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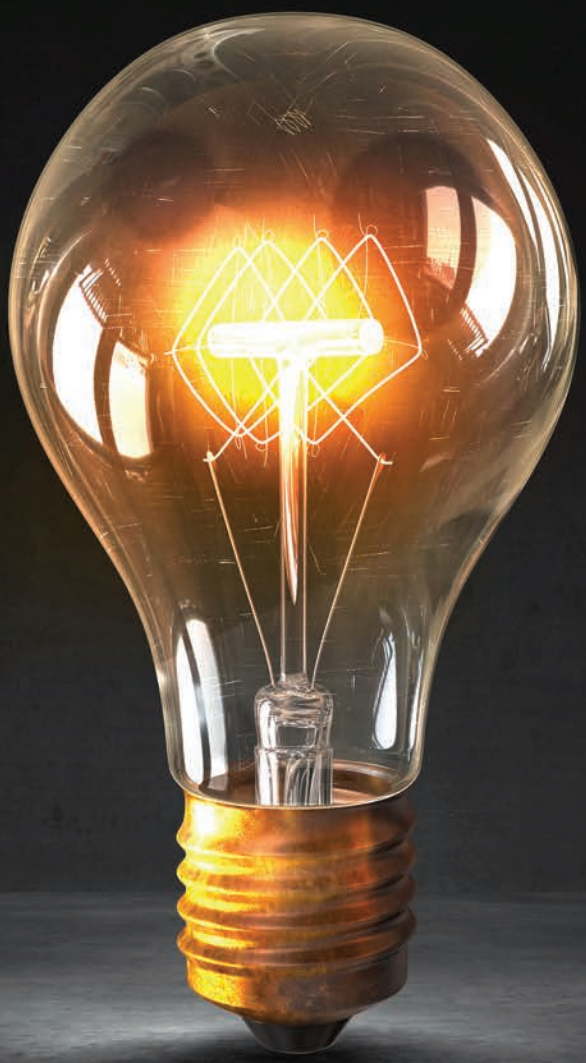
California LITIGATION



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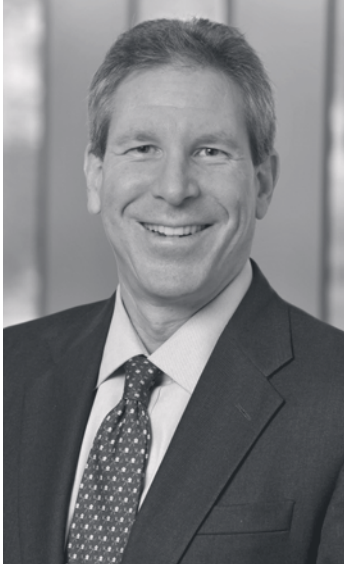
CALIFORNIA LAWYERS ASSOCIATION

The Journal of the Litigation Section of the California Lawyers Association

EDITOR'S FOREWORD

Better, Faster, Cheaper!

By Benjamin G. Shatz



Benjamin G. Shatz, Editor-in-Chief of this journal, is a certified Specialist in Appellate Law and co-chairs the Appellate Practice Group of Manatt, Phelps & Phillips, LLP, in Los Angeles. BShatz@Manatt.com.

Wow, wow, wow! Can you believe what you're seeing?! California Litigation has a whole new look—and it's about time. If one were to glance back to our first issue from 1987 (and I have, thanks to a generous donation of past issues from former Editor-in-Chief (2002-2006) and longtime Editorial Board member Joan Wolff) and compare it to our last issue, you'd see that our formatting has remained basically unchanged for over 30 years. To be sure, we lawyers value precedent and consistency.… *But come on, people!* After having fended off years of pestering to update the journal's look (and to reduce costs), we've taken baby steps over the past few years to update the masthead and stop using paper that was more expensive than most wedding invitations. But this issue right here marks the culmination of tremendous changes that have been brewing for a long time.

