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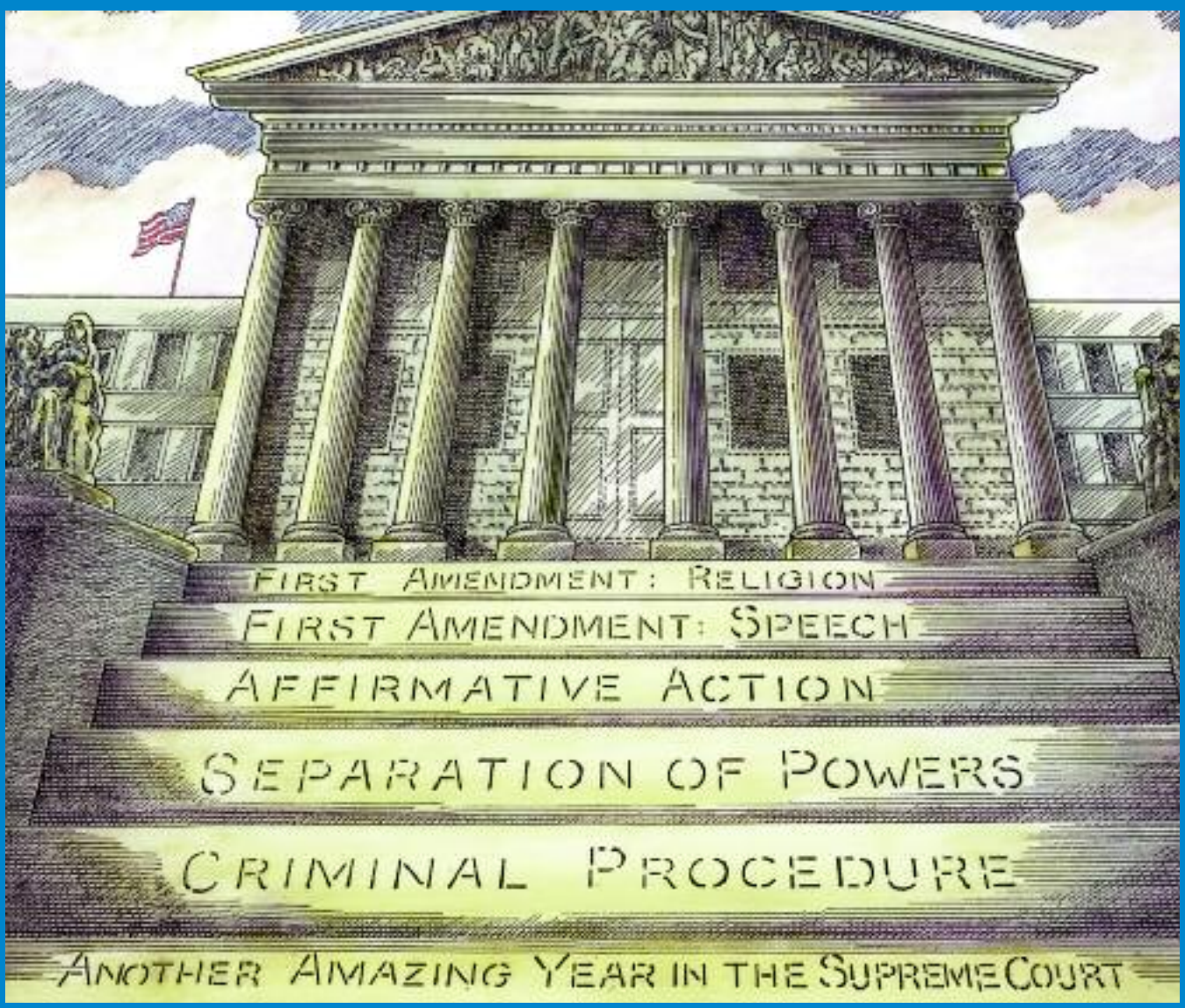
California Litigation

THE JOURNAL OF THE LITIGATION SECTION, STATE BAR OF CALIFORNIA



From the Section Chair

By Robert M. Bodzin

Robert M. Bodzin

It is an exciting time to be a member of the Litigation Section and I am honored to be your new Chair. In 2014, our Executive Committee will be working diligently to maintain and exceed the high caliber of resources and benefits provided to our membership. The commitment to excellence in our profession is exemplified by our publications which include the following:

• California Litigation Update: A monthly electronic newsletter which provides timely reports of cases of interest. Former Section Chair Mark Mellor and Justice Eileen Moore edit this publication.

• California Litigation: The journal you are now reading, which is mailed three times a year to Section members and contains informative articles on a variety of themes of interest and litigators. California Litigation is published under supervision of the California Litigation Editorial Board.

• California Litigation Review: This annual print publication provides analysis of new and important civil litigation cases.

In addition to publications, the Litigation Section has consistently provided low-cost and high-quality live MCLE programs. Immediate Past Chair/Executive Committee Member Lisa Cappelluti founded and has co-chaired the "Coaching the New Practitioner" program, which provides law students and new attorneys with mentoring advice and an opportunity to interact with prominent judges from both Northern and Southern California. Our section will be bringing back the "Best Practices for Litigation and Trial" full-day MCLE program, which is expected to provide five separate panels devoted to sharpening litigation skills from the beginning to the end of a civil case. As a Co-Chair and Panelist at this program since 2007, I am very excited that our Section is continuing this program this fall in San Francisco.

In thinking about both the "Best Practices" and "Coaching" programs, I am reminded of a common theme between these sessions, which is the importance of adhering to high ethical standards in our profession. In past "Best Practices" programs we were fortunate to feature an ABOTA Ethics panel which emphasized why our members must conduct themselves with the highest level of integrity. Last year our Executive Committee had the privilege of having Immediate Former State Bar President Pat Kelly as the Keynote Speaker at one or our meetings. His passion for ethics and civility in the profession lead him to propose Rule of Court 9.4, which would add the bolded language below to the new attorney oath:

• "I solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of California, and that I will faithfully discharge the duties of an attorney and counselor at law to the best of my knowledge and ability. **As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity.**"

As this new rule was approved by the Board of Trustees at the State Bar Annual Meeting, it is my understanding that the California Supreme Court must also provide approval and that the State Bar is in the process of filing a petition to do so.

I fully support this amendment and believe that these additional *twenty words* matter significantly and will allow our Section to expand our platform in striving for excellence in the profession. It is my hope that once passed, our Section will address the amendment in our publications and live programs.

With regard to the Litigation Section's commitment to advancing high

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California Litigation

California Litigation is pleased to review original articles submitted for publication. Articles should be 1,000-2,000 words. Please submit proposed articles – and Letters to the Editor – to Benjamin G. Shatz, at Bshatz@Manatt.com.

To subscribe:

California Litigation is mailed free to all members of the Litigation Section of the State Bar of California. To join the Litigation Section, send your name, address, telephone number, and State Bar membership number to Litigation Section, State Bar of California, 180 Howard Street, San Francisco, CA 94105-1639. Section dues are $75 per year and should be enclosed with the enrollment information.

Hypotheticals on Litigational Plagiarism:

(See pages 9 - 18 for the plagiarism debate)

We were delighted that Elliot Bien took the time and effort to draft *Officers of a Court Do Not Plagiarize* — embodying the great American notion that "there oughtta be a law" — to propose an amendment to California's Rules of Professional Conduct to expressly "bar any plagiarism in any submission to a court." We also welcome a vibrant academic debate when it comes our way, though we never expected it would come from *Beg, Borrow, Steal*, which was descriptive, not prescriptive, and offered nothing (we thought) controversial. To say that the article was an "argument" at all, let alone one that condoned plagiarism, strikes us as a misreading. Even so, the question of "plagiarism" in litigation raises many interesting issues.

To help sort through the gray area, we're asking for your help! Readers — lawyers and judges alike — what do you think? What have been your experiences with plagiarism? Is this a question of good versus poor practices or a question of good and evil? To help rev your gray cells, consider the scenarios below — or craft your own and drop us a line.

1. A brief contains simple boilerplate language, like a standard of review recitation, that is copied verbatim from a Court of Appeal opinion or a treatise (e.g., "Summary judgment is reviewed de novo. *Smith v. Jones* (2009) 123 Cal.App.4th 456, 459.") Must the opinion or treatise be cited?

2. Partner A is talking about a case he's working on with Partner B, and Partner B comes up with an interesting legal argument. Partner A uses that idea in a brief signed only by himself and makes no mention of his partner. Has Partner A "plagiarized" that idea? Should Partner A have given credit for the genesis of the idea? Must he?

3. Client comes up with an interesting idea (factual or legal) that Attorney uses in a brief to pursue Client's case. Must Attorney "give credit" for the idea to Client or risk plagiarism sanctions?

4. Partner tasks Associate with drafting a portion of a brief, which Partner inserts into the brief. Is it plagiarism to file the brief without naming Associate? What if Associate is no longer at the firm?

5. What about ghostwriting? If Lawyer 1 hires Lawyer 2 to draft a brief, must he or she disclose that fact? Does it matter if Lawyer 2 isn't admitted to Lawyer 1's jurisdiction?

6. Attorney A cuts and pastes several paragraphs from a brief she wrote last year to make an argument that applies equally in her case today as in the case last year. Does she need to disclose that she's copied from another brief she wrote? What if the text comes from a brief bank maintained by her firm and was the brilliant product of Attorney B? Must Attorney B be given "credit"?

7. Attorney uses the brief bank database on Westlaw and finds well-drafted arguments that apply directly to his case. Can he use ideas from that brief? Can he copy language from that brief? If so, must he cite to that other brief?

Editor's Foreword

Signing On: Big Shoes to Fill

By Benjamin G. Shatz

Benjamin G. Shatz

Your immediate past Editor-in-Chief, John Derrick, had a pre-law background as a publisher and editor. John was an outstanding Editor-in-Chief, and had he chosen to decree himself Editor-in-Chief-for-Life, the Section leadership no doubt would have responded with a cheer. Alas, one of the best parts of volunteer work is calling it a day and passing the torch. Hence, John's farewell Editor's Foreword in our last issue displayed near giddy delight in relinquishing the administrative reins, allowing the heady joy of freedom to drive his purple prose ever upward in prematurely extolling his successor. (Too bad his column lacks an audio feature, because his encomiums would indubitably sound even more creditable in his impeccable Received Pronunciation, or — for you non-linguistics majors out there — his refined British accent.)

This is not the first time I've followed in John's footsteps — literally. John is addicted to half-marathons, seemingly running one every month or so. I am not a runner. But with his encouragement, I followed him — as best I could — in completing the Santa Barbara half last November. Thus I know I have big shoes to fill, because I have seen his actual shoes racing off into the distance ahead of me.

For fans of John — and to know him is to fall into that category — rest assured that he cannot escape this journal's responsibilities as quickly and as ably as he can run 13.1 miles. He will remain actively involved on the editorial board for as long as I can coax, persuade, and beguile him to do so.

I'm also incredibly humbled to be following in the footsteps of this journal's inaugural EIC, the amazing Mark Herrmann. I do not know Mr. Herrmann, but I feel like I know him, first because we both worked for Ninth Circuit Judge Dorothy W. Nelson (albeit many years apart) and second, because I have been a devoted fan of his oeuvre ever since reading his classic ditty *How to Write: A Memorandum from a Curmudgeon* (1997) 24:1 Litigation 3, upon which he expounded in *The Curmudgeon's Guide to Practicing Law* (ABA 2006). He is a superstar, as prolific and renowned in legal circles as his fellow prosopagnosiac, Brad Pitt, is in Hollywood. (See Herrmann, *Have We Met?* NYT 12/11/2013.) Again, another incredibly tough act to follow.

Indeed, it's an honor to be tracing the steps of the many legal luminaries who have helmed this journal, many of whom (thankfully!) remain on the board. As an Eagle Scout, all I can say is "I will do my best."

In the following pages, we offer a guide to the U.S. Supreme Court's upcoming term from one of America's leading legal scholars, followed by several articles suggesting improvements to our system of litigation. Next, we feature a healthy debate about plagiarism, which we hope will prompt you to share your thoughts. We conclude with some of our more or less regular columns on ADR and wisdom from highly experienced practitioners. I take that back: There's nothing "regular" about any of these articles, they are all outstanding. Enjoy — and provide your feedback or, better yet, submit an article of your own.

Benjamin G. Shatz, the Editor-in-Chief of this journal, is certified by The State Bar of California Board of Legal Specialization as a Specialist in Appellate Law, and co-chairs the Appellate Practice Group of Manatt, Phelps & Phillips, LLP, in Los Angeles. Bshatz@Manatt.com

Another Amazing Year in the Supreme Court

By Dean Erwin Chemerinsky

Dean Erwin Chemerinsky

The docket for October Term 2013 is now set, and once more the United States Supreme Court has an unusually large number of high-profile cases of great potential significance. As always, the most important rulings likely will not come down until the end of June. But expect major rulings with regard to freedom of religion, freedom of speech, affirmative action, separation of powers, and criminal procedure.

— First Amendment: Religion —

A surprisingly large number of cases this year involve First Amendment issues. Some of the most important involve the separation of church and state.

In *Marsh v. Chambers* (1983) 463 U.S. 783, the Supreme Court held that prayers

before legislative sessions do not violate the Establishment Clause of the First Amendment — but the Court stressed that these must be non-sectarian prayers. Since 1999, the Town of Greece, in upstate New York, has begun its monthly town board meeting with a prayer. Except for a few months in 2008, these prayers have always been explicitly Christian in their content. In *Town of Greece v. Galloway* (2d Cir. 2012) 681 F.3d 20, cert. granted (2013) 133 S.Ct. 2388, which was argued in November, the Court will consider whether this violates the First Amendment.

'For almost a half century, the Supreme Court has held that people have the fundamental right to control their reproductive autonomy and this includes the right to purchase and use contraceptives.'

No cases will receive more media attention than the two involving the contraceptive mandate under the Patient Protection and Affordable Care Act: *Sebelius v. Hobby Lobby Stores, Inc.* (10th Cir. 2013) 723 F.3d 1114, *cert. granted* (2013) 134 S.Ct. 678, and *Conestoga Wood Specialties Corp. v. Sebelius* (3d Cir. 2013) 724 F.3d 377, *cert. granted* (2013) 134 S.Ct. 678.

