ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO

abtl REPORT

Volume XV No. 1 *March 2008*

Surviving E-discovery: Rules and Realities

By Hon. Anthony J. Battaglia, United States Magistrate Judge, Southern District of California[1]

In little over a year since the implementation of amendments to the Federal Rules of Civil Procedure addressing discovery of electronically stored information ("ESI"), lawyers and judges have struggled with these rules and the wide array of technologies. New issues arise daily and answers are being devised on a case by case basis. After a year of experience, it seems that certain core concepts and a veritable "top 10" list of techniques have emerged. These can be utilized to survive discovery in federal litigation. I do not mean survive in the T.V. show "Survivor" construct of "outwit, outplay and outlast", nor by the skin of your teeth standard. Survival in this instance should be measured as a competence to work within the rules in the best interests of your client. These techniques or tips are essentially a blend of the rules, realities and anecdotal experience of the author, following a review of developing case law and the experience gained in managing discovery issues in federal court.

Hon. Anthony J. Battaglia

ESI is critical in cases, since 95 percent of all business documents are created electronically, 75 to 80 percent of the data is never printed, and 70 percent of historic data is stored electronical-

(see "E-discovery" on page 8)

A Tribute to Joseph "Jay" Wheeler

By Jill Sullivan, Esq. of Chapin Wheeler LLP and Ken Fitzgerald, Esq. of Latham & Watkins LLP

Joseph "Jay" Wheeler, the co-founder of Chapin Wheeler LLP, passed away on January 17, 2008, at the age of 60. Before starting the Chapin Wheeler firm with his friend Ed Chapin, Jay was a senior trial lawyer at Latham & Watkins, where he served as the Chairman of the San Diego Litigation Department from 1996 to 2000.

Joseph "Jay" Wheeler

Jay was born on August 31, 1947 and was raised in South Dakota and Minnesota. He graduated from the United States Mili-

(see "Joseph "Jay" Wheeler" on page 7)

Inside

President's Letter: Always Take the High Road

By Robin A. Wofford, Esq., President ABTL

"Always take the high road." You probably heard that from your parents, teachers, mentors and friends, over and over as a child. I sometimes wondered what it meant while at the same time hoping I did not have to cross that road too often. Little did I know that the career path I chose would force me to face that road daily. I learned early on in my career that lawyers continually face that choice. Do I give the requested extension? Do I return the privileged document that was inadvertently produced? Do I inundate my opponent with thousands of pages of electronically stored information that may not really be responsive but, why not make them work to find the answer? Do I act with integrity as Jay Wheeler did, or do I agree to go to a settlement conference so my opposing counsel will agree to a trial continuance, all the while knowing my client will not negotiate in good faith?

Robin A. Wofford

As a young lawyer, I was much more susceptible to making the wrong choice because I wanted to show I was aggressive and in control. Luckily for me, I was mentored by some great lawyers like Mike Duckor who always reminded me to "take the high road" and "don't stoop to their level." This philosophy and practice is why I found ABTL to be such a rewarding organization to become involved in. ABTL's mission is to promote civility and professionalism in the practice of law. We carry out that mission by putting on programs that allow us to mingle with one another and get to know each other on a personal level outside of the courtroom. The success of ABTL is predicated on the participation of both sides of the bar and, of course, the bench. Our purpose is not to promote the agenda of the plaintiff's bar or the defense bar. Our purpose is to promote civility, honesty, ethics and professionalism and continually learn to become better trial lawyers. I can assure you that if I have shared a meal with my opponent I try and learn about them as a person and as someone I trust more. Ultimately, because of that relationship, I can take the high road and I do get better results for my clients.

So join me this year in making the effort to increase civility and ethics in our practice. Come to our programs and do not be afraid to sit with your opponent, or even a Judge before whom you may appear and get to know one another as people, not just lawyers. Ultimately that will allow each of us to become better people and better lawyers, which results in a better judicial experience for everyone involved.

My journey as President of this great organization is just beginning. I am honored to follow an incredible group of past Presidents that helped us carry out this mission with great distinction. My goal as President this year is to keep the train on its tracks. By that I mean continue to put on great programs and promote professionalism in our legal community.

I hope everyone enjoyed the insight Mark Geragos shared at our dinner in February. It was impressive that he kept his commitment to speak, even though he was in trial in Los Angeles that day. That, my friends, is an example of professionalism-- he kept his word. On April 28th Laurie Levinson will speak about ethical and excellent lawyering at a program entitled: "Lessons of the Trials of the Century for Lawyers and Judges". On June 9th we will have a panel of our distinguished Federal Magistrate Judges sharing insights into their courtrooms. There will be more exciting programs in September and December, but in the meantime I challenge each of you to continue your commitment to excellence, professionalism and taking the "high road." ▲

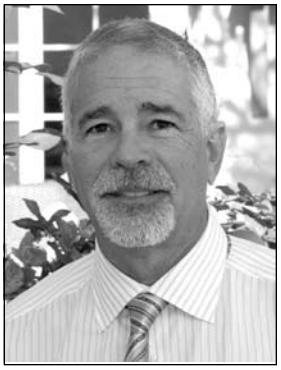
She (Almost) Came in Through the Bathroom Window: The *Stoneridge* Decision Shuts Down Private Plaintiff "Scheme Liability"

By Alan Schulman, Esq. and Nathan Karlsgodt

On January 15, 2008, a collective sigh of relief could be heard in boardrooms across the country. On that day, the U.S. Supreme Court handed investor plaintiffs a significant defeat in what may be the most important securities litigation decision in years. At issue in *Stoneridge Investment Partners LLC v. Scientific-Atlanta, Inc., et al.,* 552 U.S. ___ (2008), was whether a private right of action under §10(b) of the Securities Exchange Act of 1934 reached the conduct of so-called "secondary actors" under a theory of "scheme liability." Scheme liability is based on the theory that Rule 10b-5(a) and (c) prohibit the use of any scheme to defraud in connection with the purchase or sale of any security, whether premised on the conduct of primary actors (*i.e.*, officers and directors) or secondary actors (*i.e.*, auditors, lawyers and bankers). See generally *Ernst & Ernst v. Hochfelder*, 425 U.S.185 at 199 n. 20 (1976); *Sante Fe v. Green*, 430 U.S. 462, (1977). In an opinion authored by Justice Kennedy, the Court in a 5-4 decision held that a private right of action under §10(b) could not be sustained against a secondary actor absent a statement or representation communicated to the market and relied upon by investors. This article explains the background and reasoning of that decision.

A. Background

Investors, led by Stoneridge Investment Partners LLC, brought a shareholder class action lawsuit on behalf of itself and others who purchased shares of stock in a cable television company, Charter Communications ("Charter"), claiming Charter had inflated its quarterly financial results. Plaintiffs alleged that Charter engaged in a fraudulent scheme with two of its digital set top box providers (Scientific-Atlantic and Motorola) where Charter would overpay for the set top boxes if the providers would return the money at the end of the quarter by purchasing advertising from Charter. This transaction was allegedly designed to allow Charter to record inflated advertising revenue and capitalize the purchase of the set top boxes. Charter's accounting, which allegedly violated Generally Accepted Accounting Principles, allowed the company to falsely report overstated revenue and operating cash flow for the quarter. While Scientific-Atlantic and Motorola allegedly knew the purpose of the transaction was to boost Charter's advertising revenue, they did not play a role in preparing or disseminating Charter's financial statements to its investors nor make any direct statements to investors about such transactions. From Justice Kennedy's perspective, this distinction was pivotal in determining the scope of liability under §10(b).



