileged matter. No protective order, stipulation or reservation employed.) Limited disclosure may also be mandatory or beneficial in cases involving legal malpractice issues, attorney fee issues and advice of counsel defenses. Various pre-litigation circumstances may lead to a decision that limited disclosure is beneficial to avert an SEC, Department of Labor, or other agency investigation. In multi-jurisdictional disputes, limited disclosure in one forum may be beneficial in averting a decision on privilege in that forum that could have adverse collateral estoppel effects on cases elsewhere. In all cases, there is the potential economy of avoiding the cost of privilege logging, of suspending depositions pending resolution of privilege issues, and of potential follow-on motion practice.

Could a Protective Order Effectively Preserve Privilege Claims?

Two cases within the Ninth Circuit have upheld the

effectiveness of a protective order in preserving privilege while permitting limited, voluntary disclosure. The Ninth Circuit upheld the effectiveness of a protective order in *McDowell v. Calderon*, 197 F.3d 1253, 1255-56 (9th Cir., 1999) cert. denied 68 U.S.L.W. 3656, 120 S. Ct. 1708 (2000). The Court held that the Federal Rules of Civil Procedure gave a District Court in a habeas corpus proceeding the authority to enter an order that attorney client privileged documents disclosed to the prosecution could be used only in the habeas proceeding and would continue to be privileged and confidential for other matters. In the District Court habeas proceeding, McDowell challenged his conviction claiming ineffective assistance of counsel in his underlying murder trial. Accordingly, he placed his own attorney client communications in issue. The California Attorney General moved to vacate the protective order on the basis that "federal law does not provide for partial waivers of attorney client privilege." The District Court denied the motion to vacate and a subsequent motion for reconsideration; both orders were upheld by the Ninth Circuit at page 1255:

"It is debatable whether the district court can so limit the Attorney General's use of the documents from McDowell's trial counsel's file. The question being a debatable one, the District Court did not commit clear error when it limited access to the file pursuant to the terms of the protective order. District courts have very broad discretion in fashioning discovery orders under Fed. R. Civ. P. 26(c), and the protective order did not fall clearly outside the bounds of the authority."

The unusual procedural posture of *McDowell* may limit its application but should not undermine its rationale. Even though the Federal Rules of Civil Procedure do not expressly apply in habeas proceedings, the federal courts are empowered to draw on them as examples in habeas cases. *Harris v. Nelson*, 394 U.S. 286, 89 S. Ct. 1082, 1091 (1969). In any event, the Ninth Circuit's ruling on the extent of the District Court's powers under Rule 26(c) should be binding precedent in civil cases. In addition, the District Court may have been particularly inclined to issue a protective order by the circumstances in *McDowell* — a death penalty defendant forced to disclose attorney-client communications if he is to be able to assert his ineffective assistance of counsel defense. In less compelling circumstances, a trial judge may be less willing to enter a *McDowell* type protective order. Nonetheless, should the trial judge be persuaded good cause exists for issuance of a protective order, it would appear to be enforceable within the Ninth Circuit.

Although the Ninth Circuit did not address work product privilege, the Court's rationale would certainly appear to extend to work product. If anything, a district court's ability to limit or regulate work product discovery is even less debatable than its ability to regulate attorney-client communication privilege. Other courts addressing limited disclosures have been less protective of the attorney-client privilege and more willing to find a waiver of it than of the work product privilege, provided the claimed

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Adam D.H. Grant

work product is truly work product. See, e.g., *Weil v. Investment/Indicators, Research & Management*, 647 F.2d 18, 23 (9th Cir. 1981) (attorney-client privilege "narrowly construed"); and *Dunball Pharms., Inc. v. Discus Dental, Inc.*, 99 F. Supp. 1202, 1206 (C.D. Cal. 1998) (finding scope of waiver of work product narrower than waiver of attorney-client communication privilege).

In a second recent case in the Ninth Circuit, the Southern District of California entered a protective order allowing limited disclosure without a general waiver of privilege. *Playboy Enterprises, Inc. v. Welles*, 60 F. Supp. 2d 1050, 1054-55 (S.D. Cal. 1999). The protective order provided that disclosure for discovery purposes of claimed privileged documents to an outside computer consultant, acting ostensibly as an officer of the court, would not constitute a waiver of applicable privileges.