The Patient Protection and Affordable Care Act requires that the Department of Health and Human Services promulgate regulations to ensure that insurers provide coverage for preventative medical care. These regulations mandate that employers include payments for contraceptives in their insurance coverage. There are exceptions for religious institutions, so the Catholic Church would not need to provide this in their insurance coverage. Also, entities affiliated with a religious entity, such as a Catholic university, can opt out of this requirement by completing a two-page form.

Both cases before the Supreme Court involve corporations that are not religiously affiliated in any way. They have challenged the contraceptive mandate and argue that they wish to operate in accord with their religious views and do not wish to provide contraceptive coverage. Their claims are brought under a federal statute, the Religious Freedom Restoration Act, which says that the government can significantly burden religious freedom only if its action is necessary to achieve a compelling government purpose. In *Conestoga Wood Specialties*, there is also the issue of whether the regulations violate the free exercise clause of the First Amendment.

The threshold question in these challenges is whether a corporation that is otherwise secular can claim to have a "religion." For example, one of the cases was brought by Hobby Lobby, a corporation that has over 500

stores in 41 states and employs over 20,000 people.

Moreover, even if corporations can claim to have religious beliefs, there is the question of whether requiring that their insurance include coverage for contraception burdens or violates their rights. Finally, even if corporations could claim free exercise of religion and even if the contraceptive mandate were seen as infringing it, there is the issue of whether the law is constitutional because it advances a fundamental constitutional right. For almost a half century, the Supreme Court has held that people have the fundamental right to control their reproductive autonomy and this includes the right to purchase and use contraceptives.

— First Amendment: Speech —

Several cases raise important issues concerning freedom of speech. Since *Buckley v. Valeo* (1976) 424 U.S. 1, the Court has generally held that restrictions on campaign contributions are constitutional, while restrictions on independent expenditures are unconstitutional. In other words, the government can limit the amount that a person can give to a candidate or committee for a candidate (contribution limits), but the government cannot limit what a person spends on his or her own such as in taking out ads to endorse someone (expenditure limits). For example, in *Citizens United v. Federal Election Commission* (2010) 558 U.S. 310, the Court declared unconstitutional restrictions on independent expenditures by corporations in federal elections.

In *McCutcheon v. Federal Election Commission* (D.D.C. 2012) 893 F.Supp.2d 133, *cert. granted* (2013) 133 S.Ct. 1242, which was argued in October 2013, the Court will consider a constitutional challenge to *contribution* limits. The Bipartisan Campaign Finance Reform Act imposes an aggregate limit on campaign contributions: An individual contributor cannot give more than $46,200 to candidates or their authorized agents or more than $70,800 to anyone else during each two year election cycle. Within the $70,800 limit, a person cannot contribute more than $30,800 per calendar year to a national party committee. The Court will decide whether these limits violate the First Amendment, and in doing so may reconsider the distinction between contributions and expenditures that has been at the heart of the Court's approach to campaign finance regulation since 1976.

In *United States v. Apel* (9th Cir. 2012) 676 F.3d 1202, *cert. granted* (2013) 133 S.Ct. 2767, which I argued in December 2013, the Supreme Court will consider whether a federal law, 18 U.S.C. section 1382, allowing commanders of military bases to bar individuals from access can be applied to a public street outside the military base which is federal land, but over which an easement for public use has been granted. If the statute does apply, the question is whether this restriction of speech on a public road violates the First Amendment.

Finally, in *Hill v. Colorado* (2000) 530 U.S. 703, the Court upheld a Colorado law that prohibits approaching without consent within eight feet of a person, who is within 100 feet of a health care facility, for purposes of oral protest, education, or counseling. In *McCullen v. Coakley* (1st Cir. 2013) 708 F.3d 1, *cert. granted* (2013) 133 S.Ct. 2857, the Court of Appeals upheld a Massachusetts law that makes it a crime for speakers other than clinic "employees or agents…acting within the scope of their employment" to "enter or remain on a public way or sidewalk" within 35 feet of an entrance, exit, or driveway of a "reproductive health care facility." The issue before the Supreme Court is whether this law is unconstitutional under *Hill* and, if so, whether *Hill* should be overruled.

— Affirmative Action —

In 1996, California voters passed Proposition 209, which prohibits the government from discriminating or giving preference based on race or gender in contracting, education, or employment. In 2006, Michigan voters passed a similar initiative, Proposal 2.

'Over the last few years, the Supreme Court has decided an exceptionally large number of high-profile cases of great importance.... Once more, this year the Supreme Court has a docket filled with cases that could make a significant difference in the law and in all of our lives.'

The United States Court of Appeals for the Sixth Circuit, in an en banc decision, declared Proposal 2 unconstitutional in *Schuette v. Coalition to Defend Affirmative Action* (6th Cir. 2012) 701 F.3d 466 (en banc), *cert. granted* (2013) 133 S.Ct. 1633. The Sixth Circuit held that Proposal 2 violated equal protection because it impermissibly restructured the political process along racial lines. Any group can seek beneficial treatment from the Regents of the University of Michigan in the admissions process, except for racial minorities who could receive preference only by amending the state constitution. The Sixth Circuit said that Proposal 2 is a racial classification and that it failed strict scrutiny. Thus, the issue in *Schuette* is not whether an affirmative action program is constitutional, but whether a state can prohibit affirmative action in its state constitution.

The case, which was argued in October 2013, could have enormous importance for California. If Michigan's Proposal 2 is unconstitutional, then Proposition 209 undoubtedly will be as well.

— Separation of Powers —

In one of the most high profile cases of the term, *NLRB v. Noel Canning* (D.C. Cir. 2012) 705 F.3d 490, *cert. granted* (2013) 133 S.Ct. 2861, the Court will consider the ability of the President to make recess appointments. From December 17, 2011 until January 3, 2012, the Senate went into recess, but continued to meet in pro forma sessions every three days. To ensure that the National Labor Relations Board would have a quorum, President Obama made three recess appointments to the Board.

The United States Court of Appeals for the District of Columbia Circuit declared these appointments unconstitutional, hold-

ing that the President can only make recess appointments for intersession recesses and only for vacancies that occur during those recesses. In addition to reviewing this ruling, the Supreme Court has asked for briefing and argument over what constitutes a "recess."

The case was argued in January 2014 and raises novel questions of separation of powers. Its importance has been somewhat diminished by the Senate's elimination of the filibuster for appointments to executive agencies and lower federal courts. Without the filibuster, it is less likely that there will be a need for recess appointments, at least when the President and the Senate are of the same political party. But when the President and the Senate are from different political parties, the Senate's refusal to confirm presidential nominees would make the question of recess appointments of continued importance.

— Criminal Procedure —

There are two Fourth Amendment cases on the docket. In *Fernandez v. California* (2012) 208 Cal.App.4th 100, *cert. granted* (2013) 133 S.Ct. 2388, the Court will consider the issue of consent to searches. In *Georgia v. Randolph* (2006) 547 U.S. 103, the Court said that if one co-tenant of a resident refuses consent, but the other grants it, there is not authority for the search.

But what if after this occurs, the police come back when only the consenting co-tenant is present? In fact, in *Fernandez*, the police arrested the person who refused consent and then received consent from the other co-tenant. Is this enough to overcome *Georgia v. Randolph* and allow the search?

In *Navarette v. California* (Oct. 12, 2012, A132353 [nonpub. opn.]), *cert. granted* (Oct. 1, 2013) 134 S.Ct. 50, the Court will consider whether the Fourth Amendment requires an officer who receives an anonymous tip regarding a drunken or reckless driver to corroborate dangerous driving before stopping the vehicle. It is the first time that the Supreme Court has considered the role of anonymous tips in the context of stops for suspicion of driving while intoxicated.

Finally, in *Hall v. Florida* (Fla. 2012) 109 So.3d 704, *cert. granted* (Oct. 21, 2013) 134 S.Ct. 471, the Court will consider how a state should determine whether a criminal defendant is mentally retarded for purposes of capital punishment. In *Atkins v. Virginia* (2002) 536 U.S. 304, the Supreme Court ruled that it is cruel and unusual punishment to impose the death penalty on a mentally retarded individual. But the Court did not define "mentally retarded" or identify the process to be used in evaluating this.

Under Florida law, a person is deemed mentally retarded if he or she has an I.Q. of 70 or lower. Hall's I.Q. is 71. He was convicted for a murder that occurred in 1979. He has been in prison and on death row for over 35 years. The issue is whether imposing the death penalty would violate the Eighth Amendment.

Over the last few years, the Supreme Court has decided an exceptionally large number of high-profile cases of great importance. In June 2012, the Court struck down key provisions of Arizona's restrictive immigration law, SB 1070, and largely upheld the Patient Protection and Affordable Care Act. In June 2013, the Court declared unconstitutional Section 3 of the Defense of Marriage Act and a key provision of the Voting Rights Act of 1965.

Once more, this year the Supreme Court has a docket filled with cases that could make a significant difference in the law and in all of our lives. It is an amazing time in the Supreme Court.

Erwin Chemerinsky is Dean and Distinguished Professor of Law and the Raymond Pryke Professor of First Amendment Law at the University of California, Irvine School of Law.

Officers of a Court Do Not Plagiarize

By Elliot L. Bien

Elliot L. Bien

To my great surprise, this State Bar journal recently published an argument that plagiarism is generally acceptable in lawyers' submissions to a court. (Shatz & McGrath, *Beg, Borrow, Steal: Plagiarism vs. Copying in Legal Writing* (Winter 2013) 26:3 Cal.Litig. 14.) The authors reason that "a litigator's job is to prevail.... Pleadings and legal briefs serve practical, not academic or artistic, purposes." (*Id.* at p. 14.) "Plagiarism is rightfully a mortal sin in academic settings, where original expression is paramount. Litigation is different, with far more room for borrowing ideas and writings." (*Id.* at p. 18.)

I respectfully disagree. Unauthorized "borrowing" is no more tolerable for officers of a court than scholars or artists. However "practical" our adversarial system may be, maintaining strict integrity is critical to the rule of law and the larger purposes it serves.

The essence of plagiarism is falsehood — "the deliberate and knowing presentation of another person's original ideas or creative expressions as one's own." (Black's Law Dict. (9th ed. 2009) p. 1267.) To condone this or any other form of dishonest advocacy would spread that disease, undermining the administration of justice and diminishing public respect for it. These consequences are just as harmful to society as the effects of plagiarism in scholarship or art.

A California Court of Appeal recently wrote that "[t]he term 'officer of the court,' with all the assumptions of honor and integrity that append to it, must not be allowed to lose its significance." (*Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 292.) True, some incidents of plagiarism are worse than others, and some kinds of dishonest advocacy may be worse than plagiarism. But as *Kim* aptly stated: "the distinction between little lies and big ones is difficult to delineate and dangerous to draw." (*Id.* at p. 293.)

Unfortunately, plagiarism by lawyers is evidently pervasive despite rules of professional conduct that implicitly prohibit it. Those rules should now prohibit it expressly. Given the facts brought to light by *Beg, Borrow, Steal*, California stands in need of a bright-line rule barring any plagiarism at all — whether "little lies" or "big ones" (*Kim*) — in any submission to a court.

— The Problem is a Serious One —

Regrettably, plagiarism appears widespread among litigators. *Beg, Borrow, Steal* reports that it "happens in courtrooms on a daily basis. Using language from various sources — published and unpublished court opinions, treatises, articles, even blogs — is widespread in legal writing...." (*Id.* at 15.) Other authors agree. "Plagiarism as a potential pitfall does not burn brightly on the ethical radar screens of litigating lawyers. They are likely to view plagiarism as a species of offense peculiar to academia and the publishing world, not litigation filings." (Joy & McMunigal, *The Problems of Plagiarism as an Ethics Offense* (Summer 2011) 26 ABA Criminal Justice No. 2, at 1.) Another writes: "lawyers plagiarize in pleadings and briefs.... Outside of litigation, they plagiarize when writing articles, books, and CLE materials." (Richmond, *Professional Responsibilities of Law Firm Associates* (2007) 45 Brand. L.J. 199, 240-241.)

Also worrisome is the larger context of so much plagiarism by lawyers. It reflects a much broader decline in the values long associated with service as officer of a court. For example, a widespread perception of that decline has generated voluntary codes of civility and professionalism throughout California and elsewhere. (See Bien, *Toward a Community of Professionalism* (2001) 3 J. App. Prac. & Proc. 475.) But voluntary codes are not enough. The broad decline of ethical standards makes it all the more important to combat plagiarism through our enforceable codes of conduct.

Finally, our law schools appear in disarray on the matter. There were 14 cases of plagiarism at one unnamed law school in 1996 alone. (LeClercq, *Failure To Teach: Due Process and Law School Plagiarism* (1999) 49 J. Legal Educ. 236.) This prompted law professors at the University of Puget Sound to survey 177 schools, generating 152 responses. The result? "Our survey revealed an alarming institutional indifference to plagiarism and a disgraceful disparity in law schools' definitions of and punishments for plagiarism." (*Id.* at pp. 236-237.)

In short, anyone concerned about plagiarism in litigation has much to be concerned about, and California authorities are providing too little deterrence.

__ California is Not a __ Safe Harbor for Plagiarists

Beg, Borrow, Steal is surprisingly silent about California authorities. And this is regrettable, because the article's focus on out-of-state cases condemning plagiarism may lead readers to believe California courts and other authorities are more hospitable to it. They are not.

To begin with, courts in California have condemned plagiarism in advocacy as unequivocally as courts elsewhere. A preliminary search turned up three examples:

- In 2009, a United States District Court declared it was "contemptible" that counsel had "stolen" a passage from an unpublished district court opinion for use in an opposition brief. (*Marques v. Mortgageit, Inc*. (C.D. Cal. 2009) 2009 WL 4980269, pp. *4-*5.) *Marques* called out this single paragraph of plagiarism as "intellectual dishonesty." (*Id*. at p. *5.)
- In 2004, the Third District Court of Appeal published an opinion sanctioning counsel for plagiarism and other flaws in habeas corpus petitions. (*In re White* (2004) 121 Cal.App.4th 1453.) Indeed, the court specified that it found the plagiarism in one petition "more troubling" than its reliance on rejected authority. (*Id*. at p. 1484.) Counsel "for the most part…simply plagiarized [an] argument from [someone else's] prior unsuccessful opening brief on appeal, changing the green cover used for an appellant's opening brief to the red cover used for a writ petition." (*Ibid*.)
- Finally, our Supreme Court recently rejected a Bar applicant — a serial fabricator as a journalist — because "[h]onesty is absolutely fundamental in the practice of law; without it, the profession is worse than valueless in the place it holds in the administration of justice.…" (*In re Glass* (Jan. 27, 2014) __ Cal.4th __ [2014 WL 280612, at *17]; cit. and internal quots. omitted.) The Court also appeared incredulous at a defense offered by one of his character witnesses, a journalism professor, that "[t]he most brilliant students plagiarize." (Quoted *id*. at p. *11.) *Glass* strongly suggests that plagiarism by lawyers, at least, is intolerable.

