ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT NORTHERN CALIFORNIA

Volume 14 No. 3

SUMMER 2005

Tips for an Effective and Successful Arbitration

As courts rely more heavily on ADR processes to resolve cases, and business lawyers steer their clients away from jury trials, business trial lawyers increasingly find themselves in various arbitration forums. While presenting a case in a hot, interior conference room may not measure up to the courtroom scenes we imagined in law school, arbitration can offer the trial lawyer some of the best opportunities to hone direct and cross-examination skills. In fact, with the limited amount of discovery often incumbent in the arbitral process, your instincts and skills as a trial lawyer — let alone your stamina — are often put to the test and heightened by a hard-fought arbitration. This article presents several suggestions to effectively and successfully present an arbitration. Some of these techniques differ from those you would use before a jury.

Benjamin K. Riley

Try to Be the Claimant

The party that presents its case first has a distinct advantage. It can present its side in a neat, understandable

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Also in this Issue

Discovery's Top Ten: What Judges Think about Discovery Motions

In my two-dozen years as an advocate before taking the bench, I often heard colleagues suggest that they were sure they could increase the chance of obtaining a favorable ruling from a judge if they only knew more about what the judge was thinking. So here's your chance, at least when it comes to discovery disputes.

In Santa Clara Superior Court, currently all discovery disputes in unlimited jurisdiction civil cases are assigned to one judge. For reasons that are or will become apparent, that assignment is sometimes referred to as the "sandbox" calendar. After surviving a full year in that assignment, I have compiled the top ten things judges think about discovery motions — and wish lawyers would too.

Hon. Patricia M. Lucas

10. Resist the Urge to File

The advantage gained by a favorable discovery ruling is rarely worth the time and expense to the client of obtaining it. Effective lawyers try to minimize the number of discovery disputes and resolve them as efficiently and expeditiously as possible. I noticed that many of the best lawyers in our legal community never appear on the discovery calendar. Conversely the "recidivists" appeared regularly. A good lawyer's goal should be Zero Discovery Disputes.

In pursuit of ZDD, attorneys should focus on what's important in the case. Many discovery disputes are generated by an attorney's desire, in zealous thoroughness, to turn over every pebble no matter how small. Routinely, it is in the very first set of discovery requests that counsel demand every piece of gravel as well as the boulders. In their earnestness, lawyers with less experience (who gen-

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Discovery's Top Ten

erally are tasked with discovery matters) often find it difficult to distinguish a pebble from a boulder. The concept of proportionality is key to accomplishing justice in managing discovery. Compromises that prioritize or sequence discovery are often successful in eliminating disputes. More seasoned supervisors should actively assist less experienced attorneys to sort out what discovery is appropriate and when.

Counsel should also keep in mind the inherent limitations of the discovery vehicle in question: only so much blood from a turnip, and only so much information from an interrogatory. A motion to compel a further answer is always constrained by the original question, and oftentimes a follow-up question and/or follow-up with a different discovery device is more useful than a motion based on the original inquiry.

Regrettably, many discovery disputes are not about information at all but about personalities and egos. I could not agree more with the observations of Martin Quinn in his article from the Fall 2004 issue of this publication, "*How to Succeed with Discovery Referees*:" decision-makers abhor the *ad hominem* attacks that many lawyers seem unable to resist. When counsel instead devote their energies to focusing on a solution, even when it involves some compromise, they are far more likely to save the client money and grief — and thus to ensure the second engagement.

9. Read the Rules, Early and Often

In a number of our sister states, the state court procedural rules are clones of — or at least are numbered the same as — the Federal Rules of Civil Procedure. For better or for worse, California does things differently. There are at least three places counsel need to look for rules pertinent to discovery motions: the Code of Civil Procedure, the California Rules of Court, and the county local rules. Whether a particular topic is addressed in the CCP, the CRC, or local rules is not particularly intuitive, so you need to keep looking.

Counsel should read those rules early on in the process: before the discovery requests are drafted, rather than for the first time when the motion to compel is being prepared. For example, which discovery devices require a declaration of necessity when more than 35 are propounded, and which don't? Annoying as it can be, once you've read the rules you're not done; you should read them again every time you prepare a motion. They have a pesky habit of changing when you least expect it, and then there's that memory thing as to whether they really read the way you remember them. For example, are you positive that a CRC 335 statement is not required for the motion you are drafting?

8. Use Ex-Partes Sparingly

Reading the rules, you learn all kinds of interesting things. For example, according to CRC 379(g), to obtain relief by an *ex parte* application as opposed to a noticed motion, "[a]n applicant must make an affirmative factual showing…of irreparable harm, immediate danger, or any other statutory basis for granting relief *ex parte*." If you want the extraordinary relief of *ex parte* consideration, you must have specific, competent evidence of facts warranting that relief.

Certain kinds of things are more likely to happen on an *ex parte* basis: issuance of a commission for a deposition in another state, as compared to the granting of terminating sanctions. You are more likely to get an order shortening time *ex parte* than an order compelling the plaintiff to submit to a second deposition.

And you know, of course, that *ex parte* doesn't really mean *ex parte*? See CRC 379 (a) and (b). Notice to opposing counsel needs to be established right there in the declaration. CRC 379(e). Actually, how about reading all of CRC 379, every time? And don't forget to check the local rules.

7. Orders Shortening Time

One Wednesday morning, an attorney came in on the *ex parte* calendar requesting an order shortening time, proposing that opposition be due the following morning at 9, his reply would be filed and served by 5 p.m. that afternoon, and then the hearing would proceed on Friday morning at 9 a.m. He was astonished when I denied the request. It had not occurred to him that I, or the court staff, or even his adversary, might have other cases to attend to, or other hearings to schedule or conduct.

Shortening time is an exception to rules that are designed to ensure notice and fairness. The judge will not shorten time unless the additional burden on court staff and the adversary is warranted. Counsel's declaration in support of the request should state *specific facts* as to urgency and diligence: *i.e.*, why the matter cannot be heard on regular notice and how this emergency came to be. It does not help if the emergency is of your own making; if you waited until the last second to serve this discovery request, the Court may be skeptical that the information now urgently sought is critical to a fair trial for your client. It is not enough to say that trial is four weeks away. The discovery cutoff is there for a reason, and if it's not waived, generally it should be enforced.