It may be appropriate to consider the identity of any other jurisdictions that may be called on to enforce a protective order. While there does not appear to be any precedent from the California State courts or other federal circuit courts contrary to *McDowell*, dicta in at least one decision is contrary. The Bankruptcy Court for the Northern District of Oklahoma stated that selective waiver of the attorney-client and work product privileges could not be provided for in a protective order even though that court ordered that disclosure of certain privileged documents would not waive privilege as to any other documents. *In re Commercial Financial Services*, 247 B.R. 828 (N.D. Okla. 2000). This dicta raises a question yet to be decided: Will a court, such as the *Financial Services* court, enforce a *McDowell* type order based on *res judicata* principles, even though that court would be unwilling to enter such an order?

The few reported cases to date do not provide guidance on the effectiveness of blanket protective orders to preserve work product and attorney client communication privileges. In general, blanket protective orders have been permitted by the Ninth Circuit. *San Jose Mercury News, Inc. v. U.S. Dist. Ct. — Northern Dist.*, 187 F.3d 1096, 1103 (9th Cir. 1999). They may not be available under any circumstances in the California state courts, depending upon the trial court's interpretation of *Stadish v. Superior Ct.*, 71 Cal.App. 4th 1130 (1999) (blanket protective order voided as an impermissible delegation of judicial powers in allowing parties to designate matters confidential without express provision for subsequent judicial review); see also Los Angeles Superior Court, Local Rule 7.19 (protective orders only to be entered on a "document-by-document" basis), cf. *Stadish v. Superior Ct.*, 71 Cal.App. 4th 1130 (1999) (Zebrowski, J. concurring) (blanket orders may be available even in Los Angeles Superior Court if appropriately drafted).

Are Stipulations or Reservations Effective to Preserve Privilege?

Neither the Ninth Circuit nor the California State courts have addressed the effectiveness of a stipulation to pre-

Joint Defense Privileges: Get it in Writing!

The joint defense privilege is intended to protect exchanges of information among parties who share common interests in defending against or attacking a common opponent but who are represented by separate lawyers. Oddly enough, there is no recognized statutory joint defense privilege in California. Moreover the few courts which have addressed the privilege reserve its application to situations in which shared privileged information is reasonably necessary to the conduct of the defense.

In permitting parties to avoid waiver of the privilege by disclosure of information to codefendants under appropriate circumstances California courts rely on the provisions of Evidence Code sections 912 and 952. However, case law on the joint defense privilege is scant both in California and in the Ninth Circuit.

A succinct description of the privilege is set forth in *Separating the Joint-Defense Doctrine from the Attorney-Client Privilege*, 68 Tex. L.Rev. 1273 (May, 1990):

The joint defense privilege protects exchanges of information among parties who share common interests in defending against or attacking a common opponent but who are represented by separate lawyers. Communications directly by one party to the lawyer for another party who shares common interests also fall within the privilege. The privilege generally allows parties to exclude from evidence the information that they divulged to other parties.

The privilege is also known as the "common interest privilege," "common interest doctrine," "common interest rule," or the "pooled-information privilege." See e.g., *United States v. Schwinner*, 892 F.2d 237, 243 (2d Cir. 1989); *Schachar v. American Academy of Ophthalmology, Inc.*, 106 F.R.D. 187, 192 (N.D. Ill. 1985); *Visual Scene, Inc. v. Pilkington Bros.*, 508 So.2d 437, 440 (Fla. Dist. Ct. App. 1987); *In re Sealed Case*, 29 F.3d 715, 719 (D.C. Cir. 1994).

While the joint defense privilege "has been widely accepted by courts throughout the United States," *Metro Wastewater Reclamation Dist. v. Continental Casualty Co.*, 142 F.R.D. 471, 478 (D. Colo. 1992), "[w]hat little law there is, is federal." *Raytheon Co. v. Superior Court*, 208 Cal.App.3d 683, 687, 256 Cal. Rptr. 425, 428 (1989). Further, the privilege still remains in a confused state. *Separating the Joint-Defense Doctrine from the Attorney-Client Privilege*, *supra*, 68 Tex. L.Rev. at 1276 (May, 1990).

In California, as mentioned above, there is no statutory



Larry C. Russ

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Joint Defense Privileges

joint defense privilege, and the doctrine has been applied solely as an outgrowth or in reliance upon Evidence Code sections 912 and 952:

There is no joint defense privilege as such in California, but, as we have stated, the issue of waiver must be determined under the statute with respect to the attorney-client privilege, and depends on the necessity for the disclosure. *Raytheon Co. v. Superior Court of Santa Clara County*, 208 Cal.App.3d 683, 689, 256 Cal.Rptr. 425 (1989).

