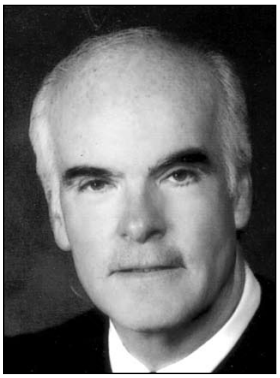
ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO

abtl REPORT

Volume XVI No. 1 *Summer 2009*

Brown Bag Luncheon with District Judge Michael M. Anello

On April 14, 2009, the ABTL of San Diego, the San Diego chapter of the Federal Bar Association and the Litigation Section of the State Bar of California co-sponsored a Brown Bag luncheon hosted by the Southern District of California's newest District Judge, the Honorable Michael M. Anello, which provided an opportunity for the local bar to get to know Judge Anello and his staff.



Hon. Michael M. Anello

The former San Diego Superior Court Judge, who has been a District Judge since October 10, 2008, was warmly welcomed by a full house of attorneys in Courtroom 5 of the Edward J. Schwartz U.S. Courthouse. Judge Anello began by introducing his new staff, which includes his courtroom deputy, Irma Fletes, his court reporter, Elizabeth Cesena, and his two law clerks, Anne Kammer and Amanda Fitzsimmons, whom the Judge referred to as his "chambers attorneys."

Judge Anello continued with an explanation of his typical courtroom practices and policies concerning a variety of topics, including motion practice. For example, while substantive footnotes are acceptable in briefs, the Judge discourages the practice of shifting legal citations to footnotes. Also, Judge Anello indicated he favors oral argument for dispositive and significant mo-

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Practical Considerations For a Successful ENE

By Hon. Leo S. Papas (Ret.)

As I transition from the bench, I have been asked to provide some insights about preparing for and handling Early Neutral Evaluation ("ENE") and settlement/mediation conferences, developed in my 18 years on the bench. While there are no true secrets about the ENE conference, I hope to pass on some tips that will help you and your clients feel more comfortable during the process. These tips also apply to any other settlement and mediation conferences in which you participate. If these suggestions are

Hon. Leo S. Papas (Ret.)

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Inside

President's Letter

By Edward M. Gergosian, President ABTL

Connections. Life is enhanced by the connections we create and maintain. As I write this I have just returned from a vacation in northern Michigan. This summer, both in Michigan (my state of origin) and here in San Diego, my wife and I have had the chance to re-connect with much of our family and many of our friends. In the process we have experienced many of the joys and sorrows of life: watching our nephews learn to water ski or my law partner's children clambering up a 400 foot sand dune, seeing the sheer joy on a child's face who has just caught a fish, hearing all the laughter during a game of euchre (or better yet, fictionary); coming together with other family members to support a brother-in-law undergoing major surgery; witnessing a friend's mother's transition to hospice; learning of a recent acquaintance's sudden and unexpected passing. These are enriching, life-balancing experiences, which bring me closer to who I am and remind me where I come from.

Edward M. Gergosian

While ABTL offers each of us the opportunity to learn and gain new skills, it is much more than that. In these times of economic instability it is important to remember that ABTL provides us with connections. At our local chapter board meetings and dinners we can network and develop new business leads; we can re-connect with old friends or make new ones; we can learn that an adversary is a real human being. We can commune with our fellow members about the pressures all firms are facing in the current business environment and learn how others are meeting those challenges.

Through ABTL San Diego's Leadership Development Committee, we have the chance to watch and help young lawyers develop their skills, and witness their growth as potential leaders of ABTL. The LDC deserves our thanks and commendation for the excellent job they are doing, and in particular for showing us the connections that ABTL offers the younger lawyers in our community. This year the LDC has put on its first two well-attended and well-received lunch-time programs that provide "nuts and bolts" training for the young lawyer, and the opportunity to meet and interact with other young lawyers in our legal community. A third such program is being planned for the fall.

At this year's Annual Seminar in Colorado Springs (October 1-4, 2009) we can connect with ABTL members from across California, as we join a distinguished international faculty of judges, lawyers, in-house counsel, and experts as they discuss cross-border litigation, including current case law, trends, challenges, tactics and strategies. The Annual Seminar panels will cover a broad spectrum of cross- border litigation topics, including choice-of-law, forum selection, and personal jurisdiction; insurance coverage for cross-border disputes; parallel proceedings and whether U.S. courts are becoming the courthouse for the world; forum non-conveniens, comity and jurisdictional privileges; the use of "independent" judicial experts in foreign proceedings; anti-suit injunctions and stays; cross-border discovery, including conflicting standards of privacy and privilege; letters rogatory and foreign depositions; jury selection, foreign witnesses, and transnational parties; mediation strategies; and enforcing foreign judgments.

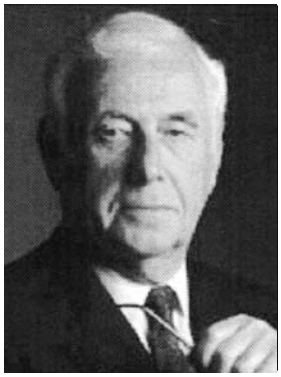
In addition to learning about cross-border litigation from this first-rate educational program, attendees at the Annual Seminar will have plenty of time to connect with other ABTL bench and bar members at a variety of social functions, the highlight of which is a trip on the world's highest cog rain to the top of Pike's Peak. Please plan to attend so that the rest of us can connect with you.

