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# A Judge's Perspective of the Most Common Courtroom Errors

OK, I admit it. At heart, I'm really a frustrated trial lawyer who'd rather be down in the well examining witnesses, arguing to the jury, trying to persuade some leather-headed judge to see the law my way. As things have turned out, however, I've fallen into the latter category. Other than occasional forays into teaching trial advocacy, I am now relegated to sitting quietly (most of the time) on the bench, watching the action unfold a few feet in front of me. And here's the rub. It's not like watching a football game, where the very point of your presence is to be the audience. Nor is it the same as a referee in a sporting match. These guys are active participants, not spectators. Plus, their physical insertion into the game is what gives their decisions clout. Visualize the reaction if a referee, sandwiched between two 240-pound linemen arguing over a play, looked at one of them and said, "Sustained."

**Hon. James L. Warren**

Not so in a courtroom. It's the "been there, done that" sort of thing. I *do* know what's going on and I *do* have some ideas about strategies that might win. (Those ideas aren't necessarily right, of course, but that's a different issue.) And that's what makes judging a trial so

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# Section 17200: Reform Comes In from the Cold

For a statute described by a justice of the California Supreme Court as a "standardless, limitless attorney's fee machine," *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 598 (Brown, J., dissenting), change was a long time coming to Business & Professions Code section 17200 ("Section 17200"). Reform was not slow for lack of effort. In the last decade, fights to abolish or amend Section 17200 were a fixture of the legislative calendar. But until the surprise victory of Proposition 64 in the November 2004 general election, these battles left the statute untouched and unrestrained in its expansive application.

**James Donato**

## The Call For Change

Section 17200's extraordinary grant of standing was a focal point in the drive for reform. Court interpretations in the 1970s made the statute an only-in-California story in which any person or group, injured or not, could sue any entity or individual doing business within the state for restitution and injunctive relief on behalf of all California residents — and could seek attorneys' fees and costs if it prevailed. Inevitably, certain plaintiffs and their counsel exploited the expansive case law interpretations to serve only their own financial interests. Section 17200 cases were filed by one- or two-member organizations created solely to bring lawsuits in a representative capacity. Sometimes, the plaintiffs were employees or relatives of the attorney filing the action. In a disturbing number of lawsuits, the plaintiff was not only uninjured by the challenged business practice but also deliberately uninformed about the facts purportedly supporting the unfair business practice, which,

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## Section 17200 Reform

among other effects, made discovery a one-way street running from the defendant to the plaintiff.

By the 1990s, calls for changing Section 17200's standing provisions were loud. To take one prominent example, in 1996, the California Law Review Commission took the substantial step of sending to Governor Wilson and the Legislature a detailed study of problems under the statute along with several proposed revisions. The proposals purported to confront the grant of standing to uninjured plaintiffs to sue in a representative capacity. As the Commission noted, the "open-ended standing provision has the potential for abuse and overlapping actions." *Unfair Competition Litigation*, 26 Cal. L. Revision Comm'n Reports 191, 201 (1996). But the Commission's solution was underwhelming. It proposed only that a plaintiff proceeding in a representative capacity must be an "adequate representative" without defining what "adequate" was. *Id.* at 211. The Commission further blunted this proposal by underscoring that it "does not go so far as to require the plaintiff to show that he or she has suffered an injury by the defendant's challenged practice." *Id.* Even these mild corrective actions failed to be implemented, and the Commission's efforts left the statute untouched.

In light of the long line of cases expansively interpreting Section 17200, the courts showed little initiative toward addressing the standing issue. The relatively few opinions that imposed boundaries on Section 17200 focused on close constructions of the statute's words and on the exercise of the courts' inherent equitable powers. In *Kraus v. Trinity Management Services*, 23 Cal. 4th 116 (2000), and most lately in *Korea Supply Company v. Lockheed Martin Corporation*, 29 Cal. 4th 1134 (2003), the California Supreme Court construed "restitution" as used in Section 17200 to be limited to the return of money to "persons in interest" who have an ownership stake in it. *Kraus* also clarified that courts could use their equitable power to decline to treat a Section 17200 action as a representative suit if it found that the action was not brought by a "competent plaintiff."

These judicial developments provided scant relief to defendants. While the Supreme Court eliminated non-restitutionary disgorgement as a remedy, it saddled defendants with the burden of identifying, locating and repaying persons in interest judged to be owed restitution. *Krauss*, 23 Cal.4th at 138. And the recognition of the "competent plaintiff" issue did little to address the statute's standing problems. Like the Law Review Commission, the Court left the meaning of "competent plaintiff" undefined, and few subsequent decisions appear to have invoked *Kraus* to dismiss Section 17200 lawsuits on this ground.

Although the courts declined to make substantial changes to Section 17200, some judges expressed profound concerns about the statute's judicial interpretation. The Supreme Court's divided opinions in *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal.4th 553 (1998), underscored deep disagreement about the direction in which Section 17200 jurisprudence had moved.

The complaint at issue in the case was a classic example of Section 17200 in action. Plaintiff Stop Youth Addiction ("SYA") was a for-profit corporation whose sole shareholder was the mother of the attorney who filed the lawsuit. On behalf of the general public, none of whom was involved as a party except the lawyer's mother, SYA purported to sue Lucky Stores under the "unlawful" prong of Section 17200 for selling cigarettes to minors in violation of Penal Code section 308, which criminalizes such sales. The complaint was only two pages long and sought $10 billion in alleged restitution along with attorney's fees and an injunction.

The specific issue presented in the case involved the ability of a Section 17200 plaintiff to sue on the basis of a penal code section that provided no private cause of action. The trial court had sustained a demurrer without leave to amend on the ground that Penal Code section 308 "pre-empted" private enforcement rights. The Court of Appeal reversed, and the Supreme Court granted Lucky Stores' petition for review.

In reviewing the issue framed by the demurrer, the Court's majority and dissenting opinions also addressed the larger issue of the uninjured plaintiff. In Justice Werdegar's majority opinion, the Court held that the plaintiff had the right to enforce indirectly under Section 17200 what it could not enforce directly under the Penal Code. The absence of a right of action in the predicate statute did not bar a related Section 17200.

