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Daily Journal photo

Plaintiffs' attorney Eric V. Traut has advocated the use of expedited jury trials. But litigators have been slow to make use of the format.

Expedited trials no hit with most lawyers

By Deirdre Newman
Daily Journal Staff Writer

The goal when expedited jury trials became an option in 2011 was to streamline certain civil cases by limiting trials to an 8-hour day, saving time and money. Since then only a few cases have been tried this way. Attorneys from both sides who have participated in expedited trials generally agree why they are not more popular:

"They are concerned they won't get enough time to explain their case to the jury, through witnesses and evidence," said Eric V. Traut, a Santa Ana plaintiffs' attorney. "I think the opposite is true most of the time. I think lawyers are too verbose and explain things over and over."

Orange County Superior Court Judge Thierry P. Colaw concurs. He said he believes expedited cases are long overdue, but underutilized, and agrees that nervousness by attorneys is the main factor. He estimates that less than one-half of 1 percent of civil cases in Orange County are tried this way. He'd like to see more.

"It's going to help save a lot of time and money, not just for the parties [involved], but for the people of the state of California," Colaw said.

Expedited trials started in California as a result of the Expedited Jury Trial Act, catalyzed by the American Board of Trial Advocates due to a lack of courtroom space and the expense of long trials. The act was based on studies of successful expedited trials in states such as South Carolina and New York. Civil cases most conducive to expedited trials are single-issue with four or fewer witnesses. Each side must agree to this format and then has only three hours to bring forth its witnesses, show evidence and argue its case. There are eight jurors instead of 12. To keep down costs, there are no appeals, except in limited circumstances. Personal injury cases are very conducive to this format.

"I think as more cases opt for the expedited format, and those attorneys share their experiences with the legal community, we will see a rise in the use of the procedure," said Mona Z. Hanna, litigator at Michelman & Robinson LLP.

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GUEST COLUMN

Origins of the modern law firm

By Edwin B. Reeser

If you unlock the cage, the beast often comes out.

The fundamental structure, operation and character of governance in law firms has transformed over the past 45 years. For perspective, consider that in 1970, the largest law firm was Shearman & Sterling, with 164 attorneys. By 1985, Shearman & Sterling had 432 lawyers. Today, Baker & McKenzie has over 4,000.

Let's look at nine important features that characterized most large law firms in 1970, and again in 2015. Several are causes central to enabling change, while others are only indicators.

General vs. limited liability partnership (cause). During this period, states adopted revisions to their Uniform Partnership Act enabling law partnerships to elect LLP status. While partners would not be protected from liability to clients for professional errors, there would be liability limits to third parties. Intense personal interest in preserving one's entire financial worth was reduced,

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Fix for *Brady* violations examined

Plan to curb practice of hiding evidence from defense in criminal trials garners Kozinski's support

By John Roemer
Daily Journal Staff Writer

A plan to rein in prosecutors who hide favorable evidence from the defense in criminal trials could be gaining traction, lawyers and judges said.

The idea got a thumbs-up from 9th U.S. Circuit Court of Appeals Judge Alex Kozinski, long a critic of errant prosecutors.

The fix is called a *Brady* colloquy and it works like this: During pretrial hearings, before a defendant enters a plea, judges could ask prosecutors a short series of on-the-record questions to explore whether undisclosed exculpatory evidence exists.

Suggested questions would require prosecutors to say whether they have reviewed their own files plus law enforcement records for *Brady*-disclosable material. Judges could remind prosecutors they are available for in camera review of any information prosecutors are unsure about disclosing.

The idea is a real-world application of *Brady v. Maryland*, the landmark 1963 U.S. Supreme Court ruling putting prosecutors on notice that withholding pro-defense material violates the Constitution.

"The goal of this procedure is obvious," wrote the law professor who devised it, Jason Kreag of the University of Arizona College of Law, "to nudge prosecutors to fulfill their due process disclosure obligations."

The need is demonstrated by a long line of *Brady* violations that Kozinski termed "epidemic" in a 2013 dissent from a 9th Circuit panel opinion. *U.S. v. Olsen*, 737 F.3rd 625.

"Only judges can put a stop to it," he wrote.

Since then, there have been numerous fresh examples in California state and federal courts.

On Monday, prosecutors moved to vacate the conviction in a murder-for-hire case after it was disclosed that Riverside County prosecutors falsely denied that a key witness was rewarded for his testimony.