ABTL adds a human, life-balancing dimension to the legal profession. Make it a practice to be an active ABTL member by attending our events and reaching out to others in attendance. It will be well worth the investment. ▲

Ethical Issues in Mediating Class Actions

By Howard B. Wiener, Retired Justice of the California Court of Appeal

After perusing the literature on ethics in class actions and based on my experiences mediating class actions, it is clear that I, and mediators generally, see only the tip of the ethical iceberg.



Howard B. Wiener, Retired Justice of the California Court of Appeal

My myopic view has focused most frequently on: (1) ethical issues pertaining to the effect of a settlement of a case on other cases involving the same or similar issues where the parties are represented by the same counsel; and (2) negotiating a mutually agreeable award of attorney fees. On occasion, I have confronted the ethical dilemma created when a defendant engages in what the courts label a "reverse auction," selecting the most pliable plaintiffs' counsel to negotiate a settlement rather than a more demanding plaintiffs' counsel in another, identical action in a different jurisdiction. And, invariably, I deal with identifying potential ethical lapses by counsel representing the parties, as well as my professional responsibility in deciding whether to assist counsel in obtaining court approval of a settlement by filing a declaration stating that the settlement is fair and the proposed attorney fee award is reasonable. I limit my comments which follow to the issue of attorney fees.

Lawyers representing litigants in class actions traverse a veritable ethical minefield throughout the litigation. Whether one uses Federal Rule 23, the California's Rules of Professional Conduct, or the Model Rules of Professional Conduct to create a laundry list of issues, the attorney representing a party in a class action must confront and overcome innumerable ethical issues to competently perform the essential tasks of the representation.

These challenges are particularly difficult because applicable ethical standards have been developed with the traditional attorney-client role in mind, and not where the lawyer represents a number of persons, most of whom the lawyer has never met and will not meet other than through a notice frequently written in legalese often perceived as offering modest benefit to the class member. Legal commentators, scholars and judges recognize "class action attorneys need more guidance on the ethical obligations in class actions… [T]he particular ethical dilemmas created by the nature of the lawyer-client relationship in the class action are not sufficiently addressed by current ethics regulations or existing class action decisional law." Scott, 15 Geo. J. Legal Ethics 561 (2002) "*Don't Forget Me! The Client In a Class Action Lawsuit*".

Scanning even an abbreviated list should sensitize plaintiffs' counsel to the importance of competence mandated by Federal Rule 23 and the problems relating to soliciting clients or making inappropriate financial arrangements with the class representative or others for the purpose of obtaining class members. In addition, there are complexities in determining members of the class that may preclude defense counsel from communicating with a person who is represented by counsel as well as the further burden on defense counsel of trying to figure out the scope of what can be said to an employee who is a potential class member when counsel represents the employer.

There is also a broad range of potential conflict issues confronting plaintiffs' counsel pertaining to different interests among the class itself or the conflict between an individual plaintiff represented by class counsel in a separate action. These difficulties are exacerbated in the context of a class action where communication to the client, a fundamental responsibility of

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tions and reminded attorneys that if oral argument is desired, it should be requested in their papers. Otherwise, unless there are significant issues or questions from the Court, the Judge will take the matter under submission.

As for tentative rulings, Judge Anello typically provides an oral tentative ruling from the bench before oral argument begins. While the Judge and his staff do their best to issue rulings in a timely fashion, Judge Anello asked attorneys to bear with them as they anticipate it will take approximately 6 months to get through the case backlog they acquired when the Judge came on the bench. Finally, when asked about his preferences with regard to motions for summary judgment, the Judge stated that as a former Superior Court judge, he likes separate statements, even though are not yet required. The Judge's chambers attorneys echoed this sentiment, stating that they find separate statements very helpful if done correctly.

Of interest to patent attorneys, for claim construction hearings Judge Anello provides detailed tentative rulings as to each claim. He also gives the parties an opportunity to meet and confer beforehand and goes through each claim during the hearing, issuing a final ruling shortly thereafter. Also, patent tutorials are allowed. If the tutorial is not complex, it may be scheduled for the same day as the claim construction hearing or, if it is more complex, it may be scheduled one to two weeks in advance. Finally, at the claim construction hearing, Judge Anello prefers attorney argument over expert testimony.

Judge Anello also discussed several aspects of his trial policies and procedures. The Judge, who likes to maintain a low-key, lawyer-friendly courtroom during trial, allows lawyers to wander the floor during presentations, though they are not to approach jurors. He also encourages *voir dire*, but time limits are imposed and he is not in favor of "mini openings" prior to *voir dire*. Also, while he encourages *voir dire*, the Judge is not in favor of jury questionnaires during jury

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Next Time You Need Help – Call a Tort Reformer?

By Mark Massarella, Mazzarella Caldarelli LLP

I feel compelled to introduce this article with a disclaimer. Perhaps, "disclaimer" is not the best word to use; maybe "qualifier" is better. The point, however, is that the thoughts that follow come not from a hardened "plaintiff's lawyer" whom some might say jousts with windmills in naive belief he can change the world, and others would suggest manipulates the system for personal financial gain. I am neither Don Quixote nor Robin Hood. I am a conservative (almost Republican), defense oriented, large firm trained, middle-aged (almost), "middle-American," who, today, is on a mission.