The majority also rejected Lucky Stores' challenge to Section 17200's "lax standing provisions." 17 Cal. 4th at 577. Relying on the traditional observation that the judicial role "is fundamentally to interpret laws, not to write them," the Court noted that Section 17200 permits "any person" to maintain a claim. *Id.* at 578. Accordingly, the Court refused to "categorize potential plaintiffs as qualified or unqualified to maintain [Section 17200] claims on behalf of the general public." *Id.* If Lucky Stores and other entities did not like that state of affairs, their "concerns are best addressed to the Legislature" and not the courts. *Id.* "[S]hould the Legislature disagree with our conclusions here, it remains free to provide otherwise." *Id.*

In a sharp dissent, Justice Brown assailed the majority's conclusions and the prior line of "sweeping" judicial interpretations of Section 17200 that supported its unique standing provision. In Justice Brown's view, the issue was not in Section 17200's language but court decisions that endorsed "an unqualified, universal public standing to sue under [Section 17200], without any requirement that a plaintiff show anything more than a 'public interest'...." *Id.* at 588. The judicial construction of Section 17200 that granted standing solely on the basis of the "public interest" ignored a common-sense reading of the statute's language and violated the separation of powers doctrine by unconstitutionally conferring on the courts the executive's duty to ensure that the law is faithfully executed and enforced. *Id.* at 586-91. The core defect of the "judicial gloss" on Section 17200 was precisely the elimination of actual injury as a requirement for bringing suit. The "absolute extinction" in Section 17200's case law of the

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obligation to "demonstrate the existence of some concrete harm, some injury in fact" to qualify for access to court, was, in Justice Brown's opinion, outright judicial error. *Id.* at 591.

### The Proposition 64 Answer

Justice Brown laid the best chance for substantive change at the feet of the Legislature. But where the majority seemed almost to dare the Legislature to act, Justice Brown implored it. Only the Legislature, in the justice's view, had the "wherewithal" to put the construction of Section 17200 back on a track consistent with traditional notions of jurisdiction and separation of powers. *Id.* at 598.

When the reform contemplated by Justice Brown's dissent finally arrived, it came through the state's "direct democracy" initiative system rather than the Legislature itself. Proposition 64 resolved the issue of standing by sweeping away more than 25 years of cases to require that "[a]ctions for relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the attorney general or any district attorney…or by any person who has suffered injury in fact and has lost money or property as a result of such unfair competition." Bus. & Prof. Code § 17204, as amended. Proposition 64 also eliminated the notorious "classless class" provision of the statute to require that a private plaintiff purporting to represent individuals other than itself abide by traditional class action requirements in Code of Civil Procedure Section 382 and related cases. Certain government entities retain the ability to sue on behalf of the general public.

### Does Proposition 64 Apply To Pending Cases?

The first question raised by Proposition 64 involves the impact on pending cases. Proposition 64 became effective on November 3, 2004, the day following the general election, and defense counsel across the state sought immediate dismissal with prejudice of pending Section 17200 lawsuits that fell with the purview of the changes.

The first published Court of Appeal decision on the issue rejected the application of Proposition 64 to pending cases. On February 1, 2005, the First District Court of Appeal, Division Four, held in *Californians for Disability Rights v. Mervyn's LLC*, that Proposition 64 "does not apply to lawsuits filed before its effective date of November 3, 2004." Case No. A106199 at 1. In May 2002, the plaintiff sued Mervyn's under the unlawful prong of Section 17200 and certain state civil rights statutes for allegedly failing to provide adequate store access to persons with mobility disabilities. The trial court entered judgment for the defendant after a bench trial in August 2003 and the plaintiff appealed. Proposition 64 was enacted while the case was pending on appeal, and defendants moved to dismiss the appeal.

The Court of Appeal denied the motion. The court found that the question of the immediate application of Proposition 64 exposed "a seeming conflict in the canons of statutory interpretation." *Id.* at 6. On one side, the court noted case law holding that legislative enactments

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# *Litigating Attorneys' Fee Claims After* Graham *and* Tipton-Whittingham

On December 2, 2004, the California Supreme Court issued two important opinions that may greatly increase the exposure of defendants to attorneys' fee awards in cases involving the "public interest." The Supreme Court confirmed that defendants may now face substantial attorneys' fee awards, even where no court has ruled in their opponents' favor, and even where the underlying case has been dismissed prior to any final judicial ruling.

In *Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553 (2004) and *Tipton-Whittingham v. City of Los Angeles*, 34 Cal. 4th 604 (2004), a sharply divided California Supreme Court endorsed the so-called "catalyst" theory, under which plaintiffs may receive attorneys' fees if they can establish that their lawsuit motivated defendants to provide voluntarily the relief the lawsuit sought.

**Robert C. Phelps**

In *Graham*, more than three quarters of a million dollars in attorneys' fees were awarded to the plaintiffs, even though the trial court dismissed their complaint as moot at the pleading stage. While the California Supreme Court imposed some additional requirements a plaintiff must satisfy before such an award is proper, the Court upheld the general principle under which the award was made. In the companion case, the California Supreme Court reiterated its support for a modified catalyst theory.

These rulings put California out of step with the federal courts. Indeed, the United States Supreme Court has expressly rejected the catalyst theory for cases litigated under federal statutes. *See Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598, 600 (2001) (to qualify as "prevailing party" for a fee award under federal statutes, party must secure judgment or court-ordered relief).

The ultimate effect of these decisions remains to be seen, particularly because they invest the lower courts with significant discretion to grant or deny fee awards. But the comments of dissenting Justice Chin in the *Graham* case sound an ominous note for defendants:

> At a time when Californians are increasingly concerned about extortionate lawsuits against businesses, large and small, and worried that the legal climate in California is so unfriendly to businesses that many are leaving the state and others are deterred from coming here in the first place, today's ruling goes in exactly the wrong direction. And it goes further in that direction than this court has ever gone before. 34 Cal.4th at 602-03.

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## *Litigating Attorneys' Fees*

### Background on *Graham* and *Tipton-Whittingham*

DaimlerChrysler mistakenly advertised that certain of its 1998 and 1999 model pick up trucks had a towing capacity of 6,400 pounds. In fact, without modification, the trucks could only safely tow 2,000 pounds. Before any litigation was filed, DaimlerChrysler set up a "response team" that advised buyers of the error, told them not to attempt to tow more than 2,000 pounds, and provided modified marketing information, manuals and brochures. DaimlerChrysler also offered refunds to buyers who paid for modifications that increased the trucks' towing capacity. On a case-by-case basis, it also offered to replace or repurchase trucks from buyers who demanded that remedy.

