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Why the Ninth Circuit Should Not Be Split

No members of the legal profession should understand more fully than your members the folly of recent efforts to split the Ninth Circuit. The Federal Bar Association, its chapters in Orange County, Los Angeles, and elsewhere in California, have all expressed opposition, as has the American Bar Association.

A major problem with any restructuring proposal is that there is no sensible way to divide the Circuit because of the size of California. Currently pending are bills containing no fewer than five different configurations of new Circuits — bills that would split the existing Circuit into either two or three parts, at great cost to lawyers, clients and taxpayers.

Hon. Mary M. Schroeder

There can be no equitable division of the case load of the Circuit without division of California into different Circuits, because California generates more than 70% of the Circuit's current case load. There has never been a regional Circuit with fewer than three states (and six Senators). None of the other eight states want to be left in a divided Circuit with California, and California certainly does not want to be left alone. We

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Also in this Issue

Increasing the Likelihood of Success on Summary Judgment Motions

Summary judgment is hard to win. In theory, summary judgment is an efficient and cost-effective means to limit or terminate an action where the opposing party has no factual support for its claims. In reality, summary judgment is highly technical and requires much to prove and little to defeat. Nevertheless, summary judgment and summary adjudication motions still hold the promise of swift termination of meritless claims or defenses, benefiting litigants and the courts.

Hon. B. Freeman

There are many practical means by which you can improve your chance of success on a summary judgment or adjudication motion. First, I will discuss some of the statutory and decisional limits of the motion, including the definition of a cause of action as well as how one can establish the existence of a duty in a summary adjudication motion. Second, I will discuss discovery tactics geared to your summary judgment motion and technical rules, knowledge of which can help improve your chances of success.

Code of Civil Procedure Section 437c sets the limits on summary judgment/adjudication. A motion is appropriate to terminate a meritless cause of action, defense, claim for damages or issue of duty. I will address two often vexing issues which can cause motions to fail unnecessarily.

What Constitutes a Cause of Action?

If you represent a defendant, you must first understand the nature and limitations of the causes of action you intend to attack. Depending on how the plaintiff has written the complaint, several causes of action may be interwoven into a section denominated by the plaintiff as

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owe a debt of thanks to California's member of the Senate Judiciary Committee, Senator Feinstein, for spearheading the opposition to Circuit division and providing thoughtful analysis raising these important points.

Thoughtful consideration of the issue, however, is sometimes lacking. Last Fall, some members of Congress pushed a bill through the House, as part of a budget reconciliation package, that would have left Hawaii and California in a Circuit by themselves.The budget reconciliation bill was in essence an attempt by the then House Leadership and Chairman Sensenbrenner of the House Judiciary Committee to bypass the Senate Judiciary Committee. The provision was taken out in Conference, but only after both the Chairman and the Ranking Member of the Senate Judiciary Committee jointly protested.

None of the proposals to divide the Circuit has seriously considered dividing California since the Hruska Commission Report did so in the 1970s. It is not difficult to foresee the costs, stresses and potential delays that would result from having different Circuit law in San Francisco, Los Angeles or Orange County. Forum shopping and confusion in the interpretation of California state law are the dismal probabilities that I need not elaborate here.

Our judges do not want a division either. Only three of our 24 active judges have advocated any split, and recently 34 of our total of 47 active and senior judges, including all of our past, present and future chief judges, authored an article explaining why a split would not be a good idea. Entitled "Federalism and Separation of Powers — a Court United," it responded to the arguments of split proponents, including the contentions that division is inevitable. Our Judges said that argument ignores "the ability of people and institutions to adapt to inevitable changes in a complex world." *See Engage*, vol. 7, no. 1, at 63.

The Ninth Circuit has indeed led the way in innovation and change. We pioneered the Bankruptcy Appellate Panel, now used in many Circuits. We began a system of issue identification and keyword searches before computers were widely available. We have the capacity to handle large volumes of cases by spotting key issues early, issuing precedential decisions, and then quickly and efficiently handling all of the cases raising the same issue.

The most recent comprehensive study of Circuit alignment was by the Commission on Structural Alternatives, commonly known as the White Commission, after its Chairman, the late Justice Byron White. Its 1998 report recommended against dividing the Ninth Circuit. It did propose dividing the Court of Appeals into a series of rotating divisions, in a manner so complex that no one seriously wanted to adopt the proposal. (I have always suspected that was the aim all along.)

So why, if there is no feasible, equitable way to divide it, and if the bar and the judges do not want a division, and if the experts have recommended against it, do efforts to divide the Circuit persist? I suggest there are three principal reasons, none of which is valid, and at least one of which is a threat to the essential Constitutional underpinning of an independent judiciary.

First and foremost, efforts to split the Circuit have been driven by particular decisions of the Court of Appeals that were unpopular in some quarters. The nature of those controversial decisions has changed over the years, but there is a common thread. All have involved cutting-edge issues that came first to the Ninth Circuit. In the 1960s and 1970s these related to Native American rights and, more specifically, to fishing in the Pacific Northwest. In the 1980s and 1990s the unpopular cases related to the environment and the Endangered Species Act and, more specifically, the spotted owl. Most recently, religion in the schools, most notably the *Newdow* Pledge of Allegiance case (*Newdow v. U.S. Congress*, 292 F.3d 597 (9th Cir. 2002)), and immigration cases have been areas of controversy. We do not create these issues, but we do have to decide them. Every civil litigant who loses a case in the District Court has a right to appeal to the Ninth Circuit. In the more than five years that I have been Chief Judge, the Court of Appeals has decided more than 28,000 cases. Of these, approximately six have fueled the efforts for division.

It is ironic that the attacks on the decisions are all attacks on the Court of Appeals, yet the actual proposals for division would dismantle the entire Circuit structure leaving at least one or possibly two orphan Circuits with no staff or headquarters. It would leave the California Circuit with our super staff, perhaps, but without the available assistance we have now from dozens of district and Circuit judges outside of California, familiar with the same Circuit law, who can assist with the case load. As Chief Judge of the Circuit, responsible for its administration, this possibility presents an administrative nightmare. As an Article III judge who has sworn an oath to support and uphold the Constitution, to me the threat of division as punishment for unpopular decisions carries an even deeper concern.