Mark Mazzarrella

Each time I hear someone climbing aboard the bandwagon of lawyer bashing and tort reform, I have an irresistible desire to sit him down on a hard chair in front of a plain wooden table in a stark cold room, with the only light beaming steadily from a bright unshaded lamp carefully positioned on the table so it shines directly into his eyes. I assume this environment is conducive to extracting candid responses to tough questions. At least interrogation rooms in the movies always seem to look something like this.

Having thus positioned my lawyer bashing, tort reforming target for truth extraction, I would first ask: If your child were permanently crippled by a product which the manufacturer knew was dangerous (though exceedingly profitable) would you:

(A) Do nothing, since "stuff happens," and it is politically correct not to sue; or

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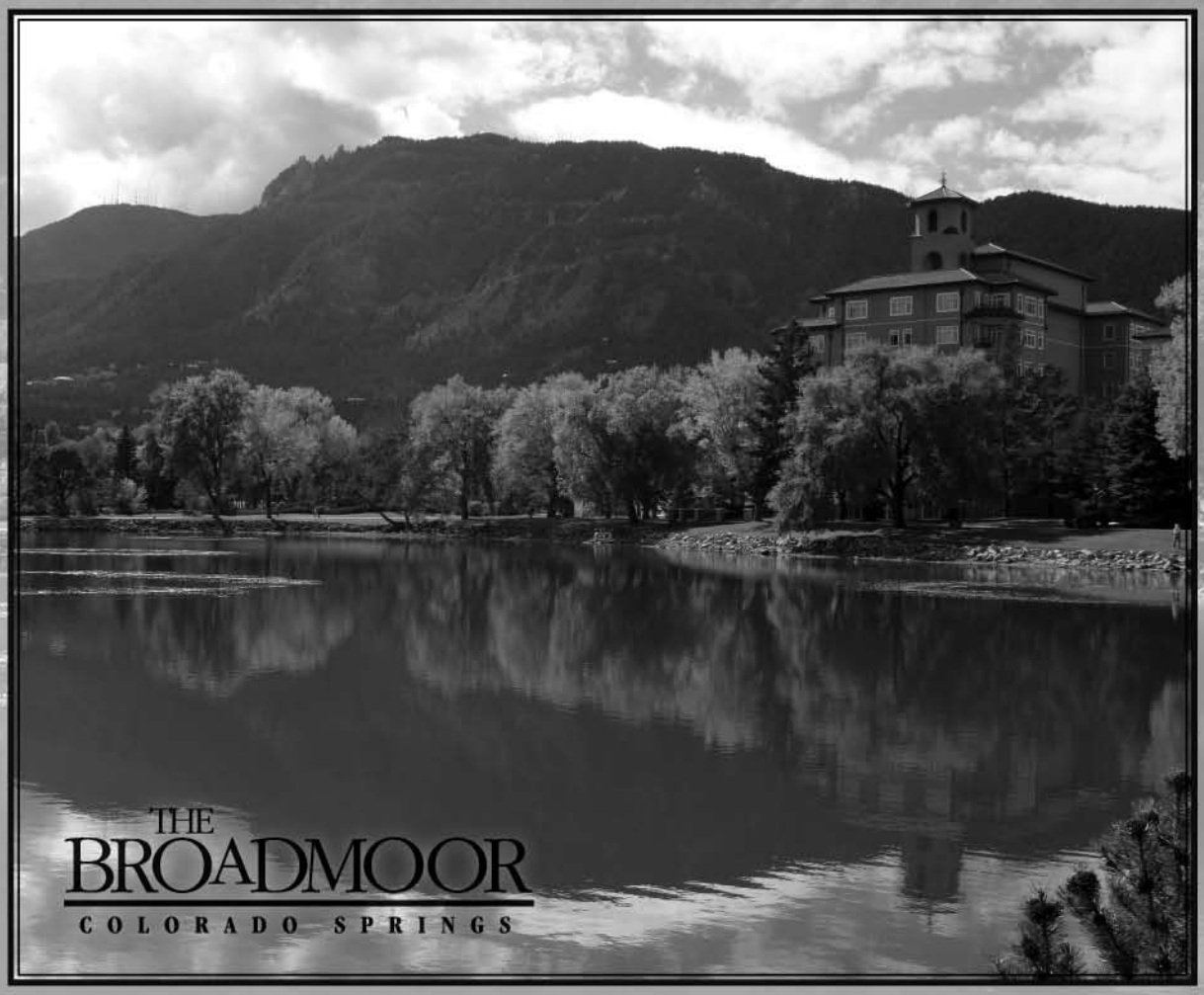
Lost in Translation:

Cross Border Considerations in California Litigation



36th Annual Seminar | October 1-4, 2009

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helpful and both your clients and you are better prepared for the ENE conference or any other settlement conference, it is a win-win situation for you and the court.

For those of you who are unfamiliar with the ENE process, let me first explain how it works. When a civil complaint is filed in the Southern District of California, a district judge and a magistrate judge are randomly assigned to the case. There's no way to anticipate which district judge is going to be working with which magistrate Judge. Generally speaking, you're stuck with the draw.