The Santa Cruz District Attorney threatened legal action, but requested DaimlerChrysler's input before acting. Shortly thereafter, the California Attorney General notified DaimlerChrysler that it was joining the Santa Cruz District Attorney. Before DaimlerChrysler could respond, plaintiff Graham filed a complaint seeking damages for breach of express warranty. Graham sought class action status for his claim, but no class was ever certified.

Ultimately, DaimlerChrysler offered to purchase or replace the trucks of all buyers. The trial court dismissed Graham's complaint, finding that it was moot since DaimlerChrysler gave the truck buyers the relief Graham sought.

But the case did not end there. Graham's attorneys sought a fee award, claiming, in essence, that their actions had been the "catalyst" that led DaimlerChrysler to offer to replace or repurchase the trucks. After lengthy (and apparently contentious) hearings, the trial court awarded Graham's lawyers a total of $762,830 in fees.

*Tipton-Whittingham* was a federal court race/sex discrimination case filed against the LAPD. While the suit was pending, the LAPD voluntarily instituted changes directed against discrimination. The federal court awarded plaintiffs in excess of $1.7 million in fees under the catalyst theory. After the U.S. Supreme Court rejected the catalyst theory for litigation under federal statutes, the City of Los Angeles sought reconsideration of the fee award. The federal district court then held that the award was proper as a matter of California state law. Answering questions posed to it by the Ninth Circuit Court of Appeals, the California Supreme Court agreed.

### The "Catalyst" Theory Endorsed by the California Supreme Court

The California Supreme Court's rulings grow out of section 1021.5 of the California Code of Civil Procedure. That statute provides an exception to the "American rule," under which parties to a lawsuit typically pay their own attorneys' fees. One exception to that general rule recognized by the statute is for "private attorney general" actions. In particular, the statute authorizes an award of attorneys' fees where the litigation results in enforcement of an important right affecting the public interest, and the following conditions are met:

> (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any.

Under the catalyst theory, plaintiffs may be awarded attorneys' fees when the defendant takes *voluntary* corrective action, without any order or judgment having been entered in favor of the plaintiff. Plaintiffs must show that their lawsuit was the motivating factor compelling the defendant to take voluntary action. The majority in *Graham* rested its endorsement of the catalyst theory on its belief that the "private attorney general" doctrine embodied in section 1021.5 is designed to encourage suits enforcing important public policies by providing "substantial attorney fees to successful litigants in such cases." 34 Cal.4th at 565.

### Additional Requirements

The California Supreme Court in *Graham* imposed two important additional burdens on plaintiffs seeking fee awards under the catalyst theory.

First, before awarding fees, the trial court must determine that the lawsuit was not "frivolous, unreasonable or groundless." 34 Cal. 4th at 575. In other words, the plaintiff must show the result was achieved "by threat of victory, not by dint of nuisance and threat of expense." *Id*. The Court did not provide specific guidelines for making this determination, except to say that it was "not unlike" the determination a trial court makes in issuing a preliminary injunction. *Id*.

Second, the plaintiff seeking attorneys' fees under a catalyst theory must first reasonably attempt to settle the matter short of litigation. *Id*. at 577. How much effort toward settlement the plaintiff must make remains unclear. The Supreme Court did state, however, that "a plaintiff must at least notify the defendant of its grievances and proposed remedies and give the defendant the opportunity to meet its demands within a reasonable time." *Id*. The Court added that what constitutes a reasonable time "will depend on the context." *Id*.

### Tips and Pitfalls for Litigating Catalyst Theory Claims

The impact of *Graham* and *Tipton-Whittingham* remains to be seen. While the slim Supreme Court majority characterized the holdings as endorsing rules long ago recognized in California, the three dissenting justices strongly disagreed. To the dissenting justices, these cases represent a dramatic — and unwarranted — expansion of defendants' potential liability for their opponents' attorneys' fees.

The practical application of these decisions also seems fraught with difficulty. How does a defendant show that its decision to take voluntary corrective actions was motivated by something other than the plaintiffs' lawsuit? In

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*Graham*, for example, the Court noted that Daimler Chrysler's response to the erroneous information regarding its trucks' towing capacity began before Graham's lawsuit was filed. Moreover, the first entities to raise this issue with DaimlerChrysler were government agencies, not the private plaintiff. Nonetheless, the Supreme Court remanded the case for a possible award of attorneys' fees.

Though the *Graham* and *Tipton-Whittingham* cases are new, several state and federal cases have previously considered the proof a plaintiff must present to establish entitlement to attorneys' fees under the "catalyst" theory. There is, of course, some question whether trial courts will continue to follow these precedents post-*Graham* and *Tipton-Whittingham*. But since the Supreme Court has given trial courts very broad discretion in this area, suggesting that trial courts give due consideration to older precedent seems wise.

Practitioners should consider the following issues and potential pitfalls when litigating catalyst claims in the trial courts.

*Scrutinize carefully the relief sought and the relief obtained*. The core of the catalyst theory is the assumption that the plaintiff successfully obtained the relief sought in his or her complaint, even in the absence of a judgment or court order. By definition, this makes the precise nature of the relief sought critical. The California Supreme Court did not define for trial courts whether fees may be awarded if there is some variance between the relief obtained and the relief plaintiff sought. The *Graham* court's requirement that plaintiffs advise defendants in advance of the "grievances and proposed remedies" suggests this is an important point. Certainly, when there is a significant difference — for example, if the plaintiff sought monetary relief and the defendant voluntarily adopted a change in its conduct — it should be worthwhile to argue that plaintiff's lawsuit did not motivate the defendant's actions.

*Proving the "timeline" can be critical*. How can plaintiffs seeking fees under the catalyst theory meet their burden to establish that their lawsuit in fact motivated the defendant to make voluntary changes? Proof of the timeline — and particularly the temporal relationship between the plaintiff's lawsuit and the "voluntary" corrective measures — can be critical.

A court will certainly find causation where the same result would not have been achieved had there been no lawsuit by plaintiff. Indeed, pre-*Graham* and *Tipton-Whittingham* cases held that trial courts could rely on chronology alone in finding causation and awarding attorneys' fees to the "prevailing party" where the defendant did not proffer counter-evidence to refute the inference of causation. At the same time, however, courts have held that the inference of causation is rebuttable.