6. Tentative Rulings and Telephonic Appearances

Tentative rulings and telephonic appearances are accommodations that the courts have made to help reduce the cost of civil litigation by eliminating unnecessary appearances and by avoiding the need for counsel to travel to the courthouse for a hearing that may only take a portion of the required travel time.

Telephonic appearances, somewhat like orders shortening time, do not just happen. CRC 298 and local rules specify the circumstances in which telephonic appearances may be made, and when and how to give notice. A request for such an appearance presents additional work for the many people involved in preparing for the call of the calendar, so inadequate or improper notice imposes a burden on staff. And please remember your telephonic

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appearance etiquette. Do not put the Court on hold and subject everyone in the courtroom to the tasteful music you make your clients listen to; pick up the speaker phone; and if you want an accurate record, say your name each time you speak, particularly if more than one party is appearing by phone.

Most Bay Area counties have tentative ruling systems for law and motion matters. Read the local rules governing tentative rulings (early and often). If you give notice and appear to contest the tentative, focus your argument with the tentative in mind. I have not yet met a judge who will reverse the tentative based on an argument that repeats what is in the papers. If you fail to give the required notice, do not count on being able to argue your matter.

5. Motions Continued and Taken Off Calendar

Discovery motions are notorious for tree-killing. As an advocate and as a judge, I have seen my share of the more-than-one-banker's-box variety. With rare exception, judges will undertake to read the papers before the hearing. If there is a tentative ruling system, the judge will devote substantial time to the file in the days before the hearing.

I loved to hear that counsel were still meeting and conferring and thought that with more time they could resolve the matter; better yet that they had resolved everything and the matter was coming off calendar. However, it was not so wonderful to hear that on the morning of the hearing, or late in the afternoon before the hearing when I had already read every one of the scores of interrogatory answers that supposedly required a further response.

Like most other humans, judges appreciate courtesy and respect for their time and efforts. If you have reached a resolution of the matter or think that a continuance would allow you to do so, call the Court early. If you wait until the last moment, you may find that the matter won't be continued, or that it will be reset at the Court's convenience and not based on counsel's schedules.

4. The Importance of CRC 335

The CRC 335 statement is one-stop shopping for the Court. The requests at issue, the allegedly offending responses, and why the relief you seek is appropriate, should all be there at the judge's fingertips. The CRC 335 statement is most likely the document for which the Court will reach first, so it should be where you start framing your motion. It is also likely the last thing the Court will look at if a question arises as to what a particular request sought or whether a particular response included an objection. If you've done a decent job in your meet-and-confer efforts (see # 3 below) you may have already written the statement. One lawyer told me she prepares a document in CRC 335 format for meet-and-confer purposes. Whatever you do, don't make the CRC 335 statement an afterthought and don't regard it as make-work.

CRC 335(a) contains a non-exhaustive list of motions for which a statement is required. Think carefully before

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Class Action Fairness Act: A Changing Landscape

Dramatic statutory changes over the last year will result in long-term changes to class action practice. In November 2004, California voters approved Proposition 64, which limits the use of "representative actions" under California Business & Professions Code section 17200. (See "Section 17200: Reform Comes in from the Cold," *ABTL Northern California Report*, Spring 2005.) Less than five months later, the United States Congress passed the Class Action Fairness Act of 2005, which creates sweeping change in the jurisdiction and procedure governing class actions filed after February 18, 2005.

Rodger R. Cole

This article focuses on the Class Action Fairness Act ("CAFA") and discusses the four most significant changes that practitioners face as a result of the legislation: the significant expansion of federal diversity jurisdiction to encompass class actions; the procedures for removing class actions from state to federal courts; the standards for determining whether a federal court should decline to exercise jurisdiction over a class action; and the process of settling class actions in federal court.

Diversity Jurisdiction

The heart of CAFA is the expansion of federal diversity jurisdiction. CAFA adds a new subsection to the diversity statute that vests federal courts with original jurisdiction over any class action with one hundred or more purported class members in which (1) the "sum or value" of the matter in controversy exceeds $5 million and (2) at least one member of the purported class is diverse from one defendant. 28 U.S.C. § 1332(d)(2), (5) and (6).

Assessing whether the matter in controversy exceeds the "sum or value" of $5 million is likely to result in a change in federal jurisprudence. If the complaint only seeks monetary damages, the courts will rely on years of case law in the context of the $75,000 amount in controversy requirement of diversity jurisdiction, and then apply the new $5 million class action threshold. The difficult situation for the courts will be where the complaint only or largely seeks injunctive or non-monetary relief. For example, if the benefit to the class would not exceed $5 million, but the cost to the defendant in complying with the requested injunction would exceed $5 million, is the "value" of the matter satisfied for jurisdictional purposes? Federal courts have wrestled with this issue in the diversity jurisdiction context with different results. Under existing Ninth Circuit precedent, the cost to the defendant of

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Class Action Fairness Act

complying with the injunction for the entire class cannot be aggregated to meet the $75,000 diversity threshold. *Snow v. Ford Motor Company*, 561 F. 2d 787 (9th Cir. 1977). However, CAFA requires the claims of all class members be aggregated to determine whether the amount in controversy exceeds $5 million. 28 U.S.C. § 1332(d)(7). As a result, district courts are likely to reverse course in the class action context, and allow defendants to aggregate the cost of the non-monetary relief sought to assess whether the $5 million threshold is satisfied.

CAFA also eliminates the "complete diversity" requirement for class actions. The federal courts have historically required all named class representatives and all named defendants to be citizens of different states. CAFA only requires diversity between any one member of the class and any one defendant. 28 U.S.C. § 1332(d)(2).

Removal Jurisdiction

CAFA also changes the rules governing removal jurisdiction, aligning them with the expanded diversity jurisdiction. Under CAFA, complete diversity is not required to remove and even a citizen defendant may remove a class action. CAFA also eliminates the requirement that all defendants consent to removal, and any single defendant may remove the action. 28 U.S.C. § 1453(b). A defendant seeking to remove a class action still must file its notice of removal within thirty days of receiving a pleading, motion, order or other paper demonstrating removal jurisdiction, but CAFA eliminates the strict requirement that a party can only remove within one year after commencement of the action. 28 U.S.C. § 1453(b).

