ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

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Letter from the President

Last Friday evening at 7:00 p.m., I made the mistake of answering my phone as I was leaving my office only to be subjected to a barrage of threats, ultimatums, and profane comments from an opposing counsel upset about his inability to close a complex multi-party settlement before a pretrial conference scheduled for Monday. Having just moderated an ABTL program on lawyer incivility three nights before, I found this a particularly timely reminder of the abuse to which we are all at least occasionally subjected in litigation practice. The widespread perception of bench and bar is that incivility and a lack of professionalism in litigation are on the rise.

Jeffrey I. Weinberger

A number of courts have looked at this issue in the last few years, most notably the Seventh Circuit Court of Appeals which, after an extensive study, found substantial factual support to back up this perception and promulgated a code of standards to address it. All potential admittees must now state that they are willing to abide by the code, the substance of which has been incorporated in curricula in all law schools within the Seventh Circuit.

In California, both of our sister ABTL chapters have adopted standards intended to curb incivility and unprofessional or abusive conduct. In the Fall of 1994, the ABTL of Northern California adopted its "Guide to Professional Practice" which addresses a wide range of subjects, including tone of discourse among

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INSIDE

When Will You Get to Trial?

While there is no clear winner in the debate over which region of California suffers from the greatest level of automobile traffic congestion, the most recent available statistics regarding the flow of civil cases in federal district courts show that Southern California venues provide the quickest path to trial. According to data from the Statistics Division of Administrative Office of the United States Courts for the year ended September 30, 1995, the median time from the filing of a civil case to the start of trial in both the Central and Southern Districts of California was 18 months.

Graig R. Woodburn

During the same period, the median time to trial in the Northern District was 25 months and in the Eastern District, 26 months.

The statistics also reveal that time to trial in all districts has increased significantly in the last five years. In the Central District for the year ended September 30, 1990, it took an average of 12 months for a civil case to reach trial; that number had increased to 18 months by the end of September 30, 1995. In the Northern District, the time to trial increased from 15 months in 1990 to 25 months in 1995. The Eastern District increased from 18 months in 1990 to 26 in 1995. Interestingly, the Southern District average increased only two months — from 16 months in 1990 to 18 months in 1995.

The time period from filing to trial in the Northern and Eastern Districts is among the worst in the nation. The Eastern District, with 26 months, places 82nd among 94 districts in the country, the Northern District's 25 months places it 77th out of 94 districts. For the Central and Southern Districts, their 18-month period ranks 40th of 94 districts in the country and fourth within the 9th Circuit.

Contrary to popular thinking, the number of civil filings in both the Northern and Central Districts has actually decreased since 1992. There were 433 civil filings per judge in the Northern District in 1992, compared to 373 per judge in the period ending September 30, 1995. In the Central District, there were 413 civil filings per judge in 1992, down to 382 per judge for the period ending September 30, 1995.

The number of civil cases pending over three years has also decreased. The Central District has experienced a near 15 percent drop from 19.5 in 1990 to 5.2 percent in 1995 and the Southern District has seen a decrease of almost 10 percent from

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An Appealing Settlement Program

Early last year, the Court of Appeal and the Superior Court identified a source of appellate delay that was fast reaching crisis proportions: a 2,000-case backlog of pending appeals in which preparation of the clerk's transcript had not even started. Since it was already taking the Superior Court nearly a year to complete a clerk's transcript, the backlog posed an ominous threat to the orderly administration of appeals.

Justices Fred Woods (Division Seven) and Richard Aldrich (Division Three) spearheaded a unique collaboration. They assembled a committee that included the head of the Superior Court's Appeal Transcripts Division and a group of experienced appellate lawyers from the Los Angeles County Bar Association Appellate Courts Committee, and asked them to help devise a program that would attack the transcript backlog. The committee, chaired by Pamela E. Dunn of Robie & Matthai, confronted several problems that were bedeviling the system: (a) While some 30% of appeals are abandoned, the abandonment often takes place after the record has already been prepared; (b) many appeals are plainly headed for affirmance and should probably be discouraged; and (c) many appeals are presented on over-inclusive records and overbroad arguments that waste the parties' and the court's time and unnecessarily lengthen the appellate process.

Robin Meadow

The committee came up with a two-pronged approach: minimizing the clerk's involvement in preparing the record on appeal and providing for early settlement opportunities.

There was a ready mechanism for the first prong in Rule 5.1 of the California Rules of Court, an under-utilized procedure that allows the parties to prepare an appendix instead of ordering a formal clerk's transcript. However, the second prong required the creation of a completely new settlement conference program for which there was no direct precedent. Scarce judicial resources limit the availability of court-supervised settlement conferences; and while Division Seven routinely invites the parties to participate in a settlement program that uses appellate lawyers as settlement officers, the case must first be assigned to that division — meaning, usually, that the record has already been completed and filed. The steering committee's challenge was to come up with a program that could begin before the parties had made a substantial investment of time and money and would not require significant judicial resources. The result is the District-Wide Settlement Conference Program which began in January.

The program kicks in at the earliest possible moment, when the appellant files the notice of appeal. The Superior Court immediately sends the appellant a "Mandatory Docketing Statement." This document tells the appellant two things: First, it describes the delays involved in obtaining a clerk's transcript and invites the appellant to utilize Rule 5.1; and second, it describes the settlement conference program and invites the parties' participation. The appellant must return the docketing statement within 20 days, advising the court whether the parties

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agree to participate in the settlement program and, optionally, electing Rule 5.1.