It is also worth remembering that merely showing that voluntary corrective action was in progress before the plaintiff's lawsuit was filed may not be enough to disprove the catalyst claim. Rather, the key question is likely to be the type of corrective action the defendant undertook. *Graham* itself illustrates this very point: Daimler-Chrysler set up a "response team" in February 1999 to address the problem of incorrect advertising of the trucks' towing capacity and plaintiff's lawsuit was not filed until late August 1999. But the relief plaintiff sought — return of their purchase or lease payments — was apparently not offered to all buyers until September 1999.

*Consider the impact of multiple lawsuits*. What if the defendant faces multiple lawsuits addressing the same conduct? Unless every plaintiff makes identical claims, the defendant facing a "catalyst" theory claim may be able to point out that its corrective actions — if not entirely unrelated to the litigation the defendant faced — were in fact motivated by lawsuits other than the one brought by the party seeking fees. Similarly, where more than one plaintiff seeks fees, or where plaintiffs who filed "tag-along" actions seek fees, the defendant may attempt to prove that the corrective conduct was motivated by only one of the lawsuits.

*Consider the effect of lawsuits against public agencies*. The causation issue is especially acute where the defendant is a public agency. Thus, as noted in *Tipton-Whittingham*, attorneys' fees will not be awarded under a "catalyst theory" where a plaintiff's suit merely led to the acceleration of the government regulations or remedial measures. 34 Cal.4th at 609. This is especially the case when the process of undertaking the measures sought is ongoing at the time suit is filed, and when the government is given discretion as to the timing to perform that function. Under those circumstances, the fact that a lawsuit may accelerate that performance should be insufficient for the award.

*Consider the benefit actually conferred on the public*. Finally, it is important to remember to ask whether the plaintiff's case satisfies the section 1021.5 requirement that the litigation confer a "significant benefit, whether pecuniary or nonpecuniary" "on the general public or a large class of persons…." Not every case brought purportedly in the public interest qualifies for a fee award. The recent (pre-*Graham*) First District Court of Appeal decision in *Baxter v. Salutary Sportsclubs, Inc.*, 122 Cal. App.4th 941 (2004), is instructive.

Plaintiff in *Baxter* contended that the defendant's contracts did not strictly comply with the requirements of sections 1812.80-1812.95 of the Civil Code. The trial court agreed, and ordered defendant to take minor corrective measures. The trial court denied plaintiffs' fee application. The Court of Appeal affirmed, concluding that the benefits conferred were minimal. The court observed, "[t]his case is a textbook example of valueless litigation against a private party under the guise of benefiting the public interest." 122 Cal.App.4th at 946.

### Conclusion

Much uncertainty remains following the *Graham* and *Tipton-Whittingham* decisions. Ultimately, however, these decisions plainly increase the possible exposure of defendants in public interest cases to awards of attorneys' fees. Given that fact, they may also greatly enhance plain-

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tiffs' leverage in litigation. Defendants will have a stronger incentive to settle early, while plaintiffs will have an incentive to continue litigation.

Whether or not this result is ultimately in "the public interest" is questionable. But however the matter is viewed, careful defense counsel must now pay even closer attention to their adversary's fees when litigating "public interest" lawsuits.

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are presumed to operate prospectively unless a clear indication of retroactive application is present. On the other side, the court acknowledged other case law holding that a court should apply the law in effect at the time it renders a decision.

The court resolved the conflict by concluding that "the presumption of prospectively is the controlling principle." *Id*. Since "Proposition 64 does not show an unmistakable intent that its statutory amendments apply retroactively," the presumption of prospective application was not rebutted, and consequently the changes would not apply to pending cases. *Id*. at 7. The court noted that the application of Proposition 64 to pending cases could substantially affect the rights and interests of plaintiffs who had relied on the prior version of Section 17200. "Plaintiffs who filed and prosecuted cases for years… could suffer dismissal of their lawsuits at all stages of litigation." *Id*. at 9. Such significant consequences should not be imposed "when, as here, there is no indication that retroactivity was ever considered or intended by the voters." *Id*.

Just days later, the Second District Court of Appeal expressly disagreed with the First District. In *Branick v. Downey Savings and Loan Association*, Case No. B172981, the Second District determined that Proposition 64 "applies to actions that were filed but not finally resolved" before enactment. The court's analysis was simple and direct. It saw no need to assess the voters' intent with respect to immediate application or to parse the question of whether the changes were procedural or substantive. Instead, the court relied on Government Code Section 9606, which provides that "[a]ny statute may be repealed at any time, except when vested rights would be impaired. Persons acting under any statute act in contemplation of this power of repeal." The court found that the right to sue without injury on behalf of the general public was a right that did not exist at common law but came into being only as a statutory right under Section 17200. The court also found that Proposition 64 repealed that right for non-governmental plaintiffs and did not contain a savings clause. Consequently, the court concluded that Section 9606 mandated the immediate application of Proposition 64 to pending cases.

To soften the potential blow from immediate application, the court left open the possibility of amending the complaint to name a qualified plaintiff. The court remanded the case to the trial court to decide whether granting leave to name a new plaintiff was warranted.

As these case show, answering the question of the immediate application of Proposition 64 leaves considerable room for reasoned and reasonable disagreement. In light of the conflicts already emerging in court decisions, and the importance of the issue to pending Section 17200 actions, intervention by the California Supreme Court seems inevitable and necessary.

### The Wide-Open Future

Looking past the immediate application of Proposition 64, the consequences of the changes are unclear and the extent to which Proposition 64 will be a long-term win for defendants is open to question. With the requirement of actual injury and the imposition of class action procedures, defendants will face more substantive claims that are less amenable to quick, confidential settlements than prior Section 17200 claims. Defendants will also no longer be able to point to uninjured and uninformed made-for-litigation plaintiffs in an effort to convince a court of equity to limit or deny Section 17200 remedies or the discretionary award of attorney's fees.

The standing changes might ultimately prove to be less of a major reform of Section 17200 than proponents of Proposition 64 hoped. The most abusive and frivolous cases of Section 17200 representative claims will abate in the face of the actual injury and class action requirements. But many Section 17200 cases preceding Proposition 64 already involved plaintiffs alleging actual injury, and finding qualified consumer plaintiffs will not be particularly difficult. Proposition 64's standing requirement could reduce to ensuring simply that a prospective plaintiff is sent to the store before the complaint is filed.