CAFA also provides for expedited appellate review for remand orders in class actions. Before CAFA, remand orders were generally not reviewable with very limited exceptions. 28 U.S.C. § 1446(d). CAFA allows a court of appeal to review any order granting or denying a motion to remand as long as application to the court of appeals is made within seven days after entry of the remand order. 28 U.S.C. § 1453(c)(1). If the court of appeal accepts review, the entire appeal including judgment must be completed within sixty days unless the parties agree otherwise. If the court of appeals does not render a decision within that time period, the appeal is deemed denied. 28 U.S.C. § 1453(c).

Exercise of Jurisdiction

If a class action is filed in or removed to federal court, the next question is whether it will stay in federal court, or whether the court will decline to exercise its class action jurisdiction and dismiss or remand the case to state court. This decision will initially be made by rote counting and determination of the geographic locale of the potential class members, thereby highlighting the importance of carefully defining the purported class. Generally, the more localized the core set of facts and injured class members, the stronger the state interest in the matter and the more likely a federal court will elect to decline jurisdiction.

If the defined class includes one-third or fewer citizens of the forum state, the district court generally must accept the diversity jurisdiction. 28 U.S.C. § 1332(d)(3) and (4). If the defined class includes between one-third and two-thirds citizens of the forum state and the "primary defendants" are citizens of the forum state, the district court may refuse to exercise jurisdiction, but only after considering six statutory factors. 28 U.S.C. § 1332(d)(3). If the defined class includes more than two-thirds citizens of the forum state, CAFA requires the federal court to decline jurisdiction if: (a) the "primary defendants" are citizens of the forum state; or (b) at least one defendant from whom significant relief is sought and whose conduct forms a significant basis for the claim is a citizen of the state, the principal injuries were suffered in the state, and no other class action based on similar claims has been filed in the previous three years. 28 U.S.C. § 1332(d)(4).

The initial emphasis on counting the class members and identifying their state of citizenship is likely to be litigated at the outset of every class action. Counting purported class members will not be easy. Imagine a consumer class action against a software company that sells software via direct mail, retail outlets, third-party web sites, etc. Since only a small number of customers generally register their software, the company will seldom know with any degree of certainty the geographic location of its customers. The parties will likely have to engage expert assistance to estimate class dispersion, forcing the court to decide an early battle of the experts to determine federal jurisdiction. All of this potentially places plaintiffs' lawyers in a quandary: to narrowly define the class to keep the matter in state court or broadly define the class to include as many potential class members as possible.

Once counted, if more than one-third of the purported class consists of citizens of the forum, the district court must decide which defendants are the "primary defendants." 28 U.S.C. § 1332(d)(3). CAFA does not define the "primary defendants," so this becomes another area for litigation and the case law to develop. For example, in the battles between the recording artists and technology companies are the primary defendants the direct infringers that use the technology or the technology companies that sell the technology? The district courts are likely to consider the legal theories involved (in the example above, direct versus secondary liability) as well as the "deep pocket" from which the purported class seeks recovery.

If the primary defendants are citizens of the forum state, the district court may decline to exercise jurisdiction "in the interests of justice and looking at the totality of the circumstances," but must consider six statutory factors in deciding to do so: (a) whether the claims involve matters of national or interstate interests; (b) whether the claims are governed by laws of the forum state; (c) whether the class is defined in a manner to avoid federal jurisdiction; (d) whether the action was filed in a forum with a distinct nexus to the class, the alleged harm, or the

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defendants; (e) whether the number of class members who are citizens of the forum state is "substantially larger" than class members in other states and whether the class members are dispersed throughout the country; and (f) whether in the three-years prior to the lawsuit one or more class actions asserting similar claims have been filed. 28 U.S.C. § 1332(d)(3).

If more than two-thirds of the purported class consists of citizens of the forum, then the district court must decide who are the "primary defendants," who is a "significant" defendant and where the "principal injuries" occurred. 28 U.S.C. § 1332(d)(4). A "significant" defendant refers to a defendant from whom "significant relief is sought" and "whose alleged conduct forms a significant basis" for the claims asserted. 28 U.S.C. § 1332 (d)(4)(A). "Principal injuries" raises yet another issue that will likely be litigated. In pure money damages cases, presumably the majority of the claimed loss would constitute the principal injuries. In cases seeking injunctive relief, the citizenship of more than two-thirds of the purported class may result in a *de facto* determination that the principal injuries occurred in the state. If either (a) the primary defendant is a citizen of the forum or (b) a significant defendant is a citizen of the forum state and the principal injuries occurred in that state, the district court must decline jurisdiction.

At this point, it is far from clear what practical effects these jurisdictional changes will bring. Consider, though, a state court class action where more than two-thirds of the class and the primary defendant reside in the forum state, causing the federal court to decline to exercise jurisdiction or the parties not to seek federal court jurisdiction in the first place. If the "primary defendant" wins on summary judgment on the eve of trial, it is reasonable to expect the remaining defendants will remove the case to federal court.

Settlement of Federal Class Actions

CAFA regulates settlements of class actions by requiring notification to governmental authorities and by limiting coupon settlements (a topic outside the scope of this article). Compliance with the notice requirements of CAFA is critical because class members are not bound by any settlement agreement or consent decree if proper notice is not provided. 28 U.S.C. § 1715(c).

CAFA requires the defendants to notify federal and state authorities of every proposed class action settlement. Each defendant participating in the settlement is required to serve the notice within 10 days of filing the proposed settlement with the district court, and the district court may not approve any such settlement until at least 90 days after the last federal or state authority is served with the notice. 28 U.S.C. § 1715(b) and (d). Practically, parties should consider scheduling any hearing to approve a proposed settlement 120 days after filing the proposed settlement to avoid any argument that a governmental authority was served late or did not have the opportunity to appear.