See, *First Pac. Networks, Inc. v. Atlantic Mut. Ins. Co.*, 163 F.R.D. 574, 581 (N.D.Cal. 1995) ("The joint defense or common interest doctrine have not been recognized statutorily in California, and case law discussion of them is sparse"). California courts seem to resolve disputes that may implicate the joint defense or common interest doctrines by relying either generally on waiver analysis or specifically on interpretation of one concept that is common to both sections 912 and 952 of the California Evidence Code. See *Raytheon*, 208 Cal.App.3d at 687-689; *Insurance Co. of North America v. Superior Court*, 108 Cal.App.3d 758, 166 Cal.Rptr. 880 (1980).

Section 912(d) provides in relevant part:

A disclosure in confidence of a communication that is protected by a privilege provided by Section 954 (lawyer-client privilege)... , when such disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer... was consulted, is not a waiver of the privilege.

Section 952 provides in relevant part:

As used in this article, 'confidential communication between client and lawyer' means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.

The common concept which permeates these two evidence code provisions is that the privilege can continue to attach to communications that are disclosed in confidence to third persons when that disclosure is reasonably necessary to achieve the ends for which the lawyer is being consulted. *First Pac. Networks*, 163 F.R.D. at 581. See *Raytheon*, 208 Cal.App.3d at 688-689, 256 Cal.Rptr. at 428-429 (Extending a privilege to information that is exchanged in joint defense only when the disclosure is "reasonably necessary to accomplish the client's purpose in consulting counsel").

In *Raytheon*, *supra*, Raytheon sought review of a discovery order requiring production of documents which Raytheon claimed were protected by the attorney-client and work product privileges. The documents consisted of correspondence, memoranda, reports and other documents over a five-year period prepared by Raytheon, its counsel and/or its consultants and circulated to two other

companies, their counsel, and/or their consultants. The trial court had ruled that Raytheon had waived all claims of attorney-client or work product privilege with respect to the documents shown to codefendants or their counsel. The appellate court held that the trial court committed error in finding a waiver of the privilege.

The appellate court relied upon Evidence Code section 912 which provides that a disclosure in confidence of a privileged communication is not a waiver of the privilege "when such disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer... was consulted..."

The *Raytheon* court noted that most cases involving the issue of waiver of the attorney client privilege are federal cases, in which the issue of waiver turns on a determination of whether there is commonality of interest among the parties as to whom disclosure occurred. Raytheon also noted that most of the federal cases involve either joint defense of criminal cases, albeit by separate counsel, or related prosecutions of antitrust or similar lawsuits by plaintiffs with interests in common. In those factual contexts, the federal courts do not treat joint disclosure as waiver. *E.g., Hunydee v. United States*, 355 F.2d 183 (9th Cir. 1965) (joint defense privilege).

With regard to the work product privilege, the *Raytheon* court noted that language in at least one California decision strongly suggests that privilege is not waived except by a disclosure wholly inconsistent with the purpose of the privilege, which is to safeguard the attorney's work product and trial preparation, citing *Fellows v. Superior Court*, 108 Cal.App.3d 55, 65-66, 166 Cal.Rptr. 274 (1980). *Raytheon*, 208 Cal.App.3d at 689.

Because the record in *Raytheon* was devoid of evidence showing whether the work product and attorney-client privileged matter disclosed was, under the circumstances, inconsistent with claiming the privilege, the appellate court remanded the case to the trial court for a determination of whether the circulated documents were disclosed with an expectation of confidentiality.

Although there is no *per se* joint defense privilege in California, the courts have recognized the shared privilege of counsel aligned as nonadversaries who share confidential information. In *Insurance Co. of North America v. Superior Court of Los Angeles*, 108 Cal.App.3d 758, 166 Cal.Rptr. 880 (1980), where INA sought a writ of prohibition against the superior court to preserve the confidentiality of its attorney-client communications against discovery by GAF Corporation, the court held:

It may be seen that under section 952 (of the Evidence Code) communication of information by an attorney to a client in the presence of a third person does not destroy the confidentiality of the communication if the third person is 'present to further the interest of the client in the consultation.' When the third person is present for that purpose, confidentiality of communication is maintained. 108 Cal.App.3d at 762.

The court further stated:

It is apparent the authors of section 952 intended a comprehensive construction of the attorney-client privilege when they specified that neither (1) disclosures to third persons present to further the interest of the client,

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DAVE DOLKAS

On INTELLECTUAL PROPERTY

Year 2000 was an interesting year in the area of intellectual property law, which is where I spend most of my time litigating. This column discusses the most significant cases or trends in the last year in the IP arena.