> *'…the Black's Law Dictionary definition — knowingly passing off another's work as your own — "is not particularly helpful for determining what constitutes plagiarism for practicing lawyers." I respectfully disagree…'*

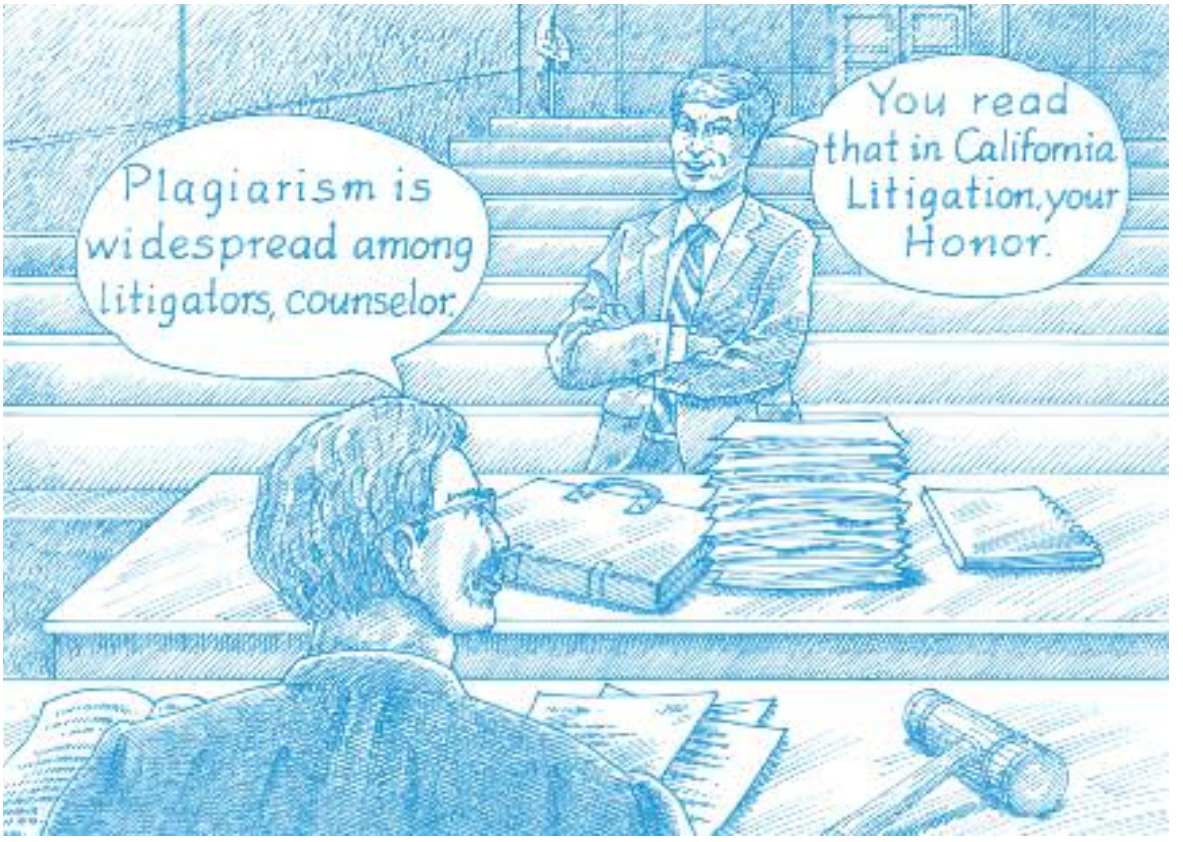
As stated at the outset, however, judicial decisions are not the only official condemnation of plagiarism in California. Our official definition of "good moral character" features "honesty,…candor, trustworthiness,…and

respect for…the judicial process." (State Bar Rule 4.40(B).) Similarly, Rule 5-200(a) of our Rules of Professional Conduct requires litigators to "employ…such means only as are consistent with truth." Both provisions encompass plagiarism.

Finally, the Board of Trustees of our own State Bar appears to be opposed to plagiarism. In July 2007, it adopted "California Attorney Guidelines of Civility and Professionalism" with an introduction emphasizing the duty of honesty with courts: "[a]s officers of the court with responsibilities to the administration of justice, attorneys have an obligation to be professional with…the courts.... This obligation includes…professional integrity…[and] candor…[which are] essential to the fair administration of justice and conflict resolution." A section on "Communications" also states that "[a]n attorney should not engage in conduct that is unbecoming a member of the Bar and an officer of the court."

California Needs a Bright-Line Rule Barring Plagiarism

Although our rules of professional conduct bar plagiarism implicitly, they should be amended or supplemented to do so expressly. The seriousness of the problem demands it, and *Beg, Borrow, Steal* claims there is uncertainty today about the very definition of plagiarism as applied to litigators. The authors say the Black's Law Dictionary definition — knowingly passing off another's work as your own — "is not particularly helpful for determining what constitutes plagiarism for practicing lawyers." (*Id.* at p. 15.) I respectfully disagree; there is nothing ambiguous about the Black's definition. Nonetheless, the claim of uncertainty in *Beg, Borrow, Steal* cries out



for a prompt and authoritative response. California needs a bright-line rule of professional conduct barring any plagiarism in papers submitted to a court.

The new rule should certainly reject several exceptions supported or openly advocated in *Beg, Borrow, Steal*:

First, the authors suggest plagiarism is wrong only if it involves "large amounts of material." (*Id*. at p. 17.) But the problem with a de minimis exception was aptly summarized by *Kim, supra*, 201 Cal.App.4th 267, 293: "the distinction between little lies and big ones is difficult to delineate and dangerous to draw." The standard itself must be unequivocal. The punishment can be tailored to the specific offense and any mitigating or aggravating circumstances.

Second, *Beg, Borrow, Steal* contends plagiarism is permissible in legal briefs produced collaboratively, on the premise that there is no representation of originality in such work. But the entire collaboration team is plagiarizing — misrepresenting the *group's* originality — if it appropriates the work of someone outside the team without attribution. There is utterly no justification to exempt collaborating authors from any duty to a court that is applicable to a single author.

Third, *Beg, Borrow, Steal* deems it permissible to plagiarize from "form books" and the like (*id*. at p. 16) because "such practices are expected and encouraged by the legal profession as efficient and effective lawyering." (*Ibid*.) I oppose that exception, too, because the need for integrity in litigation far outweighs the slight inconvenience of dropping a footnote of attribution. In addition, this simple footnote will avoid any temptation to imply original authorship to the client.

Fourth, *Beg, Borrow, Steal* suggests plagiarism is more defensible in a brief if the material copied is actually helpful to the client's cause. Thus, the authors advise litigators to "always make sure any copied material is relevant and applicable to the facts and circumstances of the case at issue."(*Id*. at p. 17.) But relevancy and honesty in a brief are entirely different subjects, and plagiarism is wrong no matter how cogently it is used.

Fifth, *Beg, Borrow, Steal* suggests it is more blameworthy to plagiarize "citable sources from outside the litigation context, such as law review articles and Web sites, versus the copying of litigation-related materials (such as briefing from another case)." (*Id*. at p. 17.) But I can perceive no principled difference. The problem at hand is passing off *anyone* else's work as your own.

Finally, *Beg, Borrow, Steal* contends it is permissible to plagiarize from unpublished opinions. "Even the sternest regulators of litigation plagiarism surely could not punish a lawyer who lifted from an unpublished opinion, but failed to provide proper attribution. Yet it would seem absurd for a lawyer to ignore such material, simply on the basis that it could not be cited." (*Id*. at p. 18.) There is no duty, however, to "ignore" unpublished opinions. It is perfectly legitimate to read them, learn from their reasoning, and check out the authorities they cite. But that is a far cry from passing off their language as the brief-writer's own.

Beg, Borrow, Steal does warn litigators that some judges might be "perturbed" or "take offense" at plagiarism. (*Id*. at pp. 17-18.) And for that reason alone, the authors conclude by advising litigators to watch their step: "[b]e forthright; give the cite." (*Id*. at p. 18.) But the authors never advocate that policy on the merits. On the contrary, the thrust of their article is that most plagiarism by litigators is acceptable because litigation is all about winning and efficiency.

California's bench and bar leaders should respond vigorously to that notion by amending the rules of professional conduct. The new rule should unequivocally bar any plagiarism in any submission to a court.

Elliot L. Bien, a State Bar certified appellate specialist based in San Rafael, is a past president of the California Academy of Appellate Lawyers. He has written and spoken frequently on appellate practice and legal ethics.

Plagiarism:
Naughty, Knotty

By Benjamin G. Shatz

Officers of a Court erects as its foil the assertion that *Beg, Borrow, Steal* was itself an "argument" that plagiarism is "generally acceptable." This launching pad is a straw man. *Beg, Borrow, Steal* presented no "arguments" and most certainly did not in any way advocate, let alone, condone plagiarism. Rather, the article — like similar ethics columns in this series — noted an issue and described how various courts have reacted to it in recent decisions. It discussed various common activities that toe (or arguably cross) the plagiarism line, noting whether they drew sanctions or not. The article made no real normative analysis (i.e., was it right or wrong for sanctions to have been imposed?) nor did it attempt to exhaustively explore the wider issue under California law or otherwise. (Not that there's much to report; *Officers of a Court* offers scant citations that do little to further the analysis.)

Had our article provided advice of a questionably ethical nature, we would have expected significant and strenuous outrage. As it was, Mr. Bien's was the only critical feedback we received. We suspect most readers understood that we never said "plagiarism is ok." To the contrary, our only hortatory admonition was that authors should — of course! — provide crediting citations to sources. Our article proposed no solutions and took no positions, other than to expressly deride plagiarism as "poor practice" and urge practitioners to be careful about it.

To use Mr. Bien's own phrasing, we "respectfully disagree" with his characterization of our article, which we believe he has misread, confusing positions taken by various courts and commentators with our own advice, which was sparing (and urged full dis-

closure) to say the least. We, of course, agree with Mr. Bien wholeheartedly that plagiarism is "bad." And we recognize in his article the main premise of our own, which is the current lack of any bright-line rule.

'…nothing in the rules of court say that the lawyers whose names are on a pleading or brief are claiming originality or even authorship to the ideas or language in a brief as their own.'

Those interested in this topic should read Cooper J. Strickland's *The Dark Side of Unattributed Copying and the Ethical Implications of Plagiarism in the Legal Profession*, 90 N.C.L. Rev. 920 (2012). Strickland explains the "reality" that "many forms of unattributed copying by attorneys are necessary and respectable and thus not deserving of the plagiarism label." (*Id.* at p. 922.)

Personally, we have encountered many briefs over the years that are blatant examples of plagiarism — briefs that copy swaths of text and citations from Witkin or other treatises, for example. These briefs have prompted the reaction, "wow, what terrible lawyering." We can all agree that plagiarism should not appear on any lawyer's list of best practices, and Mr. Bien is right to press that point home. But "best practices" versus punishable conduct are extremes with a wide continuum between. The sort of plagiarism that warrants punishment by a court is a different and more nuanced question. Our article attempted to provide some guidance based on recent cases directly on point (none from California). Our goal was an exercise in consciousness-raising, with a little bit of the standard "stick to the highroad" recommendation for prudence. We neither opined pleasure with the current gray state of the law nor did we attempt to propose any change. Our approach was more factual description than aspirational prescription. But we applaud Mr. Bien's vigor and raise a few points for further consideration.

— What's the Definition? —

The starting point for this analysis must be a definition of plagiarism. Mr. Bien argues that the Black's definition — the intentional presentation of another's ideas or expression as one's own — suffices for all contexts, including litigation. We are not so sure. Indeed, on the definitional point, "The reality is that legal practice is full of ethically acceptable forms of unattributed copying that fit neatly within many definitions of plagiarism but which do not warrant such a severe designation." (*Strickland, supra*, at p. 936; see also *id.* at p. 941.)

First, nothing in the rules of court say that the lawyers whose names are on a pleading or brief are claiming originality or even author-

ship to the ideas or language in a brief as their own. The rules require that attorneys' names be on briefs (e.g., Cal. Rules of Court, rule 8.204(b)(10)(D)) to serve the purpose of accountability: A court must know whom to hold responsible if the contents of a filing are false or misleading. Nothing in the rules indicates that names on a pleading or brief are a claim to authorship, as that term is understood in the arts or sciences.

"If a lawyer supports a black letter proposition of law by copying several case citations from a Rutter Guide or Witkin (something that probably happens every day) without citing the treatise, is that plagiarism?"

Indeed, as we noted, it is common for a lawyer's name to appear on a court submission when that lawyer had nothing or little to do with the actual thought and drafting that went into the document's creation. For example, a client-relationship partner may be "on a brief" simply by virtue of the lawyer-client relationship; or a trial lawyer's name may be on an appellate brief by virtue of that lawyer's past participation in the case, regardless of any input to the appellate brief. The actual author's name may or may not appear on the document. A paralegal may draft part of a brief or motion (Bus. & Prof. Code, § 6450, subd. (a)); or a lawyer may write a brief and yet have his or her name omitted for various reasons, with another lawyer's name appearing on the brief instead.

Under Mr. Bien's application, all these would be plagiarism because lawyers are presumably taking "credit" for ideas and expressions they did not personally "create." But as most lawyers, we believe, understand the purpose of a lawyer's name on the brief, those lawyers are merely taking responsibility for the brief, without necessarily claiming authorship. There is, therefore, no intent to deceive as to authorship, because authorship was never claimed to begin with.

Second, courts have expressed displeasure at lawyers who copy their own work, i.e., briefs they have written from other cases, calling that "plagiarism." But under the Black's definition, as long as the work really is from that same lawyer, it's not really plagiarism; it's just very poor practice — especially when documents are not properly proofed and names, dates and events from the earlier document are mistakenly included in the current one.