After the first defendant (notice I didn't say all defendants) answers the complaint, the parties and their attorneys are ordered to meet with a Magistrate Judge at an ENE, typically within 45 days after the first answer is filed. By the way, do not expect this process anywhere else in the country. It is unique to San Diego. So, the first thing to know about maximizing your potential success at an ENE is that it is, in fact, a settlement conference/mediation and you should prepare for it in that way. Yes, there is an evaluation that takes place (including self-evaluation), but, depending on the judge, you may, and likely will, be pushed regarding settlement options beyond what you might have imagined.

Thus, as important as it is to understand that an ENE is an opportunity for settlement, it is equally important that you learn as much as you can about the Magistrate Judge before whom you will be appearing—and I don't mean just that judge's background.

So, here's suggestion number one. You need to find out all the nuances about the Magistrate Judge and, if possible, that Magistrate Judge's staff. For example, you should know whether the Magistrate Judge requires an in person or telephonic ENE in your particular kind of case; whether briefs are required, and if so, how long; how detailed and how far in advance of the conference the Magistrate Judge wants them; whether, if required, briefs are to be provided in confidence to the Magistrate Judge or are to be served on the other parties. There are other things you need to learn, but I think you get the idea.

Logically, the next step in the equation is to prepare for the conference itself. While that sounds elementary, unfortunately, from a judicial perspective, the Magistrate Judges see a tremendous number of attorneys and clients who come to ENE's prepared superficially or, worse yet, assume the judge will ask some simple, perfunctory questions and let the parties leave early. I can't tell you the number of times I've seen a look of panic in the eyes of an attorney when I've asked an in-depth question about the case. Believe it or not, some judges get cranky when they don't get a clear response. So, it stands to reason that you should be prepared for the conference.

However, that doesn't really help you much because telling someone to get prepared is like asking them to get dressed for work. Just as there are endless varieties or combinations of outfits that can be worn each day, there are countless ways of preparing for an ENE. Nevertheless, here are some specific suggestions to help you get to the end result—resolution as expeditiously as possible, which is what everyone at the conference should be trying to achieve.

1. UNDERSTAND THE RISKS. Carefully evaluate the probabilities of success. There is a difference between winning or losing and the probabilities associated with success. I hear attorneys frequently say, "We are going to win this case!" I'm not sure what that means, but I know it means nothing with regard to the likelihood of prevailing as to various issues in the case and how those issues will ultimately affect liability and/or damages. You have to realistically assess the risks associated with proving or defending as to issues and sub-issues for both liability and damages. As the attorney, you should know the case better than anyone else, including your client. As a result, you should also know where every weakness and strength is in your and your opposition's case. Be prepared to discuss each in some depth because you have to assume the Magistrate Judge before whom you appear will be well-versed in the case legally and factually.

2. MAKE SURE THE RIGHT PEOPLE ARE PREPARED TO ATTEND. Depending on the Magistrate Judge, you may have a problem with this aspect of preparing for the conference.

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Some judges will insist, virtually without exception, that the person with unfettered authority for each party attend the ENE. Those that do not insist on appearances still require that you contact chambers well in advance of the conference to get permission to excuse the person with full authority, and may even require you to obtain the cooperation of the other parties. Failing to obtain that permission and showing up without the person with full authority (*i.e.*, limited authority or specific sum certain authority) makes Magistrate Judges even crankier than you not understanding your case. You may end up with an OSC and a follow-up hearing date that is extremely inconvenient for you and your client. People "with authority" can, and usually do, make a settlement happen. So, be prepared for the judge to order your client to attend. This is an offshoot of knowing your Magistrate Judge. For your information, "full authority to settle" (*See Heileman Brewing Co., Inc. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989)) means "unfettered discretion and authority". *Pitman v. Brinker Intl., Inc.*, 216 F.R.D. 481, 485-486 (D. Ariz. 2003) A limited or a sum certain of authority is not adequate. *Nick v. Morgan's Foods, Inc.*, 270 F.3d 590 (8th Cir.2001).

3. CHRONOLOGY OF EVENTS. Depending upon the complexity of the case, be prepared to discuss with and explain to the Magistrate Judge and your opponent a chronology of critical events. You should know the sequence of events by heart or, alternatively, have a chronology prepared to which you can refer quickly and easily. Nothing is more frustrating than to have an attorney fumbling around trying to find a document or date. It wastes everyone's time and makes you look unprepared and unprofessional in front of your client. You should seek to be the one to whom the court looks for information. It may not help you settle the case at that point in time, but establishes credibility with the court and shows your opponent that you know what you're doing.

Let's assume you have prepared properly for the conference and your client has the authority and comes to the conference with the mindset that settlement is reasonably possible. What about the conference itself – how should that be handled? Here are some suggestions.

4. BUSINESS TRANSACTION. When it comes right down to it, most settlement discussions are a business transaction. Thus, getting through the emotional aspect of the case is important and cannot be given short shrift. And, for those of you who think emotion is only involved in personal injury or other cases in which emotional distress is a component of damages, you haven't seen a CEO whose company is faced with a lawsuit involving lots of money. Talk with your client before the conference and be prepared to allow your client to vent. After all, it is your client's case, not yours and often your client having the opportunity to explain the impropriety of the claim will allow the business side of the negotiations to surface sooner than later. But, also be cognizant of the court's time and whether the Magistrate Judge is inclined to allow a lengthy venting process. To the extent you believe your client will need some time to express those feelings, you should consider contacting the Magistrate Judge or her/his staff in advance of the conference to discuss the situation. Remember, venting is important.