Trademarks

The most significant trademark case was *Wal-Mart Stores, Inc. v. Samara Brothers*, 120 S.Ct. 1339 (2000). The case was appealed to the Supreme Court after Wal-Mart was hammered at the trial court level for ripping off the plaintiff's dress designs. (The Second Circuit affirmed.) Most trademark law experts opined that the Court had granted *certiorari* to resolve a split in the circuit courts as to the proper test to apply in trade dress cases. However, in a unanimous opinion written by Justice Scalia, the Court held that trade dress protection could be asserted for a product design *only if* the design had acquired secondary meaning (i.e., that the public associated that design with a single producer). The Court did not provide much guidance for determining what constitutes trade packaging (protectible without proof of secondary meaning) and what constitutes trade dress (protectible only with proof of secondary meaning). The court also suggested that adequate protection for product designs already is provided by copyrights and design patents.

Domain Names

A new venue emerged for the summary resolution of domain name disputes: the Internet Corporation for Assigned Names and Numbers (ICANN), created by the Department of Commerce in 1998 as a self-governing institution for the Internet. ICANN adopted a uniform resolution policy ("UDRP") that went into effect in December 1999. About 70% of the world's domain name registrations fall under UDRP's jurisdiction. Since its implementation over 2,000 proceedings have been brought and the results of those proceedings are interesting. Most of the time (about 80%), the complainant (usually the trademark holder) wins. A holder of a domain name registered before 1997 tended to fare better than a registrant who registered a domain name after 1997. The results were mixed in cases involving fair use and free speech issues (i.e., the "companynamesucks.com" type of domain name).

Copyrights

Unless you were stranded on a deserted island for the last year or a cast member in *Survivor*, it would have been nearly impossible to miss the hoopla surrounding the Napster and MP3.com cases. For such "Rudy" readers,

both the Napster and the MP3.com cases involved claims by several large record companies that Napster and MP3.com willfully or contributorily infringed the copyrighted recordings owned by the record companies. To most of the copyright lawyers I know, these cases were "no brainers" because both companies facilitated the downloading of protected, copyrighted materials.

The district court judges who heard the cases resoundingly agreed with the record companies. In July, Judge Marilyn Patel of the Northern District found that Napster's music service was overwhelmingly used for music piracy over the Internet. Napster immediately appealed to the Ninth Circuit, which entered a stay of Judge Patel's injunction. Subsequently, the Ninth Circuit affirmed Judge Patel's decision and remanded the case back for entry of an injunction against Napster.

Meanwhile, and on the other side of the country, Judge Jed Rakoff had little trouble concluding that MP3.com's online service known as "MyMP3" willfully infringed the copyrighted recordings of several large record companies (i.e., the same line-up that sued Napster). On November 14, 2000, Judge Rakoff entered a whopping judgment of \$53,400,000.

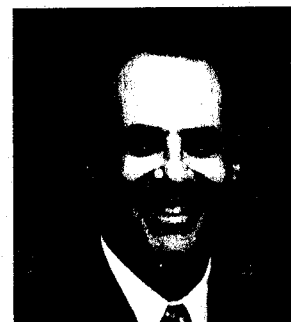
Patents

The Federal Circuit announced its decision in *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.*, No. 95-1066 (Fed. Cir. November 29, 2000). To patent litigators and patent lawyers, this case was a "blockbuster." *Festo* served a near fatal blow to the doctrine of equivalents. In short, *Festo* holds that the doctrine of equivalents does not apply to claim terms that have been amended during the prosecution of a patent, if that amendment was made for "substantial reasons related to patentability." "Patentability," as interpreted by the Federal Circuit, is not limited to amendments made at the request of the examiner or in response to a rejection. Nor is it limited to amendments made to overcome prior art. Thus, any amendments made during prosecution, regardless of the reason, will limit a patent holder's ability to prove infringement based on equivalents of the claim elements that were so amended.

Trade Secret

There were no blockbusters like *Festo* for patents, but one appellate decision, *PMC, Inc. v. Kadisha*, 79 Cal. App.4th 1144 (2000), clearly is worth mentioning. In *PMC*, the appellate court held that there were issues of facts as to the reasonableness of the investigation and the level of knowledge of the defendants, venture capitalists who invested in the defendant company after the alleged misappropriation occurred. This case has potentially chilling consequences to companies embroiled in trade secret litigation and searching for new rounds of financing or new management.

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Dave Dolkas

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Joint Defense Privileges

nor (2) disclosures to third persons which are reasonably necessary to transmit information or accomplish the purpose for which the attorney has been consulted, destroys confidentiality of communication. *Id.* at 766.