The practices noted above may not be best ones, but they do not necessarily seem, on their face, sanctionable. It would be preferable, perhaps, for lawyers to clearly explain

that "the idea for argument X in my brief, came from my brilliant partner, with whom I was discussing the case over lunch"; or that "significant portions of the brief on pages 3 and 4 were actually written by a crackerjack summer associate [who's not admitted to the bar, so I can't put her name on the brief]." Similarly, ideas and even written expressions of ideas may come from a lawyer's own client, partners, associates, co-counsel, paralegals, and perhaps others. Sure, it would be nice for credit to be given where due, but must it on pain of sanctions?

— Five Misreadings —

Mr. Bien argues against five positions supposedly "suggested" by our article. His characterization of these "suggestions" are misreadings.

First, he argues that we "suggest" plagiarism is only wrong if it involves large amounts of material. We took no position on that; what we did was describe case law where the courts involved apparently considered that to be an important factor. The more material that is copied, the more likely a court may be inclined to impose punishment.

Second, he argues that we condoned plagiarism in collaboratively produced works — and he argues that this is wrong because the entire team must be held accountable for copying. But our point addressed not that scenario, but rather the situation where a "team" consists of some lawyers who actually did no work on a brief at all, yet whose names appear on the document. We never argued that collaborative briefs should be treated differently; we merely pointed out that they generally are to this extent.

Third, he argues that we deemed it "permissible" to copy from books and treatises without attribution. But, again, we merely pointed out that this occurs. Our actual advice was to "give the cite," which is his position as well. The slippery slope here involves the copying of citations from treatises — reference works that exist seemingly for precisely this purpose. If a lawyer supports a black letter proposition of law by copying several case citations from a Rutter Guide or Witkin (something that probably happens every day) without citing the treatise, is that plagiarism? Does it matter whether the lawyer actually read the cases and confirmed that they really do support the point? (Again, of course that is obviously the best practice to follow. But if that is done, does that remove the plagiarism taint?)

'Presenting another person's ideas or expressions as one's own — in a context where originality is expected and valued — is a cardinal sin precisely because the reader is being deceived.'

Fourth, he argues that we "suggested" that plagiarism is more defensible when it is help-

ful to a client's cause. This, again, comes from the case law, not from us. Precedent shows that sloppy lawyers who copy large blocks of material inevitably end up copying wholly irrelevant material. This becomes the lightning rod that draws the court's fire: Judges are justly annoyed when tons of garbage is thrown at them; and when that irrelevant garbage happens to have been "plagiarized," the danger of sanctions looms even larger. It is just too tempting for a court to say "what you're giving me is crap, and you had the gall to copy it too!"

This also relates to the point about lawyers who copy their own work, a very poor practice that can lead to infuriating errors (such as using the wrong names for parties and discussing facts from another case). This is not, strictly speaking, plagiarism. But our point was that irrelevant material opened the door to court retribution.

Finally, Mr. Bien argues that we were wrong to suggest that copying from some materials may be less "blameworthy" than others. Again, this comes from the case law, and our point was that pirating from materials that typically are expected to be cited in litigation (such as published precedent, treatises, and law review articles) is — as the cases make it, not by our choice — apparently worse than copying from sources that are less likely to be cited — or indeed may not be cited as a matter of law (e.g., unpublished California opinions). Thus, not citing to a law review article that plainly should have been cited for an idea or phrasing is bad; but not citing to an encyclopedia for a fact is less bad. Again, this isn't our distinction; it is merely what we see in the caselaw.

Here are two examples: As part of the factual background in a brief, an attorney writes that "The dog was the first domesticated animal and is a widely kept pet." If this particular line comes directly from Wikipedia, is it sanctionable plagiarism not to credit the source? (And what if the attorney alters the wording slightly, so it is not a direct quote?) Although it is always best to source material, it seems less egregious not to do so here, than if the idea actually came from more typically cited litigation material.

Or consider this: An attorney finds a nice paragraph from a case she wants to use in a brief. If the case is published precedent, she could block quote it and give a citation. But if the case is unpublished, and thus the law prevents her from providing the citation, does that mean that she may not quote from it at all, because she may not provide attribution? That paradox seems unfair, and that is the unfairness we highlighted.

— The Gray Side of Bright Lines —

Presenting another person's ideas or expressions as one's own — in a context where originality is expected and valued — is a cardinal sin precisely because the reader is being deceived. Whether that is true in the litigation context is an open question. Judge Posner and the academics cited in our article apparently believe there is no harm; Mr. Bien believes otherwise. But even Mr. Bien can only go so far as to say that existing rules of professional conduct about behaving "honestly" only implicitly prohibit plagiarism, which is why he proposes a more express ethical rule. But he proposes no precise language for such a rule and does not seem to consider or address any of the problems that could arise from a bright-line rule (e.g., nearly everything in briefs would need to be sourced; how such a rule would be enforced as a practical matter, etc.).

Would you like to see such a rule? How would you draft it? Ponder the hypotheticals on page 2, fire up your word processor, and let us know.

Benjamin G. Shatz, a certified appellate specialist, co-chairs the Appellate Practice Group at Manatt, Phelps & Phillips, LLP, in Los Angeles. Like Mr. Bien, "he has written and spoken frequently on appellate practice and legal ethics." Co-author Colin McGrath, an associate at Manatt, endorses this response and assisted in its preparation.

Can Use of Administrative Procedures Expedite Complex State Court Civil Litigation?

By David L. Huard and Lenard G. Weiss

David L. Huard

Lenard G. Weiss

A partner of ours is fond of saying, "Litigation is the blood sport of the wealthy." As California state trial courts are increasingly absorbed with criminal matters, complex civil litigation is increasingly delayed, due, in part, to the length of time complex trials consume as well as the lack of ever-decreasing court resources.

Alternative dispute resolution, particularly formal arbitration, designed to provide an easier and quicker way to resolve controver-

sies, is often now as time-consuming and costly a process as complex litigation in court. Federal courts have developed special rules for complex litigation, and both Los Angeles and San Francisco Superior Courts have complex litigation departments, but many state courts still grapple with a large mix of the complex and the mundane.

Perhaps a partial solution to the seemingly inevitable blood sport of complex civil litigation can be found in the rules of practice and procedure of administrative agencies.

Court and Agency — Procedural Rules are — Based on the Same Model

Agency practice is certainly less formal than the courts, but the processes used by each are not totally alien to the other, with some exceptions. However, litigants' basic due process rights are just as protected in agencies as in the courts.

Administrative rules guiding the hearing (i.e., trial) of matters by federal and state administrative agencies are often modeled after the rules of court in the respective jurisdiction. For example, the rules applicable to the Federal Energy Regulatory Commission (18 C.F.R. Part 385 (2013)) are modeled, in greater part, on the Federal Rules of Civil Procedure, Evidence, and Appellate Procedure. The rules and procedures for the very first major administrative agency, the Interstate Commerce Commission, were designed during and after 1887 by an appellate judge, Thomas Cooley, who used his court experience to fashion them. Subsequent federal and state agencies followed the ICC pattern and both federal and state administrative procedure acts have also established procedures that are intended to expedite processes while retaining essential due process protections.

Administrative procedural rules differ from standard court practice primarily in less restrictive rules of evidence (e.g., limited admission of hearsay) and the absence of juries. But, more importantly for this discussion, the rules differ appreciably in how trials (hearings) are managed. Agencies endeavor to reduce the time, expense, and confusion of their proceedings in ways designed to avoid the problems that often accompany complex civil litigation.

'At agencies, the applicant (i.e., plaintiff) generally files his direct case in "question and answer" prepared written format.'

Courts Face the Same Process Challenges — in Complex Civil Matters that — Agencies are Designed to Address

Like administrative agency practice, complex civil litigation increasingly requires the extensive use of expert witnesses. It is fair to say that many complex matters now submit-

ted to courts are dominated by a limited showing of fact and a heavy dose of experts. Administrative agencies were created to free courts from dealing with regulation of specific technical areas or industries where disputes are dominated by conflicting technical expert evidence and opinion. The same motives behind the creation of agencies now apply in general to much of the concern over the log-jam in our current complex civil litigation process.

One device used by many administrative agencies — the pretrial preparation and service of written testimony and exhibits — should be considered by civil courts, mediators and arbitrators in the context of reducing trial time, reducing costs to litigants, expediting disputes concerning evidence, encouraging settlement, and allowing earlier reasoned decisionmaking. We do not propose this process as a one-size-fits-all solution, but it may prove to be very useful if narrowly tailored.

How Pre-Filed Evidence is Used in Agency Practice

At agencies, the applicant (i.e., plaintiff) generally files his direct case in "question and answer" prepared written format. This testimony is usually attached to the application for relief (i.e., complaint). This submittal includes the expert's credentials, opinions in the form of prepared written testimony, and support for such opinions as exhibits to the testimony. The direct testimony of fact witnesses can be similarly prepared and filed in prepared written "question and answer" format. Following a pre-trial conference, often limited to scheduling matters, discovery is then commenced by the intervenors/respondents (akin to real parties in interest) as to the prepared direct case.

The initial administrative discovery process relies primarily on written interrogatories (called data requests) due to the written nature of the evidence. Depositions, while somewhat rare in the administrative process, when used are more often more targeted and thus effective due to having the parties' position and evidence effectively laid out in advance.

At a time specified by the hearing officer, reply testimony with supporting exhibits are then submitted, again in prepared written "question and answer" form. The plaintiff is given the opportunity to engage in discovery relating to that prepared material. The submission of prepared testimony is then concluded with prepared written rebuttal testimony of the plaintiffs in the same form, with usually a fairly limited time for discovery by the intervenors/respondents focused on such testimony and exhibits. The matter is then brought to hearing (trial) for the purpose of admitting the prepared testimony and exhibits as served, with minimal additions, corrections and deletions allowed. The actual hearing (trial) time is limited to any unresolved pre-trial motions and cross-examination of witnesses sponsoring the prepared testimony and exhibits.

Administrative proceedings are regularly decided by a written "proposed decision" or "initial decision" drafted by the hearing officer (with input from the assigned commissioner at the state level) after the filing of posttrial briefs. After the filing of comments or briefs on the proposed decision (often limited in time and page count), the decision is subsequently confirmed or revised by a final agency decision. An appeal may be taken only after the required request for rehearing is denied by decision or, in some agencies, the passage of time without agency action. An appeal is a matter of right as to decisions of many federal agencies, and petitions for review are becoming more common for state agency matters.

The Pre-Filed Evidence Model Has Proven Useful

Litigants and agencies find the use of pre-filed evidence beneficial in a number of ways. First, it expedites the discovery process by

identifying each party's position and supporting evidence and limits an element of surprise. Interrogatories, requests for the production of documents, requests for admissions and depositions are all more targeted when the evidentiary support is provided in writing before trial.

Second, it allows quick evaluation and disposition of evidentiary challenges. Demurrers, motions for summary disposition and motions to strike or compel responses to discovery are easier to decide by the hearing officer, as the factual or expert basis has been provided in advance.

Third, the submittal of the case in written form in advance of trial strongly encourages settlements, as the parties can better judge the likely outcome and potential financial exposure of a trial and thus start negotiations in a much narrower range.

Fourth, and most importantly, it should materially reduce trial time. Indeed, administrative hearings with pre-filed testimony and exhibits may handle a dozen witnesses and hundreds of exhibits in the space of a few days. A well-publicized example is the California Public Utilities Commission's consideration of possible sanctions against PG&E for the pipeline explosion, destruction and loss of life in San Bruno. The hearings in that matter took fewer than 13 days — instead of the weeks it would have taken in the courts.

Last, the administrative process of prepared written evidence and exhibits provides a more manageable record for decision and any subsequent appeal. A record with pre-filed evidence is easily compiled and provided in support of any appeal or petition for review.

The Pre-Filed Evidence — Model is Not Always — Useful or Appropriate

The use of pre-filed evidence, however, is not the solution for expediting and managing all state trial court complex civil matters, especially those that are fact-intensive. Four examples are noteworthy.

First, the pre-filing of testimony and evidence does not appear initially suited to a matter where the plaintiff has alleged a harm caused by the defendant but is not, at the complaint stage, in possession of significant supporting evidence absent discovery. Administrative agencies assume the facts are known in general and the evidence supporting the relief is in the nature of expert opinion obtained before the complaint (application) is filed. This difference does not rule out the use of prepared written testimony in these circumstances, but may delay the implementation of the process until later in the case.

'As with the courts, processes related to alternate dispute resolution can become nearly as protracted and costly as formal litigation.'

Second, the process also may not be useful for jury trials. Jurors cannot be expected to review the written material in advance of the cross-examination of the witness on his prepared written evidence. However, assuming parties to a jury matter can agree to use this

process, it would need to be revised in a manner used in some agencies, which, while not optimal, could be adapted for juries. In some jurisdictions (and many more in the past), the prepared written "question and answer" testimony is read by counsel and the witness into the record (transcript) and exhibits are identified for admission prior to cross-examination. In that instance, the record is in the transcript itself and not in the pre-filed written material. This process may add some time to the trial, but it is not as time-consuming as a full direct oral examination with all the attendant delays due to memory loss and variations in rehearsed responses, and certainly should eliminate "surprises" that seem endemic in normal oral direct examination.

Third, the process may be too cumbersome for multiparty matters with cross and counterclaims. While multiple claims and proposed relief are common at agencies, relief, or the denial of relief, is usually limited to the applicant (plaintiff) or the intervenors/respondents (real parties in interest) as a class.

Last, in nonjury civil matters, the use of this process could also be reasonably limited to matters where the plaintiff elects to use it at the outset and the defendant does not cross or counterclaim; or presumably object to the process used by the plaintiff. If the pre-filed evidentiary process is used, the complaint could be accompanied by prepared direct testimony with supporting exhibits. The court could then provide a period for discovery after which the defendant would be required to file its reply case using the same format. This approach has been used successfully by some agencies in expediting review of complaints for violations of laws and rules. At least the FERC, and to a lesser extent the CPUC, require in part that complaints and responses be accompanied by full record support, which allows the agency to potentially decide the matter on the pleadings without the need for hearings at all. While this approach may be a hard sell to litigators, decision makers look favorably on it.