Alan Schulman

B. Scheme and Secondary Actor Liability

The *Stoneridge* decision sought to clarify uncertainty in the interplay of scheme and secondary actor liability that has existed since 1994 when the U.S. Supreme Court decided *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994). In *Central Bank*, also written by Justice Kennedy, the Court held there could be no liability under §10(b) for "aiding and abetting" a fraud perpetrated by another because the statute did not expressly prohibit such an act. This was significant for two reasons: (1) by 1994 nearly every circuit had recognized "aiding and abetting" liability under §10(b), and (2) it cemented the highest court's general shift away from implied private rights of action under the Securities Exchange Act of 1934. *Central Bank,* however, did not put an end to claims under §10(b) based on the conduct of secondary actors. The Supreme Court included

(see "Stoneridge" on page 12)

Inadvertently Produced Documents – What Do You Do If You Receive Them?

By Erik S. Bliss, Esq. of Sheppard, Mullin, Richter & Hampton LLP

Erik S. Bliss

You arrive at your desk one morning and find two envelopes from plaintiff's counsel on your desk, in a case where you represent ABC Corporation, one of two defendants. "That's odd," you think, "because last week he said he'd never speak to me again."

You open the first envelope and find a notice of your client's deposition. Stapled to the back of the notice, however, are several pages of notes. The notes, made in what you recognize as the plaintiff's attorney's handwriting, are marked "PRIVILEGED" and, at the top of the first page, indicate that they are from a "call w/ expert re liab. issues." Under headings that correspond to important issues in the case, the notes describe positions the plaintiff's expert proposes to take, and the attorney's thoughts on how those positions are consistent or inconsistent with certain evidence and potential arguments at trial. It must be your lucky day.

The second envelope contains a letter from plaintiff's counsel to an attorney for the codefendant. You are not included as an addressee on the letter, and no "cc"s are listed -- the letter is only to the other defendant's lawyer. The letter, labeled "CONFIDENTIAL," says: "Dear Counsel: I have enclosed a final copy of our negotiated settlement agreement, with my client's signature. As we have discussed (and as provided in the agreement itself), the terms of the settlement are strictly confidential, and should not be revealed to ABC or its lawyers. The plaintiff is specifically choosing to settle only with your client, and not ABC, because . . ." The letter goes

(see "Inadvertently Produced" on page 15)

Tips from the Trenches: The Inaugural Column

By Mark C. Mazzarella, Esq. of Mazzarella Calderelli LLP

I was asked recently by a young man fresh out of law school what I believed to be the key to success as a trial lawyer. Any number of thoughts came to mind -- hard work, commitment to clients, never knowing less than everything there is to know about the facts and law as they apply to your cases (and always more than your opponent knows), establishing, and jealously guarding, a flawless reputation in every respect, to name a few. But one answer pushed all those thoughts aside. After a few minutes reflection, I told him there seemed to be one common feature to the background of every successful trial lawyer I have known. Every one of them had one or more great mentors.

Mark C. Mazzarella

For E. Bob Wallach of San Francisco, there was one of the deans of the San Francisco Bar, Bruce Walkup; for Dave Bernard of Los Angeles, who tragically lost his life in the crash of PSA 187, there was Frank Belcher, for whom the mock court room at Stanford Law School is named; locally, for Tom Sharkey there were Wes McGuinness and Bill Fitzgerald; for Bob Steiner, there was Fred Kunzel; Craig McClellan learned at the knee of Jerry Davee and Judge Bill Yale, in whose offices Craig was often found during our years together at Luce, Forward; Denny Scoville had Judge Rudy Brewster as a tutor; Reg Vitek had the benefit of Gerry McMahon's mentorship, and the list goes on.

The purpose of this article (and ones that will follow in future editions of *The ABTL Report)* is, as the title implies, to pass on "tips from the trenches," from those whose mentorship is the most cherished and valuable commodity that any trial lawyer can possess. While nothing can replace the one-on-one tutelage by a master, it is the objective of this column that every trial lawyer, at any experience level, will find these "tips" thought provoking, instructional and even inspirational. Future columns will be the product of interviews with those who have staked out a well-deserved place at the highest level of our profession. Many will be past recipients of the Daniel Broderick Award. Others undoubtedly will be future candidates for, or recipients of, that Award, which represents the pinnacle of achievement for a local trial lawyer. Others may be masters who have not sought out or obtained a high profile, but yet bring to the courtroom insights and abilities that should be bequeathed to future generations of trial attorneys.

In this inaugural edition of "Tips from the Trenches," I will pass on four fundamental "rules" for success as a trial attorney I have cobbled together from my collective "interviews" over many years with my personal mentors, some for and with whom I worked, like Dave Bernard, Bob Steiner and Jerry Davee; others from whom I learned as opponents both before, during and after trials, like Reg Vitek, Milt Silverman, Vince Bartollota, Ed Chapin and Browne Greene; and still others, friends like Bob Wallach and Harvey Levine, who have always been generous with their sage advice and counsel.

While every case must be approached based on its unique facts and circumstances and the personalities and characteristics of those involved, from the client to the opponent, to the witnesses, the judge and even the jurors, there are a few fundamentals that almost universally apply. While certainly not all-inclusive, here are four that seem to be recognized consistently by the "best and the brightest" among us:

Rule Number One: Look Before You Leap

There is wisdom in the cliché, "look before you leap." Always know enough facts and law to be comfortable with your decisions before you make any decisions that cannot be reversed. As long as no damage is done by delay, take your time to do a thorough investigation and analysis up front.

Rule Number Two: Don't Strike Tentatively

Any karate master will tell his students that, if you intend to break a brick, you can't strike it tentatively; if you do, most likely it is your hand

(see "Tips" on page 17)

Recent Developments in Summary Judgment

By Charles S. Berwanger, Esq. of Gordon & Rees, LLP

The importance of summary judgment or adjudication in California jurisprudence cannot be understated. Counsel should both consider the wisdom of such a motion and prepare their case in such a way that they can either prosecute or defend against such a motion. This outcome-determinative motion was the subject of published decisions of various Courts of Appeal during 2007, and has spawned changes to the Rules of Court.

Charles S. Berwanger

1. Must the Trial Court Rule on Evidence Objections to Preserve the Objection for Review on Appeal?

For a moment, it appeared that the First Appellate District's decision in *Biljac Associates v. First Interstate Bank of Oregon* (1990) 218 Cal.App.3d 1410 had at long last been overruled. In *Biljac,* plaintiffs filed voluminous evidence objections and requested the court to give written rulings on all objections. The trial court declined, explaining that while it found merit to some of the objections, it would disregard all inadmissible or incompetent evidence and it saw little purpose in rendering a formal ruling. Specifically, the trial court observed that it did not intend to rule on each piece of evidence because it would be a "horrendous, incredibly time-consuming task that would serve very little purpose." Plaintiffs contended this was reversible error – that Code of Civil Procedure Section 437c required the trial court to expressly rule on every objection and the failure to do so, waived the objections on appeal. The Court of Appeal disagreed. *Biljac* has been rejected by various districts and on April 9, 2007, in *Demps v. San Francisco Housing Authority* (2007) 149 Cal.App.4th 564, the First Appellate District – which decided *Biljac* - rejected *Biljac*. In *Demps*, the trial court said: "I am going to disregard all those portions of the evidence that I consider to be incompetent and inadmissible." The Court of Appeal held that such procedure was wrong because the trial court, having been presented with timely evidence objections in proper form, was required to expressly rule on the individual objections; if it did not, the objections were deemed waived pursuant to Code of Civil Procedure sec-

(see "Summary Judgment" on page 17)

Joseph "Jay" Wheeler

continued from page 1

tary Academy at West Point in 1969 with a degree in Engineering. During his six years in the U.S. Army, he served in Vietnam as a military advisor to the South Vietnam army and was stationed for a time in Nuremberg, Germany. Upon returning to the United States, Jay served as Aide-de-Camp to General Henry Miley, Commanding General of the United States Army Materiel Command from 1973 to 1975. Jay's value as a friend to many was reflected by the attendance of 21 of his West Point classmates at his memorial service in San Diego.