False advertising claims under Section 17200 might see a particularly interesting and complicated evolution in the wake of Proposition 64. While the actual injury requirement will probably reduce the volume of such claims, lawsuits alleging false and deceptive representations could now turn into state versions of Lanham Act cases, complete with costly and time-consuming use of survey evidence and other elaborate methods of proof. The day of resolving a false advertising claim under Section 17200 without an expensive battle of experts and consumer evidence could be over.

In the end, the benefit of barring the most abusive Section 17200 lawsuits might be at the price of raising the stakes in other unfair practices cases. Reforms that looked strong on paper could also prove to be only minor restraints on the filing of new Section 17200 cases. All of us who practice in this area will play a role in determining the ultimate impact of Proposition 64.

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CHIP RICE

# *On* LITIGATION STRATEGY

You know you're a litigator if you think that cross-examination is one of the great pleasures of life. It is a unique opportunity to confront the weaknesses of a witness and his or her story. But, if done poorly, it wastes everyone's time and, even worse, can give the witness another chance to score points.

## Controlling the Witness

The focus of cross-examination should be to force the witness to choose between admitting the truth of the points you want to make or lying in a way that undercuts his or her overall credibility. In order to do that, you have to control the witness, so you have to ask questions that require straight answers, usually "yes" or "no." And you have to establish your own moral authority to demand such answers.

The conventional rule is that you should never ask a cross-examination question if you don't know the answer, but it is not enough just to know the answer. You have to be able to prove immediately that there is only one right answer and to show the witness that it would be a mistake to contradict you again.

Keep each question simple and straightforward, so the witness (and the fact-finder) can accept it in one bite. Limit yourself to one new fact per question, and build patiently. Stick to nouns and verbs and avoid the adjectives and adverbs. You don't need to get the witness to accept negative characterizations of the facts that they admit (for example, that they were lying in the past or that they are lying now). Trying to get the witness to agree to such conclusions will only provoke an argument and distract you from your program. Just prove the facts you need and save the argument for closing.

## Getting Prepared

I usually start by making a list of short statements that build on each other and can be proven to be true with a document or deposition passage. These statements must track the exact language of the supporting evidence, so the witness can't use any different wording as a basis for disagreement. The key to controlling the witness is to eliminate any good faith basis for quibbling so that the witness has to accept your statement or look dishonest or evasive.

If you are well prepared, it is actually better if the witness disagrees with you at some point. You get to remind the witness of particular damaging evidence, and the judge and jury get to see that this witness may not be trustworthy. Good witnesses will realize this and not try to deny the obvious. But bad witnesses will fight you every step of the way and, in the process, convince everyone in the room that they cannot tell the truth under pressure.

Don't let your preparation make you rigid. Once the questioning starts, listen carefully to the witness so that you can follow up on any unexpected admission or particularly significant choice of words. Such moments can be particularly dramatic, precisely because they are not expected by you or anyone else, so don't miss them by keeping your nose stuck in your outline.

## A Test of Character

Someone once said that cross-examination is ultimately a test of character — not just for the witness, but also for the attorney. The witness is faced with a series of challenges to tell the truth or to lie. But the questioner also faces a challenge: to use the power and attention that comes with the role in a way that inspires confidence and respect — even in the witness. If the attorney is evasive, dishonest or too aggressive, he or she will lose the test of character with the witness.

**Chip Rice**

So, think of Gregory Peck in *To Kill a Mockingbird*. Don't be greedy or sneaky. Stick with what you can prove and think twice before freelancing. You may end up wasting time arguing with the witness without impeaching him or, even worse, giving her the opportunity to explain something in a new and more persuasive way.

Even more importantly, don't be a jerk or a bully and don't be snippy or sarcastic. If you keep to the moral high ground, it will be hard for the witness to fight with you effectively. The judge and jury know that you have a right to have your questions answered, and they can see when the witness is trying to avoid the truth. Just keep asking straightforward questions and restraining your emotions in order to heighten the contrast with the witness.

## Building a Cage

Sean Penn once described preparing for a role as building a cage to go wild in. That seems like a good analogy for preparing for cross-examination and a lot of other things we litigators do. We need to be well prepared so that we can be spontaneous when necessary.

Cross-examination is inherently dramatic and communicates a wealth of information on many different levels. Before you start, you need to lay a factual and moral foundation for yourself so that you know exactly what you want to stress and what you want to avoid. But that is only the foundation. Once the bell rings, you need to show at every opportunity that you care more about truth than the witness does. If you can do that, you win the battle and are on your way to winning the war.

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## *Common Courtroom Errors*

frustrating; you can't participate. Once the actual trial starts, you are relegated to the background. You must remain on your perch, speak only when spoken to, and cringe (invisibly, of course) as you see trial lawyers slog through the process. Poor trial technique is not merely a function of experience, either. Sometimes the most egregious errors are committed by seasoned litigators. Sadly, this happens more frequently than we'd like to believe.

In this article, I offer some observations about trial technique from a judge's perspective. Literally. We view the courtroom from a different vantage point. We're higher up, and that lets us see what's happening in more parts of the courtroom. We're not focused on following a carefully crafted witness examination outline, so our attention can turn to see the jurors' actual reaction to your line of questioning, to an exhibit, to how your key witness is faring on the stand, and to you. We hear your questions for the first time, just as the jury does, so we can tell if they're intelligible or not. We note whether the witness' answer is responsive. If it's not, do you follow up on it, or do you simply go to the next question in your outline? Do you speak Brobdignagian, or do your questions bear a functional relation to the English language?

What follows is not simply a collection of my personal observations or pet peeves. Many of my experiences are shared by my good friends William Alsup and Susan Illston, both of whom sit on the federal bench for the Northern District of California, and were offered at a recent ABTL dinner program. We got a good laugh out of the similarity of our experiences, and hope our observations are helpful the next time you're in trial.

### Less is More

Every case contains tens of thousands of facts. Only a few of them matter. Your case should focus on those. More often than not, counsel seem to believe that if a fact exists in the case, it must be proven to the jury. Not so. Sure, you need context to make the relevant facts matter and to add credibility to your witnesses, but that doesn't mean that every little bit of trivia has to be forced down the jury's throat. Among other dangers, the more facts a jury has to digest, the more likely it is that there will be differences of opinion among the jurors about whether a particular fact, no matter how peripheral to the case, has been proved. This simply decreases your chances of success.