Earlier this month, federal prosecutors from the Eastern District conceded they had failed to give exculpatory documents to lawyers for an environmental activist convicted of conspiracy in 2007. He was released from prison.

In October, a federal judge in Los Angeles dismissed an indictment against two defendants in a health care fraud case after learning prosecutors failed to disclose details of a plea agreement with a witness.

Kozinski this week read a Stanford Law Review outline of Kreag's plan. "On initial reading, it seems like a very good idea," he emailed.

"Under the current regime, prosecutors don't really have an incentive to examine the evidence too closely and think hard about what evidence might be exculpatory," he added. "Having to face a judge who asks hard questions about *Brady* will incentivize prosecutors to take a hard look."

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TracFone to pay $40M to resolve suits over data throttling

By Hadley Robinson
Daily Journal Staff Writer

A prepaid mobile phone carrier will pay $40 million to resolve claims that it slowed down Internet speeds when users went over a certain data limit, even though they were told their plans were unlimited, the Federal Trade Commission announced Wednesday.

TracFone Wireless Inc. marketed its many plans as providing unlimited data since 2009, but was actually "throttling" the data, slowing it down or cutting it off completely when people used up a certain amount in a 30-day period.

The announcement is the second time the FTC has brought claims over data throttling recently; it sued AT&T Mobility LLC in October.

The money paid to the FTC will go toward resolving five proposed class actions consolidated in the Northern District of California and providing redress to consumers represented in those cases.

"We are delighted that the Federal Trade Commission has joined with consumers to help achieve a comprehensive resolution of the case," Michael W. Sobol, a partner at Lieff Cabraser Heimann & Bernstein LLP who helped lead the class litigation, said in a statement.

Lieff Cabraser initiated the first class action over TracFone's alleged data throttling in 2013. *Hansell et al v. TracFone Wireless* et al, CV13-3440 (N.D. Cal., filed July 24, 2013)

Lawyers from Sidley Austin LLP represented TracFone in the private civil suits, but did not respond to a request for comment Wednesday.

Though TracFone, which sells its plans under brands Straight Talk, Simple Mobile and Telcel America, disclosed that it would slow Internet speeds on some plans in 2013, the FTC found that was not enough.

It found the print was too small and placed on the back of packages where customers were likely to miss them. *FTC vs. TracFone Wireless Inc.*, CV15-392 (N.D. Cal., filed Jan. 28, 2015).

The lawsuits comes amidst uncertainty over government regulation of "net neutrality," or allowing all people and companies equal access to the Internet.

The net neutrality debate centers on whether wealthier communications providers can pay to get their customers speedier Internet service, leaving others in the "slow lane," or if all companies should get the same access.

The FTC complaint alleges TracFone did not limit data to reduce network congestion, but rather because it cost too much to provide unlimited data.

As part of the settlement, TracFone is prohibited from making deceptive claims about offering unlimited data plans. A spokesman for the company said it worked to "reach an amicable settlement" with the FTC, but had no further comment.

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DAILY APPELLATE REPORT

CIVIL LAW

Civil Procedure: Service of judgment by plaintiff upon defendant does not trigger jurisdictional limits when plaintiff moves for new trial. *Maroney v. Iacobsohn,* C.A. 2nd/3, DAR p. 1178

Civil Procedure: Payment of judgment with certified cashier's check renders subsequent attorney fee request untimely. *Gray1 v. SCC Acquisitions,* C.A. 4th/3, DAR p. 1183

Contracts: Changing retirement plan beneficiary over phone may have substantially complied with plan's 'governing documents.' *Mays-Williams v. Williams,* U.S.C.A. 9th, DAR p. 1190

Government: Public works contractor may only recover attorney fees on claim for which they are allowed when there are no common issues with other claims. *FTR International Inc. v. Rio School District,* C.A. 2nd/6, DAR p. 1141

Government: Public entity may be entitled to disgorgement of profits that came from ticket sales resulting from agreement negotiated by financially interested public employee. *Los Angeles Memorial Coliseum Commission v. Insomniac Inc.,* C.A. 2nd/5, DAR p. 1149

CRIMINAL LAW

Criminal Law and Procedure: Justified-homicide-during-lawful-arrest instruction not required where defendant's intention was only to kill. *People v. Zinda,* C.A. 3rd, DAR p. 1162

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Shattuck Hammond was accused of playing role in Ponzi scheme.
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Fixing computer fraud
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New life for Proposition 8?
The same-sex marriage cases pending before the U.S. high court could potentially breathe life into Prop. 8. But who will perform CPR? By Karl Manheim, John S. Caragozian and Donald Warner
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In 1970, today's firms were inconceivable

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making growth through lateral hiring a feasible consideration for both firm and candidate, and for removing involvement in this and many other decisions by partners.