In the fall of 1975, Jay entered the University of Virginia School of Law, where he served as the Law Review Notes Editor in his second and third year. There, he met his future wife, Ann, also a student in the law school. Upon graduating in 1978, he served as Law Clerk to the Hon. Roger Robb, U.S. Court of Appeals for the District of Columbia circuit.

Jay moved to California in 1979 to take a position at Latham & Watkins in Los Angeles. Jay and Ann were married two years later in 1981, and celebrated their 26th wedding anniversary in September 2007. Jay relocated to the San Diego office of Latham & Watkins in 1982, where he became a senior partner and served as one of the firm's principal trial lawyers.

While at Latham & Watkins, Jay tried a variety of business disputes to verdict, in areas of securities, antitrust, intellectual property, real estate, contract and employment law. He represented an impressive roster of clients, including Credit Suisse, ITT, Kodak, Signal, BAR/BRI Bar Review Course, and many others. He loved the courtroom, and was fearless about trying cases. He made innovative use of demonstrative exhibits, and although he prepared cases methodically and thoroughly, his demeanor before juries was calm and sincere. He loved taking complex cases and presenting them as basic human stories. His favorite beginning for an opening statement was: "Ladies and gentlemen, this is a simple case."

Jay served on the Recruiting Committee at Latham & Watkins, and helped lure a large number of lawyers in San Diego's legal community to our city. He was a thoughtful and patient teacher, who held young lawyers to high standards, while trusting them to take on great responsibility early in their careers.

In February 2005, Jay and his friend Ed Chapin founded Chapin Wheeler, along with Jill Sullivan, one of the associates Jay had closely mentored at Latham & Watkins. During the almost three years Jay, Ed and Jill worked together, Jay was driven by his enthusiasm for representing plaintiffs and his continuing love of the law and cutting-edge legal arguments. His passion and humor were infectious, and the halls of Chapin Wheeler often rang with laughter. Jay's relaxed intensity inspired everyone in the office to perform at their best, and simultaneously created an atmosphere of happiness and reassuring calm. He continued to teach and mentor, but also took great pleasure in learning new areas of the law and new strategies to best represent his clients. In his partnership with Ed, Jay was absolutely supportive, selfless and guileless. With clients and colleagues alike, Jay gave people his full attention so that everyone left his office feeling understood, energized and enlightened.

Jay was always willing to do the hard work himself. When associates had vacations to take, he made sure they took them, even when it meant that Jay was left doing legal research, writing briefs, and inspecting documents. He had a great sense of fun, played many practical jokes, and loved to laugh. He was serious about his craft, and about his cases, but he never took himself seriously. No matter how difficult the situation, he always exuded calm, and he was always able to find the humor in any circumstance. While waiting in the courtroom for oral argument, Jay frequently leaned over and whispered to the young lawyer waiting with him, "I have a brilliant idea," raising his eyebrows and giving a knowing look and small smile. Jay's brilliance, humor, and powerful but easy nature are and will be deeply missed. ▲

E-discovery

continued from page 1

ly.[2] Few cases go to trial, but almost each one involves some discovery. Discovery is easily the most expensive aspect of each case.

Looking at core concepts, we should start with the fact that our disclosure and discovery rules are aimed at a goal of providing full disclosure and minimizing the time and expense associated with discovery. More specifically to ESI, we need to accept the following:

1. Unless discovery in specific cases dictate otherwise, "documents" include ESI in discovery requests;

2. Disclosure requirements (initial, expert and pretrial) under Rule 26 include ESI;

3. ESI is defined as "information that is stored in a medium from which it can be retrieved and examined, and courts have included ephemeral or transient data in this definition."[3] The definition is purposely flexible, recognizing that technology will evolve in many, as yet unimagined, means for information creation, transmission and storage; and

4. ESI is everywhere, from computers, PDAs, backups, printer memories, wireless routers, fax machines, thumb drives, IPods, etc. Essentially, anything with a memory provides a source for ESI.

With these core concepts in mind, let's explore ten tips for survival.

1. Don't Forget Rule No. 1.

That is Rule No. 1 of the Federal Rules of Civil Procedure, of course. That rule states that the federal rules "shall be construed and administered to secure the just, speedy and inexpensive determination of every action." This should be the mantra of counsel in planning, discussing, and arguing discovery issues. Despite how technical the area of ESI sounds, the base line, and our goal, is established by this rule. It is our obligation to strive to meet this goal, recognizing that discovery is a major portion of the expense associated with litigation. As stated previously, not every case goes to trial, but every case has some degree of discovery or disclosure required.

2. Meet and Confer Like You Mean It!

A meet and confer process is required under the federal rules, specifically in Rule 26(f), and under most local rules. Judges consider the concept of meet and confer extremely important and will require you to comply very literally. In other words, pick up the phone, or arrange a meeting. Avoid e-mails, letters and faxes as the vehicle to meet and confer. They perpetuate arguments. It is just too easy to say "no" in a written communique. There is nothing like a face-to-face or voice -to-voice discussion where people can be earnest in their demands and work out agreements for what they really need. It is appropriate to use e-mails, letters and faxes to set an agenda, or to confirm an agreement, but not as the medium for "discussion".

If you can't resist the temptation to get into a letter writing, fax or e-mail campaign, please do not send copies of the correspondence to the court, unless it has been asked for. Copying the court will violate any number of local rules (*e.g.*, Local Rules of Practice for the United States District Court for the Southern District of California, Civ. L. R. 83.9). It is an improper and *ex parte* communication. Trust me, you won't persuade the judge to your way of thinking. Rather, you are apt to annoy, if not anger, the judge and the court staff. You might also end up on the wrong side of a sanctions hearing or disciplinary referral. Not a good idea!

One word of caution about the meet and confer process is warranted. It is important to keep in mind that turn about is fair play. If you insist and are successful in imaging your adversaries' entire data base, they will no doubt want yours! Recognizing that there are seldom one way streets in litigation, the court will likely embrace reciprocity in the interest of a level playing field. Of course, in the meet and confer process, don't forget Rule No.1. Your goal should be to find a just, speedy and inexpensive solution to your discovery needs, not bury your opponent in bits and bytes.

3. Be a Rules Geek.

There are seven rules that cover the process of disclosure and discovery. They are Federal Civil Procedure Rules 16, 26, 30, 33, 34, 37 and 45. It is important to read these rules periodically. Despite the recent re-styling, they are lengthy, complex, and address various items. Familiarity with the rules is of significant assistance in working through discovery problems.

(see "E-discovery" on page 9)

E-discovery

continued from page 7

As a lawyer, you are a craftsman. These rules are your tools. Using the tools without reading the operating instructions can spell disaster.