5. PERSISTENCE AND PATIENCE. Don't expect immediate results. If you're really interested in settling the case, be prepared to spend whatever time is necessary to get there. Reinforce with your opponent through the Magistrate Judge that you are willing to continue the dialogue without acrimony and look for creative ways to maneuver around what appears to be a developing impasse. The court and your client will appreciate you more if you maintain a calm and clear focus on the ultimate objective and not get sidetracked with demeaning gestures and arguments. The judge can convey that sense of confidence and resolve to your opponent.

6. GRACEFUL EXIT. Do your best to avoid ultimatums. No one likes to be pushed into a corner or have the feeling that they had to capitulate. It causes people to dig their heels in and polarize and thus upsets the dynamics leading to a resolution. It's always wise to leave yourself some bargaining room and not to say, "Judge, tell the other side this is my final and last offer."

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After all, if you take position "X" as a final position and your opponent proposes "X + or - 1," you may find yourself in an awkward spot. That, in turn, makes the judge uncomfortable and there may be no easy way for the judge to save you from impasse.

Let's assume you prepared yourself and your client properly for the conference. Let's also assume your client vented appropriately and was able to move beyond the emotional aspects of the claims to a business discussion. We know you were patient and persistent in pursuing settlement and that you gave your opponent a graceful exit which appears to have borne fruit it looks like the case is going to settle. What now?

Well, there are two final details that need to be addressed.

7. "OH, BY THE WAY." If the Magistrate Judge doesn't ask you, make sure you bring up at some point in the discussions whether there are any other details besides those being discussed that need to be put on the table before final agreement can be reached. The last thing either the Magistrate Judge or you want to hear after you and your opponent have reached a tentative agreement on the principal aspects of the case is for one side to say, "Oh, by the way, judge there is one last thing I need," and that one last thing can and often does result in the entire deal falling apart. Make sure the judge makes everyone put everything on the table early enough in the process so there are no "Oh by the Ways."

8. SAFETY NET. You've made a deal, now how do you make sure the deal doesn't fall apart? After all, even if you put the bullet points on the record or write them out and get signatures, there's still the possibility of a dispute over the attorneys putting on paper everything the parties have agreed upon during the negotiations. In addition, despite having gone through a number of hours negotiating a resolution, it still remains that there wasn't a great deal of trust between the parties when they came to the ENE. As a result, how is it that both sides can now trust each other?

Both documentation and compliance can become a serious impediment to final resolution. Both you and your opponent should confer with the judge in depth about creating a safety net to protect everyone from failure of the agreement during documentation and compliance. Don't leave it to chance.

This can be a difficult aspect of the resolution and may take some creativity. Some judges will leave you to your own devices while others will dig in and try to help you find a solution. The scope of that issue is too large to be adequately addressed here.

I hope you feel better equipped to handle an ENE. My objective is to make you feel a higher degree of comfort and to have the confidence necessary to help your client reach a successful resolution of her or his case. ▲

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selection due to the time they expend.

Typically, 23 jurors are called and the Judge will give an introduction to the jurors. The attorneys can question all jurors and each juror answers 10-12 questions, followed by blind strike challenges. For criminal trials, Judge Anello uses the same process, but with a bigger jury pool, usually at least 32 jurors. As for jury deliberations, if all counsel are in agreement, alternates are sent in with jurors for deliberation, but the alternates will not participate in the deliberations. For civil trials, if there are at least six jurors, the Judge will send them all in for deliberation.

Inevitably, Judge Anello was asked about his "pet peeves." In response, Judge Anello discussed civility in a general sense, but also reminded counsel to avoid speaking objections and to refrain from interrupting attorneys and witnesses when they are speaking, while asking attorneys to train their clients to do the same. Judge Anello also reminded counsel that his chambers attorneys are an extension of the Court and, thus, his chamber rules prohibit *ex parte* communications with them.

This informative event closed with a few useful tips from the Judge's chambers attorneys. For instance, Judge Anello's chamber rules require the parties to meet and confer before the filing of

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the competent lawyer, is problematic where the class representative is not truly engaged in the adversarial process and appears more willing to serve as an accommodation to plaintiffs' counsel rather than becoming personally involved in the litigation.

In my experience counsel decide to mediate a case with the hope of negotiating a mutually satisfactory settlement following sufficient discovery and judicial rulings that strongly suggest the benefits of settlement will probably outweigh the costs associated with continuing the litigation. In other words, although I am aware of the myriad of ethical issues that confront the attorneys representing parties in a class action, I, unlike trial counsel or the trial judge, do not routinely deal with these issues. The ethical issues that arise after I become involved as a mediator are generally the adequacy of the settlement and attorney fees. This is not to say, however, that I can ignore the ethical issues which may have preceded my involvement, because one or more of those issues may become relevant before the case can be settled.

The class actions in which I have served as a mediator include securities litigation, disputes between franchisor and franchisee, senior living housing, marketing cellular telephone services, mass toxic torts, employment issues, violation of California law relating to copying documents, defects in automobile, motorcycle or computer products, insurance coverage and privacy issues. By the time I see counsel they have started their settlement negotiations, reaching tentative agreement on certain issues with a number of challenging substantive issues remaining for discussion. In virtually every case counsel make clear they will not discuss attorney fees until they reach agreement on the terms of the class settlement. They believe simultaneous negotiation on the merits and attorney fees is ethically prohibited.