Federal Cases

The above discussion notwithstanding, within the Ninth Circuit, there is scant law on the joint defense privilege. In *Waller v. Financial Corp. of America*, 828 F.2d 579, 583-584 (9th Cir. 1987), the court held that communications to an attorney remained privileged when the attorney shared the information with codefendants in joint defense of the claims against them. The privilege has been applied when attorneys exchange information, and may encompass statements made by a party directly to the lawyer for another party with common interests. This type of communication has been protected even when the client of the lawyer with whom the other party is communicating is present. *See, e.g. Hunydee v. United States*, 355 F.2d 183, 185 (9th Cir. 1965).

In *Continental Oil Co. v. United States*, 330 F.2d 347 (9th Cir. 1964), subpoenas were issued in aid of a Federal Grand Jury proceeding. During the proceedings of the Grand Jury certain employees and executives of the appellant oil companies were summoned to testify before it. Before and after their appearance before the Grand Jury these witnesses were interviewed by their respective counsel, who in turn prepared memoranda concerning the information received from such witnesses and relating to the clients' appearance before the Grand Jury. The memoranda were then exchanged between the counsel for the different oil companies in confidence in order to apprise each other as to the nature and scope of the inquiry proceeding before the Grand Jury. The government then issued subpoenas *duces tecum* upon the oil companies and their attorneys calling for the production of the memoranda prepared by the lawyers. The oil companies moved to quash the subpoenas.

Government counsel contended that the attorney-client privilege was not applicable because the attorneys did not represent the witnesses from whom the statements were procured, and because if the communications were initially privileged, the privilege was waived when the statements received from the witnesses were exchanged by counsel representing the corporate clients. The court concluded that attorneys who took the statements not only represented the corporations referred to but represented the witnesses, and that they were called upon to advise and represent the persons from whom such statements were taken:

Where an attorney furnishes a copy of a document entrusted to him by his client to an attorney who is engaged in maintaining substantially the same cause on behalf of other parties in the same litigation, without an express understanding that the recipient shall not communicate the contents thereof to others, the communication is made not for the purpose of allowing unlimited

publication and use, but in confidence, for the limited and restricted purpose to assist in asserting their common claims. The copy is given and accepted under the privilege between the attorney furnishing it and his client. For the occasion, the recipient of the copy stands under the same restraints arising from the privileged character of the document as the counsel who furnished it, and consequently he has no right, and cannot be compelled, to produce or disclose its contents.

The *Continental Oil* court concluded that the attorney-client privilege existed so as to require a quashing of the subpoenas *duces tecum*. 330 F.2d at 350.

Conclusion

Although not one case indicated that the joint defense privilege, to the extent it is recognized in state or federal decisions in California (or for that matter, elsewhere), requires for its existence the execution of a written joint defense agreement, it is considered good practice to execute such an agreement where multiple parties and counsel are going to be sharing data and strategy. Some practitioners even suggest submitting a written joint defense agreement in the form of a stipulation to be approved by the Court in advance. If the Court approves the written stipulation, the risk of privilege waiver is obviously significantly reduced.

Larry C. Russ is a partner with Russ, August & Kabat in Los Angeles.



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Impression Formation and Management

the United States. At 5-foot-3 and 110 pounds, she is not physically intimidating. In private she had a quick wit and a ready smile, but in public she came across as extremely serious, almost humorless and harsh.

Because of her phenomenal success in business and a strong academic background that included a law degree from Stanford, we had little doubt that she would be perceived as capable. Since she was being sued for breach of fiduciary duty, we were much more concerned about her impression as an honest, caring and humble person. Our impression management plan for her included these observations and suggestions:

She was weak in the Magic Pills department, and needed to engage in better eye contact, smile more, greet the attorneys who would cross examine her with a pleasant "Good morning," exhibit better posture, and more energy. During our preparation we encouraged her to sit up straight with a slight forward lean, avoid glancing down, and show more energy. Our highest priority was to assure that she did not come across as the "dragon lady."

From the time she walked into the courthouse, while sitting at the counsel table, and of course, during her testimony, we wanted her to appear approachable - just a regular person - in order to compensate for the

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BARRY P. GOODE

On ENVIRONMENTAL LAW

This is a multiple choice test. The subject is constitutional law. Which of the following phrases does not belong? (A) no person shall be deprived of life, liberty or property without due process of law; (B) the legislature shall make no law respecting an establishment of religion; (C) a law impairing the obligation of contracts may not be passed; or (D) the people shall have the right to fish. The answer is "D", right?

Wrong. The California State Constitution guarantees all those rights, including "the right to fish upon and from the public lands of the State...excepting upon lands set aside for fish hatcheries." If that's in Article I, Section 25, and it is, what else does the California Constitution say that environmental lawyers should know?