Here's a suggestion: when putting together your trial outline, start by putting together your jury instructions. Don't, as many counsel seem to, write your jury instructions as the last step in your trial preparation. Look at the substantive instructions that relate to each cause of action involved in your case, and list the elements that you need to prove (or disprove) to win. Make a list of your evidence (witnesses, exhibits, *etc.*) that will prove or disprove each element. Taken together, those lists become the facts that you have to prove at trial; facts not on the list are not essential to your case and should be used sparingly.

### The Jury Matters

Why is something so self-evident on my list? Well, many trial lawyers treat the jury like a group of vassals brought in from the country to serve the master's pleasure. They're there to suit counsel's schedule, which often includes things like making 73 motions *in limine* at 9:00 am on the morning opening statements are set to start. Part of the responsibility for not allowing this to happen rests with the judge. But as lawyers, don't even think of treating the jury this way.

Try this: flip the roles around. The jury is not there to serve your case, you are there to serve the jury. Treat the jury as your boss, respect their time and their intelligence, and you'll be amazed how the courtroom dynamic changes — for the better.

### Speak English

Exactly what language do you think we lawyers speak? Well, I'm not sure what it's called, but it is often a special language reserved for scholars who write footnotes for the *Harvard Law Review*. Legalese is a terrible curse in trial, and you should avoid it. It's not only presumptuous, but it obscures the point you're trying to make.

Here's my suggestion: the Beer with a Buddy routine. Get yourself a plastic cup and a can of a generic beer. Budweiser is fine, Pilsner Urquell is not. Pour the beer into the cup and hold it in front of you. Then, pretend that the witness is your best friend and, with the cup extended between you, ask your friend a question. I dare you to say things like:"With respect to the athletic competition that you attended last night, did you have the opportunity, if you recall, to observe whether or not one of the participants was able to obtain an advantage over the opposing team by executing a maneuver that placed the ball in a better position to allow a subsequent player to increase the points on the scoreboard?" Sound preposterous? Read a trial transcript. The most effective questions are those that are simply stated, with one point to make, asked using words of one or two syllables.

Work especially hard to avoid professional jargon with experts. Think of "cop-speak." When a police officer testifies, the thief never gets out of the car, the perpetrator always exits the vehicle. You'll never change the way the police officer talks, but that doesn't mean that you have to adopt his style of speaking. So it is with experts. They will speak the language of their trade, but you're better off sticking to everyday language in the courtroom. You have to let the jury know that you understand what the expert is saying, of course, and this means using his or her specialized words on occasion. But for the most part, stick to English, and let the expert speak the language of forensic thermodynamic pyroclastic reconstruction on her own.

### Let the Witness Talk

Of course the witness is going to talk. That's why he or she is there. Sounds logical, but in practice, it's one of the most frequently violated rules of examination. It is pandemic among lawyers, who have spent years getting ready for trial and know every factual nuance of the case, to want to get this storehouse of personal knowledge before the jury with a minimum of interruption from the

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**Trent Norris**

# *On* ENVIRONMENTAL LAW

Three recent decisions by the U.S. Supreme Court, the California Supreme Court, and the California electorate are keeping things interesting for environmental lawyers and their clients.

## CERCLA Contribution

The U.S. Supreme Court's December 13 decision in *Cooper Industries v. Aviall Services*, 543 U.S. __, 125 S. Ct. 577 (2004), dealt directly with the cornerstone of environmental litigation. In *Aviall*, the Court interpreted the federal Superfund law to hold that a party cannot sue other potentially responsible parties for contribution unless it has itself first been subjected to a "civil action" under that statute. As a result, there no longer appears to be a Superfund contribution claim for a cleanup that, like many, is performed voluntarily or under an agency order based on laws other than Superfund.

Legislation may address this seeming technicality, which reduces incentives for companies to voluntarily cleanup contamination. In the meantime, counsel for companies seeking to recover cleanup costs from others are boning up on state statutes and common law theories of recovery (*e.g.*, nuisance and trespass). In some cases, they are also considering the unorthodox step of soliciting regulators to reinvigorate regulatory involvement in Superfund cleanups.

## Catalyst Fees

The California Supreme Court's December 2 decision endorsing the "catalyst theory" of attorneys' fees recovery will affect every California environmental case brought "in the public interest." Under *Buckhannon Board & Care Home v. West Virginia DHHS*, 532 U.S. 598 (2001), a prevailing party in federal court may not obtain its attorneys' fees if the dispute is resolved without a judicial order. The ruling has been decried for reducing incentives to investigate and sue over violations when the result is corrective action by defendants that moots the litigation. Environmental groups view *Buckhannon* as forcing them to pursue cases to the bitter end in order to obtain their fees even though the primary remedy sought has been achieved. Businesses view the ruling as promoting voluntarily actions to address issues brought to their attention and avoiding rewards for those who pile on lawsuits looking more for fees than for substantive redress.

As discussed in Mr. Phelps' article in this issue, in *Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553 (2004), the California Supreme Court, by a 4-3 margin, rejected the federal rule and held that plaintiffs are entitled to their attorneys' fees — potentially enhanced for various factors — when a defendant changes its conduct without a court order. This keeps defendants in environmental litigation in the uncomfortable position of either addressing the plaintiff's concerns (however unwarranted) and risking payment of attorneys' fees, or enduring the costs and risks of litigating to the end without taking interim action. It also places a premium on the early analysis of whether to fight or settle, since voluntary action at the outset of the suit limits the amount of potentially recoverable attorneys' fees.

Defendants' concerns are heightened because *Graham* only requires that plaintiffs' attorneys bring a "meritorious" claim and make a "reasonable attempt" to settle it. The dissent feared that California will "truly become a mecca for plaintiffs and plaintiffs' attorneys" unless the state is "at least somewhat in step with the rest of the country."

## Proposition 64

In November the voters of California voted overwhelmingly to put the state more in step with other states by reining in perceived excesses of Business & Professions Code section 17200 ("Section 17200"). Section 17200 essentially created a universal private right of action against any business alleged to be in violation of any federal or state law or engaging in conduct perceived to be "unfair."