As noted in issue 31:3, our illustrator, Peter Siu, retired after decades of work for our journal, and we presented him with a Friend of the Section award. We've now made similar presentations to founding Managing Editor Stan Bachrack (working since the journal's creation!) and longstanding Art Director/Typographer Larisa Pilinsky.

As of this issue, we are now working with Sublime Designs Media, which has specialized in producing digital and print publications for legal organizations since 2002, including many of our CLA sister-section publications. If you'll allow me to date myself, like Colonel Steve Austin, with Sublime, "we have the technology," we can rebuild to be better than before. Like the "better, stronger, faster" promise of cybernetic implants, our new systems will make us "better [looking], stronger [administratively], and faster [in production]." Moreover, unlike the astounding price tag for the Bionic Man (a whopping Six Million 1973-dollars), our amazing upgrades actually *lower* your section's expenditures for creating and printing each issue of the journal.

Yes, your Litigation Section leadership is working hard to put your highly appreciated section dues to their best possible and most efficient use. This is volunteer-leadership at its finest. Now's a great time to get more involved in Section activities and to recruit your friends and colleagues to join CLA. What do you think of our new look-and-feel? Please email me your impressions and ideas. And if you're really interested, call me to talk about joining the editorial board. We're always on the lookout for interested lawyers and judges with thick rolodexes able to reel in excellent articles.

Or maybe you don't care about what's under the hood—you just want to hit the road. Fair enough, here's what's in the pages of this issue.

We begin with a very bright idea (notice the lightbulb on the cover?)—issuing tentative rulings in appeals. Two Court

of Appeal justices were gracious enough to submit takes on this topic. But they also wanted the practitioners' perspective, hence the exploration of this topic in three takes. As for how lawyers feel about tentatives, that's easy: We love tentatives! Read our triptych of articles to find out why. And to round things out, we have a superior court judge's exploration of tentative rulings as well. He calls them both the "bane of [his] existence" and also his "salvation." By the time you read this, the First District Court of Appeal's new Rule 15 should be in effect. Will it be effective in prompting the release of tentative rulings or focus letters? The bar certainly hopes so!

Next, we have a piece on the ever-evolving world of ADR. This time it's the Singapore Convention, which sounds like a great tropical drink. But don't try ordering it at your local tiki bar just yet. Rather than a way to relax, this looks like the ticket for energizing your international mediation practice.

Turning from the wider-world to home, has your town experienced the proliferation of flocks of e-scooters yet? Well, with great innovation comes … great litigation! Let's be careful on our commutes and try not to run down any scooter-zipping millennials on the blacktop—no matter how vexing you find their man buns. We've gone from "get off my lawn," to "get out of my lane." Of course, if they were wearing helmets we wouldn't have to see those top knots at all. Wait, is it even legal to ride without a helmet? Better read that article.

On the related theme of government regulation and citizen safety—and following the theme of trios—Eddy Board member Marc Alexander offers an edifying triple book review.

Finally, we conclude with another rollicking journey into California's legal past, as lawyer-historian James Attridge takes a deep dive into the life and times of Justice Stephen J. Field—that "low-down dirty dog who wrote *Pennoyer v. Neff*."

So don't get distracted by our stunning visual makeover. We've got a ton of valuable substance to share. California Litigation is not just another pretty face on the newsstand.

I am inclined to dissent, because counsel on the losing end has a chance to explain the error in the majority's analysis more persuasively than I did in pre-calendar conference.

There are those who think changing a tentative opinion after argument is an admission of error in our initial analysis that may expose the court to criticism. Some counsel may feel misled. I do not think that changing a tentative opinion reveals a flaw or weakness. The purpose of oral argument is to give counsel a chance to answer our questions and persuade us to their view of the case. If we change our tentative opinion, that demonstrates counsel wisely chose to request argument and that we benefited by it.