The Pre-Filed Evidence — Model can be Effectively — Used in ADR Proceedings

As with the courts, processes related to alternate dispute resolution can become nearly as protracted and costly as formal litigation. Even where the parties agree to time limits, arbitration often compresses schedules and efforts but does not appreciably reduce the costs to parties. The use of pre-filed testimony and evidence could be useful to reduce the costs, encourage the use of minitrials and expedite formal arbitration. With prepared written material circulated in advance and subjected to discovery, the minitrial could be both mini and a real trial, not an expedited substitute for a real consideration of issues. Further, having the matter laid out in written format often gives a litigant a better ability to judge whether a reasonable mediation or settlement may be better than litigation in any form.

Use of Pre-Filed Evidence — in Complex Civil Litigation — is Worth Consideration

While by no means a complete solution to court congestion and delay, and the related costs, the administrative process does present some potential tools for expediting and resolving complex civil litigation and relieving some court congestion. It certainly may be worth discussion, and we have the time to do so as we wait the five or more years a complex civil matter now takes to go to trial.

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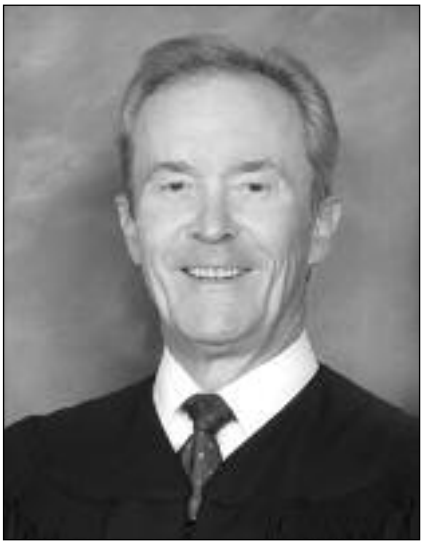
Can We Shorten This Trial?

By Judge Michael Mattice



Judge Michael Mattice

"I'm in the third week of a one-week trial!" How many laments have we heard about excessively long trials from frustrated judges or lawyers? Think of this problem as a relic of the past, because courts and the public can't afford to let it happen today. It consumes excessive court resources and it impedes access to the courts for other litigants.

The California Judicial Branch's current economic stress compels us to study our entire operation from the point of view of efficiency. What can we do to timely complete cases — and trials — to conserve meager resources, all without compromising the quality and fairness of adjudication?

This is the core question of "case flow management" ("CFM"), which is both the process and the pragmatic study of the process whereby courts convert their caseloads of newly-filed and pending matters into closed cases. Trial judges are ethically and statutorily bound to "dispose of all judicial matters fairly, promptly, and efficiently." (Cal. Code Jud. Ethics, canon 3B(8); Gov. Code, § 68607.) Proactive CFM is an appropriate way to support this goal.

— The Cost of Trials —

What is the common thread among our budget crisis, CFM and trials? While comprising only about 4-5% of the total case load, cases going to trial represent huge investments of judicial time and court resources. Twenty years ago, the state Legislature concluded that civil trial courts cost $3,943 per "judge day" to operate. (Code Civ., Proc., § 1775, subd. (f); Stats. 1993, ch. 1261.) That number is far higher today.

So taxpayers and the Legislature would certainly welcome shorter trials. Parties and efficient, cost-conscious attorneys benefit from trials that are shorter and therefore less expensive and more convenient. Jurors also benefit from shorter trials, as do court personnel and judges, who can devote more quality time to the 95% of cases that aren't going to trial.

— Case-Flow-Management Techniques —

Thus, CFM-proactive trial courts are exploring ways to manage the length of trials. What can lawyers expect as a result? This article lists some common judicial techniques that are used with increasing frequency and urgency, both in jury and bench trials, and in virtually every legal field. More techniques will certainly spring from the minds of inventive judges and attorneys, and most judges welcome new trial-shortening ideas.

1. Widening judicial interest in proactive CFM causes new, more frequent, and more penetrating questions at all stages of litigation. For example, what is the optimum number of pretrial appearances in this particular case, and in this class of cases? How can we eliminate excessive continuances and other hearings that generate little or no forward progress? What are the impediments to discovery, to settlement, and/or to the use of trial-shortening stipulations and techniques in this case? What is the minimum necessary number of trial days to achieve a fair trial in this case? How can lawyers and judges ensure compliance with that time frame? Routine attention to such issues and consis-

'Courts on their own motion are more likely to bifurcate civil or family law or probate trials, to isolate and resolve issues that either obstruct settlement or are completely dispositive.'

tent use of the following techniques combine to shorten trials.

'Last in this article but certainly not least in importance, professional civility is a basic element of an efficient, fair and appropriately long trial. CFM-conscious judges expect this.'

2. Many California Rules of Court, and local rules and pretrial orders, are designed largely to promote forward progress in cases. They are written so as to be clear to self-represented litigants as well as lawyers, and must be fairly enforced across the board. Trial length is especially affected by rules and orders about trial management conferences and other immediate pretrial events. Compliance with these rules and orders is crucial.

3. Judicial involvement in estimating the length of trial at all stages of the case including during trial is also essential. If the early estimates are unusually short or long, detailed inquiry from the bench usually helps to anticipate and prevent time management problems later. Extensive and effective meeting and conferring (defined nicely in *Clement v. Alegre* (2009) 177 Cal.App.4th 1277, 1281) is expected before and during all trials, to help trim off the fat. A judge may often point out, both before trial and during delays, that excessive increases in trial length may cause a mistrial based upon unavailability of jurors or the judge.

4. Courts on their own motion are more likely to bifurcate civil or family law or probate trials, to isolate and resolve issues that either obstruct settlement or are completely dispositive. (Code Civ. Proc., §§ 597–598.) Similarly, civil division courts may suggest summary adjudication of issues that, although not completely dispositive of causes of action, affirmative defenses or duty questions, nevertheless obstruct settlement or efforts to streamline and shorten a trial. (Code Civ. Proc., § 437c, subd. (s).)

5. Direct-set courts are specially setting some hearings well before the scheduled trial date for motions in limine, examination of foundation issues under Evidence Code sections 402–405, and expert opinion "gatekeeping" functions under *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747. Master calendar courts are exploring ways to do this with stipulations and prearrangements with special early-resolution departments, or potential trial or other judges, or special masters, or other pretrial opportunities.

6. A detailed trial management order stating the bench officer's expectations about time, a trial schedule, interruptions and delays can save hours or days of frustrating

time loss later. Such orders often require extensive meeting and conferring about document foundations, motions in limine, and jury instructions and verdict forms, all to limit the court's time expenditure to truly disputed items. Other potential subjects include pretrial set-up, vetting and organization of exhibits and audiovisual equipment, dealing with newly-arising issues outside of scheduled jury time, and stacking of witnesses to back up an unexpected no-show. These orders are enforceable in criminal and civil trials in a broad range of ways, up to and including serious monetary sanctions, and without the hassle of contempt proceedings. (Code Civ. Proc. § 177.5; *Seykora v. Superior Court* (1991) 232 Cal.App.3d 1075, 1080 fn. 3.) Penal Code section 1050.5 provides additional and quite severe enforcement tools concerning procedurally deficient requests to continue trials or other criminal hearings.

7. Routine and vigorous judicial exploration of alternative forms of trial, such as Expedited Jury Trials ("EJTs", see Code Civ. Proc., §§ 630.01–630.12; Cal. Rules of Court, rules 3.1545-3.1552), stipulated hybrid EJTs, stipulated smaller juries, or "high-low" trials, leads to some shorter trials. Jurors welcome this effort, and cooperating lawyers are often rewarded with judicial comments to the jury that they have thereby saved valuable time.

8. Similarly, vigorous exploration of procedures to shorten the evidence phase shortens some trials. Judges often emphasize, from Evidence Code sections 210, 352 and 765, that only "disputed facts…of consequence to the determination" of the case are relevant, that all other facts presumably consume "undue time," and that the judge has a duty to keep witness examinations moving forward. This can instigate useful shortcuts such as stipulations of fact, or agreements for presentation by reliable documentary evidence, or agreed non-objections to declarations from witnesses as to minor or foundational facts, or even shorter (and likely more effective) direct and cross examinations. Juxtaposed expert testimony ("JET") is a sophisticated way to add efficiency, brevity and clarity to expert evidence, at least in civil and family law trials. (See Brown, Hon. Rick S. (Ret.), Juxtaposed Expert Testimony: A New Way to Hear from the Experts (2012), www.jet-trials.org.)

9. Once the trial actually starts, the proactive judicial officer steadily applies well-known CFM tactics such as creating, maintaining and enforcing expectations that events will occur when scheduled, and creating opportunities and incentives for issue stipulations and other partial case determinations. Appreciative comments again from the judge to the jury, about all of the attorneys' cooperativeness, help to maintain the jurors' interest and commitment.

10. Last in this article but certainly not least in importance, professional civility is a basic element of an efficient, fair and appropriately long trial. CFM-conscious judges expect this. Good trial lawyers and judges know that civility facilitates effective meeting and conferring, and it enables counsel to reach more stipulations than they can with embittered animosity. (See, Knowlton, Natalie Anne and Richard P. Holme, Working Smarter Not Harder: How Excellent Judges Manage Cases (2014), pp. 27-29, iaals.du.edu/workingsmarter; Karnow, Hon. Curtis, Trials and Tribulations (2013, unpub.), in Selected Works of Curtis E.A. Karnow, www.works.bepress.com/curtis_karnow.) Thus, civility shortens trials. As a bonus, jurors appreciate the opportunity to focus clearly on the facts and their jobs as jurors. They don't want or need the distractions caused by unnecessary firefights, and they recognize that attorney animosity wastes their time, which they resent. For many jurors and even some judges, a lawyer's credibility is inversely proportional to his or her overt hostility.

So, can we shorten this trial?

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Statements of Decision:

Errors, Omissions, and Solutions

By John Derrick

John Derrick

Somewhere in the labyrinths of the Judicial Council, a working party has been trying to reform the widely unpopular system of statements of decision. But the word on the judicial street is that the reform initiative has stalled. It's not that there's a lobby determined to protect the status quo. It's that no one can agree on a better alternative.

But there is a simple solution, which has, to the best of my knowledge, been overlooked. Read on and you'll find out what it is. First, however, a review of what's wrong with the system now and how to avoid the most common pitfalls.

The failure to agree on reform reflects the fact that different folks dislike different things. Trial judges often dislike SODs, because they are a lot of work. Many would like to do away with them altogether or, at a minimum, streamline the present cumbersome system of requests, proposals, and objections, which can drag on for months, as memory of the trial that led up to them recedes.

However, lawyers — and parties — often want reasons behind decisions, especially when they have lost. Family law and probate practitioners are especially vocal in that regard, since their trial practices are especially bench-oriented.

But as much as lawyers like reasons, part of the problem is that many simply don't understand how to get them under the existing system. To be fair, the system is quite confusing. Take the opening two sentences of the

key statute, Code of Civil Procedure section 632. The first one reads: "In superior courts, upon the trial of a question of fact by the court, written findings of fact and conclusions of law shall not be required." Okay. Fair enough.

But the next one reads: "The court *shall* issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial." (Emphasis added.)

Huh? Isn't that, like, contradictory? (Since I passed my American citizenship test on the first try, I think I'm entitled to say "huh" and "like.") First, the statute says that they are *not* required. And, then, it says they must be issued on request, which means they *can* be required. The visiting delegation from Mars might be confused.

It's definitely not the Legislature at its most lucid. (I'll spare you the bit about that being an oxymoron.)

But the two sentences can be harmonized, sort of. "Findings of fact and conclusions of law" — referenced in the first sentence of the statute — were actually something a bit different, which existed before the current system of SODs was introduced in 1981. The differences didn't really amount to all that much. (*R.E. Folcka Construction, Inc. v. Medallion Home Loan Co.* (1987) 191 Cal.App.3d 50, 54.) But, maybe, those opening sentences in section 632 were simply saying "out with the old, in with the new," or something like that.

— "Decisions" — That Aren't What You Think

Don't think that you can master SODs simply by poring over the Code of Civil Procedure. Some of what you need to know is there, but much is in the Rules of Court.

This brings me to what is probably the most misunderstood part of the whole system. Read Rule 3.1590 carefully and you'll find out that with trials lasting more than eight hours, or any other type of proceeding of that length that can lead to a statement of decision, the first thing the court issues relating to the outcome of the case is *necessarily* a tentative decision.

Despite that, this initial document can be captioned all sorts of weird and wonderful things — "Decision," "Notice of Ruling," "Statement of Decision," even "Judgment." But it is none of those things. *Ignore the caption*. Whatever it calls itself, Rule 3.1590 means that it can *only* be a tentative decision. And that then sets off a chain of potential procedural events that may or may not eventually lead to an SOD.

I'm not going to laboriously describe all the steps leading to that glorious climax. But the key point is that lawyers often think they have got a statement of decision, because that initial document, loosely speaking, does contain something that looks like a "decision," complete with reasons. Moreover, the word "tentative" may be nowhere to be seen.

It is quite possible that the same document *could* subsequently morph into a statement of decision, if it contains self-transforming language to that effect (i.e., that it will become the SOD unless a party makes a request within 10 days for additional findings). But unless it does, if you leave it at that, you're SOD-less. All you have is a tentative, which will be followed by a judgment.

To put it another way, a statement containing a decision is not necessarily a statement of decision. It is because readers of this journal have what it takes to appreciate such subtle distinctions that the State of California grants us licenses to practice law.

— The Perils of Being SOD-Less —

So what does it mean to be SOD-less? If you lost and you're planning on appealing, the problem is that you run up against the dreaded "doctrine of implied findings." This means that the Court of Appeal will presume that the trial court made whatever findings of fact would be necessary to support its decision, so

long as there is any evidence to support them.

Implied findings can also come into play if you have requested a statement of decision, but didn't request findings on specific topics or failed to object to omissions.

If you are the losing party, a statement of decision can *only* do good, assuming it makes any difference at all. There is no possible downside (except, perhaps, for gratuitous adjectives that add nails to the proverbial coffin).

But that doesn't mean that it *will* do you much good. This is because by dodging the bullet of implied findings, you may simply end up with express findings that are just as unhelpful. So an SOD is not some elixir that is sure to sweeten a distasteful result.