Direct percentage ownership in assets (cause). Growth in size increased frequency of changes to membership, creating valuation and tax issues with every adjustment. Further, challenges to valuations from retiring or withdrawn partners, divorcing spouses, or trustees of deceased or disabled partners posed financial risks to all partners. Most large firms moved to a structure where the partners disclaimed any goodwill value, and waived direct ownership interest in firm assets. Firms converted to a capital contribution model, the only "equity" stake of ownership. This capped the amount of equity investment and return to the capital account, virtually eliminating financial interest in the continuation of the enterprise after departure.

Partner mobility. Lateral mobility was limited in 1970. By 2015, the majority of firm partners may have been partners at two, three or more firms in their careers. Potential for destabilization by key departures puts pressure on firms to compete annually with the market to retain their partners, leading to greater emphasis on ever increasing profits, wider compensation spreads, borrowing for partner pay and other pressures encouraging over distribution

Promotion from within. Still the primary source of partners in 1970, associate ranks become a declining source of partners, with only a small percentage of hires from law school making partner. High attrition rates make investment in associate skills development a low priority.

Multiple partner classes. Most law firms in 1970 used one "equity" partner class, though compensation varied among partners. By 2015, the multi-class structure predominated, with non-equity "partners" common.

Partner participation. From participation in almost all decisions as partners, firms have migrated to a governance and management model much less inclusionary, and sometimes virtually exclusionary outside a small circle of partners, the partnership within the partnership.

Debt. Sourced from third-party lenders, landlords, equipment lessors, vendors or the partners themselves, substantial debt use has become widespread in the operating model of many law firms by 2015. In 1970, debt during the year was small, and distributions came after all obligations to third parties were satisfied.

Headcount size. Today's firms are sizes unimaginable in 1970.

Unfunded retirement plans (cause). Typically a stream of payments over a term of years, often in amounts arrived at by formula, and capped to the aggregate of partner payees in any one year to a percentage of partner profits. These programs took a period of years to vest, and many more years to vest fully — almost an entire career at one firm. Forfeit should a partner leave to compete at another firm, these plans encouraged talent to stay in a firm with a continuing interest in the firm's long term financial sustainability.

Then	Now
GP-Joint and several unlimited liability	LLP-Liability limited to investment in partnership
Direct percentage ownership in assets	No ownership in assets
Little partner lateral mobility	Active lateral mobility
Partners drawn from associates	Majority of partners drawn from laterals
One class of 'equity' partners	Multiple classes of partners
Full partner participation in decisions	Nominal partner participation in decisions
Little debt during the year	Continuous use of debt for working capital/investment
Relatively few firms over 100 attorneys	100 firms over 600 attorneys (42 over 1,000 attorneys)
Few unfunded retirement plans	Many unfunded retirement plans

Rei Estrada/Daily Journal

Why are unfunded retirement plans on the list? Weren't they a bad idea, or no longer desirable?

History may give a clue why they were created, and what happened after.

When former governor of New York, and name partner Thomas Dewey died in 1971, his passing left his firm and family in a difficult predicament. The leading revenue producer in the firm was gone, his practice was not sustainable by others without him, and the partners were jointly and severally liable personally to buy out Dewey's large ownership interest.

The firm survived a litigious struggle, but the lesson was clear. The risk of one key partner, or several important partners, ceasing to practice in a short period, could destroy the financial sustainability of almost every law firm. Senior partners with long tenure had significant accrued equity ownership accounts. They had invested in the self-financed growth of the firm over decades, essentially via reduced income and the buildup of the only meaningful asset of a law firm: the accounts receivable.

What could be done to strengthen a law firm so it could survive the otherwise guaranteed crisis of succession, and to do it affordably yet fairly? Eliminating direct ownership interest in assets would do it, but what about the already existing ownership shares, especially for senior partners?