The notices must be sent to the United States Attorney General (unless the defendant is a federal depository institution) and the "appropriate state official" of each state in which a class member resides. 28 U.S.C. § 1715(a), (b) and (c)(2). CAFA defines "appropriate state official" as the person who has the primary regulatory or supervisory responsibility or who licenses or authorizes the defendant to conduct business in the state. If there is no such person, then the notice must be delivered to the state Attorney General. 28 U.S.C. § 1715(a). Defendants will have to independently analyze to whom notice should be given, with some cases requiring notice to multiple state entities. As a failsafe, settling defendants should send notice to the U.S. Attorney General and the Attorneys General of every state.

The notice must include specifically enumerated documents including a copy of the complaint, the proposed class notice, the proposed settlement, any contemporaneous agreements between class and defense counsel, and the names of each class member residing in the state and their estimated proportionate share of the settlement, or a reasonable estimate of the number of class members residing in each state and their estimated proportionate share of the settlement. 28 U.S.C. § 1715(b). Two of these provisions are likely to change class action practice. CAFA's requirement that contemporaneous agreements be included with the notice requires the disclosure of any "blow" agreements between counsel. Blow agreements are common confidential side agreements that give defendants the option to withdraw from the settlement if a certain percentage of class members opt-out of the settlement. It will be interesting to see if disclosure of the blow agreements results in more opt-outs and more "blown-up" settlements.

CAFA's requirement that the settling defendants identify the class members and their proportionate share of the settlement, or the reasonable estimate of the class members residing in the state and an estimate of the proportionate share of their settlement, raises the same issues with counting the class members discussed above. A cottage industry of experts to estimate the geographic dispersion of potential class members is sure to develop.

Conclusion

The real impact of CAFA will not be worked out for years. In the meantime, counsel representing parties in class actions will need to be prepared at the beginning of each case to analyze, identify, and potentially fight about the geographic location of class members, the primary defendants, the significant defendants, the principal injuries, and other undefined terms in CAFA. These issues will arise long before class certification and the merits. When settling class actions, counsel need to carefully review CAFA to ensure compliance with the notice requirements so the class settlements resolve the claims once and for all. In all events, CAFA will keep class action practitioners on their toes for years to come.

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you conclude that a statement is not necessary on your motion. Even if it's not necessary, it will probably be very helpful. Similarly, think carefully before you "group" responses that involve similar arguments. Although it may save a few trees, it also may make your CRC 335 statement non-compliant to the point of being useless. How do I find the analysis of Special Interrogatory 85, if it's not between 84 and 86?

3. Meet and Confer

There's a good reason why the discovery statutes contain dozens of references to the requirement that the parties meet and confer before bringing discovery disputes to the Court. Limited judicial resources ought not be spent on discovery issues unless and until the parties have exhausted the prospects for solving the problem themselves. A discovery motion must include a statement under oath stating facts which show an informal effort to resolve each issue raised by the motion. CCP § 2016.040. Judges will examine the quantity and the quality of the meet-and-confer efforts, not only to evaluate responsibility for (and the reasonable amount of) monetary sanctions but also to determine whether the motion should be heard at all.

How much meet-and-confer is enough? It depends on the complexity of the issues and the history of the case, but at a minimum allowing a realistic period for a reply to a meet-and-confer proposal and for service of further responses is essential. Faxing a letter as you run out the door at 5:15 to catch an airplane to the discovery hearing the next morning, is not enough. (That actually happened.) Likewise, faxing a letter at 2 p.m. on Saturday and demanding further responses by 5 p.m. Sunday is also not enough. (That also actually happened.)

Finally, the meet-and-confer effort should reflect the same level of persuasive effort as a motion. If the moving party has not given the responding party a chance to consider all the arguments made in the motion, the meet-and-confer effort was lacking. Also, the discussions should have the same level of professionalism as papers filed with the Court and argument occurring in the Court's presence. Few things make a sanctions decision easier than seeing disrespectful, nasty or rude correspondence attached to declarations of counsel.

2. Creative Writing in Orders after Hearing

Credibility is all you have as a trial lawyer. Guard it carefully; it's awfully hard to get it back once you've lost it. Submitting a form of order after a hearing that says I granted your motion — when I denied it — is a sure means of losing your credibility. For a long time. (And yes, that also really happened.)

CRC 391 sets forth in some detail the process for obtaining a written order after hearing. Maybe it's too harsh to conclude that some lawyers play games with this process — maybe they just can't count to five, or maybe they think that a transmittal letter is their chance to chat *ex parte* with the judge about how she handled the hearing. Copy opposing counsel on everything — including transmittal letters — and be sure to give counsel a real chance, consistent with the rule, to receive and review your proposed order.

Every once in a while, but far less often than lawyers think, a legitimate dispute arises over the language of the order after hearing. Submit a specific and succinct statement of your position *and* the other side's, as CRC 391(b) requires, and a transcript if that would be material. Think of your credibility and the Court's distaste for *ad hominem* attacks — and don't give the Court a reason to revisit its sanctions order to your disadvantage.

1. Sanctions

The California legislature has created a statutory scheme for resolution of discovery disputes in which the default is that the losing party pays the prevailing party's attorneys' fees and costs. The exceptions are essentially two: the losing party acted "with substantial justification" or "other circumstances make the imposition of the sanction unjust."

Potter Stewart famously observed concerning obscenity that, although it may be incapable of formulaic definition, he would "know it when he sees it." Most judges similarly feel that they know "substantial justification" when they see it. If the motion was too easy to decide (*e.g.*, the answer is right there in the statute), that's a good indication that the exception does not apply.

Another tool judges have been given to maximize the behavior modification effect of a monetary sanction is the option to impose the sanction against counsel only and not the litigant, or the litigant only and not counsel, or both. This assumes that the prevailing party has complied with the requirement that the notice of motion specify "the person, party or attorney against whom the sanction is sought" as well as the type of sanction sought (*e.g.*, monetary). CCP § 2023.040. I saw many motions, often from well-respected law firms, which did not contain the language necessary to comply with this requirement.

Although an order imposing monetary sanctions can be converted into a judgment, affording the prevailing party all attendant enforcement opportunities, good lawyers know that the client may be better served by a negotiated waiver of sanctions in furtherance of a more significant litigation goal. Such a waiver might even be used to resolve the next discovery dispute.