Critics of this process think it devalues argument, because courts may become locked into their opinions and unwilling or unable to listen to argument with an open mind. That has not been our experience. The risk a justice may be reluctant to change his or her mind arises from having a draft opinion fully prepared before argument. Issuing tentatives before argument does not increase the risk that a justice will feel disinclined to reconsider a decision. Justices must have the discipline to maintain an open mind whether or not a tentative was issued. The only statistics I have seen indicate that justices remain willing to modify an opinion or change the outcome of an appeal when argument was conducted after issuing tentative opinions. (Hollenhorst, *Tentative Opinions*, *supra*, 36 Santa Clara L.Rev. 1.)

A few years ago, the Conference of California Bar Associations proposed an amendment to rule 8.256 of the California Rules of Court that would require all Courts of Appeal to either issue tentative opinions or focus letters a week before oral argument to alert the parties to the bases for the court's likely ruling and/or the issues the parties should address at oral argument. I expect there will be more calls like this. My experience on Division Eight supports the broader use of tentative opinions.

Part 3: Why We Should All Love Tentatives

By Benjamin G. Shatz

Benjamin G. Shatz, Editor-in-Chief of this journal, is a certified specialist in Appellate Law and co-chairs the Appellate Practice Group of Manatt, Phelps & Phillips, LLP, in Los Angeles. BShatz@Manatt.com.

Litigants, lawyers, and judges have different roles but all are seeking the same overall goal: resolving disputes fairly and efficiently. On appeal, the parties present their positions first in writing and then may choose to appear for oral argument to further press their positions orally and answer questions from the court.

But most oral arguments in the California Court of Appeal do not seem to be particularly helpful to the court or effective for the parties. Justices report that oral arguments only very rarely result in a change of outcome from the already-drafted tentative decision or a modification of that pre-drafted tentative decision. Tentative rulings can help.

We all know that by the time of oral argument, the court already has analyzed the written arguments and drafted a tentative decision. Thus, the court already has a perspective and inclination. If that tentative view is shared with the parties (either in full or in part), positive results may emerge. The parties may settle or waive oral argument, essentially submitting on the tentative. This leads to prompter and less costly resolution.

Alternatively, having seen the tentative, the parties may recognize a misunderstanding or misapprehension by the court that can be addressed at oral argument. Doing so at oral argument

makes sense, and indeed may be the highest and best possible purposes of oral argument. The alternative of using the post-opinion petition for rehearing process is far less efficient, and does not allow for any give-and-take exploration of whether there really is a misunderstanding and, if so, how best to correct it. Justices sometimes say that oral argument is useful to "kick the tires" on a tentative decision. Counsel can kick back better when they know where to aim their feet.

Even when a tentative ruling does not reveal a mistake, it at least provides a target for oral argument. Without this guidance, lawyers must guess at what the court cares about. In other words, tentatives make for easier and better oral argument preparation. Although counsel always must be prepared to address every aspect of the case, being able to know ahead of time which points the court deems most significant simplifies and provides focus for preparation. Countless billable hours have been spent preparing to argue points that have already been won, or worse, that are not at all meaningful, let alone dispositive.

A truism about oral argument is that "the time belongs to the court" and that the purpose of oral argument is to address the court's concerns, rather than to make an affirmative presentation of the case—which is the purpose of briefing. If the goal of oral argument really is for counsel to answer the court's questions, then knowing those questions beforehand would clearly make for better answers. And if the goal of argument is to have a meaningful—but very time-constrained conversation—then having a starting point for that conversation would also be beneficial.

Looking again at the stakeholders at oral argument, all three benefit from tentative rulings.

Clients like them because any form of transparency and signaling from the court is appreciated and meaningful. Litigation is a long, strenuous struggle to reach a climax that answers the questions "what will happen" and "who wins?" Much time, money, and emotional energy are spent in this process. But the process is opaque and often mysterious until the big reveal. While a surprise denouement may be an enjoyable way to end a thrilling mystery novel, litigation is neither a game nor a form of entertainment. The stakes are real and always high to the litigants. Any hint or clue about how a court may be inclined to rule has psychological benefits. Lawyers want to keep their clients as informed as possible, and clients always want to know "how are we doing?" Obviously, then, litigants appreciate as much transparency as possible from the courts. Even if the news is bad, at least it's progress toward an eventual end. It is the rare client indeed who takes the view, "I don't want to know what's coming. Just give me the final result."