**Trent Norris**

Claims under Section 17200 had become regular additions to almost every environmental lawsuit, even when a specific environmental law created a private right of action, because it provided various procedural benefits. Proposition 64 limits enforcement of Section 17200 to public prosecutors and private individuals who have suffered financial harm. It also mandates class action procedures for anyone seeking to represent the claims of others.

Much of the debate over Proposition 64 centered on claims by environmentalists and plaintiffs' lawyers that its passage would impede environmental protection in California. Proponents of the proposition (myself included) disputed those predictions. It is too soon to tell, but impacts are already being felt.

As Mr. Donato notes elsewhere in this issue, courts are grappling with the question of whether Proposition 64 bars pending actions. More long-term, plaintiffs' lawyers in environmental cases will continue to sue under specific environmental statutes that require adherence to notice requirements. They may seek out potential plaintiffs who have suffered financial injury in order to add a Section 17200 claim. They may work more closely with public prosecutors to co-litigate environmental cases containing Section 17200 claims. And without a doubt, the battle over Section 17200 will continue apace in the legislature and possibly, once again, before the electorate.

It has always been an interesting time to be an environmental lawyer in California, but perhaps never more so than today.

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## Common Courtroom Errors

witness. This results in the lawyer stating, ostensibly in the form of questions, what he or she understands the facts to be, and letting the witness participate by inserting an occasional "Yes." Leading questions on direct examination abound, and while this is sometimes necessary, it is mostly ineffective and, at times, dangerous.

First, believe it or not, the witness actually knows more about what happened than you do. Let him tell it in his own words. This not only creates credibility with the jury, it offers the possibility of unanticipated nuance that may change your case. I recall one case where a witness, out of the blue, referred to the defendant as a Blunder Butt. The impression on the jury was indelible. The testimony was spontaneous, it was effective, and most important, it was something the lawyer would never have come up with on her own. Contrast that with the lawyer who asks questions like: "Did you see her wearing the green dress?" or "Was the light red when the Cadillac ran through it?" or "When you went to the hospital, did you notice that no nurse was at the emergency station?" All these are technically leading, all elicit nothing more that a "yes" from the witness, and all let counsel talk to the virtual exclusion of the person who was there. The *words* get into the record, but the evidentiary *oomph* — the very foundation for the witness' credibility — doesn't.

Second, if all the witness does is say "yes" or "no," that witness will quickly fade from the jurors' minds. The lawyer will remain paramount in evidentiary focus. But since the jury instructions tell jurors to disregard questions of counsel, the risk is that the whole point the lawyer is trying to establish will be lost. The jurors may simply not remember who said the statement, or they may recall the lawyer said it and disregard it.

I'm often asked why, no matter how many times counsel are told not to lead on direct, they continue to do it. The answer, I think, is control. If counsel asks an appropriate form of open ended question such as: "Who was there?" or "What did you see?" or "Why did you do that?," there's no telling what the witness might say. Leading questions are much safer, but they are much less effective. The lesson here: Let the witness talk.

### Listen to the Witness' Answer

But of course you listen to the answer. It's trial testimony and very important. Right in the abstract, wrong in the execution. I cannot tell you how many times, as a trial judge, I have seen counsel pose a question to the witness, and then drop his or her head immediately to those pernicious outlines that seem to grow out of lawyers' hands like leaves on a tree. Counsel's attention is so focused on getting out that next question that he barely hears what the witness is saying in response to the pending question. And sometimes there's gold in those answers. But if you're more intent on following your outline, you will miss those beautiful nuggets of testimony, or will not catch the fact that your witness has not really answered the question. The witness' answer is more important than the lawyer's question 95 percent of the time; listen to it.

### Snatching Defeat from the Jaws of Victory

This is one of Bill Alsup's favorites. Let's say that you have a breach of contract case. Your client, the defendant, has previously been found liable for breach in six contract cases. You move *in limine* to exclude this evidence for obvious reasons, and the court buys your argument. No evidence of prior contractual relationships is allowed. Then, during your case, you attempt to elicit evidence of your client's good business reputation, knowing that evidence of his six prior contract cases can't come in. Surprise: you've "opened the door" for the admission of the previously excluded testimony!

### I Have No Bad Facts On My Side

Often, counsel get so caught up in the righteousness of their case that they fail to see — or cannot admit to — the bad facts on their side. Every case has bad facts. The best advice: Admit them and move on. This means that your witness should respond forthrightly to the question eliciting the unhelpful information, and should not squirm around in an attempt to offer excuses. Nor should the witness quibble with the lawyer who is trying to establish the damaging point. Few things are as transparent to a jury as an evasive witness. Take Abe Lincoln's advice: concede five points in order to get to the one point which you know you cannot lose.

### My Witness is Telling the Truth

Jurors know that they are to decide the facts. They know they are to listen to witnesses, and determine if anyone is not being truthful. That's their job, so don't take it from them. This means not only that you can't vouch for the veracity or integrity of any witness, it means that your other witnesses shouldn't do it either. If they do, they're usurping the job of the jury, and the jury is likely to resent it.

This problem comes up all the time — witnesses can hardly wait to vouch for the honesty of their friends — but it can be controlled. This can be tricky, of course, especially when an expert is called to opine in a "standard of care" case. The expert needs to render the opinion that Dr. Quack's treatment of Paula Patient fell below the relevant standard, but he or she needs to be circumspect about it. One effective method is to have the expert, at the beginning of the testimony, tell the jury what his or her conclusion is: "Dr. Quack's treatment fell below the standard of care." But that should be the last time the expert utters these words. For the rest of the testimony, the expert should focus on the basis for his or her opinion, namely, what a reasonable doctor would have done at the time, versus what Dr. Quack actually did. If your expert always adds things like, "Based on the foregoing, it is again my opinion that Dr. Quack continues to fall below the standard of care," his testimony becomes soupy and substantially less likely to receive the jury's blessing. Let your expert establish the facts, and then you argue the legal conclusion during closing.

Most of these and other blunders by trial lawyers are really just matters of common sense, but they

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KATE WHEBLE

# *On* TRADEMARK and COPYRIGHT

The sale of keywords and "metatags" to link advertisers to online consumers is widespread and lucrative. Revenues generated by this practice are estimated to range in the billions of dollars. Whether the use of keywords and metatags that also happen to be trademarks violates trademark law remains unsettled, although courts are under increasing pressure from both trademark owners and advertisers to decide the issue.