It is also important to focus on the Committee Notes. Read them as well! The Committee Notes are effectively the legislative intent of the rule makers. They provide significant meaning, definition, and explanation with regard to the rules. Often, key distinctions or practical examples are listed.

For super geeks, there is also a resource on the Administrative Office of the U.S. Court's website (called the JNET), at www.uscourts.gov/rules/index/html, where you can find Committee Reports, transmittal memoranda, and past public comment about the rules with a highly technical issue as presented. Please keep in mind that judges are schooled on the rules, the notes, and have ready access to the JNET. It is good to be on the same plane as the judge in trying to prevail in a discovery dispute.

4. Don't Forget You Are Not Alone.

As talented as lawyers are, they can never do, or know, everything themselves. They need to rely upon clients, partners, associates, paralegals, secretaries, house counsel, litigation counsel, experts, consultants, and legal vendors. All these people need to be on the same page. It is important to discuss the details of the case, the discovery plan, and the rules that form the basis for the discovery and disclosure process with these people. It is critical to have a base line understanding with the members of this "team."

Lack of communication, miscommunication, et al., can be costly. That is the lesson illustrated in *Qualcomm v. Broadcom*, U.S. District Court for the Southern District of California, 05cv1958. In ruling on a motion for sanctions and attorney's fees, and in ordering almost $9,000,000.00 in relief to a party abused by discovery violations, Judge Barbara Major has said, "for the current 'good faith' discovery system to function in the electronic age, attorneys and clients must work together to ensure that both understand how and where electronic documents, records and e-mails are maintained to determine how to best locate, review, and produce responsive documents." Order of January 7, 2008, page 17-18, Docket No. 718.

It is important to work as a team from planning to execution to survive the discovery process. After *Qualcomm,* can there be any doubt? In one word, this is a call for you to "communicate".

5. Be Careful What You Ask For!

With ESI, you can ask for too much, too little, or the wrong format, just to name a few perils. It has been customary over the years to seek "any and all" of the subject documents or information a party is interested in to avoid missing something. The problem is, asking for "any and all" when it comes to ESI can bring you volumes and volumes of data in forms very difficult to work with. This is because the technological advances allow us to create more data, create it faster, and keep it virtually forever. As a result, storage requirements for ESI are reported to quadruple every year. [4]

The volume of data is daunting. One gigabyte is roughly the equivalent of 65,000 pages, or 10,833 documents. The physical space to store this amount of data would take 26 banker's boxes. Statistics as of 2007 indicate that a person creates about 4 gigabytes of e-mail per year. That means, 104 banker's boxes full of this data. A gigabyte is very small in terms of its own physical space. Most thumb drives start at 2 gigabytes, basic IPods start at 4 gigabytes and your personal computers are advertised at very low prices with 60 to 100 gigabyte hard drives. Multiply this by the number of employees, or the computer storage capacity of a major corporation, and you will soon recognize the huge volume that you are dealing with.

Keep in mind that computerized data is not stored similarly to the old filing cabinet. Hard drives store the information in sectors, and the related sectors of a file are not necessarily sequentially located on a hard drive. The computer can distribute parts of a document throughout the disk, just like you would distribute pepperoni on top of a pizza. The operating program will reconstitute the information into a viewable document on screen. When you obtain the data in native file format[5], it will present itself as a series of zeros and ones. It will be very disorganized and will need to be organized and recon-

(see "E-discovery" on page 10)

E-discovery

continued from page 9

structed into logical and understandable "documents" through the use of the correct software. Upon initial presentation, a copy of a hard drive with one gigabyte of data will look like twenty-six banker's boxes full of shredded documents.

So, be careful, don't over expand the request in the blind hope that you have asked for enough to cover the issues in your case. You may well go blind reading the zeros and ones on your computer's screen as you sift through the staggering mountain of data you receive. By consultation with your team of clients, associates, experts and staff (Remember Tip 4!), you should detail the information sought with your capacity to be able to utilize it.

Rule 34(d)(iii) limits a responding party's duty to one form of production. You can ask for too little information in a general sense, and not get a second chance to ask for more. You can also ask for too little data by requesting it in the wrong format for production. This will result if you are unaware of the varieties and relative advantages or disadvantages of the various formats. As a result, choosing the right format is another significant concern for the litigator.

There are a variety of formats. For purposes of this article, let's focus simply on two: native and image. As noted above, native format is the form in which the data is typically stored. That is the "default" manner for production under the literal reading of the rules. Fed. R. Civ. P. 34(b)(2)(E)(i). Image format, is essentially a picture of the document.

In a very simple illustration, remember that for native format, you will need the operating program software, including any different versions used by the party creating the data, in order to work with the data. Native format has the ability to allow you to fully explore metadata[6], formulas, spread sheets, audio and video files. The limitations to native format include the fact that you cannot search the attachments to e-mails in the data, can't effectively redact information, nor can you bates number, or do a single search across all data. Also, the data is changeable and changed by working with it.

Image format[7], on the other hand, is simpler to search, review, organize, redact, bates number of search all from one interface. It presents metadata limitations, although some image programs have searchable text formats, and it is also more expensive to produce. Ultimately, however, the data is fixed, that is unchangeable, which could be important for admission at a later trial. It also tends to be more expensive to produce.

It is important to understand what it is you want to do with the data. Are you seeking a data base, that is, the raw information from which you can determine the formulas used, run the spread sheets enclosed, or develop other information analysis? Do you need to exhaustively search the metadata for all documents in the database? Or, do you really just need a picture of the documents, with some limited metadata search capability, but a perhaps more usable format to use? These are the questions you need to ask so that the right answer will come to you for your case.

In the end, you should consider different formats for different things. It may be that for e-mails, image format will do fine. If you need human resources data or spread sheet information, go with the native format. If a picture that allows you to view e-mails and their attachments with some metadata involved, then image format with searchable text attributes would be the thing for you. You can easily, and with proper planning, request a mixture of formats for varying data. As stated, while the rules limit the producing parties' obligation to no more than one format [Rule 34[(b)(2)(E)(iii)], that is specific as to certain data. It does not mean that you cannot obtain certain things in native format and others in an image format.

Finally, lawyers, as advocates, often want to dive into archival files and legacy data without always understanding whether it is necessary. The proverbial, "no stone unturned" method of litigation. This can be a very costly and time intensive process with ESI. However, when new computer systems are adopted, a great deal of data is often migrated into the new system from the prior system. It may well be that the data you seek is in the current data base since it was migrated in from the old system. As a result, it could be unnecessary to get into the archival or legacy data at all. This is important to consider. As noted, restoring and reconstructing these old files can be very expensive and time consuming.

(see "E-discovery" on page 11)

E-discovery

continued from page 10

How would you know? Remember Tip No. 4, "You Are Not Alone." Talk to those involved on your team about what you want and truly need, and then return to Tip No. 2, call and discuss it with your opposing counsel. There should be a written migration plan for the switch over. It should answer many, if not all, of the questions in this regard. Where doubt remains, always consider sampling of the archival and legacy files before going "whole hog." That's likely what the judge will order if you are in a dispute in this regard.

Everyone will benefit by the precision these efforts will provide.

6. Check Before You Speak.

Before you commit to a production deadline, make sure it is feasible. How? Talk to those experts, consultants and IT people. Don't come to a CMC or a discovery conference unsure of your ESI issues. This can only lead to trouble. In fact, you may want to bring the technical people with you to court on these issues.