One of my heroes is the late, great Circuit Judge John Minor Wisdom of the Fifth Circuit. He opposed division of the Fifth Circuit. That division eventually happened in the late 1970's but it had its roots in congressional opposition to the Fifth Circuit's desegregation decisions in the 1950s and 1960s, in which Judge Wisdom was a leading voice. He believed that Circuits should be large, so that the Circuit court of appeals could reflect diverse interests. He decried efforts to divide Circuits in order to create smaller courts that reflected only local interests. In an article after division of the Fifth Circuit, entitled "Requiem for a Great Court," 26 *Loyola Law Review* 788 (1980), Judge Wisdom said: "The federal courts rose to bring local policy in line with the Constitution and national policy.... The federalizing role of Circuit courts should not be diluted by the creation of a Circuit court so narrowly based that it will be difficult for such a court to overcome the influence of local prides and prejudices."

Those who have wanted to divide the Ninth Circuit in order to create a Pacific Northwest Circuit that would be

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more friendly, for illustration, to timber or fishing interests, would deny the Ninth Circuit this federalizing role. That is a salient reason why the Circuit should not be divided.

Proponents of division advocate some secondary reasons for dividing the Circuit, but these reasons also serve to highlight important grounds why the Circuit should remain intact. There is, for example, the misguided notion that the Circuits should all look alike; that the map of federal Circuits west of the Mississippi should look like the map of Circuits on the East Coast.

However, the western states do not look like the eastern states. The Circuits in the East were formed from the original 13 colonies, while the west has its roots in the Louisiana Purchase. This pro-split argument is most frequently phrased as "it's too big." But the truth is that any Circuit with Alaska is going to be larger than any other Circuit geographically, and any Circuit with California is going to be larger than any other Circuit in case load and population. As Judge Shirley Hufstedler once said, "you can't legislate geography." And in the U.S.A. you cannot legislate demographics either.

An argument related to size involves our *en banc* process. For many years we operated quite happily with an *en banc* court of 11, and recently began an experiment with 15 judges on an *en banc* court. Congress by statute has authorized any court with more than 15 judges to use a limited *en banc* court, and we like it. We could adopt a rule that all of our active judges sit on each *en banc* court, but we haven't done so because we think the limited *en banc* is a better use of resources. We encourage other Circuits to try it. If there were to be a Circuit division, additional judgeships would have to be created for California, and the California Circuit would use the limited *en banc*. Nothing would be gained by splitting except cost and confusion.

Finally, there is a lack of understanding of the real costs for lawyers and their clients inherent in Circuit division. The fact is that while the ire of a few in Congress is focused on the decisions of our court of appeals, all of the proposals are to dismantle the entire Circuit, including its staff, all of its district courts and the bankruptcy courts. The Circuit law for California would be different from that of its neighbors. Yet California does a lot of business with its neighbors. Lawyers should not be forced to track new and different Circuit law in bankruptcy or commercial litigation. The Ninth Circuit has become the home of intellectual property and technology, with Microsoft, Intel and the Silicon Valley. Division makes the practice of law and litigation more complicated and more expensive, with no commensurate gain in administrative efficiency. As the United States looks toward the Pacific for increasing foreign trade, and our major law firms are opening offices in Asia daily, the nation can benefit from the Ninth Circuit as an unfragmented source of federal law. True, the East Coast has been fragmented since the l8th centu-

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Using an Employer's E-Mail: Attorney-Client Privilege Issues

Every business litigator knows that e-mail has become an important means for communicating with clients. As issues of privacy regarding e-mail communications evolve, the courts and legislatures continue to sort out their impact on the privilege for attorney-client e-mail communications. Recently, courts have begun to consider whether a client's e-mail communications with his or her personal attorney using an employer's computers and e-mail systems are protected from disclosure by the attorney-client privilege. Litigants are questioning whether an employer's access to employee e-mails, particularly where the employer has an express policy addressing its access to and monitoring of employee e-mails, renders those communications insufficiently confidential to support the attorney-client privilege. So far, those challenges have failed.

Tyler G. Newby

In 1999, the American Bar Association ("ABA") addressed whether attorney-client e-mail communications lose their privileged nature when a third party may be able to access them. The ABA's Committee on Ethics and Professional Responsibility responded to concerns over whether unencrypted e-mail communications between attorneys and their clients were sufficiently safe from prying eyes to be "confidential" by issuing Formal Op. 99-413. That opinion provided that "a lawyer sending confidential client information by unencrypted e-mail does not violate [the client confidentiality model rule requirement] in choosing that mode to communicate. This is principally because there is a reasonable expectation of privacy in its use." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 99-413 (1999). The ABA's opinion relied, in part, on the illegality of intercepting e-mail communications to find a reasonable expectation of privacy.

The evolution of business e-mail systems and policies, which have eroded employee's expectations of privacy, has added a new twist on this issue and raises new questions not answered by the ABA's 1999 opinion. For example, if an employer may legally access an employee's e-mails, would the privilege analysis change? Similarly, does an employee who knows or has reason to know that an employer may access her e-mails still have the requisite expectation of privacy, as set forth in the ABA's opinion? The few cases that have confronted these circumstances have continued to sustain the privilege, but the narrowness of the holdings leaves the issue unsettled.

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Guidance from New York

In a case of first impression, the United States Bankruptcy Court for the Southern District of New York confronted these issues in 2005. In *In re Asia Global Crossing, Ltd.*, 322 B.R. 247 (S.D.N.Y. 2005), the court ruled that an employee's use of his employer's e-mail system does not, in all cases, waive the attorney-client privilege. There, after receiving subpoenas for documents from the appointed trustee, several members of the debtor company's former management team withheld e-mails between themselves and their personal attorneys that had been sent, received and stored on the debtor's e-mail network. The trustee argued that the e-mails were not protected by the attorney-client privilege because they were stored on the company network. The court rejected the trustee's argument and upheld the claim of privilege.