The Constitution provides unusually specific guidance with respect to fish and game, water law, and marine resources. It also has tax and revenue provisions that deal with specific environmental matters. Although your ordinary environmental law case may not give rise to issues of state constitutional law, you should not necessarily rule it out.

Water Law

Article X is, perhaps, the most important source of environmental law in the Constitution. Section 2 declares that "the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable." It prohibits the unreasonable use, the unreasonable method of use and the waste of water.

That section contains the guiding principles of California water rights. Since its adoption, the conservation of water has been a key tenet of state law.

But until recently, there was little thought about how water *quality* could affect water *rights*, and vice-versa. Today, hundreds, if not thousands, of California lawyers are struggling with cases involving polluted aquifers and contaminated surface streams. They are working with a like number of engineers to determine how best to reduce contamination below clean-up levels.

Often the remedy selected is "pump, treat and dump." But does "dump" really comport with the Constitution's mandate that "waste...of water be prevented?" Is it constitutional to discharge treated water — in some cases to the ocean? Must it be put to beneficial use? No reported case has confronted this yet.

Statutes in the Constitution

The state constitution also contains some extraordinarily detailed provisions regarding the regulation of fish and

game. With the precision of a statute, Article IV, Section 20 establishes the Fish and Game Commission. Article XB is even more unusual. It is the "Marine Resources Protection Act of 1990" and prohibits the use of gill and trammel nets in defined coastal zones, including around named offshore islands. Anyone working on declining fisheries resources should examine this article to see if it might be relevant to the issue at hand or provide a model for further legislation.

Revenue and Taxation

Those who counsel clients should be familiar with the provisions of Article XVI, which authorize the issuance of revenue bonds for pollution control facilities and plants that create energy using cogeneration technology, solar power, biomass or other alternate sources. Once the bonds are issued, these facilities may be sold or leased to private entities.

Similarly, Article XIII (Taxation) creates tax incentives for specified environmental purposes, including open space, certain timber and farm lands and historical properties. In a peculiarly idiosyncratic provision, the constitution describes how to assess parcels of ten or more acres that have been used exclusively, for at least two years, for "nonprofit golf course purposes." (Mineral rights must be included in the assessment.)

Those working on matters involving mass transit, vehicle emissions and noise pollution should know that Article XIX requires gas tax revenues to be used for only limited purposes, including "the mitigation of...environmental effects" of streets, highways and traffic. Likewise, motor vehicle fees may only be used for certain purposes, including "the mitigation of the environmental effect of motor vehicle operation due to air and sound emissions." In the same vein, Article XVI, Section 9 requires that any "money collected under state law relating to the protection or propagation of fish and game shall be used for activities relating thereto."

Finally, when environmental lawyers vacation in the wild, they do so secure in the knowledge that the California Constitution guarantees them not only the right to fish, but that "no land owned by the State shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon; and [subject to certain DFG regulations] no law shall ever be passed making it a crime...to enter upon the public lands...for the purpose of fishing in any water containing fish that have been planted therein by the State." Where else in the United States does a state constitution go so far to secure environmental lawyers the right to pursue happiness?

Barry P. Goode was a partner in the firm of McCutchen, Doyle, Brown & Enersen when this article was written. This will be Mr. Goode's last column because he recently became Legal Affairs Secretary to California Governor Gray Davis.



Barry P. Goode

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Impression Formation and Management

probable stereotypical conclusion that she was arrogant or felt superior because of her success and status. We counseled her to open doors for others, to help carry exhibits, to smile and speak frequently with the court staff, particularly when the jury was present, and to be very respectful and non-confrontational when she was cross examined.

After the first two or three meetings with her, it became apparent that she favored black clothing — a stylish and professional color — but not one that enhances approachability. Her hairstyle was also short and somewhat severe. We told her to wear colors that would preserve her impression of leadership and capability, while softening her otherwise harsh appearance, such as forest green, burgundy and medium shades of blue. She also let her hair grow a little longer, and had it cut in a very professional, yet feminine style.

She had a very no-nonsense, direct communication style, which probably served her well in her professional environment, but could have come across in her trial as overly aggressive and perhaps even egotistical. Accordingly, we worked with her to listen patiently to questions and to respond in a conversational tone.

This approach worked well for this particular woman; but might have been disastrous for a woman with traits that placed in question her capability or played to the stereotypical biases of women as the "weaker sex." But so it is in every instance; what works for you, or any particular witness, or even what works for the same person in different situations, given different objectives, will vary. But in every case, if you actively manage impressions by emphasizing the Magic Pills, eliminating the Toxic Traits, and preserving the positive aspects and compensating for the negative aspects of other traits, you will put your best foot forward and enhance your success in court, in your office environment and in your personal life.