Far too many lawyers don't grasp this point, and come to court far too little information from their clients and others about the realities of their client's information system, their client's IT sophistication, and the real abilities or limitations about producing information in their case. Keep in mind all clients are different. Just because your last client was able to quickly and efficiently produce volumes and volumes of ESI doesn't mean all clients will be similarly equipped. It is best to check to avoid trouble.

7. It Is Better To Ask For Permission Than Forgiveness.

If you need an extension of a discovery cut-off, an extension of a discovery due date, or are having problems complying with discovery requests, or are involved in a discovery dispute, it is better to discuss this with your opponent and then the Court, prior to the expiration of the discovery cut-off or discovery due date. Courts prefer to be proactive in dealing with the problem in a real time sense, not after deadlines have run. If you delay, the case litigation schedule is likely prejudiced, the judge will be upset with you, and time and money will be wasted. You are more likely to get sanctioned for your shortcomings if you wait until it's too late. Finally, you may suffer other consequences, like issue preclusion, evidentiary bars or outright dismissal or judgment.

One last note. When asking for "permission," be prepared to explain how you can't comply despite the diligence in trying. Courts embrace the premise that when a party seeks to modify a schedule or court order, if they have not been diligent, the request to modify should not be granted! *Johnson v. Mammoth Recreations, Inc.* 975 F. 2d 604 (9th Cir. 2002). So, do your best, but seek relief before deadlines have run.

8. See The Forest For The Trees.

Remember that discovery is not the end game. In fact it's no game at all. It is a means to an end. It is a way to get information necessary to prosecute your client's claims or defenses. You should plan, meet and confer, and focus with that in mind. It is human nature to assume that where someone says they have no documents responsive to a request, they must be hiding something good! As a result, you will want to pursue that issue to the end of the earth, if need be. Realize, however, that sometimes "no" is a good answer. Think back to your classes and training in trial practice. The argument to a jury that these very "relevant" documents were not produced, don't exist, or were not kept by the opponent, can be particularly powerful.

9. Don't Get Caught Using Sound Bites.

We love catch phrases, and that is a principal tool in current advertising and marketing. However, it is not helpful to use catch phrases in working through discovery problems, especially when presenting the issues to a Court. Telling the Court that something is not "reasonably accessible" isn't enough. It is a nice sound bite, but the operative phrase is "not reasonably accessible because of undue burden or cost." Of course, that is just where you start. The Court will always want to know the cost, timing and relevance factors associated with the information. The how much, how long and what's the point is the real point here!

Another often used example relates to information lost, or not located, from a computer system. Lawyers like to toss out that they have "acted in good faith." Of course, the operative phrase from Rule 37(c) (in order to avoid sanc-

(see "E-discovery" on page 12)

E-discovery

continued from page 11

tions under the rules) is that "the information was lost as a result of the routine good faith operation of an electronic information system." That is the proper context for the dispute, and this complete statement will need to be backed up by the details of operation of the electronic information systems, the degree to which a litigation hold altered the routine practice, the careful management and ongoing review of compliance with the litigation hold, and all other particulars associated with the data under consideration.

The pace of litigation and the overwhelming costs of discovery and discovery disputes warrant your very literal reading of the Rules. Present the right context for the positions you assert. Sound bites are good for selling products and tickets or for gaining votes, but they are a non-starter in the discovery arena.

10. Don't Forget Rule No. 1.

Well, you really shouldn't forget any of these tips. But, Rule 1 is the key. Courts have wide discretion and latitude in the area of disclosure and discovery. They will seek to find a fair, quick and inexpensive method to keep things moving. Being a zealous advocate, as opposed to a zealot, means being mindful of what's best for your client. Getting mired down in unreasonable and protracted battles over discovery, or using an unsophisticated "shotgun" approach to collecting data, particularly ESI, will prove anything but fair, quick or inexpensive, or the best thing for you and your client.

If you want to boil this whole thing down into an even shorter list, say three things, it would be: (1) follow the rules with their express purpose in mind; (2) communicate; and (3) don't leave your common sense at the door! Good luck! ▲

1 This is adapted from a presentation on January 24, 2008 to the Association of Business Trial Lawyers, San Diego Chapter and the State Bar of California's Litigation Section. Anthony J. Battaglia, 2008. All rights reserved.

2 P. Lyman and H. Varian, *How Much Information?* 2003, U.C. Berkeley School of Information Management and Systems, http://www.sims.Berkeley.edu/how-much-info2003.

3 The principal cases in this area are *Columbia Pictures v. Brunnell*, 2007 WL 2080419 (C.D. Cal.); *Paramount Pictures v. Replay TV*, 2002 WL 32151632 (C.D. Cal.); and *Convolve Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162 (S.D.N.Y. 2004). These are very fact specific cases, and seem to revolve around three key points. The first is whether or not the ephemeral or transient data is captured in the normal business operations of the party; next, the extent to which the information has been requested; and, probably the most key factor, what efforts, cost and relevance are associated with the collection of the data.

4 See footnote 2.

5 Native file format or raw files refer to the data in the manner it is stored on the media. This is the way it is ordinarily maintained for use by a specific computer program. If you don't want it in this format, better specify that to your opponent. Rule 34(b)(1)(C) and (b)(2)((E)(ii).

6 Data about the data, including date of creation, author, changes made, dates of transmission. It's "hidden" in a paper or screen image, but available digitally.

7 There are a variety of image format programs available. PDF and TIFF are two generally referred to.

Stoneridge

continued from page 3

language in its opinion that left a window open for imposing liability on such persons:

> "The absence of § 10(b) aiding and abetting liability does not mean that secondary actors in the securities markets are always free from liability under the Securities Acts. Any person or entity, including a lawyer, accountant, or bank, who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be liable as a primary violator under 10b-5, assuming all of the requirements for primary liability under Rule 10b-5 are met." *Central Bank*, at 191 (1994).

This language has been the source of debate over the line dividing actionable conduct by secondary actors from mere "aiding and abetting".

Not long after *Central Bank*, Congress responded to intense lobbying by business interests to reform securities class actions, and by investors to restore aiding and abetting liability, by enacting the Private Securities Litigation Reform Act ("PSLRA"). In §104 of the PSLRA,

(see "Stoneridge" on page 13)

Stoneridge

continued from page 12

Congress authorized SEC enforcement actions against aiders and abettors. 15 U.S.C.A. § 78t(e). Although Congress restored enforcement to the SEC, it otherwise made it harder for private investors to bring securities fraud class actions. Among other things, the PSLRA heightened pleading standards, requiring a plaintiff alleging a misleading statement or omission to specify in the complaint "each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief … all facts on which that belief is formed." 15 U.S.C.A. § 78u-4(b).

Faced with rigorous pleading requirements and other obstacles to pursue secondary actors, plaintiffs' counsel carefully crafted pleadings to circumvent such problems. One creative solution was to pursue claims under "scheme liability," based on the language of Rule 10b-5(a) and (c): "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." Such broad language seemed to provide a path around *Central Bank* and the heightened pleading requirements of the PSLRA by alleging that secondary actors who engaged in a scheme to defraud, but made no direct statement to the market, were primarily liable under Rule 10b-5(a) or (c).

C. A Circuit Split Develops

In *In re Charter Communication,* 443 F.3d 987 (8th Cir. 2006), the Eighth Circuit rejected this use of scheme liability as an end-around the *Central Bank* decision. Plaintiffs suggested that they had "properly alleged a *primary* violation of the securities laws within the meaning of *Central Bank* because the vendors…participat[ed] in a "scheme or artifice to defraud" and engag[ed] in a "course of business which operates ... as a fraud or deceit", even though the vendors did not make any statement to Charter's investors. *Id* at 990-991. The Eighth Circuit was not persuaded, holding that there could be no liability absent investor reliance. *Id* at 992.