Jan J. Klohonatz

The *Asia Global Crossing* court found that the following four factors should be considered to determine whether a client had an objectively reasonable expectation of privacy when engaging in the communications: (1) whether the corporation had a policy of prohibiting sending personal e-mails or other objectionable use of the company e-mail system, (2) whether the company monitored the use of the employee's computer or e-mail, (3) whether third parties had a right of access to the computer or e-mails, and (4) whether the corporation notified the employee, or the employee otherwise was aware, of the use and monitoring policies regarding the e-mail system. *Id*. at 257. Applying these factors, the court found that there was not sufficient evidence to show that the privilege had been waived. Central to the court's ruling was a factual dispute over whether the company had implemented and enforced a publicized policy of monitoring its employees' e-mails. Although the trustee submitted documents referring to a company e-mail policy that authorized the company to monitor and access its employees' computers and e-mail accounts, there was no evidence that those policies had been adopted or communicated to the employees. *Id*. at 259-61.

A similar issue arose more recently in *Curto v. Medical World Communs., Inc*., 2006 U.S. Dist. LEXIS 29387 (S.D.N.Y. May 15, 2006). In that case, an employee used her private e-mail account to communicate with her personal attorney. Even though she used her private e-mail account, she did so on a company-owned laptop computer. The employer had an express policy prohibiting personal use of company-issued computers, and the employee had signed an acknowledgment expressly stating the following:

> Employees expressly waive any right of privacy in anything they create, store, send, or receive on the computer or through the Internet or any other computer network. Employees consent to allowing personnel of [employer] to access and review all materials employees create, store, send, or receive on the computer or through the Internet or any computer network. Employees understand that [employer] may use human or automated means to monitor use of computer resources.

Id. at *2-*3.

Despite her acknowledgment of this policy, the employee, who frequently worked from home, used two company-issued laptops for her personal use. *Id*. at *3. Not only did she use the company's computers to communicate with her personal attorney through her private America Online e-mail account, she did so about potential claims against the employer. *Id*. Moreover, prior to returning the laptops to her employer, the employee attempted to delete all of her personal files, including the e-mails with her attorney. *Id*. It was only after hiring a forensic consultant that her employer was able to discover the personal e-mails with her attorney. *Id*. at *4.

Despite the former employee's undisputed breach of her employer's computer usage policy, and her express acknowledgment that she had no right to privacy in any materials stored on company-issued computers, the district court upheld a magistrate judge's ruling that the employee had not waived the attorney-client privilege by using the company-owned computer to communicate with her personal attorney. *Id*. at *24-*25. The court specifically distinguished the line of cases holding that an employee does not have a reasonable expectation of privacy in e-mails generated or received using her employer's computers and e-mail network on the ground that those cases had not dealt with attorney-client communications. *Id*. at *15-*20. Furthermore, the district court held that the magistrate judge had not committed clear error in considering the employer's lack of enforcement of its computer-usage monitoring policy in its finding that the former employee had not waived the attorney-client privilege. *Id*. at *14-*15. In effect, the magistrate judge had found that the employer's failure to enforce its policy created a sense of security and expectation of privacy among its employees in their personal uses of the company's computers, even in light of the express acknowledgment of the policy. *Id*. at *8.

Application in California

There is little California case law on these privilege issues, but the results in the *Asia Global Crossing* and *Curto* decisions may have application in California. The California legislature appears to have contemplated that technological advancements could affect the attorney-client privilege analysis. Evidence Code section 917(a) provides that communications between an attorney and client are *presumed* to be confidential. In 2002, Evidence Code section 917 was amended to add subsection (b), which provides that:

> A communication…does not lose its privileged character for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication.

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The Evidence Code incorporates the definition of "electronic" from Civil Code section 1633.2, which provides that:

> "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

The plain language of Evidence Code section 917 suggests that an individual's use of her employer's computer network to communicate with her personal attorney does not waive the privilege for the sole reason that the employer may access those communications.

Section 917 is based on a similar statute in New York, Civil Practice Law and Rules section 4548, which was cited in both the *Asia Global Crossing* and *Curto* decisions. The California Evidence Code version departs somewhat from the New York statute in two respects. The New York statute provides that an electronic communication does not lose its privileged character if persons "necessary" for the "delivery or facilitation" of the communication may have access. The California statute replaces "necessary" with "involved," and adds persons involved in the storage of communications to those who may have access to the communications without defeating the privilege. The California legislation thus provides even broader protection of the privilege than its New York counterpart.

One potentially instructive opinion, albeit now depublished, was decided by the California Court of Appeal for the Sixth Appellate District. In *People v. Jiang*, 131 Cal. App. 4th 1027 (2005), *depublished* at 2005 Daily Journal DAR 11824, the court addressed a tangential topic, but its reasoning could provide some guidance about how a California court might analyze application of the attorney-client privilege for personal e-mails on an employer's system.

In *Jiang*, the prosecutor obtained by way of a subpoena *duces tecum* files from the defendant's employer-owned laptop, including password-protected documents that defendant had stored in a folder labeled "Attorney." *Id*. at 1052. The defendant had signed an "Employee Proprietary Information and Inventions Agreement" which gave his employer the right to inspect the employee's computer. The trial court ruled that defendant did not have an *objectively* reasonable expectation of privacy when he stored the files on his work computer, and thus the stored information was not privileged.

The appellate court reversed, holding that the defendant had a *subjectively* reasonable expectation that the documents he created at the direction of his attorney and stored on his work laptop would remain private. *Id*. at 1054. The test applied by the California appellate court thus differed from the *Asia Global Crossing* court's test, which looked at whether the expectation of privacy was objectively reasonable. The Court of Appeal in *Jiang* based its finding of a subjectively reasonable expectation of privacy on the fact that the purpose of the company's policy was to protect its intellectual property and not to invade the privacy of its employees, and that the company did not prohibit its employees from using company-issued computers for personal use. *Id*. at 1053-54.

Conclusion

The California Evidence Code provides courts with a basis on which they can fashion rules for protecting the attorney-client privilege where the client uses her employer's e-mail system for communications with her private attorney. Indeed, the Evidence Code creates a presumption of confidentiality for any electronic communications, including wireless, optical and electromagnetic communications, that are accessible to persons involved in their delivery, facilitation or storage. As the notes to Evidence Code section 917 recognize, "electronic [communication] is broad, including any intangible media which are technologically capable of storing, transmitting and reproducing information in human perceivable form." (internal quotations omitted). The presumption of confidentiality is not defeated simply because someone involved in the delivery, facilitation or storage of such a communication, such as an employer, may have access to the content of that communication. How California courts apply Evidence Code section 917 to decide these privilege issues on a case-by-case basis remains to be seen.