Mark Mazarella is a partner in the San Diego law firm of Mazarella, Dunwoody & Caldarelli, LLP.



COMING EVENTS

April 3, 2001

MCLE Dinner

*Moves & Countermoves in High Stakes Trade
Secrets Cases: A State and Federal Perspective*

Moderator:

Roberta S. Hayashi

Panel Members:

Hon. Conrad L. Rushing, Hon. Jeremy D. Fogel,
Robert P. Feldman, James Pooley

Sheraton Palace Hotel, San Francisco
Cocktails at 6:00 p.m. • Dinner at 7:00 p.m.

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Efficient Practice or Malpractice

serve privilege following limited, voluntary disclosure in the absence of a protective order.

The Northern District of California has held such stipulations to be ineffective. In *Atari Corp. v. Sega of America*, 161 F.R.D. 417, 420 (N.D. Cal. 1994), it held that Sega waived the attorney client privilege when it provided Atari's consultant with an otherwise privileged document as part of a settlement negotiation, even though the parties expressly agreed that disclosure would not waive applicable privileges. Many courts outside the Ninth Circuit have held similarly, most recently in *In Re: Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 192 F.R.D. 575 (M.D. Tenn. 2000) (appeal filed, 2000 U.S. App. Lexis 21206, 6th Cir., August 15, 2000). Columbia had produced privileged documents to the Department of Justice subject to an agreement with the government that production of documents did not and would not constitute a waiver of the attorney-client communication or work product privileges. Nonetheless, the court held that a determination of what constitutes a waiver of privilege is a legal question, one the parties cannot negate by agreement. The court held that "voluntary disclosure of privileged materials to the government constitutes a waiver of the attorney-client privilege to all other adversaries."

A minority view contrary to these decisions was first stated in dicta but not applied in *Teachers Insurance & Annuity Association of America v. Shamrock Broadcasting Co.*, 521 F. Supp. 638 (S.D.N.Y. 1981). The minority view found application in *Jobin v. Bank of Boulder*, 161 B. R. 689, 695-6 (Colo. 1993), in which the court found that the Bank of Boulder had not waived applicable privileges despite limited disclosure. The bank had taken substantial steps to insure maintenance of confidentiality by those to whom it had made disclosure, including entering into an agreement that the limited disclosure would not constitute a waiver generally of applicable privileges.

The Ninth Circuit has held that parties may not effectively preserve the attorney client communication and work product privileges by making a limited disclosure and purporting, at the time of that disclosure, to reserve a right to assert applicable privileges in the future. *Weil v. Investment/Indicators, Research & Management*, 647 F.2d 18, 23 (9th Cir. 1981) (case fact statement does not specify clearly if disclosure was completely voluntary or with reservation of privilege claims). Only the Eighth Circuit Court of Appeals has expressed a somewhat different view in holding that production in a non-public SEC investigation could be done without causing a general waiver of applicable privileges, if done with a reservation of rights by the producing party. *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977).

Laurence Jackson is a partner and Adam D.H. Grant is Of Counsel with Christa & Jackson in Los Angeles.



CHARLES R. RICE

On SECURITIES

Cyberspace sometimes seems like the wild frontier of securities trading, because deceptive information can move so quickly over the Internet. In one recent case, the stock of a company called Emulex dropped 62%, losing more than \$2.5 billion of market capitalization, when a phony press release on the Internet claimed that its CEO was resigning as the result of an accounting scandal. A "pump and dump" scheme — fraudulently promoting a penny stock and then selling when the price rises — used to require a boiler room of fast-talking salesmen on the phone. Now it only requires a home computer and a modem.

The Lebed Case

Jonathan Lebed was 14 years old when he started committing securities fraud. He may have been a little nerdy, toting his black leather briefcase to school each day, but he already seemed to have a bright future on Wall Street. At the age of 12, he and two friends had placed fourth in a national stock-picking contest for students.

Jonathan used the computer in his bedroom to buy shares in thinly traded, over-the-counter stock. Then he sent hundreds of identical e-mails to various Internet chat rooms under fictitious names in order to tout the stock that he had just purchased. Meanwhile, he placed "limit orders" with his broker to sell his shares when the price rose to a designated point. According to the SEC, his phony messages caused the price and trading volume of each touted stock to increase dramatically. Jonathan would be in class when his profits rolled in, usually within 24 hours of his purchase.

When the SEC investigators caught up with him, Jonathan reportedly told them, "What's the big deal? Everybody does this." Nevertheless, he agreed to a consent decree to stop his scam and paid a penalty of about \$285,000 based on his illegal profits and interest.