The Ninth Circuit took a more expansive view of scheme liability in *Simpson v. AOL Time Warner,* 452 F.3d 1040 (9th Cir. 2006). In *AOL Time Warner,* plaintiffs alleged that multiple actors conspired in a scheme to overstate reported revenues of Homestore.com by engaging in round-trip transactions that allowed Homestore to recoup money sent to vendors in a second transaction. As the district court summarized, "Homestore would find some third party corporation, one that was thinly capitalized and in search of revenues in order to 'go public.' Homestore then agreed to purchase shares in that company for inflated values or to purchase services or products that Homestore did not need. This transaction was contingent on the third party company 'agreeing' to buy advertising from AOL for most or all of what Homestore was paying them. The money thus flowed through the third party to AOL, which then took a commission and shared 'revenue' with Homestore." *Id* at 1044. This money was then improperly reclassified as revenue. *Id* at 1043. The Ninth Circuit held that liability as a primary violator of §10(b) in a "scheme to defraud" was established under such circumstances, as the defendant "engaged in conduct that had the principal purpose and effect of creating a false appearance of fact in furtherance of the scheme." *Id* at 1048. The Ninth Circuit noted that "It is not enough that a transaction in which a defendant was involved had a deceptive purpose and effect; the defendant's own conduct contributing to the transaction or overall scheme must have had a deceptive purpose and effect." *Id.* The Ninth Circuit's decision in *AOL Time Warner* conflicted with the Eighth Circuit's decision in *Charter Communications,* setting the stage for the showdown in *Stoneridge*.

D. A Summary of *Stoneridge*

The five-member majority in *Stoneridge* declined to permit the scope of scheme liability to

(see "Stoneridge" on page 14)

Stoneridge

continued from page 13

encompass the conduct of scheming secondary actors. In its decision, the Court stressed the importance of investor reliance in a private cause of action under §10b. The Court acknowledged two instances where reliance is established by a rebuttable presumption: (1) where there is an omission of material fact by one with a duty to disclose, and (2) under the fraud-on-the-market doctrine when the statements at issue become public. *Stoneridge,* 552 U.S.___, 8 (2008). However, because Scientific-Atlantic and Motorola had no duty to disclose information to Charter's investors and their deceptive acts were not communicated to the market, neither presumption applied. *Id.* Further, the Court generally rejected scheme conduct as too attenuated to establish liability in private plaintiff lawsuits.

Justice Kennedy concluded that "were the implied cause of action to be extended to the practices described … there would be a risk that the federal power would be used to invite litigation beyond the immediate sphere of securities litigation and in areas already governed by functioning and effective state-law guarantees." *Id.* at 10. Most significant, the majority concluded that Stoneridge's scheme theory "would put an unsupportable interpretation of Congress' specific response to *Central Bank* in §104 of the PSLRA," which restored aider and abettor liability only as to SEC enforcement actions – not private litigation. *Id.* at 11.

E. Is the Window Shut On Secondary Liability?

The *Stoneridge* decision appears to leave open, at least slightly, the question of how a court would respond where a scheming secondary actor played a more significant role in communicating to the market than did the vendors who worked with Charter. In a securities class action stemming from the Enron litigation, *Regents of the Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372 (5th Cir. 2007), the Fifth Circuit addressed such an issue in the context of the infamous Nigerian barge transactions between Enron and Merrill Lynch in late 1999. The Fifth Circuit had concluded that "an act cannot be deceptive within the meaning of Section 10(b) where the actor has no duty to disclose ... Enron committed fraud by misstating its accounts, but the ... [defendants] only aided and abetted that fraud by engaging in transactions to make it more plausible; they owed no duty to Enron's shareholders." *Id.* at 386.

In a supplemental brief filed two days after *Stoneridge,* plaintiff's counsel in the investor class action against Enron attempted to distinguish the two cases by suggesting that the investment bankers in Enron played a much more significant role because they spoke to the market in the structuring and supporting of off-the-books special purpose entities and related-party transactions. However, the U.S. Supreme Court promptly denied *certiorari* in *Regents of the Univ. of Cal. v. Merrill Lynch, et al.* --- S.Ct. --- (2008), leaving this issue unresolved.

Plaintiff's counsel have always proved inventive in pleading securities fraud claims. The recent spectacular collapses in the sub-prime mortgage market will produce another bull market for investor actions. Undoubtedly, the last word has not been written regarding the reach of §10(b) against parties who actively conspire to defraud investors. ▲

Nathan Karlsgodt is a third year law student and Alan Schulman is Professor-in-Residence at University of San Diego School of Law. This article adapted from a research paper written by Mr. Karlsgodt under Professor Schulman's supervision. Alan Schulman is a Past President of ABTL San Diego and was a well-known securities class action litigator before he retired from private practice in 2007 to teach at USD.

Editor: Alan M. Mansfield
(858) 348-1005
Editorial Board:
Erik Bliss, John T. Brooks,
Richard Gluck,
and Shannon Petersen.

Inadvertently Produced

continued from page 4

on to discuss certain evidence and potential arguments at trial. As stated in the letter, a copy of the settlement agreement (which contains confidentiality provisions) is enclosed. There are recitals in the agreement and statements in the letter that do not jibe with the plaintiff's deposition testimony. This just keeps getting better.

Before you get too excited, though, read *Rico v. Mitsubishi Motors Corp.*, 42 Cal. 4th 807 (2007). Recently decided by the California Supreme Court, *Rico* concerns "what action is required of an attorney who receives privileged documents through inadvertence." *Id.* at 810.

In that case, the plaintiffs' lawyer obtained copies of the defense attorney's notes taken during a meeting of the defendant's representatives, lawyers, and experts "to discuss their litigation strategy and vulnerabilities." *Id.* at 811. The notes were "dated, but not labeled as 'confidential' or 'work product'." *Id.* Nonetheless, the plaintiffs' lawyer "knew that [the defense attorney] did not intend to produce it and that it would be a powerful impeachment document." *Id.* at 812.

The trial court considered whether plaintiffs' counsel had stolen the notes -- the only printed copy of the notes were supposedly in defense counsel's file in a conference room where the plaintiffs' lawyer and his client were alone for a period of time. The plaintiffs' attorney claimed that, in the course of the deposition that took place in the conference room, he was given the document by the reporter, and the trial court found insufficient the evidence that he had obtained the document by more than inadvertence.

Despite this finding, the Court also recognized that plaintiff's counsel had "made a copy of the document. He scrutinized and made his own notes on it. He gave copies to his cocounsel and his experts, all of whom studied the document." *Id.* He "specifically discussed the contents of the document with each of his experts," and then "used them during the deposition of [a] defense expert." *Id.* Through this deposition the defendant's attorney first became aware that plaintiffs' counsel had the notes. The defendant moved to disqualify the plaintiffs' attorney, and the motion was granted.

The Supreme Court affirmed the decision disqualifying counsel. It found that the document was "absolutely protected work product because it contained the ideas of [the lawyer] and his legal team about the case." *Id.* at 815. The question, then, was "what ethical duty [the attorney] owed once he received it," and the remedy for failure to fulfill that duty. *Id.* The answer: "an attorney . . . may not read a document any more closely than is necessary to ascertain that it is privileged. Once it becomes apparent that the content is privileged, counsel must immediately notify opposing counsel and try to resolve the situation." *Id.* at 810.