Conclusion

If you have the impression that judges do not relish hearing discovery disputes, you're right. Whenever possible, resist the urge to file the discovery motion and reach an acceptable middle ground. You'll likely come out ahead. But if you must file, read and re-read all applicable rules, stick to only essential disputes, and treat the Court and counsel with the appropriate respect. Oh, and did I remind you to follow the rules?

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WALTER STELLA

On EMPLOYMENT

Under a new California law that went into effect this year, California employers with 50 or more employees are required to provide their supervisors with training in preventing and correcting sexual harassment. Failure to comply with this requirement will not in and of itself create employer liability in sexual harassment cases. Nor will compliance automatically insulate the employer from liability. Nevertheless, the training and educational requirements of the new law are expressly intended to establish a "minimum threshold." As such, employers must comply with them in order to raise certain affirmative defenses in sexual harassment suits.

Sexual Harassment Training Requirements

California Government Code section 12950.1 requires employers to provide all supervisory employees with at least two hours of "classroom or other interactive training and education" on sexual harassment. The training must include: (a) information and practical guidance regarding federal and state law prohibiting sexual harassment and the remedies available; and (b) practical examples aimed at instructing supervisors in preventing sexual harassment, discrimination, and retaliation. The training must be presented by trainers or educators with appropriate expertise.

Training must be provided by January 1, 2006 for all supervisors employed with the employer as of July 1, 2005, unless these supervisors already received the required two-hour sexual harassment training from the employer after January 1, 2003. After January 1, 2006, training must be conducted for all supervisors once every two years. Training must also be provided to any new supervisors within six months of their assumption of a supervisory position with the employer.

Federal Application

By complying with the new sexual harassment training requirements, an employer may use proof of its training program as an affirmative defense in harassment suits under both federal and California law. Under federal law, employers are strictly liable under Title VII of the Civil Rights Act for supervisor harassment that results in a tangible employment action (*i.e.*, an adverse employment action such as discharge or demotion). However, when no tangible employment action occurs, the employer may raise an affirmative defense to liability if it can prove that: (a) it exercised reasonable care to prevent and promptly correct any sexually harassing behavior; and (b) the employee "unreasonably failed to take advantage" of the employer's preventative policies and measures. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Training is the first step in sexual harassment prevention and, with enactment of the new law, arguably the bare minimum required to exercise reasonable care in preventing harassment from occurring.

California Application

Under California law, by contrast, employers cannot rely upon the *Ellerth/Faragher* affirmative defense to shield them from liability. The California Supreme Court has interpreted the California Fair Employment and Housing Act as imposing strict liability on California employers for *all* acts of sexual harassment by their supervisors. *State Department of Health v. Superior Court of Sacramento*, 31 Cal. 4th 1026 (2003). However, California courts will consider the totality of the steps an employer took to prevent and correct workplace harassment to limit the amount of damages awarded under the avoidable consequences doctrine.

Under that doctrine, the aggrieved employee may not recover damages that he or she could have avoided "with reasonable effort and without undue risk, expense, or humiliation," by taking advantage of the employer's internal procedures. *State Department of Health* at 1044. The employer may assert the defense of avoidable consequences when the employer can show: (a) it took reasonable steps to prevent and correct harassment; (b) the employee failed to use the provided procedures; and (c) use of the procedures would have prevented at least some of the harm. *Id.* California employers should take advantage of this defense by training their supervisors as required by section 12950.1 and adopting policies and procedures designed to prevent and respond to harassment in the workplace.

Walter Stella

Training supervisors on sexual harassment prevention can also assist employers in minimizing the risk of exposure to harassment claims arising from conduct by non-supervisory employees. California employers can be held liable for harassment by an employee's co-workers, as well as non-employees such as clients or vendors, if the employer knows or should have known of the conduct and fails to take immediate and appropriate corrective action. *Salazar v. Diversified Paratransit, Inc.*, 117 Cal. App. 4th 318 (March 30, 2004, *as modified*, April 6, 2004); Cal Gov't Code § 12940(j)(1). Thus, it is important to train supervisory personnel on the proper and immediate handling of any report of harassment, including complaints of sexual harassment based on the conduct of non-supervisors and non-employees.

The obligation to prevent sexual harassment from occurring in the workplace is not new in California. Sexual harassment training for supervisors has gradually become customary for many California employers. However, the new law raises the bar for the scope and frequency of training required for supervisors. Employers must be vigilant in complying with this law or else face the loss of key affirmative defenses in harassment suits.

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Tips for a Successful Arbitration

package, before the opponent has a chance to rebut and present its case. Jurors are reputed to "feel most deeply and retain most vigorously" information they hear and believe first. *Cal. Trial Handbook* (3d ed. 2004 Supplement) § 19.2 at 69. There is no reason to believe that arbitrators react differently.

You should take every opportunity to capture the position of "Claimant." Think twice before you advise a client to ignore an arbitration clause on the chance that a jury will enter a large compensative or punitive award. In reality, trials in business cases are rare and big verdicts rarer still. More likely, the defendant in your case will immediately file an arbitration demand and successfully compel arbitration, putting you in the Respondent position — and on the defensive. And then you will have to explain to the arbitrator why you sought to avoid arbitration in the first place.

Alternatively, if you represent the "defendant" and you know a lawsuit is coming, consider a preemptive strike and serve an Arbitration Demand seeking declaratory relief. In this way, you capture the Claimant position and can present your case before your opponent.

Set Forth Your Best Facts and Documents in the Demand

Conventional wisdom holds that a Demand For Arbitration and other arbitration pleadings should be brief statements of the claims. I tend to disagree. The *first thing* the arbitrator will read is the Demand For Arbitration and then the Answering Statement and Counterclaims. The initial pleading provides your first opportunity to persuade. Use it. Consider making your Demand or Counterclaim a complete (but still relatively concise) opening statement with the key facts and documents (and perhaps even law) carefully marshaled leading to the conclusion that your client must prevail. But try to limit yourself to only those key facts for which you possess strong documentary proof — even where your client swears he can clearly prove something later. You don't want to be in the position of having to retract an important fact on the first day of the hearing.