If you've won, by contrast, implied findings can be quite handy. They provide more appellate cover than a somewhat circumspect SOD might do. And that's why, unless you've got a specific reason for wanting one, prevailing parties are generally better off not requesting one. It's usually just fine if matters proceed straight from the tentative to judgment.

— The Power of the Scribe —

If you prevailed and the *other* side has requested an SOD, try to have the court ask you to prepare a proposed one. Personally, I think judges shouldn't be allowed to delegate that function. It seems a bit lazy. And it enables prevailing parties to try to put words into the court's mouth that go further than what might otherwise have been said.

Of course, the court has the last word. But, with a busy calendar, a trial judge might not agonize about every last phrase in a 20-page document presented for signature whose bottom line appears consistent with the tentative.

So as long as that system exists, you might as well take advantage. It's not every day that lawyers get to write a court's decision.

— Missing the SOD Bus —

Another common pitfall with SODs is not requesting one because you didn't know you could get one. After a bench trial, the entitlement is obvious. But there are other occasions when they are required, providing a proper request is made. For example:

- Hearings on petitions to confirm or vacate an arbitration award. (Code Civ. Proc., § 1291.)
- Hearings on petitions for writs of administrative mandamus. (*Giuffre v. Sparks* (1999) 76 Cal.App.4th 1322, 1326.)
- Hearings on petitions to compel arbitration. (*Metis Develop. LLC v. Bohacek* (2011) 200 Cal.App.4th 679, 688-689.)

Remember, where you could have requested an SOD or specific findings, and you didn't, implied findings will kick in.

— Judicial Error —

Lawyers aren't the only people who don't always "get" SODs. A surprising number of judges don't, either. I'd like to know who teaches SODs at judges school (yes, there is such a thing). Whoever it is either doesn't get them himself or herself or, maybe, just talks in a monotone that sends the eager new Honorables to sleep.

Perhaps the most common judicial error regarding SODs is to enter judgment before the time for a party to request an SOD has run. A variation is when an SOD has been requested, but the judgment is entered before the SOD has been issued or the time for objections and so forth has run.

This is jurisdictional error. When an SOD has been properly requested, its issuance *must* precede a judgment. If you find yourself in a situation where a judgment is entered prematurely, you need to go in ex parte and ask for it to be vacated.

Whatever you do, don't complicate the issue further by filing a notice of appeal immediately, without seeking to have the judgment vacated. That will only take the train further off the procedural tracks.

— Overdoing Requests —

Some lawyers think the key to making a

good record is to request findings on every possible evidentiary fact. Their requests read something like a set of interrogatories. But, guess what — far from making a good record, they may have just thrown their clients to the implied-findings wolves.

The reason is that you are only entitled to findings on the *ultimate controverted issues*, not on every evidentiary issue leading up to them. So if your request is out of line — I've seen ridiculous ones with requests for hundreds of findings — the court is entitled to treat the entire request as defective. In that event, you risk waiver as to any specific issues that were not addressed in what the court finally puts out.

When I'm asked by trial lawyers about how much detail to put in requests for specific findings, I encourage them to think in terms of a special verdict form in a jury trial. Maybe you can go a bit beyond that, but you need to think in terms of the elements of the causes of action and, of course, the affirmative defenses.

— How to Make a Bad System Better —

Talking of special verdict forms, at the start of this article, I promised a solution to the present cumbersome system of SODs. On the one hand, many judges don't like them. But, on the other, lawyers and their clients want some sort of a reasoned outcome. So here's the obvious solution: Why not treat bench trials in the same way as jury trials and allow special verdict forms that would have the same effect as a statement of decision?

Just as in a jury trial, the lawyers would have to try to agree on the questions to be answered. Failing that, the judge would have to rule.

Once the judge has decided the case, all he or she would have to do would be to check the boxes and write in any damages or other form of relief.

Maybe this wouldn't work for every single bench trial. But it could, at least, be an *option* in cases where the parties and the court agree.

A special verdict form might not be as effective in dealing with the other function of a statement of decision, which is to set out the court's legal basis. But, as a practical matter, that is the less important component. A trial court's decision can be affirmed on any legal basis, whether or not it was the one on which the court relied. (*D'Amico v. Board of Med. Examiners* (1974) 11 Cal.3d 1, 19; *Bealmear v. Southern Cal. Edison Co.* (1943) 22 Cal.2d 337, 339.)

Of course, there is nothing to stop parties and judges from adopting special verdict forms in bench trials right now, even though there is no provision in the Code of Civil Procedure or Rules of Court. But if you do proceed that way under the current regime, what you end up with won't be a "statement of decision" as the law defines it. And if it isn't that, it doesn't preclude implied findings. So self-help isn't a viable alternative. The law needs to change.

While in the process of making easy changes, I'd scrap the eight-hour rule, under which in any proceeding lasting less than a day or eight hours, an SOD — the existing variety — has to be requested prior to submitting the matter.

That's a terrible rule for at least two reasons. The first is that it's very difficult to track the length of a proceeding down to the nearest minute — and minutes count under this rule. Who is keeping the time? Court clerks sometimes record certain start/stop times, but not always — and certainly not for bathroom breaks. Second, the decision on whether to request an SOD may turn on whether one has won or lost. But one doesn't know that when one submits (even if one can often make a shrewd guess).

So those are two reforms that the Judicial Council working party should take up. In the meantime, proceed with caution under the existing, distinctly imperfect system.

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The Perils of Punishing Public Employees for Protected Speech:

Applying Pickering v. Board of Education *to Posts and Pins*

By James Brown, J. Scott Tiedemann and David A. Urban

James Brown

J. Scott Tiedemann

David A. Urban

What if a public school teacher of students with learning disabilities uses the word "retard" in a joke on Facebook, and her students and colleagues have access to the page? What if a police officer states on Facebook that he watches the movie *Training Day* to brush up on proper police procedure and posts: "If you were going to hit a cuffed suspect, at least get your money's worth"? (*Training Day* is a film in which Denzel Washington plays a nefariously corrupt veteran police officer responsible for mentoring a rookie.)

Disciplining employees for their expressive activity has long presented complex issues of First Amendment law for public sector management. In the age of social media, whether the platform is Facebook, Pinterest, email or texts, the challenge to employers is constant. Public employers can advance sound reasons for wanting to control employees' statements that can become public. Crude or offensive comments by public employees can easily

become openly available on the Internet and place the public employer in a bad light. In the case of police officers in particular, inapt statements on social media can potentially impair the officer's ability to testify in court by providing material for cross-examination. Statements can also surface as evidence in civil litigation, for example, in a police brutality case. On the other hand, the question then arises of whether the First Amendment nonetheless safeguards a right to make these comments in social media.

> *'The Garcetti Court prescribed that courts must affirmatively go beyond the job description on paper and determine what the employee's actual duties are in order to answer whether speech was pursuant to official duties.'*

Free Speech Rights of Public Employees

When Public Employees Can be Disciplined for Speech

The First Amendment affords vast rights to freedom of expression. For public employees, however, these rights are diminished when asserted against a government employer. In *Garcetti v. Ceballos* (2006) 547 U.S. 410, the United States Supreme Court explained: "When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." (*Id.* at p. 418.) However, a public employee keeps the "right…to speak as a citizen addressing matters of public concern." (*Id.* at p. 417.)

The United States Supreme Court has ruled that generally First Amendment protection attaches to speech if: (1) The employee's speech is on a matter of "public concern"; (2) The employee spoke as a private citizen and not a public employee (i.e., the speech is not pursuant to "official duties"); and (3) The employee's speech interest outweighs the agency's interest in efficiency and effectiveness. (See, e.g., *Eng v. Cooley* (9th Cir. 2009) 552 F.3d 1062, 1070-1071 [summarizing the primary elements of an employee free speech claim].)

Public Concern. The first element of the test, "public concern," is in many ways straightforward. What if an employee complains repeatedly about items such as not having the right type of coffee in the break room, having shabby workplace furniture, or having a boss who is sometimes angry and unprofessional? A court is likely to find that this type of speech does not rise to the level of "public concern," and as a result the employee will not be able to use the right to free speech as a basis for a retaliation claim. Courts use the following considerations in

determining "public concern": Whether the employee's speech relates to a matter of political, social, or other similar concern to the community; the content, form, and context of the speech; whether the employee sought to inform the public; whether the employee sought to shed light on wrongdoing; and whether the employee spoke simply about a personal grievance. (See, e.g., *Connick v. Myers* (1983) 461 U.S. 138, 146-148; *Robinson v. York* (9th Cir. 2009) 566 F.3d 817, 823.)

'Social media platforms also encourage participants to communicate and share information freely — basically, to make permanent, semipublic statements in a glib, real-time manner.'

Outside "Official Duties." The "official duties" element of the test is less intuitive, involving the question of whether the employee has spoken as a private citizen or as a public employee. The Supreme Court set forth the "official duties" test in *Garcetti*. There, the Court found that a deputy district attorney could assert no First Amendment retaliation claim because his speech — questioning the legality of a search warrant — had been in his capacity as a public employee, i.e., pursuant to his "official duties." The Court found the prosecutor's speech was his simply doing what he was paid to do. Therefore, the Court found no First Amendment protection. (*Id.*, 547 U.S. at pp. 420-424.)

The *Garcetti* Court prescribed that courts must affirmatively go beyond the job description on paper and determine what the employee's actual duties are in order to answer whether speech was pursuant to official duties. (*Id.*, 547 U.S. at pp. 424-425.)

Recently, the Ninth Circuit's en banc opinion in *Dahlia v. Rodriguez* (9th Cir. 2013) 735 F.3d 1060 further clarified when a public employee's speech is pursuant to "official duties." The court described, first, that "[w]hen a public employee communicates with individuals or entities outside of his chain of command, it is unlikely that he is speaking pursuant to his duties." (*Id.* at p. 1074.) Second, when the speech is not routine, but instead "raises within the department broad concerns about corruption or systemic abuse," it is less likely that the speech is within job duties. (*Id.* at p. 1075.) Third, "when a public employee speaks in direct contravention to his supervisor's orders, that speech may often fall outside of the speaker's professional duties." (*Ibid.*) Applying these considerations, the court in *Dahlia* held that a Burbank police detective's alleged complaints to authorities about abusive interrogation tactics used by his department were protected by the First Amendment. (*Id.* at pp. 1077-1078.)

The Supreme Court will soon decide a

case from the Eleventh Circuit, *Lane v. Central Alabama Community College* (11th Cir. 2013) 523 Fed.Appx. 709, *cert. granted* Jan. 17, 2014, No. 13-483, which may further define the contours of the "official duties" rule. In *Lane*, the plaintiff audited a public program over which he was the director, discovered potential fraud, and then testified about the fraud in criminal proceedings. The plaintiff was then terminated and sued his employer alleging that his termination was retaliation for his truthful testimony. The Eleventh Circuit determined that this speech arose out of his official duties and therefore was unprotected.

Balancing Test — Pickering v. Board of Education. Another element of the test for free speech by public employees is the *Pickering* balancing test, famously named after the Supreme Court case *Pickering v. Board of Education* (1968) 391 U.S. 563.

The balancing test applies if the previous two elements have been met. The balancing test weighs the speech interest of the employee under the First Amendment with the legitimate interest of the government in regulating the speech in a way it has chosen to do. In other words, the test asks whether the workplace rule that the employee violated is important enough to justify suppressing the employee's speech at issue. The following are factors courts consider:

- Did the speech impair discipline or control by superiors?
- Did the speech disrupt coworker relations?
- Did the speech erode close working relationships premised on loyalty and confidentiality?
- Did the speech interfere with the speaker's performance of duties?
- Did the speech obstruct routine office operations? (See, e.g., *Hyland v. Wonder* (10th Cir. 1992) 927 F.2d 1129, 1139 [interpreting *Pickering*]; see also, e.g., *Pickering, supra*, 391 U.S. at p. 568 ["The problem…is to arrive at a balance between the interests of the [employee], as a citizen, in commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."].)

Free Speech Rights — and Social Media, New Media, — and the Internet

Same Test But Different Issues. The test applicable to speech made in the social media context is not different from that applied in any other context. However, social media has changed the workplace to make the test's applicability difficult.

One practical way social media has changed workplace speech is that employees' gripes, gossip, and criticism used to occur in contexts that were not recorded, e.g., break rooms and hallways, and their impact was fleeting. Now, many statements made through social media and the Internet become permanent records (although new apps such as SnapChat and TigerText permit users to send messages that autodestruct after a preset period of time).

Social media platforms also encourage participants to communicate and share information freely — basically, to make permanent, semipublic statements in a glib, real-time manner. This increases the chances of persons making permanently recorded statements they would never make "in writing" and amplifies potential harm. It certainly increases the number of incidents coming to the attention of public administrators and that must be analyzed for First Amendment ramifications.

One other unique issue is that although what an employee says on social media can be very disruptive to the organization, it may be difficult to pin down a particular rule that the employee has violated, since the conduct takes place outside of the work environment. Typically, these types of statements are made on home computers after hours and are not intended to be viewed by the public.

Several recent cases provide some exam-

ples of how the test has been applied to public employee speech on social media:

Shaver v. Davie County Public Schools (M.D.N.C. 2008) 2008 WL 943035. A school district terminated a bus driver after district officials discovered the MySpace page he designed with his wife. The page revealed that the employee practiced the Wiccan religion and contained several phrases that apparently indicated his wife was bisexual. The district fired him based on the premise that the web page damaged his position to be a role model at school. The employee sued under the First Amendment. Ultimately, the court ruled that the First Amendment did not protect his speech because it was not on a "matter of public concern."

Spanierman v. Hughes (D.Conn. 2008) 576 F.Supp.2d 292. A school district did not renew a teacher's contract based on the teacher's MySpace pages, which featured his name as "Mr. Spiderman" and "Apollo68," displayed pictures of nude men and contained comments to other users, blogs, poetry, and other pictures. The teacher admittedly used the webpages to communicate with district students about non-school-related topics. In addition, the pages displayed the profile pictures of students the teacher had accepted as "friends" to his pages. The teacher sued the district, alleging that the district chose not to renew his contract because he exercised his freedom of speech and freedom of association rights. The court ruled for the district, determining that the only item on his webpages that was of a matter of public concern was a poem about the Iraq War, and there was no indication the poem played any part in the decision not to renew his contract.