The Court approved the test that previously had been stated in *State Comp. Ins. Fund v. WPS, Inc.*, 70 Cal. App. 4th 644 (1999), which held that "[w]hen a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged." *Id.* at 656-57.

According to the *Rico* court, this rule is "fair and reasonable," and shows due respect for the work product doctrine and "the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases." *Rico*, 42 Cal. 4th at 817-18 (internal quotations omitted). The Court also believed that the *State Fund* rule was right in a world of complex litigation, where the costs of typically massive document discovery would be increased if every producing party's lawyers had to further sweat the practical penalties of an inadvertent disclosure.

So hopefully you didn't read plaintiff's counsel's notes too closely. After concluding that they are privileged (or, more specifically, protected by

(see "Inadvertently Produced" on page 16)

Inadvertently Produced

continued from page 15

the attorney work product doctrine), you must call the plaintiff's attorney to discuss the inadvertent production. Don't make copies; don't share the notes or their content with your client or experts. If you want to stay on the case, you should return the notes to plaintiff's counsel and promptly forget that you ever had them.

But what of the settlement agreement and letter? There is no attorney-client privilege or work product protection for a letter and agreement between plaintiff's counsel and the attorney for the codefendant. Rather than an obligation of return, it may be that you are obligated -- to your client -- to use the information in those documents.

In *Aerojet-General Corp. v. Transport Indem. Ins.*, 18 Cal. App. 4th 996 (1995), the court considered "the duty of an attorney who, without misconduct or fault, obtains or learns of a confidential communication among opposing counsel, or between opposing counsel and opposing counsel's client." *Id.* at 1002. In that case, the plaintiffs' lawyer obtained a copy of a memorandum written by a defense lawyer, which described an interview with a witness. The memorandum apparently had traveled from the defendant's lawyer, to the parent corporation of the defendant insurance companies, to an insurance broker who worked with those companies, to a plaintiff, and to the plaintiffs' attorney. The plaintiffs' attorney, now aware of the witness, interviewed and deposed him.

The *Aerojet* court noted that, although the memorandum may have been privileged, the identity of the witness that was the subject of the memorandum was not. "If the underlying information which respondents sought to prevent plaintiffs from using is not privileged, and if such information was revealed to plaintiffs' counsel through no fault or misconduct of his own, plaintiffs and their counsel were entitled to use it." *Id.* at 1005. The court observed that, "[o]nce [plaintiffs' counsel] had acquired the information in a manner that was not due to his own fault or wrongdoing, he cannot purge it from his mind. Indeed, his professional obligation demands that he utilize his knowledge about the case on his client's behalf." *Id.* at 1004.

The plaintiffs' lawyer in *Rico* relied on *Aerojet* to defend his actions. The *Rico* court discussed *Aerojet* and its limits, noting that "Aerojet is *distinguishable* because there are [in Rico] no 'unprivileged portions' of the document." *Rico*, 42 Cal. 4th at 816. In *Aerojet*, "[b]ecause counsel was blameless in his acquisition of the document and because the information complained of was not privileged," the attorney could use the non-privileged information. *Id.* By contrast, the notes in *Rico* "were absolutely protected by the work product rule." *Id.*

Since 2002, the American Bar Association has had, as part of its Model Rules of Professional Conduct (and specifically Rule 4.4(b)), that "[a] lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." However, the rule has no specific requirement beyond notice, as a proposed rule requiring return of such documents was not adopted. There is no such provision in the California Rules of Professional Conduct. *See State Fund*, 70 Cal. App. 4th at 655-66 "[T]he ABA Model Rules of Professional Conduct . . . do not establish ethical standards in California, as they have not been adopted in California and have no legal force of their own.").

The letter and settlement agreement, then -- perhaps depending on your own sense of professional courtesy, balanced against your obligations to zealously represent your client -- appear outside the scope of *Rico*, and fair game for use against the plaintiff.

Rico sets forth a clear standard regarding the receipt of inadvertently produced privileged documents, and should be read and heeded by all litigators. The consequences are large: in *Rico*, "the Court ordered plaintiffs' attorneys and experts disqualified." *Rico*, 42 Cal. 4th at 813. Based on *Rico* and *Aerojet*, however, there is still a distinction, important to your legal obligations, between "privileged" and some lesser level of "confidential" that does not involve a privilege, and that can make all the difference. ▲

Tips

continued from page 5

that will break. Once the decision has been made to attack, victory is typically achieved by an assault that is well planned, swift and powerful. The absence of any of these three elements jeopardizes the prospects of a favorable result. Experienced and successful trial lawyers know that proactivity, not reactivity, wins cases.

Rule Number Three: Use a Rifle not a Shotgun

As the British army learned from its defeat 200 years ago at the hands of a relatively small number of poorly equipped and virtually untrained colonists and a few supportive native Americans, a commander cannot line up his forces in well ordered rows, dress them in bright colors, announce their entrance to the field of battle with fanfare, and have them march in perfect unison toward a foe who carefully positions himself behind the trees firing a squirrel gun from long distances, and then retreats, only to repeat the process for as long as it takes to eventually pick the commander's legions apart. Reams of written discovery may produce massive casualties for your opponent, measured by weeks of time spent, money wasted, and attention distracted, but are about as subtle as a train wreck, and for what? Reams of boilerplate objections and meaningless responses received in return, at much the same cost to you as you inflicted upon your opponent? Scores of triple-set depositions, only a fraction of which produce evidence that will find its way to the eyes and ears of the judge and/or jury are no more productive, and even more costly. All too often, after the carnage is viewed in hindsight, the client is heard to echo the words of Pyrrhus, the King of Epirus, who solemnly whispered after his bloody victory at Asculum in 280 B.C., "Another such victory over the Romans, and we are undone." Spend the time it takes to truly understand what you must prove to win, and then go about gathering the evidence you need, not with the finesse of a street mugger, but with the precision of a surgeon.

Rule Number Four: Be Adaptable

As evolution has taught us, notwithstanding the wisdom of recognizing and generally following the normal "rules," it is folly to set and pursue a course in the face of changed or unanticipated circumstances. Strict adherence to a "game plan" that isn't working, even when the players on the field have changed, or the environment has otherwise become different from that which was anticipated, is just plain foolish. You may decide upon an approach initially that won't be optimal a week or a month later. Think of your approach to the ultimate target like that of a cruise missile, which hones in on its target from the moment of lift off, but constantly readjusts its trajectory until the moment the target is reached. ▲

Summary Judgment

continued from page 6

tion 437c(d).

The importance to attorneys of this decision and decisions of other districts disapproving *Biljac* is that if the trial court fails to rule on an objection, the objection is deemed waived on appeal. The appellate court will consider the objected to evidence in ruling on the merits. See *Sharon P. v. Arman Ltd.* (1999) 21 Cal.4th 1181, 1186, fn. 1, disapproved on another point in *Aguilar v. Atlnatic Richfield Co.* (2001) 25 Cal.4th 826, 823, fn. 19; *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 660, 670, fn. 1.