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ry, but why in the 21st century should we set out to create a similar system?

Technology and communication have made the business of court administration easier, not more difficult. In fact, Senior Circuit Judge J. Clifford Wallace of San Diego, who served with distinction as our Chief Judge a few years back, has outspokenly opposed division and has repeatedly suggested that the smaller Circuits ought to think about merging. As our judges said resoundingly in their recent article: "yes, we are big and our territory is wide, but we have shown that we can function effectively and efficiently despite — indeed because of — our size. . . we have made size our friend rather than our enemy." *See Engage*, vol. 7, no. 1, at 66.

The Ninth Circuit works well; the proposals to divide it do not. Changing Circuit structure because of disagreement with the outcome of judicial decisions is a threat to the judiciary and all that it protects. The latest round of proposals to divide the Circuit should be denied.

The Hon. Mary M. Schroeder sits on the United States Court of Appeals for the Ninth Circuit, and is the Chief Judge.

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a single "cause of action." Unless you can first delineate and separate these causes of action, you will have difficulty persuading the court that you are entitled to relief.

Witkin defines a cause of action as a set of facts from which plaintiff claims a primary right and a corresponding duty on the part of the defendant, together with facts that constitute defendant's wrongful act. *See* 4 Witkin, *California Procedure* (4th ed. 1997), § 24 at p. 85. Take, for example, a complaint that alleges under the heading of a single cause of action both sexual harassment and retaliation for complaining about the harassment. Properly identified for the court as two distinct wrongful acts, summary adjudication is appropriate on one claim even where the other claim may be in dispute. *See Mathieu v. Norrell Corp.*, 115 Cal. App. 4th 1174, 1188 (2004).

The leading case on this issue, *Lilienthal & Fowler v. Superior Court*, 12 Cal. App. 4th 1848, 1854 (1993), discusses the legislative intent of Section 437c(f) in the context of a legal malpractice case where the complaint alleged malpractice in two separate matters unrelated to each other. The court easily defined those claims as separate and distinct obligations constituting two causes of action, and affirmed that summary adjudication was properly granted on one of them.

Convincing the motion judge that the allegations set forth by the plaintiff under the heading of a single cause of action actually constitute more than one cause of action is the critical first step. I find that attorneys often fail to make the argument that the cause of action as set forth in the pleading actually is a combination of two or more causes of action. Motions frequently fail to address a portion of the cause of action as defined in the pleading without any explanation of why, or argue persuasively about a portion of the cause of action without explaining why the rest can be safely ignored. Without a showing that the plaintiff has combined two causes of action in the complaint, the court will likely deny the motion on the grounds that the motion does not fully dispose of an entire cause of action. *See* Code Civ. Proc. 437c(f)(1). Such a motion appears to be nothing more than an impermissible attempt to obtain summary adjudication of issues or facts.

I recommend a few techniques. First, when you evaluate the complaint for purposes of deciding whether to file a summary adjudication motion, be on the lookout for multiple causes of action combined under a single heading. Second, when you attack a portion of a cause of action as defined by the complaint, you should succinctly address this issue in your motion by showing that the cause of action as defined in the complaint actually constitutes separate causes of action. This showing will put the court and the opposing party on notice of the issue. Regardless of whether the judge ultimately agrees with your position, you will have had a hearing on the issue and received a determination by the judge that can be useful throughout the remainder of the proceedings. You may successfully dispose of one or more causes of action that the plaintiff has combined under a single heading even though you have determined that you cannot be successful on other causes of action contained in that section of the complaint.

How Far Will the Court Go in Resolving Issues of Duty?

Will judges consider granting summary adjudication of essential issues of contract interpretation? This is a tricky issue under Section 437c. In most instances, the short answer is probably "no." Most issues of contract interpretation, which can often be a roadblock to settlement, require resolution of disputed facts which is not allowed under Section 437c. However, the statute does provide for summary adjudication of "issues of duty," including both the presence and absence of a duty. Unfortunately, the Legislature did not provide any guidance to the courts on what the statute's language means.

In my experience, judges are comfortable granting summary adjudication on the absence of duty where that duty is an essential element of a cause of action, because the finding of no duty will completely dispose of the cause of action. The problem arises when a party seeks a determination of the affirmative existence of a duty. Such a finding by the court clearly will not dispose of the cause of action. Without further support for the appropriateness of the motion, it might appear that the motion must fail.

Looking closely at the summary adjudication statute, it is readily apparent that the Legislature had something in mind other than limiting summary adjudication to the absence of a duty. Section 437c(f)(1) expressly provides that summary adjudication is proper to determine "that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs." Just what that means is a bit harder to determine. Although the court has an obligation to rule on the existence of a duty, it is not so easy to define the reach or limits of the statute. When seeking summary adjudication of an affirmative duty, you can assist the motion judge by clearly defining the duty in question and establishing that a ruling granting the motion will completely dispose of that issue of duty.

When seeking an affirmative determination of the existence of duty, there are two hurdles you will need to traverse. First, you must convince the judge that it is appropriate to grant the motion even though the ruling will not completely dispose of the cause of action. Second, you must persuade the judge that the duty on which your motion is based is the type of duty contemplated by the statute.

The first issue is easier to address. In *Linden Partners v. Wilshire Linden Assoc.*, 62 Cal. App. 4th 508, 522 (1998), the Second District Court of Appeal held "the court may rule whether defendant owes or does not owe a duty to plaintiff without regard for the dispositive effect of such ruling on other issues in the litigation, except that the ruling must completely dispose of the issue of duty." This ruling is not without its detractors. Some commentators and many judges believe that summary adjudication of the affirmative existence of a duty is not consistent with the

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MARY MCCUTCHEON

On INSURANCE

When faced with a complex, high-stakes securities claim, corporate and individual insureds may be pleasantly surprised — indeed relieved — when their Directors and Officers Liability ("D&O") insurer agrees to meet its defense and indemnity obligations rather than deny coverage or rescind the policy. Individual insureds and their counsel, however, must take care that the benefits offered by the insurer do not come at too high a price.