It is hard to imagine a client not wanting to have the benefit of a tentative ruling. From the client's perspective, such a ruling may prompt a settlement, or help direct counsel, or at least help diminish a shocking surprise at the ultimate outcome. In short, clients like tentatives.

The practicing bar loves tentatives, and for many and obvious sound reasons. The advocate's job is to attempt to persuade the court to the client's position. Knowing where the court stands is immeasurably helpful in that regard. A tentative shows what effect—for good, ill, or naught—the lawyer's prior efforts at persuasion via briefing have had. This provides direction for whether the lawyer should celebrate, throw in the towel, or try a new tack. It is the rare lawyer indeed, who would prefer not to have the guidance of a tentative ruling.

Finally, courts benefit from tentative rulings as well. To begin, the fact that many trial court judges use tentative rulings must indicate some utility in calendar control and time management. The same benefits apply on appeal.

Next, the appellate courts that use tentatives report that they are helpful in many ways. They can reduce time wasted on points that are not worth pursuing and often eliminate meaningless arguments altogether. More importantly, they focus counsel on the court's concerns, making for a more directed and useful oral argument.

The benefits of tentatives are clarion. What about possible detriments?

Preparing tentatives does not appear to be a burden on the courts that use them, nor should it be. Releasing the entire draft opinion, of course, is one option used by one court, and it has not been

seen to have any calamitous consequences. But preparation of shorter forms of tentative decisions also could serve the same purpose without being onerous. Such preparation need be little more than drafting a paragraph or simply copying a few key paragraphs from the draft written opinion. Any additional time spent locating and summarizing the highlights of a decision would seem to be worthwhile given the savings of time to result at argument thereafter.

Changing one's mind after releasing a tentative ruling diminishes neither the appearance of justice nor the sagacity of the court. To the contrary, proposing a tentative—clearly designated as such—for purposes of discussion and the betterment of the process, and then reaching a contrary result exemplifies the court's fairness and open-mindedness.

Finally, the practicing bar would not raise the objection that the sharing of a tentative decision is somehow a distraction that prevents lawyers from presenting "their best case" by misdirecting them and instead shifting oral argument to a different point. Lawyers who insist on their view despite a tentative, will persist in their prepared presentations anyway—for better or worse. That is a tactical decision. But far from being a distraction, a tentative ruling provides the one true guidance for addressing the case from the decider's point of view. As for setting up a "target" for oral argument, what better topic is there at oral argument than to address the court's existing views? Indeed, if the point of questioning advocates at all during oral argument is to test theories of decision, then providing a tentative decision both saves the effort of having to actually formulate questions and has the benefit of ensuring that counsel will provide the best possible answers.

The practicing bar does not wish to impose any added burdens on the courts. There is little support for absolutely *requiring* disclosure of full draft decisions before oral argument in every or any case. (Christmas comes but once a year!) The bar's perspective is not to mandate that appellate courts take any particular path for tentatives. Instead, the bar simply would appreciate relevant guidance for oral argument through some pre-argument communication.

The Fourth District, Division Two's longstanding practice has benefited those who practice in and work at that court. Division Eight's experiments in the Second District are also uniformly lauded and applauded by the bar. Recently, the First District Court of Appeal proposed amendments to its local rules to expressly authorize practices that were always allowed: the issuance of focus letters and tentative opinions. (Ct. App., First Dist., Rule 15, https://www.courts.ca.gov/documents/1dca_localrules.pdf [as of July 23, 2019].) Those amendments are scheduled to take effect August 23, 2019. The bar hopes that new local rule 15 will have the effect of encouraging these practices—within the First District and beyond.

Those who represent clients on appeal are not at all tentative about tentative opinions: We love them. And we want to share that love with those on the fence. So we urge doubters to give it a try. We think the benefits will be clear.