The Ninth Circuit considered the issue in early 2004 in *Playboy Enterprises, Inc. v. Netscape Communications Corp.*, 354 F.3d 1020 (9th Cir. 2004). Playboy alleged that Netscape's use of trademark terms to direct consumers to unlabeled banner ads constituted "initial interest confusion," in which an advertiser leverages the goodwill associated with another's mark by using the mark to entice consumers to take an interest in the advertiser's own goods or services. The Ninth Circuit determined that this was a viable legal theory, and overturned the district court's grant of summary judgment in favor of Netscape.

Using the traditional test for trademark infringement — likelihood of confusion — the Court reviewed numerous factors: similarity of the terms at issue; strength of the trademark owner's mark; similarity of the parties' products and services; marketing channels; degree of purchaser care; intent; actual confusion; and likelihood of expansion of either party's product line. The Court found that the balance of these factors favored Playboy, and that there were triable issues of fact about whether consumers could be confused when confronted with unlabeled ads displayed when the term "playboy" was entered into a search engine. The parties settled the lawsuit before trial.

*Playboy* did not address the situation in which ads clearly indicate that competing firms are the sources of the advertised goods and services. These were the facts in *Government Employees Insurance Co. v. Google, Inc., et al.* ("GEICO"), 330 F.Supp.2d 700 (E.D. Va. 2004). GEICO sued Google for trademark infringement based on Google's use of the GEICO trademarks in selling advertising on internet search engines.

Google sells advertising linked to a particular search term. When a consumer enters a term such as "GEICO," the results page displays not only a list of websites generated by the search engine using objective criteria, but also links to websites of advertisers who pay Google to be so listed. GEICO claimed that this practice constitutes trademark infringement, and is also actionable under state tort laws.

The infringement claims survived Google's motion to dismiss. Google claimed that its use of GEICO and other terms claimed as trademarks was not "trademark use" — *i.e.*, was not use in commerce in connection with the sale of goods or services — because Google only uses the terms in internal computer algorithms that never appear to the user, who thus cannot be confused. In response, GEICO pointed to the *Playboy* case, in which use of the PLAYBOY trademark in keywords was deemed to be "trademark use." The court agreed, finding that Google used GEICO's trademarks to sell advertising and then linked that advertising to searches keyed to that trademark. The court also allowed GEICO's direct, contributory and vicarious liability claims to go forward.

Nonetheless, in December 2004, the trial court ruled orally at the bench trial of the matter to allow Google to continue selling keywords. The case has been continued pending a written decision. The judge did not decide whether the advertisers themselves are infringing the GEICO marks or whether Google has contributed to that infringement. Google has argued that it has a policing policy in place that negates claims of vicarious and contributory liability.

In November 2003, several months before GEICO filed its complaint, Google made a pre-emptive strike against similar infringement claims by filing an action in the Northern District of California against American Blind & Wallpaper Factory, Inc. ("American Blind"), in which Google seeks a declaratory judgment that selling keyword-triggered advertising is not trademark infringement.

**Kate Wheble**

The suit is the culmination of a year-long dispute between the parties. American Blind owns the federally registered trademarks AMERICAN BLIND & WALLPAPER FACTORY, AMERICAN BLIND FACTORY and DECORATE TODAY. American Blind not only objects to Google's sale of keywords that are identical to its trademarks, but also objects to the sale of keywords that combine "American" with "decorate," "blind" or "wallpaper." Unlike the PLAYBOY trademark, which is considered highly distinctive, the American Blind marks contain generic terms. In fact, in its trademark applications, American Blind disclaimed the terms "blind factory" and "blind & wallpaper factory," an admission that the terms are merely descriptive and not exclusively owned by American Blind. This means that American Blind may have little recourse against the sale of phrases that include these words but are not identical to its registered trademarks.

There's plenty to look forward to as these cases progress. First, it will be interesting to see the reasoning in the *GEICO* decision. Second, the cases are pending in two different circuits and may produce different results. Of course, there is always a chance that the parties will settle in order to avoid an unfavorable ruling. And no matter what the ruling, Google has plenty of generic words left to sell.

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# *Letter from the President*

The courts are under attack today as never before, and we, as trial lawyers — business cases may be our specialty, but we are trial lawyers first and foremost — must do what we can to protect and defend the public justice system on which we and our clients depend.

Our first program of 2005 was on the theme of "The Disappearing Trial." There are many explanations for the phenomenon of "The Disappearing Trial," but one is obvious. We are now so accomplished at channeling cases out of the public court system through ADR that trials are now rare events. We have so thoroughly succeeded in creating what amounts to a separate, private system of justice that we are oblivious to the undermining effects it has had on our public courts.

**Jon B. Streeter**

Public perceptions are part of the problem. There was a day not long ago when trials in high profile business cases merited serious public attention. That still happens occasionally, but more often these days, bizarre criminal trials dominate public perceptions of what we do with our time in the court system.

I find myself alternately amused, repulsed and scared to death at media images of the public justice system. The main danger is that, if the courts lose their stature and are no longer revered, as they should be, we all lose. And we are not far from that day. Calls for impeachment of federal judges, recall campaigns against state judges, and politically driven efforts to reorganize the judicial system — such as calls to split the Ninth Circuit — have become routine.

In fact, after years of increasingly shrill political attacks on the judiciary, we have now entered a far more insidious and dangerous phase. At both the federal and state levels, the courts are being treated as if they were simply another government agency, subject to budgets cuts that will starve the courts of critically needed resources. As business trial lawyers, we certainly have a stake in this. As citizens, we have an even greater stake.

When cases must be tried — and, let's face it, sometimes there should be a trial, and that trial should be public — we all depend on a healthy, well-functioning, and most of all, independent court system. We, as business trial lawyers, must join the emerging public debate over this most fundamental of all issues.

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## *Common Courtroom Errors*

get lost in the flurry of "being a lawyer." You don't do them when talking to your friends at a cocktail party, nor with my Beer-Buddy. But things change when you get into a courtroom. You have an audience, and you are expected to act a certain way. Quell the urge. Remember, it is inevitable that some of you will become judges some day. You will then see things from a very different perspective. Don't wait until you're on the bench — when you can't do anything about it — to be a truly effective trial lawyer.

*The Hon. James L. Warren is a judge on the California Superior Court for the City and County of San Francisco, currently sitting in Law & Motion. (Photo courtesy of* The Recorder*)*

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