One popular solution became the unfunded pension plan, contractually embedded in the partnership agreement. A variety of approaches to them was available to apply flexibility to each law firm's unique needs. Basically, firms prepared a current estimation of all partner equity ownership shares, and a years-to-retirement and vesting formula. Then an allocation of current income to retired partners could be made each year to retired partners, to avoid double taxation on the consideration compared to a direct purchase. The payout stream was without interest, and received over a term of years taxed at lower rates to the retired partners. A cap on current income to be applied was often included, to keep the burden manageable. Affording all partners a similar arrangement became a strong incentive to stay.

Thus, a mechanism to allow withdrawal of wealth share created by partners was created. The Dewey crisis of 1971 was "Exhibit A" to the industry of why something had to be done to avoid winding up like Dewey. (A theme that returned for different reasons in 2012.)

But for active lateral markets, the unfunded plan becomes a barrier to hiring top talent. Firstly, the candidate forfeits her benefits at her current firm, and the new firm may have to offer a financial package that replaces that value. Secondly, the candidate may be obliged to tithe from 5 to 10 percent of annual income to support the plan for retired partners, but her seniority virtually assures she will never be a partner long enough to vest a meaningful benefit from that plan, so she won't come, or demands a "premium" compensation to net out the distribution she wants. This unequal pay for equal performance is difficult to justify. Compensation transparency becomes a problem, as does informed partner participation in decisions on hiring, compensation and ultimately even basic operations. So it disappears.

The plans are unwound because they impede lateral growth.

Unwinding the unfunded plan removes all financial interest in a legacy to the firm beyond one's own tenure. All financial rewards are made on a current basis, and capital return is limited to the amount contributed. Once removed, this last incentive to firm sustainability contributes to the appetite to distribute on a current basis as much as possible, and pressure to borrow money, or to demand increased capital from partners to make distributions becomes acute.

Adverse financial consequences to a firm by a departing partner are not usually shared unless they are so great as to cause the collapse and bankruptcy of the enterprise, triggering "clawbacks" of distributions. To date, the actual clawbacks achieved relative to overdistributions made have not balanced out to arrest the practice of passing out monies yet to be collected. The lateral market has shown that forfeiture of substantial capital is often perceived as a preferable cost to pay for a departing partner to leave a struggling firm and continue earning high pay, rather than stay and invest through lower pay for years for an uncertain outcome.

Partnership compensation from highest to lowest paid partners widens as firms feel pressure to pay market rate compensation for some partners that might leave, while the firm overall cannot afford to do so, and thus reallocates it from lower ranks of equity partners to higher ranks. Profits per equity partner (PPEP) goes up, partner headcount goes down, median partner income falls, the ratio of partners making as much as PPEP falls.

There are other dynamics at work, which can't be covered in such a short piece. Consider this an introduction. Reflect on how we have arrived at where we are. And if we don't make positive changes, where this inevitably leads us.

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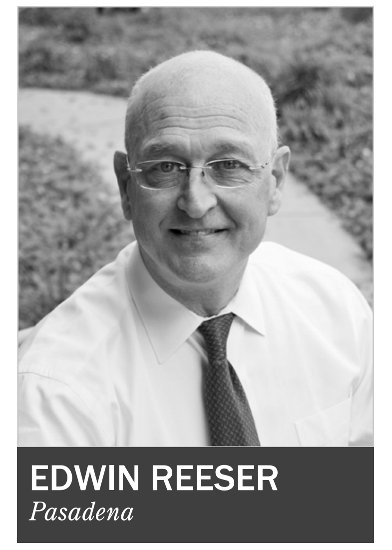

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Who, me? Law firm partners, profits and payroll taxes

By Robert W. Wood

These days, being a partner in a law firm may not mean what it used to mean. Perhaps that's true in some other professional fields too, like accounting. But in law firms, at least, being named "partner" may not mean ponying up capital.

It may not involve a stake in the firm's equity or profits. It may not come with much authority to sign for the firm either. But when it comes to taxes, partners are taxed differently than employees and that can matter to the partner, to the firm, and to taxing authorities.

Federal income tax withholding applies to wages. That is why employees get a payroll check with income and employment taxes taken out. Not so for partners.

Partners are supposed to get a draw from the firm, with no taxes taken out, and then are to take care of their *own* taxes. Of course, some firms treat some partners as salaried income partners, like employees. There can be income partners, limited partners, and a whole host of other confusing labels, including the of counsel or senior counsel variety.