But *Biljac* is not moribund. The Sixth Appellate District in 2007 decided *Reid v. Google* (2007) 155 Cal.App.4th 1342, concluding that *Biljac* is substantially correct. *Reid* reasons that there is nothing in Code of Civil Procedure section 437c that requires the trial court to issue an explicit ruling. Thus, the failure of a trial court to rule on an evidence objection when considering a motion for summary judgment is analogous to a trial court's taking under submission at trial an objection to evidence, hearing the evidence and never ruling. In the latter instance, the objection is reserved for appeal and there is no requirement that the objection be expressly ruled upon. Notwithstanding *Reid,* counsel would be well advised to press the court for an evidence ruling to preserve an evidence objection on appeal.

The California Rules of Court were amended effective January 1, 2007. New Rule 3.1354 provides that all written objections to evidence in

(see "Summary Judgment" on page 18)

Summary Judgment

continued from page 17

support of or in opposition to a motion for summary judgment or summary adjudication must be served and filed at the same time as the objecting party's opposition or reply papers are served and filed. Further Rule 3.1354 specifies the required objection and proposed order formatting. This may make it easier for trial courts to make a more complete record on this issue.

2. Must all Evidence Be Set Forth in the Statement of Undisputed Facts?

King v. United Parcel Service, Inc. (2007) 152 Cal.App.4th 426, decided by the Third Appellate District, deals with the so-called "Golden Rule" of summary judgment jurisprudence, which condemns the consideration of evidence that is not expressly delineated in the separate statement of undisputed facts. *King* concludes that the rule is not absolute. See also *San Diego Watercrafts, Inc., v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 315 which concludes that Code of Civil Procedure 437c, subd. (b) is permissive.

In *King,* one of the material facts was UPS' motive for terminating its employee King. Declarations were submitted by UPS regarding its motive and only portions of such evidence were referred to in the separate statement. The Court of Appeal concluded that those portions of the declarations not referred to in the separate statement may still be properly considered by the trial court. This was not a case where plaintiff was "sabotaged by the sneaky introduction of new evidence for the first time in the defendant's reply" and, therefore, the trial court properly exercised its discretion by considering the evidence material to the dispositive issue of motive.

3. Are Respondent's Declarations to be Liberally Construed?

Powell v. Alan Kleinman (2007) 151 Cal. App.4th 112, decided by the Fifth Appellate District, was an appeal from an order granting summary judgment. The trial court sustained Dr. Kleinman's objections to plaintiff's expert's declaration. *Powell* reiterated that in reviewing the trial court's rulings on evidentiary objections, the Court of Appeal is to apply an abuse of discretion standard rather than the *de novo* standard used to review a summary judgment motion ruling. Further, said the court, when it considers the parties' experts' declarations, it liberally construes the opposing party's experts' declarations and resolves any doubts as to the propriety of granting the motion in favor of the opposing party.

The *Powell* court then scrutinized plaintiff's expert's declaration and concluded that it is reasonable to infer from the declaration that, but for Dr. Kleinman's failure to ascertain the results of an MRI or to determine what treatment plaintiff received at the hospital, plaintiff's condition would have been more quickly correctly diagnosed. In other words, by giving plaintiff's expert declaration all favorable inferences, it must be concluded that it contains an explanation as to causation. Therefore, respondent raised a triable issue of fact.

4. Is an Order Denying a Summary Judgment Appealable After Trial?

In *California Housing Finance Agency v. Hanover/California Management and Accounting Center* (2007) 148 Cal.App.4th 682, defendants unsuccessfully moved for summary judgment based upon a statute of limitations defense. The matter proceeded to trial and the issue of whether the statute of limitations had run was tried and decided by the trier of fact against defendants. The Court of Appeal concluded that, given that there was a trial covering the same issue dealt with by the order denying a motion for summary judgment, the court's denial order is not reviewable on appeal. The Court of Appeal reasoned that error may lead to reversal only if the Court of Appeal is persuaded upon an examination of the entire cause that there is a miscarriage of justice. Because a court is to presume that the trial was fair and that the verdict in plaintiff's favor was supported by the evidence, it cannot find that an erroneous pre-trial ruling based on declarations and exhibits renders the ultimate result unjust.

The above developments are but a tip of the veritable iceberg of summary judgment jurisprudence, as summary judgment motions are a common feature of litigation. Both the practitioner and the Court should be aware the law in this area is ever evolving and replete with complications and judicial refinements that require careful preparation and scrutiny of such motions. ▲

Association of Business Trial Lawyers - San Diego 2008 Officers and Board Members

President
ROBIN A. WOFFORD

Vice President
EDWARD M. GERGOSIAN

Treasurer
MARK C. ZEBROWSKI

Secretary
HON. M. MARGARET McKEOWN

Program Co-Chairs
THOMAS E. EGLER
ANNA F. ROPPO

Immediate Past President
HON. JAN M. ADLER

Past Presidents
PETER H. BENZIAN
CHARLES V. BERWANGER
MICHAEL DUCKOR
HON. J. RICHARD HADEN (RET.)
HON. MAUREEN F. HALLAHAN
FREDERICK W. KOSMO, JR.
MARK C. MAZZARELLA
ALAN SCHULMAN
HON. RONALD L. STYN
HOWARD E. SUSMAN
CLAUDETTE G. WILSON
MERYL L. YOUNG

Executive Director
SUSAN W. CHRISTISON

Board of Governors
HON. CYNTHIA G. AARON
HON. JEFFREY B. BARTON
FREDERICK S. BERRETTA
ERIK S. BLISS
ETHAN T. BOYER
EDWARD D. CHAPIN
EDWARD M. CRAMP
HON. STEVEN R. DENTON
DANIEL DROSMAN
MICHAEL D. FABIANO
BRIAN A. FOSTER
CYNTHIA A. FREELAND
CHAD R. FULLER
EDWARD M. GERGOSIAN
RICHARD D. GLUCK
HON. IRMA E. GONZALEZ
HON. WILLIAM Q. HAYES
CHRISTOPHER J. HEALEY
MICHAEL J. HOLMES
ROSS H. HYSLOP
MARISA JANINE-PAGE
DANIEL G. LAMB, JR.
JACK R. LEER
HON. JOAN M. LEWIS
ALAN M. MANSFIELD
HON. M. MARGARET McKEOWN
THOMAS W. McNAMARA
S. CHRISTIAN PLATT
ANNA F. ROPPO
HON. JANIS L. SAMMARTINO
HON. KENNETH K. SO
NANCY L. STAGG
FRANK L. TOBIN
VALERIE TORRES
KENT M. WALKER
HON. HOWARD B. WIENER (RET.)
ROBIN A. WOFFORD
MARK C. ZEBROWSKI

Emeritus Board Members
WILLIAM S. BOGGS
HON. PETER W. BOWIE
LUKE R. CORBETT
CHARLES H. DICK
HON. IRMA E. GONZALEZ
HON. JUDITH L. HALLER
HON. HERBERT B. HOFFMAN (RET.)
HON. WILLIAM J. HOWATT, JR.
HON. J. LAWRENCE IRVING (RET.)
HON. RONALD L. JOHNSON (RET.)
HON. ARTHUR W. JONES (RET.)
MICHAEL L. KIRBY
MICHAEL L. LIPMAN
HON. JEFFREY T. MILLER
DAVID E. PERRINE
ABBY B. SILVERMAN
ROBERT G. STEINER
WILLIAM F. SULLIVAN
REG A. VITEK
MICHAEL J. WEAVER
SHIRLI F. WEISS

ASSOCIATION OF BUSINESS TRIAL LAWYERS
SAN DIEGO
abtl

P.O. Box 16946
San Diego, CA 92176-6946

PRSRT STD
U.S. POSTAGE
PAID
PERMIT 2644
SAN DIEGO, CA