Also, be ready for the first status conference with the arbitrator, when she will turn to you and say "Counsel, tell me about your case." Give her the 10-minute version of your opening statement illustrated by your five key documents. Take each opportunity to persuade.

Jettison Weaker Arguments

By the time a court case reaches the jury, you likely have eliminated those "alternative" positions that you threw into the Complaint or Answer, just in case. An arbitration requires this same honing of theories, but much earlier in the process. Since the arbitrator will first judge your case based on the Demand or Counterclaim, try to eliminate the weaker or even "fall-back" arguments from your first pleading. You may not relish explaining at the Pre-Hearing Conference how two of your five claims have now been dropped. And unlike a jury, which frequently will be unaware of tactical moves during a trial, the arbitrator will know all about your shifts in strategy. Substantial changes in position may cause the arbitrator to question your remaining claims. If you start and remain in the position of strength and equity, your chances of prevailing are enhanced.

Limit Discovery and Hearing Testimony

While our business lawyer counterparts advise their clients that arbitration is "cheaper and faster," we trial lawyers know it ain't necessarily so. It can take a very long time before the hearing commences, especially where depositions are allowed or where three arbitrators and two law firms need to agree on scheduling a month long hearing. With no limits upon the evidence presented, the hearing may also take longer than necessary.

At the pre-hearing conference, propose a schedule with realistic limits upon document discovery, depositions and expert discovery. Equally important, suggest that time limits be imposed on the testimony by each side at the hearing, including direct and cross. If your client is allocated a maximum of 30 hours of testimony, it is amazing how efficient your direct and cross-examinations will become.

In an arbitration we recently conducted, the parties opted to strictly follow the limited AAA discovery rules. We only exchanged documents, took no depositions, and then exchanged expert reports. The upshot was that a lot of "new" facts came out at the hearing, documents were constantly re-examined for alternative explanations, and theories evolved as the testimony proceeded. If full depositions had been taken, most of these new slants on the facts and documents would have been previously vetted. But at least in our arbitration, it ultimately did not seem that much would have been gained (other than increasing lawyers' fees) by deposing the 15 testifying witnesses. The same basic facts, documents and contentions came through at trial.

The practice point is that a case that depends mostly on documents with the testimony providing the color around the edges (like most business cases) may not require many (or any) depositions prior to the hearing. In fact, the lack of depositions presents real opportunities for effective and surprising cross-examination based on the documents. A skilled trial lawyer will likely come out even or perhaps a bit ahead by effectively using the documents against a witness who hasn't been "prepared" for cross-examination by a previous deposition.

Be Candid

Candid and forthright advocacy is perhaps more important in an arbitration than in a court trial. A competent, hard-working arbitrator who has been responsible for a dispute since its inception is unlikely to be swayed by irrelevant facts and overly-emotional appeals. An arbitrator will strive to be dispassionate — to decide the case based on the facts. The arbitrator will look to the attorneys to accurately and fully present the evidence. The arbitrator *will* recognize when "zealous advocacy" be-

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MARY MCCUTCHEON

On INSURANCE

Like tabloid articles about celebrity trials, news about Eliot Spitzer's insurance industry investigations is diverting, but generally irrelevant to most litigators' practices. Other less sensational industry developments, particularly in the area of Directors & Officers liability insurance, will have a more direct impact on the defense and settlement of insured claims.

The Rise of "Side A" Coverage

Traditional D&O insurance consists of three types of coverages: "Side A," which provides coverage for the individual directors and officers when the company is unable to indemnify them; "Side B," which insures the company's obligations to the directors and officers; and "Side C," which insures the company's own direct liability (usually limited to securities or employment liabilities). In response to board members' concerns about individual exposure, more companies are purchasing additional Side A coverage in excess of their traditional A-B-C program. Moreover, some companies are eliminating Side C coverage, and buying policies which pay a fixed percentage, typically 70% or 80%, of defense and indemnity costs "jointly incurred on behalf of" the company and the insured individuals in the defense of securities claim.

If a company has limited or no entity coverage, it may face disputes with its insurers about which costs are "jointly incurred." The desire to utilize insurance proceeds can affect strategy decisions such as whether to employ separate counsel for individual insureds, whether to settle out individual insureds, or whether to file dispositive motions which could result in dismissal of the individual insureds only, leaving the company to face defense and indemnity costs which are not "jointly incurred."

On the other hand, if there is a concern that the policy proceeds will not be sufficient to protect the individuals in the underlying litigation, and the company's ultimate ability to indemnify the individuals is also in question, counsel for individual insureds may resist any strategic efforts which benefit the company at the expense of preserving limits for the individual insureds.

New Insurers/New Relationships

Despite rumblings of hard times ahead in the D&O market, new insurers are entering the market, including new players at the primary level — the first layer of insurance which generally controls the terms of all policies on the program. This means that securities defense counsel accustomed to working with the "usual suspects" face new challenges: negotiating billing and reporting guidelines, gaining the trust of unfamiliar claims representatives, and understanding the litigation and settlement philosophies of the new organization. These challenges are complicated by the fact that many companies are insured by as many as six or seven insurers — each with a different perspective on liability and damages in the underlying action, and each with a view as to why its policy should not respond to the claim.

New Insurers/New Forms

Insurers entering the D&O primary market are issuing new policy forms with subtle but critical wording changes. Like the limitations on Side C coverage, not only do these provisions create tensions between individual insureds and the company, they also pose difficult questions regarding joint defense efforts and litigation strategy.

For example, many insurers have modified their "fraud" and "personal profit" exclusions. Originally, those exclusions only applied if the insured "in fact" committed fraud or gained an improper personal advantage in connection with the underlying claim. The exclusions eventually were modified to provide coverage until there was a "final adjudication" of improper conduct, a rare event. Now many insurers are reverting to the "in fact" language, or revising the exclusions to apply when the improper conduct is established by "written evidence." Nobody ever really knew what "in fact" meant, and it certainly isn't clear what "written evidence" means: An ambiguous memo by the alleged wrongdoer? A declaration by a fellow insured with his or her own agenda?