The insurer often will expect the corporate and individual insureds to execute an Interim Funding Agreement ("IFA") in exchange for advancing defense costs. An IFA may specify that all insureds agree to reimburse the insurer for such defense costs in the event that the insurer ultimately obtains a determination that it had no obligation to advance them. Eager to secure funding for defense costs, the insureds may not object to the terms by which the insurer confirms its right to reimbursement. Most D&O policies do not explicitly require the insured to execute an IFA. Thus, it may be improper for the insurer to demand that the insured execute a new contract to obtain the benefits that the D&O policy already provides.

When an insurer agrees to fund settlement under a reservation of rights, or final funding agreement ("FFA"), the insureds may be so eager to conclude the litigation that they unwittingly allow the insurer to reserve more rights than the policy provides. If an insurer demands that an FFA be executed in connection with the funding of a settlement (a condition sanctioned by California law even if not specified by the policy), or if the policy requires an IFA, the agreement should be limited to what is required by the policy or applicable law. It should also be executed only by the insured(s) actually receiving the benefits of the policy.

Generally, an individual director or officer should agree to execute an IFA or FFA only when the corporation is unable or unwilling to fulfill its contractual or statutory indemnification obligations to its directors and officers. The corporation should enter into such an agreement only after confirming that the proposed agreement does not grant the insurer broader rights than those in the policy.

If the corporation can indemnify its directors and officers, the insurer's rights and obligations under the D&O policy are governed by that portion of the policy (typically called "Coverage B") that provides coverage for the corporation's contractual and statutory obligations to indemnify its directors and officers. Under Coverage B, the corporation is the insured, rather than the individual director or officer. The corporation receives the benefits of the insurance, namely coverage for its indemnification obligations. Thus, the corporation, not the individual insured, is responsible for reimbursement of defense and settlement costs if the insurer ultimately establishes that there is no coverage for the claim.

Individual directors or officers may feel pressure to sign a funding agreement. For example, the company does not want its balance sheet harmed by the indemnification obligations, nor does it want cash flow problems created when it must pay defense bills up-front, then wait for reimbursement. It also wants to ensure that a settlement is promptly funded. An individual may be told that an IFA is the equivalent of the undertaking which the company requires in connection with advancement of defense costs under his or her indemnification agreement with the company, *i.e.*, "if you have to sign an undertaking, why not go ahead and sign an IFA instead?"

Once the individual allows the company and the insurer to circumvent the protections he or she receives from the D&O policy and the corporate indemnification agreement, however, the individual's chance of an unreimbursed exposure increases. For example, the insurer may rely on an unfavorable finding in the underlying action to seek reimbursement. Or it may seek to rescind the policy as to all insureds based on the conduct or knowledge of one "guilty" insured that is imputed to all. Often the indemnification agreement with the company may provide protection to the individual for what are now uninsured exposures. But in the meantime, the once solvent corporation may have become insolvent, rendering the indemnification rights valueless. Or a change in control may mean that new management will not honor the new arrangement without extensive effort, or even litigation.

Mary McCutcheon

Even if a funding agreement is warranted, it should not give the insurer any rights not found in the policy. The policy may not clearly address the insurer's right to reimbursement of defense costs, allowing the insured to argue that the right in fact does not exist. An IFA can close this loophole. Or an IFA may impose joint liability for defense costs incurred on behalf of all insureds, even the corporation, while the policy specifies that the insureds are severally liable. An FFA may provide that all insureds are jointly liable for reimbursement of an uncovered settlement, even if one or more insureds otherwise could have argued that only a small portion of the settlement, if any, is based upon their liability.

Usually these concerns never materialize into actual exposures. Often the insurer decides not to pursue its rights, or it settles with the corporation. But when the insurer does pursue its reimbursement rights, an individual insured — particularly one with significant assets — can face serious liability that would have been avoided by careful review of an IFA or FFA, or by refusing to execute one.

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overriding purpose of the summary judgment statute, which is to streamline litigation. You can assist the judge by tackling this issue head on.

The second issue regarding the type of duty that can be resolved under Section 437c is much more complex. Whether Section 437c(f)(1) allows a determination of duty that extends beyond a determination of a duty of care in negligence claims — for example, in the insurance context, the duty to defend or indemnify — is subject to debate. The statute does not define "duty," and the case law is split. In *Linden Partners*, the court ruled that the affirmative existence of a duty owed under a contract is properly decided by summary adjudication. There, the Court of Appeal evaluated whether normal and customary contractual performance obligations were "duties" under Section 437c. (In *Linden Partners*, the duty was defined as the implicit duty to provide accurate disclosures.) The *Linden Partners* court found that a determination of the existence of such a duty was amenable to summary adjudication. The contrary view is based on the holding in *Regan Roofing Co. v. Superior Court*, 24 Cal. App. 4th 425 (1994). In that case, the court stated that "[a]lthough a trial court is authorized to interpret a contractual provision as a matter of law, where such contractual interpretation does not fully dispose of any portion of the action, it is not a proper subject of summary adjudication." *Id.* at 437.

Judges are concerned that litigants will seek adjudication of a fact dressed up as a "duty," precisely the result the statute seems to prohibit. You can address this concern and assist the court by explaining why the matter rises to the level of a duty and provide the court with a well-reasoned definition of the scope of the "issues of duty" that is consistent with the legislative mandate under Section 437c. Certainly, the resolution of these issues in complex cases often will streamline the litigation and may also facilitate settlement.

Develop Your Discovery Strategy with Summary Judgment in Mind

The separate statement of undisputed material facts is often the beginning and end of a motion for summary judgment or adjudication. The statute requires that the moving party either conclusively establish evidence negating as a matter of law an essential element of the cause of action or that plaintiff does not possess and cannot reasonably obtain needed evidence to establish that cause of action. *See Aguilar v. Atlantic Richfield Co.*, 25 Cal. 4th 826, 854 (2001). The second prong of this test is the more difficult. Your evidence may well establish that the opposing party does not now have the evidence needed to support its claim, but it is another matter entirely to establish conclusively that the opposing party will never obtain such evidence. Failing to do so in your moving papers will result in defeat because you will not have met your initial burden under Section 437c, or you will have opened the door to your opponent to submit self-serving affidavits to defeat the motion.