Bland v. Roberts (4th Cir. 2013) 730 F.3d 368. The 2012 district court decision in this case involving Facebook gained enormous attention in legal circles. It involved a Hampton, Virginia, sheriff who allegedly fired a number of employees for conduct that included "liking" the Facebook page of the sheriff's political opponent. The district court had found that a public employee's mere pressing of "like" for a Facebook post *did not* constitute expression that could be protected by the First Amendment. The district court reasoned that "liking" a Facebook page "is not the kind of substantive statement that has previously warranted constitutional protection. The Court will not attempt to infer the actual content of [a plaintiff's] posts from one click of a button.…" (*Bland v. Roberts* (E.D.Va. 2012) 857 F.Supp.2d 599, 604.)

Legal commentators criticized the district court's ruling for failing to recognize that "liking" a post constitutes a mode of expression. On appeal, the Fourth Circuit reversed the district court's determination and found that pressing the "like" button was, in fact, a form of speech that could have First Amendment protection. "In its way," the Fourth Circuit reasoned, "it is the Internet equivalent of displaying a political sign in one's front yard, which the Supreme Court has held is substantive speech." (*Bland, supra*, 730 F.3d at p. 386.) Finding that the employee's "like" was speech, the Fourth Circuit examined the other elements at issue, "public concern" and "official duties," and determined the employee in question might be able to prevail on a First Amendment claim.

The law of free speech rights of public sector employees is constantly evolving, public employee utilization of social media is increasing, and First Amendment retaliation litigation is proliferating. Thus, employers must keep pace by establishing effective workplace policies and educating management and employees about the Internet, the pitfalls of social media use, and employees' right to free expression, whether shouting from the rooftops or "liking" a Facebook page.

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ADR Update:

Can Post-Award Searches Vacate Arbitration Awards?

By Paul J. Dubow

Paul J. Dubow

In the olden days (about ten years ago) an attorney, suspecting that an adverse decision in an arbitration that should have been won was the consequence of an undisclosed arbitrator bias, could not do much about it. But today, thanks to the magic of internet googling, something can be done. All the attorney need do is use the magical device and — presto — if there is an undisclosed bias lurking, it will appear.

The most recent evocation of the internet's ability to unearth hidden arbitrator bias (whether apparent or actual) materialized in *Mt. Holyoke Homes, L.P. v. Jeffer Mangels Butler & Mitchell, LLP* (2013) 219 Cal. App.4th 1299. Plaintiffs filed an arbitration claim alleging malpractice against the law firm that had represented them in a real estate transaction. The law firm filed a cross-complaint for unpaid legal fees. The parties chose as their arbitrator a retired superior court judge who had an impeccable reputation as an arbitrator. Upon his appointment, the arbitrator disclosed that he had known for many years the attorney whom the plaintiffs had originally retained (but who was not involved in the proceeding that led to the malpractice claim) and that in the previous five years he had mediated a matter in which the defendant law firm had represented a party, and he had been the neutral in an arbitration and a mediation in which one of the plaintiffs was a party. Neither side objected to his service. After a hearing, the arbitrator rejected the malpractice claim and awarded

the defendant firm in excess of $400,000 in legal fees.

The aggrieved attorney for plaintiffs thereupon conjured internet magic and found an organization known as the National Association of Distinguished Neutrals. NADN provides information about neutrals for the benefit of attorneys seeking the services of a neutral. (In the interest of full disclosure, the author is also listed with NADN.) A link on the NADN website led to a resume that the arbitrator had prepared ten years before that listed the name partner of the defendant law firm as a reference. Armed with this information, plaintiffs moved to vacate the award on the ground of arbitrator bias. The trial court denied the motion and the plaintiffs appealed. The Court of Appeal accepted as true a declaration by the arbitrator that he had no professional relationship with the name partner and had listed him as a reference only because he was a highly regarded litigator who was familiar with the arbitrator's ability as a neutral. The Court also did not believe that the arbitrator was biased in favor of or against any party in the arbitration. But it reversed on the ground that a reasonable person aware of the facts could reasonably entertain a doubt that he could be impartial in the case.

There are two issues concerning disclosure in this decision. One is whether an arbitration award can be vacated solely because of an arbitrator's failure to disclose a reference on a ten-year-old resume. The situation in *Mt. Holyoke* differed from the one in *Haworth v. Superior Court* (2010) 50 Cal.4th 372, 393, where the arbitrator, also a retired superior court judge, failed to disclose that he was publicly censured during his tenure as a judge for making sexually explicit remarks to female staff members. The Court of Appeal affirmed the trial court's ruling that this activity created an impression of bias that should have been disclosed, and thus affirmed the decision to vacate the award against the claimant, a female. The Supreme Court reversed, holding that implicit in a determination to impose a public censure on the then judge, rather than permanent removal from office, was the expectation that the judge would respond to the censure by ceasing to engage in the conduct that resulted in the disciplinary action. In other words, he was presumed to have learned his lesson and would not be expected to do it again. But where one has a high enough regard for an individual so that one would list the individual as a resume reference, it can be presumed, in the absence of contrary evidence, that such regard would continue for ten years or more. As a side point here, the Administrative Office of the Courts effectively negated the *Haworth* decision when it amended the Ethical Standards for Neutral Arbitrators by requiring disclosure of any public discipline imposed within ten years of the date of disclosure. See Standard 7(e)(1)(c).

The second issue is whether a party aggrieved by an adverse award can, as the consequence of a post-award investigation, cite information publicly available before the arbitrator's appointment, but not disclosed by the arbitrator, as a basis for vacating an award. If there is evidence that a party was aware of the undisclosed information before the arbitrator's appointment, then the party is estopped from asserting bias. (*Cobler v. Stanley Barber Southard Brown & Associates* (1990) 217 Cal.App.3d 518, 526.) The same result occurs where the disclosure is incomplete but provides sufficient information to allow the party to either request that the arbitrator provide additional information so that a more informed decision can be made about retaining the arbitrator or move to disqualify the arbitrator based on the information that was provided. (*Dornbirer v. Kaiser Foundation Health Plan, Inc.* (2008) 166 Cal. App.4th 831, 842-844.)

But *Mt. Holyoke* holds that so long as there is no evidence that the party was aware of the undisclosed information before the award, then the party can successfully move to vacate the award even if the undisclosed information was publicly available before the appointment. The *Haworth* case also

involved a post-award internet search, and the Court of Appeal's endorsement of such an activity troubled Justice Mosk, who wrote in dissent "that a rule of law that excuses parties to arbitration proceedings from exercising due diligence in choosing an arbitrator, and that encourages parties to arbitration proceedings to conduct intrusive investigations into an arbitrator's background in a post hoc attempt to overturn an adverse arbitration award, is fundamentally unsound." (*Haworth, supra*, 164 Cal.App.4th at p. 952 (dis. opn. of Mosk, J.).) The court in *Remmey v. Paine Webber, Inc.* (4th Cir. 1994) 32 F.3d 143, 148, put it more succinctly. It characterized an alleged post-award investigation as "the ultimate attempt at a second bite" and observed that "[i]f this challenge were sustained, nothing would stop future parties to arbitration from obtaining allegedly disqualifying information, going through with the proceedings, and then coming forward with the information only if disappointed by the decision."

The defendant law firm in *Mt. Holyoke* did argue that the plaintiffs' constructive knowledge of the resume debarred them from raising it to show arbitrator bias. But the court rejected the argument, stating that "[a] party to an arbitration is not required to investigate a proposed neutral arbitrator in order to discover information, even public information, that the arbitrator is required to disclose. Instead, the obligation rests on the arbitrator to timely make the required disclosure. The fact that the information is readily discoverable neither relieves an arbitrator of the duty to disclose nor precludes vacating the award based on the nondisclosure." (*Mt. Holyoke, supra*, 219 Cal.App.4th at p. 1313.)

The dilemma here is that there are two competing situations that can threaten the integrity of an arbitration proceeding. One is where an arbitrator decides to withhold certain information that might lead to disqualification in the hope that the parties do not uncover it. The other is where a party, unlike the plaintiffs in *Mt. Holyoke*, obtains what it perceives to be negative information about an arbitrator before the time set to receive the arbitrator's disclosures, the information is not disclosed by the arbitrator, and the party nevertheless decides to retain the arbitrator possibly because of his or her reputation, receives an adverse award, claims the information was obtained post-award, and cites it as the basis for vacating the award.

One might argue that it would be better not to reward a post-award investigation where the information was readily available before the arbitration commenced. Those favoring this position might suggest that there is no incentive for an arbitrator to withhold information and risk damaging his or her reputation, because a diligent attorney could be expected to uncover it anyway and challenge the arbitrator (particularly if the rule is that post-award investigations will not be rewarded), while there is no downside for a party to withhold its prior knowledge of adverse information about the arbitrator and claim later that the information was obtained post-award because there is rarely a practical way for the party's adversary to prove that the information was known at the time that the arbitrator was required to make the disclosures. On the other hand, those who favor post-award investigations could argue that full disclosure is the keystone of a fair arbitration process and awards by arbitrators who fail to make full disclosure should be vacated as the consequence of a post-award investigation, even though there is a risk that this policy will from time to time reward an unsavory party who was aware of the undisclosed information beforehand.

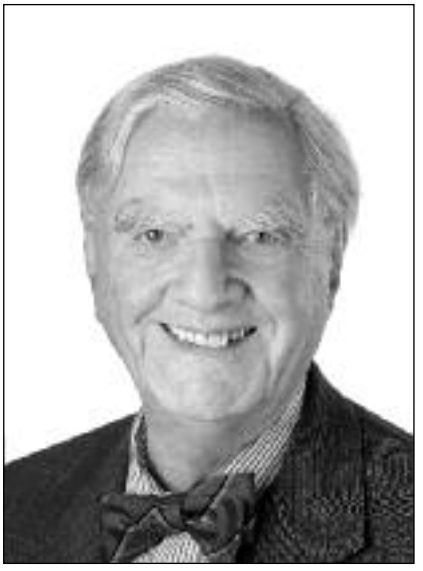
The Supreme Court denied the law firm's petition for review in *Mt. Holyoke*. Hopefully, in the near future the Court will resolve this dilemma.

Paul J. Dubow, an arbitrator and mediator practicing in San Francisco, specializing in employment, commercial, and securities transactions, has been a member of the California Litigation editorial board for over 20 years.

Trial Lawyer Hall of Fame (2004):

62 Years in the Practice of Law

By Kurt W. Melchior



Kurt W. Melchior

When I was first establishing my practice, many people talked about Joe Ball. When he died 13 years ago at the age of 97, his L.A. Times obituary described him as "one of the country's most respected trial lawyers." Joe was the first inductee into the California Trial Lawyer Hall of Fame; and I remember the awe with which he was regarded by many, and the very open, approachable person I met when I was introduced to him at a State Bar convention. So it is a bit hard to write about my own journey to that exalted place, since I never thought I would be within the same frame of reference as Joe Ball. And here I am in my sixty-third year of practice myself — hard to believe!

Now, *California Litigation* wants my "anecdotal, inspirational and educational thoughts." Let me start with what I think it means to be a litigator — a trial lawyer.

Many nonlawyers think of lawyers as paragraph splitters — as people who dissect events and ideas into technicalities, who will do anything to have their client prevail, to win. There is, of course, some truth in that description; but to me, a trial lawyer is first of all a person who becomes the voice, the sword and the shield, of someone in society who has problems which are beyond their own means to solve. The lawyer steps into that person's shoes and becomes their voice, their mouthpiece if you want to use a derogatory term. The client sees his lawyer as perhaps his only champion in a tough situation: the lawyer literally stands in for the client and speaks for the client, who is too overcome with doubts or emotions and has neither the skill nor the detachment to speak for him or herself.

That takes strength, courage and an understanding on the lawyer's part, both of the client and of the broader world. When we start out on a legal career, we seldom think of such Darrow-like powers and duties, but we learn as we go. To me, it is just as hard to develop the skill of understanding how the world would see the client, and in a civil case — where I have spent almost all my career — how the other side, and eventually a judge or jury, would see the client and his case, as it is to figure out the intricacies of the client's case. Another tough part of the lawyer's task is the duty to explain to the client the entire configuration of the case, including the "other side" of his problem: How the world may not see the situation as he does — and how that may influence a potential solution!

It is axiomatic that most cases settle. But let me say a few things about why they settle, and why some cases must go to trial. In my experience, cases settle because lawyers have a deep understanding of the risks of each separate piece of litigation, and just as much because they understand that the other side has reasonable arguments which contradict their own client's perceptions. Thus a skilled lawyer — often reinforced by a skilled mediator — can persuade the client that his position is not absolute or certain, and that it is better to take — or lose — a half a loaf than to play for the entire pile of chips.

But that formula assumes at least a degree of rationality on both sides, and of course good insight by each party into the limits of the other side's positions. Where one of these volatile elements is missing or the costs of losing are too steep, the case must go to trial.

Trials (or at least civil trials) are rare these days; and the defunding of the courts has not helped. So, the occupation of Trial Lawyer has more or less disappeared from the American scene. The days of Abe Lincoln, circuit rider, and even of Clarence Darrow, attorney for the damned, are pretty well gone. What happens if you do have to go to trial?

Let's talk separately about jury trials and bench trials. I must admit that I have wondered much of my professional life whether I really was a lawyer who could communicate with juries. Wasn't I an intellectual who had somehow found his way into the trenches instead of academia? How could I make the justice of my client's position known to the average man or woman on a jury? I have usually approached jury trials with some nervousness because of such feelings.

But I was wrong. True, I am not a folksy guy who pals around with jurors and tries to have them identify with me, which is (within limits) what the books tell you to do. But I figured out two things that have largely dispelled my fear of juries. One is that I have a story to tell: that truth and justice are on my client's side, and the jurors have agreed to commit themselves to truth and justice, if not exactly to me. The other is that there is no point in trying to be something you are not: Since I will never be a good Average Joe, I should not try to act like one. If I think of abstractions, I must make those abstractions comprehensible to the jury. I have learned that I can speak to the jurors from my own perspective; and if that means that I get at the case from certain philosophical or abstract origins, so be it — I can teach, as

long as I don't try to lecture. That approach has worked out pretty well, by and large.