The Settlement Conference Program

If the parties agree to participate, the Superior Court faxes a copy of the docketing statement to the Court of Appeal, which is responsible for the conference from that point forward. The Court of Appeal locates a settlement officer from a panel of about 75 appellate lawyers who have volunteered to serve one day per calendar quarter. The court also sends the parties a questionnaire designed to elicit basic information about the appeal, including information that might reveal a conflict for the settlement officer.

In addition to their experience as appellate lawyers, many members of the panel have handled voluntary settlement conferences in Division Seven's program. Most of them also received a full day of settlement conference/mediation training in a program sponsored by the Los Angeles County Bar Association. The panelists for that program included Justice Aldrich and Superior Court Judge Richard Harris, who both regularly teach settlement techniques to judges, and Richard Chernick, a former County Bar president who has long been a leader in the development of alternative dispute resolution techniques.

Settlement conferences are held at the Court of Appeal, which provides unused chambers with adjoining rooms for caucusing. Normally a justice and limited secretarial facilities are available if the parties need them to complete a settlement. Since cases in the program have not yet been assigned to a division, they come under the supervision of the Clerk of the Court of Appeal, Joseph Lane. If the settlement requires any judicial action, it will be assigned to a division at that time.

There are advantages and disadvantages to participating in a settlement process this early in an appeal. Some factors the parties should consider:

- Many cases have no business being in the appellate system at all. To an experienced appellate lawyer, they are obvious affirmances (or, rarely, obvious reversals). However, trial counsel may not have enough appellate experience to advise their clients wisely on the chances of prevailing. The program's settlement officers can provide a perspective on the case that the parties may not otherwise have available to them.
- Although the most informed assessment of an appeal comes after briefing, by that time the parties may have invested tens or even hundreds of thousands of dollars in the appeal. Regardless of the settlement officer's assessment of the case, at that late stage the parties may feel they have nothing to lose by proceeding further.
- It is difficult for the parties' appellate counsel, much less the settlement officer, to evaluate the merits of an appeal without having reviewed the record. However, it may be possible to identify central issues or themes that will govern the evolution of the appeal in such a way that the settlement officer can provide a meaningful prediction of how the case is likely to go.
- There is strong empirical evidence that early settlement conferences work, and work well. The Ninth Circuit's mediation program, which since 1992 has operated as a separate department within the court, has achieved substantial success. According to mediator Claudia Bernard, she and her colleagues have settled as many as *73% of the cases they have worked on*. Of course, there are differences — among other things, the Ninth Circuit uses full-time mediators, who screen cases for the program — but this compelling statistic at least shows that holding settlement conferences early does not necessarily limit their success.

The program has broader goals than settlement. A perennial problem in the appellate courts is appeals in which the issues are not sharply focused and the record is overly inclusive. If a settlement conference fails to produce a settlement, the settlement officers may nevertheless be able to help the parties narrow the issues and limit the size of their record. Achieving even that limited goal may enable the appeal to move through the system less expensively and possibly more quickly. The result helps not only the parties to the particular appeal, but also parties to other appeals that are waiting in line.

Record Preparation

From the Superior Court's perspective, the simplest way to break up the transcript-preparation logjam is for parties to use Rule 5.1. Once a party elects that procedure, the clerk's transcript portion of the record becomes entirely the parties' responsibility and requires virtually no court resources. Indeed, if the appellant does not need a reporter's transcript, record preparation bypasses the Superior Court almost completely. One cautionary note, however: Preparing a good appendix takes a lot of careful work and may, in a complex case, end up costing more than a court-prepared clerk's transcript because of the need for lawyer and paralegal time. *See generally* Meadow and Geffen, "Taking Care of the Record on Appeal," *Los Angeles Lawyer* March 1993.

The settlement program strongly endorses the appendix procedure. The Mandatory Docketing Statement allows an appellant who has already designated a clerk's transcript to change that designation and to elect Rule 5.1 instead, even if the original ten days for designating the record has expired. (The current version of the docketing statement contemplates a complete redesignation of the record, including *both* the Rule 5.1 election and the designation of the reporter's transcript. If the record *has not yet been designated*, the appellant can simply file a regular designation of record, electing Rule 5.1 if he or she chooses.)

The new program does *not* relieve the appellant from complying with the usual appellate deadlines and paying required deposits, and record preparation is not stayed unless the parties stipulate. However, at least until the backlog gets reduced, participation in the program is still a no-lose proposition for both sides:

- Since it normally takes six to seven months before the clerk starts preparing the transcript, the program allows a settlement to occur before the deposits have been used. A settling appellant can therefore get the deposits back.
- For the same reason, participating in the program does not cost parties their place in line. If they fail to settle, their transcript will be prepared just as quickly (or slowly) as if they had not participated.
- At most, the program requires an investment of perhaps a couple of days' time. That is a small price to pay for the opportunity of avoiding the substantial time and expense of carrying the appeal to its conclusion. And every case that settles early helps the progress of those cases that cannot settle.

One thing is certain: If this program fails to have a significant impact, the Court of Appeal and the Superior Court will need to look for other innovative solutions, and some form of aggressive early intervention seems likely. In a recent interview, for example, Justice Aldrich suggested the possibility of mandatory early mediation for all appeals (a possibility the Legislature is already exploring for trial courts via Senate Bill 1429).

While the District-Wide Settlement Conference Program does not pretend to be a panacea, broad participation can make a real difference in the appellate system. All it takes is for open-minded lawyers and clients to give it a try.

—Robin Meadow

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