I find this prong of the summary judgment analysis is the most often overlooked element and frequently causes motions to fail. The role of discovery cannot be overemphasized here. Responses to interrogatories and requests for admissions and deposition testimony can be powerful tools if properly deployed. An opposing party can be effectively foreclosed from offering self-serving declarations to defeat summary judgment where such affidavits would contradict previously-offered testimony or verified responses to discovery.

Discovery responses offered to support a motion often do not clearly support the proffered undisputed material facts. When this is the case, not only will you have failed to establish a particular fact as undisputed, but you will also have lost credibility with the judge if she believes that you are overstating the underlying evidence. One of the first things I do when I review a motion for summary judgment is to determine whether the underlying evidence actually establishes the proffered undisputed material fact. If I find that it does not, my entire review of the papers is colored by that determination.

Most commonly, when there is a problem, the proffered discovery responses are equivocal. I recommend that prior to preparing for depositions, drafting interrogatories or requests for admissions, you prepare the statement of undisputed material facts. If you know the response that you need in order to succeed on summary judgment, you will be able to draft the questions effectively. At depositions, follow up with questions that produce the needed evidence or that demonstrate that the evidence cannot be obtained. Try to get the witness to state succinctly his or her answer. Lengthy passages from depositions that require the judge to draw substantial inferences from the tenor and tone of the responses are simply not sufficient to support a favorable ruling. In trial, when the jury or judge can evaluate the credibility of witnesses, the evasive answer may support your position, but it is simply not enough at summary judgment.

Knowing the Rules on Summary Judgment Is Key

In preparing summary judgment or adjudication motions, the devil is certainly in the details. It is an intensely rule-bound process. California Rule of Court 342 is key. Strict adherence to its requirements cannot be overemphasized. Although you might think it is a trap for the unwary, in fact, I find that a properly prepared motion that conforms to Rule 342 significantly enhances the accessibility of the key evidence and legal issues.

Starting with the form of the notice of motion for summary judgment or adjudication, Rule 342 requires that the moving party state all issues in the notice on which adjudication is sought. Additionally, I recommend that you request summary adjudication in the alternative to summary judgment. Failure to make this request will defeat partial adjudication.

In summary adjudication motions, the notice of motion must set forth the "specific cause of action, affirmative defense, claims for damages or issues of duty." This specif-

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PETER BENVENUTTI

On CREDITOR'S RIGHTS

If a plaintiff fears the defendant will be unable to pay a money judgment when the plaintiff ultimately obtains it, the customary remedy is prejudgment attachment. In California, attachment is a creature of statute, Sections 482.010 — 493.060 of the Code of Civil Procedure. A plaintiff, upon a showing of the "probable validity" of its claim and the posting of a bond, can obtain a lien on the defendant's assets to secure the anticipated judgment and have tangible personal property seized and held pending the outcome of the lawsuit. *See* C.C.P. §§ 484.090, 488.500(a), and 488.335.

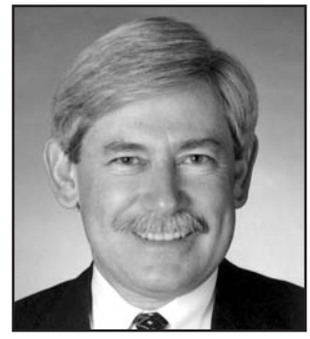
Attachment is available in federal court actions under Rule 64 of the Federal Rules of Civil Procedure, which incorporates the provisional remedies of the state in which the district court sits. Attachment, however, is not available in every case where a plaintiff might desire it. Under the California statute, for example, attachment is limited to actions "on a claim for money…based upon a contract, express or implied." C.C.P. § 483.010(a). This provision omits actions based on tort or statutory claims. Other states' attachment processes also feature an array of limitations and restrictions. So creative plaintiffs have tried other measures, notably asking the court to enjoin the defendant from transferring assets.

These creative efforts hit a roadblock in a 1999 decision of the U.S. Supreme Court, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999). In *Grupo Mexicano*, the Court held, with four justices dissenting, that district courts have "no authority to issue a preliminary injunction preventing [defendants] from disposing of their assets pending adjudication of [plaintiffs'] contract claim for money damages…[b]ecause such a remedy was historically unavailable to a court of equity" in England in 1776. 527 U.S. at 333. While recognizing the broad equity powers of federal trial courts, the Supreme Court concluded that employing that power to fashion a pre-judgment remedy that was not available under historic English practice was the province of Congress, not the courts.

The lower federal courts have construed *Grupo Mexicano* to allow some significant exceptions to the ban on pre-judgment asset-freezing injunctions. If the underlying action seeks equitable relief (such as constructive trust or disgorgement) instead of, or in addition to, a legal claim for money damages, or if the plaintiff claims an interest in the assets which are the subject of the requested preliminary injunction, the lower courts have had no difficulty in permitting preliminary injunctions freezing assets. *See, e.g., United States v. Oncology Associates, P.C.*, 198 F.3d 489 (4th Cir. 1999); *SEC v. ETS Payphones, Inc.*, 408 F.3d 727 (11th Cir. 2005).

Another possible basis for exception is the distinction the Supreme Court drew between the relief sought in *Grupo Mexicano* and "the law of fraudulent conveyances and bankruptcy." 527 U.S. at 322. In *Rubin v. Pringle (In re Focus Media, Inc.)*, 387 F.3d 1077 (9th Cir. 2004), the Ninth Circuit relied on all of these grounds for distinguishing *Grupo Mexicano* to sustain an asset-freezing injunction. *Focus Media* involved a fraudulent conveyance action brought by a bankruptcy trustee to recover funds transferred by the debtor to its former principal; the Ninth Circuit held that a bankruptcy court has the power to preliminarily enjoin the defendant from "'spending, transferring, concealing, dissipating, encumbering, assigning, and/or hypothecating' $20 million in assets." 387 F.3d at 1080.