A bench trial is a different matter. Everything — and I mean, *everything* — depends on the judge — his personality, his attitudes, his Weltanschauung, if you will. (I do not intend this as a male chauvinist piece: Let the masculine include the feminine, to save space and readability.) And you have just a smidgeon of control over what judge you get. I remember a jurisdiction where years ago there were three judges whom everyone wanted to duck. The plaintiff would file a section 170.6 disqualification against one, the defendants against the next; and you then hoped that the third judge would be in trial so that you would not get assigned to him.

'So if I have any tip to give you, it is that you are selling your case.'

I have appeared before many wonderful judges, but the system, like any system, is far from perfect. Just to cite a few instances (although lawyers can be disciplined for criticizing the courts): There was the time when the judge decided a huge contract interpretation case, on which the future of an area literally depended, by ruling that one witness was not credible because he misspoke about a meeting having taken place in one town instead of another with a like-sounding name. (That case was reversed on appeal.) There was the unpublished appellate decision ordering a corporation to pay out its profits as dividends. And there was the case (not in California) where the court ruled against me in a published opinion that never once cited or referred to the Supreme Court cases on which I had based my entire argument. These are just some examples of how things can go terribly wrong. Judges are only human.

Even in a bench trial, remember that you are a salesman. That may sound like a comedown after three years of law school; but that's what you are. You are not selling jewels, or cheese as my dad did, but a special commodity called justice. I remember how, years ago, I received a call from a lawyer whose name I did not remember. He scolded me: "I was in Judge So-and-so's courtroom this morning waiting to be heard, when you were arguing your case." (I wondered what would cause him to call me.) "You were telling the judge that justice was on your client's side. That reminded me: you did the same thing to me in the such-and-such case. We all have a tough enough time telling the judge that the law is on our side. Bringing in justice on your side just isn't fair!"

So if I have any tip to give you, it is that you are selling your case. That means selling your facts, your legal argument, your client, and disparaging (however politely) the opposing position as being unwarranted and unjust. You do that in a jury trial as well as in a bench trial; but bear in mind that you are selling to different audiences.

And, of course, you cannot let salesmanship get the better of the facts and the truth.

When you sell the justice of your position, truth is an indispensable element.

And you must always keep a special eye on the record. Record your objections; make sure that your proposed jury charges are in the record; remember that there are countless ways in which an appeal can be frustrated, simply squelched, because the record fails to disclose your materials or arguments.

And now a few words touching on changes in the legal profession during my time at the bar. Like everything else in our society, lawyering has become more formal, more institutionalized and more bureaucratic. That trend is inevitable as society becomes more urban, sophisticated, and technically oriented, and as distances shrink and the world becomes smaller. But when I began practice in California, lawyers in one place knew each other, or at least knew *of* each other. My mentor told me about the strengths, weaknesses and idiosyncrasies of local judges and of other lawyers, which gave me a leg up when I then encountered them. By the same token, whatever "adversarialness," not to say animosity, developed against the opposing lawyer during a case would usually dissipate when the case was over. Indeed, I fondly recall an instance of a particularly antagonistic matter — a child custody case, of course — where I ran into the opposing lawyer at a bar function not long after the case ended. Though I tried to give him a wide berth, he came over (not wholly sober) and told me how sorry he was about this difficult case and how *the judge* had messed it up.

That wasn't my take; but I took his comments to mean that he wanted peace restored, and so it happened. Today, such encounters are more than rare, simply because there are too many of us. We cannot all know each other, or even of each other; and anonymity seems our fate as far as our colleagues are concerned. That seems unavoidable with the growth and depersonalization I have described, which is certainly not limited to lawyers, although we cannot take a pass from that development.

What can we do about that? I don't know; but it is the same problem of a crowded planet that we see when we read about millions of refugees from a civil war in a remote country, about inconvenience to thousands if there is a transportation strike, or about how many hundreds of thousands of new unemployment claims there were in the last quarter. Individual lives and encounters seem to disappear in those infinite numbers; but we — each of us — must remember that we are on this earth only once and that this is our specific opportunity to live a constructive life, to make our presence felt, and to leave this a better world than we found it.

There are things you can do. You may — as I did in *In re Lifschutz* (1970) 2 Cal.3d 415 — encounter a psychiatrist who refuses to answer discovery questions about a patient because doing so would violate his professional standards, and take him through the courts, including a weekend in county jail, but end up with a triumphant new victory for rights of patient privacy. Or you may find yourself at the receiving end of a huge class action which is so enormous that it must be tried even though class actions are never tried, and then get a 93 defense verdict after nine days of deliberation, during which one juror dropped dead. (*Richmond v. Dart Industries, Inc.* (1987) 196 Cal.App.3d 869.) Or you may be asked, as I was, to serve on a commission that wrote the country's first no-fault divorce law. There is just no telling what life may bring; but it can be interesting and challenging if you make it so.

All that may be hard to do; but ask yourself whether it is not worth the effort. To that question there is only one answer.

Kurt Melchior is a partner and general counsel of Nossaman LLP in San Francisco. He has been trying civil cases and appeals since 1951 — in California since 1957 — and was inducted into the California Trial Lawyer Hall of Fame in 2004.

"I Learned About Litigating from That"

In Memory of Joel A. Cohen

By Howard S. Shernoff

Howard S. Shernoff

BECAUSE OF HIS CANCER, Joel was working from home by the time I began practicing at the Shernoff law firm. He was our Los Angeles office's head law-and-motion writer, on whom we relied to beat demurrers, get past summary judgments, craft motions in limine. But owing to his illness and harsh treatment regimen, Joel himself began to rely on others, including me, to research and draft the steady stream of motions we faced as we waded through the unchartered litigation waters involving Holocaust-era life-insurance claims and health-insurance rescissions.

I came to the law from a writing background, with aspirations of handling motions and appeals. Having read that most court rulings turn on the papers submitted rather than the accompanying arguments (which

generally are invited only after the court has formulated its tentative position), I convinced myself that writing was what the law was all about. It was where the glory lies. So I began working gratefully under Joel's guidance.

Although Joel had always argued his own motions and appeals, and he wanted to continue to do so very badly, he just couldn't. And so while I had contemplated working in the law as a writer only, perhaps even from a remote location rather than in the office, I soon found myself facing a full calendar of court appearances. That was not at all what I had envisioned for my career, as I had never enjoyed speaking in public (let alone across from an adverse party in front of a judge at 8:30 in the morning with a tie around my neck) and felt that I lacked the legal grasp and the spontaneity to perform as a courtroom orator. But before each appearance, Joel and I would go over our main points and prepare me for argument. I still remember Joel's voice sounding from my speakerphone as I paced my office. Reviewing the legal issues with Joel imbued me with the confidence I needed before the hearings and taught me valuable lesson number one: preparation not only wins arguments, it soothes nerves.

Joel occupied pole position on my speed-dial list, and the button that connected me to him became well worn over time. Like a lot of plaintiff's lawyers, I bypassed the "associate" stage of the lawyer's career trajectory and started handling my own cases from day one. So having Joel on the other end of that phone connection felt like a true lifeline. We had somewhat different writing styles, but he taught me the virtues of relentless attention to detail, of knowing cited authority cold, of favoring an even-handed tone over bombast, of structuring a coherent argument and presenting it with due pith.

Joel and I got crosswise only once. We were briefing what appeared to be an issue of first impression regarding the statute of limitations in certain health-insurance policies. I thought I understood the issue with crystal clarity, and I believed that I had discovered the right authority to cement our stand. I was bullish about the case and my ability to brief the issue, and I uncharacteristically deviated from the approach that Joel wanted to take. When Joel later read the brief, he was upset that I had, as he put it, blown him off. A somewhat heated squabble ensued. It turned out that I didn't know the issue so well and had misunderstood and misapplied my prime piece of

'Joel was on the losing side of a few motions and appeals, and he made his share of errors. But even here, he managed to teach me through his mistakes.'

authority. Joel too had missed some of the angles. So we were both being too headstrong.

> *'I learned to never take anything for granted when briefing a court on a potentially fatal issue, and I never have since.'*

We buried the hatchet when Joel sent me an email titled, "All You Need Is Love." You see, he was a huge Beatles fan. He was the bigger man and taught me that lawyers' warring in litigation over matters of ego, whether infighting or scrapping with the other side, creates nothing but a needless distraction from the real issues — the ones that are important to our clients and our jurisprudence. As a bonus, we ultimately won on our issue and created new law after beating summary judgment, working on appellate briefing together and my arguing the case in the Court of Appeal.

Joel was on the losing side of a few motions and appeals, and he made his share of errors. But even here, he managed to teach me through his mistakes. On one case, the appellate court made us pay when we failed to dispute a critical fact in the separate statement of defendant's summary judgment. (It was something like fact number 167 out of 339.) We made some bad law there. Another time, Joel thought that the points-and-authorities I had drafted in opposition to a summary judgment were solid enough to carry the day without declarations from our clients on several key facts. The court didn't think so, and we lost. I learned to never take anything for granted when briefing a court on a potentially fatal issue, and I never have since.

When Joel's cancer began to spread, he was compelled to increase the dosages of his drugs and the frequency of his chemotherapy. It pained me to admit it, but these things took their toll on his mind and his spirit. His voice grew wobbly, and he had to spend more time sleeping than poring over cases on Westlaw to support our motions. Not wishing to disturb him and steal his dwindling energy, I cut myself off from the reflex of pressing his speed-dial button. It felt strange at first, kind of lonely. But by turning to Joel less and less, I relied on myself more and more. It was the vital last lesson of Joel's legal tutelage: self-dependence.

It was merciful when Joel finally passed away, because cancer causes so much pain in the final stages. And I took comfort by keeping him on my speed-dial. When faced with a new legal challenge, I can, in my mind at least, still push the well-worn button that connects me to him.

Howard S. Shernoff is managing attorney of the Los Angeles office of Shernoff Bidart Echeverria Bentley LLP.

McDermott On Demand:

Ozymandias?

By Thomas J. McDermott, Jr.

Thomas J. McDermott, Jr.

With the upcoming anniversaries of the beginning of World War I (100 years - 2014) and the end of World War ll (70 years - 2015), there has been much writing about the "special" relationship of the United States to England, the closeness, if you will. It served to remind me that while I was in grade school, each morning we sang "God Save the King." That's right, the English national anthem. We pledged allegiance to the American flag, then sang "God Save the King," albeit with our American words that started, "My country, 'tis of thee...." In my own lifetime, at least at the beginning of it, we were still that close to England and, I believe, the English system of Justice.

Turner Classic Movies is the savior of the geriatric set because it reminds us that people in movies once were actually good-looking, enjoyed smoking and drinking a lot, had talent, seldom swore, and generally ended up being not murdered. In other words, they were more or less real. TCM put on *The Talk of the Town* recently, an Academy Award nominee, starring Cary Grant, Ronald Colman, and Jean Arthur. Mr. Grant and Mr. Colman competed for Miss Arthur, a more-than-worthy reward, by arguing the pluses, the minuses, and the vagaries of the English-American legal system. That's a somewhat oversimplification, of course, but it captures the spirit of the movie's debate: the written academic side of the law as against the person-oriented reality side of the law.

The movie concludes that both are important and shows it by making both significant to the resolution. The human side of the law, i.e., the listening to and the considering of what the human being has to say, sort of won the day because Mr. Grant, representing that side, got Miss Arthur.

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McDermott on Demand

(Continued from Page 47)

English-American law, contrary to most civilized legal systems, held onto "biblical" law, or "traditional" law, where the parties tell their stories to impartial peers who then reach a decision as to right or wrong. Disputes arose long before writing was developed, so there had to be some way to resolve them. Of all the systems developed — trial by combat, etc. — oral presentation proved to be the most effective.

But we have gone from all oral to part oral, part writing to, in the United States today, almost all writing, or at least too much writing. Does any judge really believe that he or she is deciding a case in the most humane way while ruling on a demurrer or motion for summary judgment? lf so, I suggest that that judge leave the bench. There are arguments in favor of the demurrer and the motion for summary judgment, but they go to efficiency and not to justice.

ln this issue of *Cal Lit* there is a bit of a joust going on about the right or wrong of plagiarism in brief writing. Plagiarism is a concept developed to protect the intellectual property of a person who writes for a living. Plagiarism in a brief has now become an issue for lawyers? Are lawyers now writing for a living instead of trying cases? l remember the late Mark Robinson, Sr., belittling the American College of Trial Lawyers by calling it the American College of Pre-Trial Lawyers.

The American system for resolving civil cases is failing for the following reasons: (1) the emphasis by the courts on disposing of any case for any reason without ever seeing the parties; (2) the great cost of a hindering bureaucracy while trying to secure a jury decision; and (3) the failure of the appellate courts to apply any rigor to oversight on demurrers and motions for summary judgment, i.e., the unpublished rubber stamp.

Alas, the English too have moved away from the jury system, but their cases usually are tried before judges. In other words, the judges see the parties and hear them describe their impositions. Somewhere, somehow there has to be a way to solve these problems, and we should start to develop it. A quote from Shelley may be apt:

> 'My name is Ozymandias, king of kings:
> Look on my works, ye Mighty, and despair!'
> Nothing beside remains. Round the decay
> Of that colossal wreck, boundless and bare
> The lone and level sands stretch far away.

Perhaps 500 years from now our progeny will look upon unending stacks of reported writings strewn about and ask, "But how could they have allowed Justice to slip through their fingers like sand?"

A longtime member of the California Litigation Editorial Board, Mr. McDermott is a sole practitioner in Palm Desert.

From the Section Chair

(Continued from Inside Front Cover)

standards in civil litigation, I am compelled to remind our members that the ADR Committee is an extremely active subcommittee within our section. The ADR committee consistently provides content in the form of articles on new developments in the law, live programs and webinars. The ADR Committee also created the comprehensive "The Lawyer's Guide to Drafting ADR Clauses," which like our other publications is *free* to section members and is available on the State Bar Website under the Litigation Section "Members Only" link.

With regard to webinars, our Section is committed this year to increasing the amount of these high-quality/low-cost events. We are thrilled one of our MCLE webinars was led by our very own Joan Wolff, who is an editor for California Litigation and an advisor on the Executive Committee. This MCLE, titled "Ten Ways to Lose Your Appeal at Trial," took place January 24, 2014 and is still available for purchase. I look forward to announcing many more webinars this coming year.

Again, I am energized to work as your Chair this year and look forward to serving all of you.

Robert M. Bodzin is a partner/trial attorney at Burnham Brown in Oakland and is the 2013-2014 Chair of the Litigation Section.

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