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The broadening of these exclusions permit innocent insureds to demand that insurers stop funding the defense of complicit insureds to preserve their liability limits. On the other hand, if an individual's wrongful conduct is imputed to the company, the insurer may cut off defense payments at a crucial point in the litigation.

Insurer Requests for Information

As the SEC has become more aggressive in its investigation of alleged securities fraud, tensions between insurers and insureds have increased. Insurers, under the guise of "seeking cooperation" and "the need to evaluate liability and damages," are demanding that policy holders turn over information relating to SEC investigations. While an insured must cooperate with its insurer, it is not required to provide the insurer with a roadmap for denying coverage. Further, insurers often seek privileged information, the disclosure of which could harm not only the defense of the underlying securities case, but the SEC investigation as well. The law regarding privilege and work product in the insurance context, particularly with respect to D&O policies, does not guarantee that information provided to the insurers will be protected from disclosure to third parties. Defense counsel must walk a fine line between providing information legitimately needed for the insurer to participate in settlement, and waiving privileges to the detriment of coverage or the defense.

These developments may not be as exciting as the insurance industry scandals in the news. But they are likely to complicate defense and settlement strategies in the years to come.

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Tips for a Successful Arbitration

comes stalling, obfuscation or deception. Once any of these labels are pinned on you and/or your client, your chances of prevailing will be substantially diminished.

While there may be a place for dramatics in jury trials, avoid it in arbitrations. In one of our arbitrations, an arbitrator emphatically directed opposing counsel to stop pointing at the panel while asking if our client's witness "truly meant to tell this panel of judges…." Counsel soon quieted down and had fewer problems with the judges. Normally, your arbitrator has seen courtroom dramatics many times, and is not about to let it influence her opinion.

Most "slam-dunk" or "dog" cases settle. To win the arbitration of the closer cases, don't run away from bad facts or create issues where they do not exist. You only have to win the case, not every argument, document or examination. Present the case accurately, fully and logically. When your opponent strays from this advice, chances are that your client's position will appear stronger.

Pitch Your Case to the Arbitrators

This is an obvious, but critical suggestion. In a single arbitrator case, there is only one person you need to convince. Focus and present your case so that it will appeal to your arbitrator. Find out if she is a strict constructionist who is likely to enforce the terms of a written contract and the Evidence Code, or is more likely to resolve the case on the "equities." In shaping each argument and examination, think and re-think how your theme is likely to be received by the arbitrator.

In cases with three arbitrators, it is usually possible to determine which arbitrator will have the swing vote. Where one lawyer or judge is appointed along with two non-lawyer industry experts, you can be almost sure that the lawyer will find at least one other vote for her position. Where there are three judges or lawyers, examine the relationship between the three to determine who is likely to be the leader and who is likely to agree with whom. Once you determine which arbitrator is most likely to sway her fellow arbitrators, pitch your presentation right at her.

Benefit From the Relaxed Evidence Rules, But Fight Blatant Hearsay

The less stringent rules of evidence normally applied in arbitration (*see, e.g.*, AAA Commercial Arbitration Rules (Complex Matters), R-31) — especially the lack of strict prohibition on hearsay — will provide your witnesses with greater latitude in their testimony. Your first witness can lay the foundation for the entire case, going beyond areas where he has strictly personal knowledge to the introduction of subjects that will be dealt with more expansively by other witnesses. Let the first witness become a mirror of your opening statement. Later witnesses can tie up the foundation and go into the necessary details.

As for objections to your opponent's evidence, you normally will not prevail with an objection to admissibility of a party's own records. While they may be hearsay, they probably qualify as business records with foundation easily established by a custodian of records. The arbitrator likely will not require the non-controversial testimony of document custodians. In our recent arbitration, the parties disagreed over the admissibility of two to three documents out of 500. Don't fight unimportant battles you're probably going to lose.

But make sure the records were truly made in the ordinary course of business. If the record was made to support the litigation or to "summarize" events for counsel, it probably should not be allowed in, especially where the author is unavailable to testify.

Constantly Re-Think Your Strategy

In any trial, anytime, you must always be prepared to re-evaluate your case plan and even your next document. The relative importance of key facts, documents and even theories changes constantly in trial, especially in fast-moving arbitrations. Prior to the hearing, you cannot fully predict how your case will go into evidence and which witnesses will ultimately be most credible, important or even necessary. The person that you viewed as a key expert prior to the commencement of the hearing may become unnecessary by the middle of the case.

Every night, every witness, re-think your overall case strategy and don't be afraid to change course. What has the arbitrator said or conveyed through rulings on objections or other comments? Is "reinforcement" evidence on a subject necessary, or ill advised? Has your opponent made a new attack on a different front? For example, if opposing counsel obtained damaging cross from one of your main witnesses, think about not calling another witness whose testimony would be cumulative. If you choose to call that additional witness without being able to neutralize the points your opponent already made, you're just handing your opponent the opportunity to re-bloody your side with the same cross.

The ability to restructure strategy mid-trial/hearing is a primary factor in making a great trial lawyer. Constantly re-evaluate your case and go with your best judgment (after obtaining your client's agreement!) as to how best to present the remaining testimony. And when your gut says it's time to stop, rest.

Provide An Out

It's always difficult for counsel to plan for losing the verdict. While we all imagine winning every verdict, it doesn't happen. Often, an arbitrator will want to find a middle ground between the parties' positions. Although not always comfortable, one of our jobs is to provide evidence and argument for the arbitrator to "split the baby" in a way that is acceptable to the client — or at least not too painful.

The most obvious way for a Respondent to paint a middle path is effective cross-examination both on liability and damages. But you often need to expressly argue not only for no liability but alternatively for reductions in the

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PETER BENVENUTTI

On CREDITORS' RIGHTS

Readers may recall the discussion in this column several years ago of the common law assignment for benefit of creditors ("ABC") as the vehicle of choice for the liquidation of insolvent technology companies. (*See ABTL Northern California Report*, Summer 2002.) In an ABC, a financially troubled company — the "assignor" — transfers all its assets to an independent third party — the "assignee" — who then liquidates the assets and distributes the proceeds to the assignor's creditors. Corporate directors opt for the ABC procedure because it can often be faster, less expensive, more flexible, and less notorious than a formal bankruptcy case, while offering comparable or even better prospects for recovery for unsecured creditors. However, a recent split decision of the Ninth Circuit Court of Appeals has cast doubt on the future of this alternative to bankruptcy.