Counsel's mantra that negotiating fees must await resolution of the terms of the case is understandable. Unquestionably, a conflict occurs when an attorney negotiates a settlement for the attorney's client while simultaneously negotiating with defense counsel for a separate award of attorney fees.

Legal commentators and members of the judiciary treat the foregoing sentence as a truism: "The concern is that the attorney in a class action will be so worried about recovering the greatest amount of fees that he or she will overlook the duty to his or her client to seek the largest possible recovery for that client." 36 Houston Law Review 531, "*The Dilemma: Simultaneous Negotiation of Attorneys' Fees And Settlement In Class Actions," at 534, citing Ramirez v. Sturdevant* (1994) 21 Cal. App. 4th 904, 923, which expressly states that "the duty of counsel to promote the client's interest in obtaining the highest settlement amount [conflicts with] the interest of the attorney in obtaining satisfactory compensation for work done."

Respectfully, counsel's description of the context of their fee discussion is inaccurate. The reality is that at this stage of the negotiations the settlement is contingent. If not otherwise expressed, the settlement implicitly includes the defendant's right to successfully negotiate its liability for attorney fees and costs. If it fails to do so there is no settlement.

The United States Supreme Court has made it clear that before agreeing to a settlement a defendant has every right to know its total liability from both damages and fees. *See White v. New Hampshire Dept. of Employment Security* (1982) 455 U.S. 445, 453, n. 15. Consistent with that holding, *Evans v. Jeff D.* (1986) 475 U. S. 717, disapproved earlier circuit cases, *Mendoza v. United States* (2nd Cir. 1980) 623 F.2d 1338 and *Prandini v. National Tea Co.* (2nd Cir. 1977) 557 F.2d 1015, which had placed "a ban on simultaneous negotiations of merits and attorney's

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a motion to dismiss. If no agreement is reached, the Judge may schedule a telephonic conference with the parties at which time the Judge may determine whether a motion is necessary. This requirement and process are described in detail in Judge Anello's chamber rules, which are available from the Court's website. ▲

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fees issues to prevent attorney from trading relief benefiting the class for a more generous fee for themselves." *Evans v. Jeff D.*, fn. 10, p. 725. Thus, pursuant to this precedent, unless counsel otherwise agree, the defendant's commitment to the terms of settlement on the merits of a class action is conditioned upon negotiating an acceptable award of attorney fees.

If the attorneys disagree on an appropriate fee award, a defendant is not obligated to submit that issue to the court, as a defendant faced with the uncertainty associated with that outcome may prefer to try the case. *Evans* at p. 733 and fn. 23.

By the time a mediator has been selected and the parties have begun the arduous process of negotiating a settlement to fully resolve the case, including attorney fees, the goals are the same. Everyone wants to settle the case as efficiently as possible while protecting class members against any possible conflicts of interest.

If the settlement is limited to disbursement of cash to class members, the conflict between class members and plaintiffs' counsel can be resolved by negotiating a global sum, allowing the trial court to allocate how that sum should be divided. This is certainly efficient from a defendant's perspective as it establishes its total financial responsibility and removes defense counsel from participating in the determination of plaintiffs' counsel's attorney's fee. It is also beneficial to class members as it incentivizes their lawyer to maximize the award potentially increasing

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counsel's fee. This method also, quite properly, will cause the trial court in the approval process to carefully scrutinize the class benefit.

The problem with this simple solution is, from my experience, it is a rare occurrence when the settlement terms are limited to a cash disbursement. As a result, confronted with competing goals of fairness to class members and to the defendant, limiting transactional costs in the settlement process, achieving settlement and assuring reasonable compensation to plaintiffs' counsel, it is indeed tempting in certain cases to discuss attorney fees before or at least concurrently with discussing the terms of settlement on the merits.

This situation can arise in a case where resolving the terms of settlement on the merits will be particularly difficult, time consuming and expensive. An argument can be made that a defendant should be permitted to forego that costly journey if ultimately there is no agreement on fees. If a defendant is entitled to know the entire cost of settlement, it may simply be more efficient to determine whether the attorney fee component of that total amount can be resolved before discussing other, more difficult issues.

Although the foregoing approach sounds sinful and contrary to the ethical constraints governing attorney conflicts of interest, it is not as

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if counsel are not thinking about the amount of attorney fees that will be acceptable to the respective parties as they negotiate on the merits. Both counsel are well-aware there is a remaining component essential to resolve the case, with both factoring in that element as they negotiate on terms. Arguably rather than treating this issue in a silent manner, the efficiency of the process might well be enhanced if counsel entertain a willingness to determine initially whether there is some way to see if the issue of attorney fees will be an impenetrable obstacle to settlement. Based on my experience there is nothing more frustrating than to engage in days of negotiating on the merits finally reaching agreement and then to have the settlement crater because of lack of agreement on fees. Costly and time consuming unsuccessful efforts to reach settlement are not beneficial for any party in a class action. The defendant incurs significant additional transactional costs and class members are denied prompt resolution of their claim.