Unfortunately, the story doesn't end there. Jonathan went on "60 Minutes" to claim that he had done nothing wrong. His lawyer added that Jonathan had done only "what is done every single day of the week on Wall Street" in promoting and then selling stocks.

Jonathan also got to keep most of his ill-gotten gains. The SEC brought charges on only some of his suspicious trading, and Jonathan reportedly retained half a million dollars of other trading profits. His family also got to keep the Mercedes SUV that Jonathan had bought for them. His classmates who spoke to the press seemed to think that Jonathan was some kind of hero and that manipulating

stocks on the Internet was just the latest X-game. Even worse, some older commentators who should have known better have criticized the SEC for picking on a plucky kid.

It may be too much to expect remorse or rehabilitation from Jonathan or his friends and family. But we can hope that his case will provide some benefit by helping to educate the investing public about how easily it can be fooled.

Cyber-Enforcement

The SEC has been working hard to bring law and order to the electronic frontier, establishing an Office of Internet Enforcement in 1998. It now has a "cyberforce" of more than 250 people nationwide who are specially trained for Internet surveillance, and each local office has its own Internet Enforcement Branch.

In the last few years the SEC has brought more than 180 Internet-related cases, usually in "sweeps" that bundle related enforcement actions for maximum publicity and deterrent effect. In its most recent sweep, last September, the SEC accused 33 companies and individuals of using the Internet to drive up the prices of more than 70 micro-cap stocks with fraudulent Web sites, e-mails, and chat room postings.

Despite this effort, Internet stock fraud seems like a growth crime, and even garden variety stock fraud increasingly will leave some evidence in cyberspace. According to one estimate, half of the securities-related messages posted in chat rooms are passing on false information. The good news is that, while securities fraud may be cheaper and easier to commit on the Internet, it is also easier to catch. Marc Fagel, head of the Internet Enforcement Branch in the SEC's San Francisco office, points out that Internet frauds leave electronic tracks that more conventional scams don't. For example, Mark Jakob was targeted within hours after he posted the phony press release about Emulex and was arrested within six days. Nevertheless, the sheer volume of Internet traffic will remain a challenge to the SEC.

In the final analysis, the best defense against Internet stock fraud is a sadder and wiser investing public. The willingness to follow anonymous Internet tips should fade as investors realize that the market does not always go up and that anonymous tipsters probably have their own agendas and should not be trusted. The proclivity to bet on such flimsy information someday may be seen as just another facet of the "irrational exuberance" that has driven the stock market in recent years.

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Charles R. Rice



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Letter from the President

works, what doesn't, what *might* work, and how best to experiment successfully with new case management ideas and trial techniques. Coming together as a group on a regular basis gives all of us the chance to share ideas, as well as our collective experiences in the Bay Area's courts, with one another. It also provides us with the opportunity to talk with one another candidly about the new types of cases and legal issues that arise daily in our evolving practices. More importantly, the ABTL's programs promote new trial and case management techniques that encourage judges and lawyers to work together to plan individual cases and implement more sweeping improvements in the practice of law as a whole. It is my hope the ultimate result of our efforts will be the continued enhancement of the Bay Area's legal practice generally, with the added benefit of providing a better "product" to all consumers of legal services.

I am proud to say the ABTL continues to accomplish these goals in the time-honored tradition of lawyers and judges who volunteer generously of their time and substantial talents. The willingness of these individuals to act as panelists for the ABTL's programs has made it possible for us all to hear from a number of the most highly regarded attorneys and judges in the state. Each of them has shared his or her candid thoughts and opinions on a variety of topics, as well as their considerable skills and experiences as jurists and litigators. While the ABTL programs provide a unique opportunity for our membership to share these experiences with the judges of Northern California, the organization also sponsors an annual seminar involving judges and lawyers from all parts of California. This year the ABTL's 28th Annual Seminar will be held at the La Quinta Resort in Southern California (October 11-14, 2001). I hope that each of you will find the time to join us for what promises to be an exciting and informative series of trial skills demonstrations and programs.

One of my and the Board of Governors' goals in 2001 is to continue to expand our Northern California membership into geographic areas outside of the City of San Francisco. We also want to actively foster and encourage the participation of federal and state court judges from San Francisco and the surrounding Bay Area counties. Under the capable leadership of Douglas R. Young, this past year was marked by the ABTL's continued tradition of organizing and presenting innovative programs for members of the Bay Area bench and bar. As President in 2001, I look forward to working with our new Board of Governors to identify novel ideas and opportunities to facilitate education, civil discourse and professionalism in the legal community.

Stephen Taylor is the founder of and practices with Taylor & Co. in Alameda.



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