The Ninth Circuit characterized *Grupo Mexicano's* reference to the law of fraudulent conveyances and bankruptcy, arguably with a bit of artistic license, as "specifically except[ing]" those matters from the rule stated in the court's holding. 387 F.3d at 1084. The Ninth Circuit also observed that *Grupo Mexicano* had suggested that "when equitable claims are at issue, as opposed to solely legal damage claims, the rule barring issuance of a preliminary injunction freezing assets is inapplicable as well." *Id.* Additionally, the *Focus Media* court, finding support in decisions from other circuits, concluded that the *Grupo Mexicano* ban on asset freezes did not apply when the plaintiff asserted a "cognizable claim to specific assets of the defendant" or sought an "[equitable] remedy involving those assets" if there was a "nexus between the assets sought to be frozen…and the ultimate relief requested…." 387 F.3d 1085, quoting *Oncology Associates*, 198 F.3d at 496.



Peter Benvenutti

Noting that the plaintiff trustee had pleaded causes of action for fraudulent conveyance and constructive trust, and had sought damages for the fraudulent conveyance, turnover, imposition of a constructive trust, and a permanent injunction freezing assets, the Ninth Circuit held that *Grupo Mexicano's* ban on asset freezing injunctions was categorically inapplicable to "an adversary bankruptcy proceeding alleg[ing] fraudulent conveyance or other equitable causes of action…." 387 F.3d at 1085.

Focus Media is the only reported decision holding that asset-freezing injunctions are permitted in any fraudulent conveyance case asserted in a bankruptcy context. That is now the law in the Ninth Circuit, but it remains to be seen whether other courts will join the Ninth Circuit in finding such a categorical exception to *Grupo Mexicano's* ban on asset-freezing injunctions.

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ic statement must be "repeated *verbatim* in the separate statement of material facts." Easy as this seems, I find that the notice of motion is often overlooked or the separate statement fails to repeat the cause of action exactly as set forth in the notice.

Attorneys make another common mistake when they file a separate statement that fails to categorize undisputed material facts ("UMF") by issue. Many times I receive a separate statement that lists all of the UMFs in a single list without identifying how they relate to each of the individual issues argued in the memorandum of points and authorities. Although this alone is not fatal to the motion, once the judge finds that a single UMF is in dispute, the entire motion may be lost, even if that particular fact is not material to the cause of action or issue presented. In fact, my practice is to take the attorney at his or her word that all of those facts are material to each and every argument, and upon finding that a single UMF is disputed, to deny the entire motion.

Equally important is to make sure that all evidence is submitted in admissible form. A request for judicial notice must be presented in a separate document. *See* Cal. Rule of Court 313(k), 342(c)(5). Evidence must be properly authenticated. Personal knowledge is required to lay a proper foundation for admission of evidence. Be aware that attorney declarations may fail for lack of personal knowledge.

A corollary to the requirement to submit admissible evidence is that evidentiary objections not made at the time of hearing are waived. It is preferable to submit written objections prior to the hearing, although the Rules allow those objections to be posed orally at the time of hearing. Summary judgment motions can be won or lost based upon these rulings. That being said, I recommend that you think carefully about these objections. Objections based on relevance are not usually effective and can distract the judge from reviewing your key objections. Objections that will, if successful, bar the introduction of portions of your opponent's case can be powerful. California Rules of Court 343 and 345 set forth the technical requirements for written objections.

What Do Judges Want?

As with all communications, assessing your audience is the key to your success. Remember, your motion is not the only matter on the judge's docket that day. First and foremost, judges want to know right away what relief you are requesting and why your client deserves it. In summary judgment or adjudication motions there are a few things that make a difference.

Generally, attorneys include too many UMFs in support of their motion. It is highly unlikely that a case dependent on proving 200 or 300 UMFs will survive the process so that a judge can determine that as a matter of law those facts are all without dispute. I recommend that you review the jury instructions associated with each cause of action you intend to attack in your motion. The jury instructions offer a straightforward and uncomplicated list of the elements of each cause of action and can greatly assist you in identifying the essential facts that will be necessary to support your motion.

Make sure that your motion truly deserves consideration for summary adjudication. Judges often fear that motions are submitted as an additional discovery tool. If you submit a motion that is too diffuse, the judge may doubt the viability of many of your assertions. Focus your argument on the strongest claims and think about taking a pass on the weaker arguments. Sometimes less is more.

If your opponent raises an issue not included in the complaint, answer or cross-complaint, make sure that you identify that issue for the court. Parties sometimes forget that the case is governed by the pleadings and often neither side recognizes that the case has morphed into something not reflected in the complaint. I always read the complaint before I review the summary judgment motion. All too often when the parties appear in court, I am the only one who knows what the complaint says. It is a good idea to bring a copy of the complaint to the hearing.

Attorneys can also do a number of little things to make their papers more accessible to judges. Remember, you have submitted a mountain of paper to the court, as has your opponent. Especially in master calendar courts, the judge may not have seen your case prior to this motion. I look for a concise statement of the facts and law that supports the motion. When you refer to evidence in your memorandum of points and authorities, identify the UMF where that evidence can be found. This will ensure that all of the evidence upon which you are relying is set forth in your separate statement, and will ease the judge's ability to find and evaluate that evidence.

Highlighting in yellow marker those portions of deposition transcripts or sections of contracts and other documents referenced in the UMFs saves the judge considerable time. *See* Cal. Rule of Court 316(c). I encourage attorneys to highlight portions of cases that are relevant to their argument. Make sure that all exhibits have tabs to separate them and never use side tabs. See Cal. Rule of Court 311(e). (In San Mateo, our clerk's office will physically chop off side tabs so that the document fits in the file thus rendering your exhibits virtually unusable.) Provide any federal or out-of-state authority in an appendix for the court. *See* Cal. Rule of Court 313(h). Finally, refrain from using footnotes for substantive arguments and make sure that you comply with page limits.

Conclusion

Summary judgment or adjudication can be an invaluable tool in winning your case. Persuading the judge that the case does not deserve a trial on the merits can be a daunting task. Attorneys should begin the process of preparing for summary judgment or adjudication at the time that the discovery strategy is developed. Motions that are focused and lean will have the best chance for success.

The Hon. Beth L. Freeman is a judge on the Superior Court for the County of San Mateo, and is also a member of the Board of Governors of the Northern California chapter of ABTL.