Provided counsel make appropriate disclosure to the court and use a third party to confirm compensation was not "traded off" for a lesser result, simultaneous discussion of the merits and attorney fees does not require the court to disapprove the settlement. The inherent conflict arising from simultaneous negotiations of substantive claims and attorney fees to be paid by the adverse party, does not necessarily invalidate any resulting settlement. Each case is to be decided on its own merits. *Ramirez v. Sturdevant, supra*, at pp. 924-925. Though a court may treat the conflict as presumptively prejudicial, the prejudice can be overcome after the court carefully scrutinizes the facts to determine whether the settlement is fair and reasonable to the class and the fee award is consistent with the factors governing attorney fees in class actions. *Ibid.*

As tempting as the situation may have been, I have not participated in any case in which attorney fee negotiations arose either before or concurrently with the merits dialogue. Invariably, fee discussions follow the apparent resolution of the merits. Sometimes the fee negotiation has been successful; other times not. I have pondered in the latter situation how or in what way the process could have been improved to eliminate the resultant frustration, expenditure of substantial costs and considerable delay. Frankly, other than reflecting on the problem and reviewing what more knowledgeable commentators have to say, I do not have a satisfactory answer.

The issue of simultaneous discussion of fees and merits in class actions remains a difficult and complex issue that neither the bar nor courts have fully addressed. It is left to counsel in individual cases to deal with this issue in a thoughtful manner, with the trial court ensuring on final settlement approval, the lawyers have done so in an appropriate fashion. ▲

This is taken from an earlier published article. Justice Wiener thanks Attorney William J. Doyle for editing the article for publication by ABTL.

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(B) Leave it to the free market place to adjust the equities, with confidence the offending company would spend the millions of dollars needed to re-design its product and re-tool its manufacturing facility, rather than lose future sales; or

(C) Hire the best lawyer you could find and file suit with the hope of not just obtaining compensation for your child, but also assuring the next time that company sits down to do a cost benefit analysis, there are lots of zeros on the cost side representing your suit, and others like it.

Next, I would ask my hopefully attentive, and assuredly captive, audience of one: If you were wrongfully arrested, jailed and charged with a crime you did not commit, would you:

(A) Believe if you just explained what happened to the nice policeman, you would be released promptly, and your life would continue on its merry way;

(B) Contact an experienced criminal law and/

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or civil rights attorney to get you out of jail as quickly as possible, and to obtain a dismissal of the charges against you using whatever "technicalities" (aka Constitutional rights) that might be available; or

(C) Call a therapist, instead of an attorney, since his hourly rate is lower, and even if he can't keep you out of jail, at least he will help you adjust to your new lifestyle.

Sensing my "companion" is beginning to see where I am going with this line of questioning, I decide to ask just one more question: If you were sixty years old and had worked all of your life to save for your retirement, and a substantial portion of your savings were lost because a company in which you invested lied about its future prospects, would you:

(A) Start thinking guys like Bill Lerach might be pretty good after all;

(B) Dig out your old college textbooks about the free market economy, and take some comfort in the knowledge that even if you lose your home, at least you will have plenty of reading material to keep you busy at the shelter; or

(C) Call the SEC and ask it to initiate an investigation, recognizing of course, the chances of seeing a dime of your hard-earned savings are slim to nil, and that if you do recover anything, it will be as a result of the efforts of none other than the lawyers who work for the SEC.

By now, my interrogee (I assume there is such a word) is hard-pressed to deny he would want the smartest, craftiest, toughest, most effective attorney in the world if he were wronged, and would want that lawyer to use every legitimate procedure, rule, regulation and technique available to her to assure the world was set right once again.

But my new found friend is not yet willing to completely concede the wisdom of my views. In a last desperate attempt to disparage the system, he resorts to the tort reformer's version of the cry "Remember the Alamo." He screams out: "The McDonalds Coffee Case." He does not explain what he means. In fact, he makes no attempt to put his outburst in any context whatsoever. He does not need to. Having had several jurors allude to "the McDonalds Coffee Case" during *voir dire* in my most recent trial, I know exactly what he is talking about.

In my most conciliatory tone, I ask: "What do you know about the McDonalds Coffee case." He tells me, "some woman spilled hot coffee on her lap and got millions of dollars." I probe further. "Do you know anything more about the case?" "No." "Would you like to?" "I don't think I need to know anymore to know the system doesn't work if something like that can happen!"

I stop, breath deeply, and politely tell him that was my initial reaction as well. However, I later learned McDonalds super heated its coffee because it could make more coffee per pound of coffee grounds, and keep the coffee flavorful longer if it did. The result was McDonalds saved millions of dollars, but sold coffee near the boiling point. I also learned the coffee sold by McDonalds was so hot when it contacted the woman's skin, it caused massive severe full thickness burns. The resulting surgeries and other extensive medical treatment cost tens of thousands of dollars, and left the woman permanently scarred in areas where no one wants to be permanently scarred. The ultimate kicker was that McDonalds had many previous complaints about serious accidents resulting from spills of their super heated coffee, and after "due consideration" decided dollars bills were more important than human flesh.

I then asked my skeptical friend if he spilled a cup of McDonalds' super heated coffee on his crotch, causing full thickness burns, permanent loss of tissue, scarring and disfigurement, might he consider suing, just as the "McDonalds coffee lady" did. He begrugently agreed he "might," as he furtively glanced down at his lap.