In *Sherwood Partners, Inc. v. Lycos, Inc.*, 394 F.3d 1198 (Jan. 12, 2005), *rehrg. and rehrg. en banc den.* (March 1, 2005), the Ninth Circuit majority, in an opinion written by Judge Alex Kozinski, held that the assignee under a common law ABC could not enforce the power granted by California Code of Civil Procedure section 1800 to recover as a preference certain payments that had been made by the debtor/assignor to creditors shortly before the assignment. CCP section 1800 is modeled on, and indeed is virtually identical to, the preference avoidance provisions of the federal Bankruptcy Code (11 U.S.C. § 547). Both statutes authorize the administrator of the insolvent debtor's assets (assignee or bankruptcy trustee) to recover payments made to creditors within 90 days before the beginning of the insolvency proceeding (one year if the creditor is an "insider"), if the payments were made on account of "antecedent debt" and they give the creditors a greater percentage recovery than if the payments had not been made and the recipients simply shared in the distributions from the insolvency proceeding. Both statutes provide the same array of defenses to a creditor sued for a preference. The only material differences between the two statutes are the source of authority (state instead of federal bankruptcy law) and the identity of the plaintiff (assignee instead of bankruptcy trustee).

Relying on the implied preemption doctrine, the Ninth Circuit concluded that the state's grant of power to an assignee to recover preferences intruded too far on one of the two core objectives of Chapter 7 bankruptcy — equitable distribution to creditors. (The other is to provide a discharge of indebtedness for honest debtors.) The panel majority relied on a series of United States Supreme Court decisions holding that state statutes that purport to provide a discharge are preempted. *See, e.g., Int'l Shoe Co. v. Pinkus*, 278 U.S. 261, 265-66 (1929). The *Sherwood Partners* majority reasoned that the same logic should apply to the other core objective of bankruptcy — equality of distribution. The court found the state preference statute unacceptable because it gave special powers which are not available to individual creditors under state law to an assignee "hand-picked by the debtor" (as contrasted with an impartial bankruptcy trustee), and concluded that an assignee's recovery of preferences "is inconsistent with the enactment and operation of the federal bankruptcy system and is therefore preempted." 394 F.3d at 1206.

The dissent by Senior Judge Dorothy Nelson asserts that the majority's decision does not adequately take account of the long history of common law assignments for benefit of creditors or of the Supreme Court's recognition in *Pobreslo v. Boyd Co.*, 287 U.S. 518, 526 (1933), that "Congress intended that such voluntary assignments… should be regarded as not inconsistent with the purposes of the federal [Bankruptcy] Act." More significantly for corporate decision makers and their legal advisors, Judge Nelson observed that the logic of the *Sherwood Partners* decision would apply to "any number of state laws governing voluntary assignments" and that the majority's problems with section 1800 are "not distinguishable from concerns about voluntary assignment provisions generally." 394 F.3d. at 1206, 1207. If this is so, and I find Judge Nelson's propositions hard to dispute, *Sherwood Partners* calls into question (at least in the Ninth Circuit) the continuing validity not only of ABCs, but also of other state law procedures that might be used to distribute the assets of insolvent entities, including receiverships and state law dissolution procedures for the liquidation of insolvent corporations.

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Whatever the broader implications of *Sherwood Partners* for ABCs or the other state law procedures, the decision will likely complicate directors' ability to liquidate their insolvent corporation. Directors are generally thought to owe fiduciary duties to creditors when the corporation has become insolvent. Often a troubled corporation makes substantial payments to a few particularly aggressive creditors shortly before deciding to throw in the towel. Before *Sherwood Partners*, those payments could be recovered as preferences in either an ABC or a bankruptcy case — but no longer. How must directors now weigh this factor into the mix when deciding between an ABC and Chapter 7 bankruptcy? And, if they select an ABC and thus forego the ability to pursue preferences, do they face criticism — or legal exposure — for having done so? It will be very interesting to see how corporate directors, their legal advisors, and the courts answer these questions in the next wave of business failures.

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Tips for a Successful Arbitration

Claimants' damages. One effective method is to incorporate Claimants' damages in a spreadsheet and then, step-by-step, modify the calculations based on comparative fault, lack of causation and other factors you have established through your cross or other evidence. During closing argument, provide the arbitrator with hard copies of the spreadsheets demonstrating each of these reductions. She will then have those modified damage calculations when she writes the Award and may be searching for a principled compromise. And if the Award should come in against your client, but still in an amount less than or about the same as you offered in settlement, you can chalk up another win.

Leave the Arbitrator with a Roadmap for the Award

I recommend holding an oral closing argument immediately following the close of the arbitration testimony, rather than extensive and prolonged post-hearing briefing. We have found post-arbitration briefing to be expensive and time-consuming; it does not appear to add much, if anything, to a cogent oral closing argument made after an evening of preparation.

For closing argument, put together a binder of the most important documents organized by the topics or themes of your argument. Highlight the key passages, and then have copies for the arbitrator and counsel. The binder will become the outline of your argument, freeing you from any notes. More importantly, the arbitrator will be able to take the binder with her. When, several weeks later, it comes time to write her Award, the arbitrator will be able to reference your binder — highlighted with the passages or damage analysis that support your case. In this way, your closing argument will be close at hand whenever she writes her Award.

Whether or not your arbitration concludes with closing arguments or extended briefing, offer to present proposed findings of fact and conclusions of law. They normally should be brief (five to ten pages), highlighting the key facts and law. The proposed findings and conclusions serve a purpose similar to bare-bones jury instructions providing the framework and path for the arbitrator's Award.

Conclusion

Your best presentation in an arbitration hearing may significantly differ from the same case presented in a jury trial. It may not be necessary to take depositions; instead, consider relying on the surprise of "cold" cross-examination based on the documents. Then keep your eye on the arbitrator, and pitch your case to a position with which she will agree.

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