WALTER STELLA

On EMPLOYMENT

Not too long ago, retaliation claims were relegated to the role of "add-on claims" in employment suits. They were an important part of the drama to be sure, but not the star attraction. However, in recent years, retaliation claims have increasingly been brought on their own and have become the suits du jour in employment litigation. According to the Equal Employment Opportunity Commission ("EEOC"), retaliation cases have increased 100% in the past ten years. This new popularity has prompted disagreements among courts regarding the appropriate standards to be applied in retaliation cases.

The most basic disagreement among courts is over what employer conduct should constitute an adverse action sufficient to form the basis for a retaliation claim. Both the California and United States Supreme Courts have now considered this question and have arrived at different answers.

Retaliation claims are essentially comprised of three elements: (1) protected activity by the employee; (2) an adverse employment action by the employer; and (3) a nexus between the two. Last year, in *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028 (2005), the California Supreme Court held that, to be actionable under the California Fair Employment and Housing Act ("FEHA"), an adverse employment action must *materially* affect the terms, conditions, or privileges of employment.

In reaching this conclusion, the Court interpreted the anti-retaliation provision of FEHA to encompass the unlawful employment practices prohibited by FEHA's anti-discrimination provision, and therefore to provide the same protections. Cal. Gov't Code §§ 12940(a) and (h). Thus, an adverse action is not limited to so-called "ultimate employment actions" such as terminations or demotions. It covers the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career. However, minor or trivial adverse actions or conduct do not qualify as adverse actions under California law.

In arriving at this decision, the California Supreme Court declined to follow federal precedent in the Ninth Circuit. In *Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000), the Ninth Circuit held that an adverse employment action was any action that reasonably would *deter* an employee from engaging in protected activity. The *Henderson* court adopted the definition of adverse employment action contained in the EEOC Compliance Manual: "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity."

The "deterrence" standard adopted by the *Henderson* court was the minority view among federal appeals courts. The majority followed the "materiality" test adopted by the California Supreme Court. Two Circuits (the Fifth and the Eighth) had taken the position that only "ultimate employment decisions," such as terminations and demotions, can constitute adverse employment actions. The Seventh and D.C. Circuits opted for the following objective standard: the employer's challenged action is material to a reasonable employee such that it is likely to dissuade a reasonable worker from making or supporting a charge of discrimination. On June 22, the Supreme Court resolved the split among the federal circuits by adopting the Seventh and D.C. Circuits' test. *Burlington Northern Santa Fe Railroad Company v. White*, 74 U.S.L.W. 4423 (2006).

Walter Stella

The plaintiff in *Burlington Northern* was a forklift operator for the railroad who complained about harassment by her supervisor shortly after she was hired. The supervisor was disciplined for his conduct, but the plaintiff was transferred to a more physically demanding job. The plaintiff filed a charge of discrimination and retaliation with the EEOC. Three days later, the plaintiff was suspended without pay for insubordination. Following a union grievance, the plaintiff was reinstated with full pay. At trial, the jury found for the plaintiff on her claim for retaliation.

The verdict was upheld on appeal by the Sixth Circuit sitting *en banc*. *Burlington Northern Santa Fe Railroad Company v. White*, 364 F.3d 789 (6th Cir. 2004). A few of the judges advocated that the Ninth Circuit "deterrence" test be adopted, but the Sixth Circuit adopted the "materiality test" followed by the majority of other circuits and the California Supreme Court in *Yanowitz*. The Sixth Circuit found that the plaintiff had met her burden of establishing an adverse employment action under either test. While affirming the Sixth Circuit's decision to uphold the jury's award, the Supreme Court rejected its reasoning. The Supreme Court held that the anti-retaliation provisions of Title VII were not confined to actions that serve as the basis of a discrimination claim.

Despite the similarity in the anti-retaliation provisions of Title VII and FEHA, California employers will face application of different state and federal standards. That is nothing new for California employers. What is new, however, is for federal law — instead of California law — to provide the greater protection to employees.

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Letter from the Editor

Five years ago, Ben Riley and Tim Nardell took over as co-editors of the *ABTL Northern California Report*. With Ben becoming president of the Northern California ABTL next year, and Tim starting out in his own solo practice in Marin County, they have decided to let someone else give it a try. So starting with this issue, Howard Ullman of Orrick and I start in our new roles as co-editors. It's no easy task. Ben and Tim, like Chip Rice before them, set a high bar for producing a timely, informative publication that people find useful in their practice. On behalf of the Board of the Northern California Chapter of ABTL and all of its members, our great thanks to Ben and Tim for a job very well done!

Thomas Mayhew

Given Ben and Tim's success, our new vision is more of the same. The *Report* is known for articles that provide not just legal analysis but also practical advice on how to deal with the types of issues that lawyers and judges encounter in trial and appellate level business litigation in the state and federal courts of California. And the nine columnists — Peter Benvenutti on Creditor's Rights, Mary McCutcheon on Insurance, Trent Norris on Environmental Law, Chip Rice on Litigation Skills, Michael Sobol on Class Actions, Walter Stella on Employment, Howard Ullman on Antitrust, Kate Wheble on Trademarks, and James Yoon on Patents — share specialists' insights into areas that many business litigators encounter in some of the most active and important areas of law in which we litigate.

The *Report* is widely read. It is distributed to the Superior Court judges of thirteen local counties, the U.S. district judges for the Northern and Eastern District, the judges of the Ninth Circuit Court of Appeals, and yes, even the nine Justices of the United States Supreme Court. Copies go to law libraries around the state and the Library of Congress, to the entire membership of the Northern California and San Joaquin Valley branches of ABTL (nearly 2,000 members), and to a few hundred general counsels from many of the Bay Area's largest companies. Prospective authors will have an impressive readership for their words of wisdom!

This is where you come in. We publish three times a year, and so we are always looking for new articles addressing the issues that trial lawyers and judges face in high-stakes business disputes. As editors we will be unremitting in our criticism of your poorly constructed sentences and inchoate thoughts. But by the time of publication, your article will be truly impressive indeed, and strangers will stop you in the street to sing your praises to passers-by. Please give me or Howard a call any time to discuss ideas or leads for an article by you, one of your associates or partners, a judge, or a litigation consultant. With your help we will keep up Ben and Tim's excellent tradition for the *ABTL Northern California Report*.

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Back Issues Available on Website!

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