Thomas Jefferson once said the jury system was the most important part of our system of government. He was right. Juries are not legislators who may be influenced by campaign contributions or a desire to cater to particular causes solely to be re-elected. Juries do not receive information only after the media has filtered, massaged and distorted the facts in whatever fashion best serves its editorial criteria. Jurors see the witnesses, hear their stories first hand and as a group are postured like no one

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else could ever be to decide, for example, whether McDonalds should pay millions of dollars as a consequence of the wounds inflicted upon "the McDonalds lady," or whether the "McDonalds lady" should be sent packing, along with her money-grubbing lawyer, with the stern message not to bring frivolous lawsuits. Who am I to second guess the decision those people made? Who could be so arrogant? So foolish? Unfortunately, today the answer is lots of otherwise humble and intelligent people.

The fact is because of lawyers and our legal system today, products are safer, police departments have extensive policies intended to avoid abuse, companies carefully review their offering circulars before seeking investment capital from others, and the list goes on and on and on. We live in a safer, better and fairer society because of our system of justice, and the men and woman who make it work. It may not be perfect; and certainly there are the occasional aberrant results. But upon close and informative examination, such cases are few, and certainly do not justify throwing out the baby with the bath water.

Unfortunately, the public is inundated with misinformation, or only partial information about the legal system. Those who disseminate the information hope the public will believe the wholesale dismantling of our system of justice is the only solution. The public is told runaway verdicts of tens of millions of dollars are common place, even though the fact is they are exceedingly rare, and seldom survive post-trial motions and/or appeal. The public is lead to believe the O.J. Simpson case is a good example of how the system really works, when we all know it barely, if at all, resembled the typical case. The public is told greedy plaintiffs and their greedier lawyers (like those involved in the McDonalds case) are costing society billions of dollars pursuing "frivolous" lawsuits; but are never told the complete facts underlying the lawsuits from which they could make an informed decision as to whether it would be fair to characterize the suits as "frivolous."

We as lawyers must fight to preserve the system of law enjoyed by the generations who preceded us. Society must constantly be reminded that in each lawsuit tried to a jury, there were a number of our peers who pay taxes, buy products, go to work, come home, and try to make the best life possible for themselves and their family, who were asked to sit in judgment of the behavior of others who do likewise. These juries don't like to pay higher prices for insurance or consumer goods. They don't like to pay higher taxes and they understand unjustified verdicts lead to just such results. When they retire to deliberate their cases, they carry into the jury rooms all over the country the wisdom, restraint, concerns, judgment and sense of partners of American society as a whole. These jurors are not above the law, below the law, or outside the law. In the final analysis, they *are* the law.

I started these comments with the "qualification" that I am not a "plaintiff's lawyer", although I am not sure what that means. I file as many Complaints as I do Answers. However, given the nature of my business litigation practice, I do not have the "typical" law practice, political or philosophical bent on clientele that would cause anyone who knows me to read my observations here and respond: "Well, what do you expect from Mazzarella."

I have spent most of my professional career representing generally wealthy litigants (either individual or corporate) locked in battle for the purpose of either achieving or preventing the redistribution of wealth. This is not exactly the type of litigation that makes me wake up in the morning and say to myself "this is obviously why God put me on earth."

There have been a few occasions, however, when I have had the privilege and opportunity to really make a difference. The irony is that the one case that stands out most distinctly in my mind as having been truly worthwhile, is precisely the type of case the lawyer bashing tort reformers would target to go the way of the dinosaurs.

I represented a wonderful young woman who was in an automobile accident during her senior year in high school. She was driving down one of the busiest surface streets in the county. A drunk driver coming from the other direction, swerved across the center line and collided head

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long with my client's car. My client suffered severe facial injuries, a broken hip, and other injuries. On investigation, we found the roadway was so heavily traveled, and by vehicles traveling at such high speeds, that it actually qualified for a cross-median barrier (those three feet high cement barriers in the middle of the freeway) under the Cal Trans standards for freeways. We also found there had been 49 "cross-median accidents" in the same stretch of road during the previous ten years, resulting in untold human tragedy, loss of life and limb, and economic loss. The City had investigated the need for center divider before my client's accident. Even though it found one was appropriate, it did nothing, allowing the only thing separating oncoming traffic to be the yellow painted lines on the roadway. We sued.

Ultimately, after trial and appeal, the case settled. The fee my firm received was only a fraction of what we normally would have received on an hourly basis. But the case was a terrific success for all of us because the City was finally "persuaded" to install three miles of cross-median barrier.

Every time I drive by that stretch of road, I feel proud to be part of the process that has evolved in America for addressing the needs of our society and its individual members. It is a system that succeeded in accomplishing what politics, letter writing campaigns, and even the tragedy of human suffering alone cannot. Today, there are thousands of lives which, though blissfully ignorant of the fact, remain untouched by

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the tragedies which would have resulted had the system not been there to force companies to build safer products and make honest disclosures, and yes, even install cross-median barriers. The irony is, among those untouched by tragedies which were avoided because of the effectiveness of our system of justice are no doubt countless lawyer bashing tort reformers.

For those who are, and always will remain, unpersuaded of the benefits of, and the need to preserve, our current system of justice, I can only say, "next time you need help – call a tort reformer." Now that would be real justice. ▲

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