In all of these cases, how firms and lawyers handle taxes can be sensitive, for the lawyer, the firm, and the government. Even for full equity partners that are supposed to do their own taxes, some law firms help partners take care of their taxes. After all, the firms do not want to risk having a partner who fouls it up, which is easy to do.

Uniformity is important too, and more than one state is sometimes involved. Taking care of taxes usually means both federal and California, and sometimes other states. But what about local taxes?

You might think those don't matter, but they can add up. Take San Francisco's payroll tax that hits law firms in the city with a 1.5 percent tax on all the firm's payroll. For every employee of every type, you add up their wages and pay 1.5 percent of that amount to the city.

If you can prove what portion of the workers' pay was for work done outside of San Francisco, you avoid the tax on that piece. Still, it can be a surprisingly big number. What about the pay of partners? That has been a controversial issue.

Indeed, many highly compensated people in San Francisco, including law firm partners, do not show up on payrolls. For many years, the firms quietly got away with not paying payroll tax on their partners. That made sense, since they really were not on the law firms' payroll.

But San Francisco eventually wised up and went to the voters. In 2008, San Francisco voters approved Proposition Q, extending the city's payroll tax to "certain partnerships and other businesses." The proposition recognized that partners were really wearing a couple of different hats.

Often, law firm partners are paid some money for working in the firm. Hopefully, the partners also get some money for sharing in the profits of the firm. Such tasks as bringing in business to be handled by others is arguably services too, but there are different ways of looking at such things.

In any case, receiving a cut of the firm's profits rather clearly could not be treated like payroll. Yet the factual issues seemed tough so the law following Proposition Q included a rule some find arbitrary. There is a safe harbor so partnerships can elect to treat a portion of their partner income as compensation subject to the city payroll tax.

If the firm elects, it can pay city tax on 200 percent of the compensation of the top quartile of employees. The upside of this safe harbor, of course, is that the balance of the partner's "pay" can escape the city's 1.5 percent payroll tax. Not everyone was happy with this compromise, and there were some lawsuits filed.

Notably, in *Coblentz Patch Duffy & Bass LLP v. City and County of San Francisco et al.*, A135509 (Cal. App. 1st Dist., Dec. 24, 2014), one firm sued to recover $194,903 of payroll taxes paid on the compensation of its equity partners. Some simple math suggests that the amount being split up between partners was considerable. They argued that equity partner compensation should only be subject to the payroll tax if it was guaranteed.

That "guaranteed" term has a technical meaning in the partnership tax law, under federal tax law at least. And it is a logical argument if you are talking about federal income taxes. Just how relevant that was to city tax law was an open question.

The federal tax law says guaranteed payments (pay that does not hinge on partnership profits) are deductible to the partnership and taxable to partners. Ultimately, the court found that the federal and state income tax rules about guaranteed payments did not bear on the applicability of the San Francisco's payroll tax. The court found that the city was really taxing compensation for services in partnership profit distributions.

To the court, a portion of the firm's profit distributions were for the partners' services, and the tax applies to it. In the overall scheme of taxes, one can argue that a 1.5 percent payroll tax is not the biggest problem. We have federal income taxes at 39.6 percent, California income taxes at 13.3 percent, and Social Security tax at 15.3 percent.

The latter alone is a big issue for law firms. That 15.3 percent is borne half by the employer and half by the employee on wages. There are some wages that escape most of these taxes, once the wage base of $118,500 is exceeded.

In the case of partners, the self-employment tax is 15.3 percent, and it is borne by the partner. Law firms are getting increasingly sophisticated about how they classify and treat their partners. In some cases, a good part of the decision can come down to taxes.

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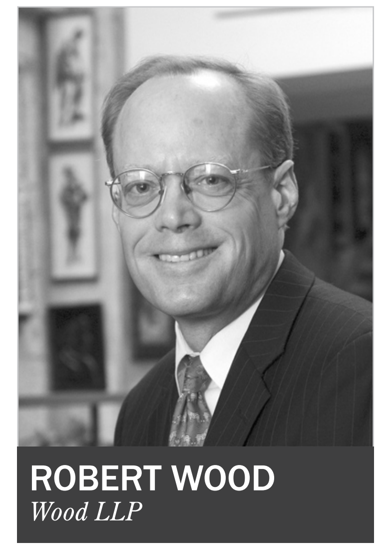

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