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FEATURED ARTICLE

You've Got to Know When and How to Ask: A Look at Eight Years of "Certified" Questions to the California Supreme Court

James C. Martin and Benjamin G. Shatz

Introduction

Until very recently, federal and out-of-state courts confronting an unsettled issue of California law were forced to guess at how the California Supreme Court would resolve the issue and then undertake to decide the case. Neither federal courts sitting in diversity nor sister-state courts applying California law could invoke a certification procedure to get the supreme court's views. Eight years ago, however, California joined the majority of states—including every other state in the Ninth Circuit—and adopted a procedure allowing review of such unsettled questions. With eight years of practice and one revision of the rule behind us, there is now a useful bank of precedents showing how the procedure is being utilized and applied.

The History of Certification

In 1945, Florida became the first state to pass a statute allowing federal appellate courts to certify questions of state law to the Florida Supreme Court. This statute went largely unnoticed until 1960, when the Florida Supreme Court actually created a rule to implement the statute, probably at the urging of the United States Supreme Court. The Supreme Court previously had complimented Florida's "rare foresight" in making such a procedure available and suggested that the federal court of appeals invoke the procedure on remand—which it did. *Clay v Sun Ins. Office, Ltd.* (1960) 363 US 207, 212, 4 L Ed 2d 1170, 80 S Ct 1222; *Sun Ins. Office, Ltd. v Clay* (5th Cir 1963) 319 F2d 505.

Despite this endorsement, momentum for the practice was slow to develop. By 1971, only seven states had a certification procedure. Three years later, the United States Supreme Court favorably commented again on how certification could "save time, energy, and resources and help[] build a cooperative judicial federalism." *Lehman Bros. v Schein* (1974) 416 US 386, 390, 40 L Ed 2d 215, 94 S Ct 1741. Nevertheless, by 1976, the number of states with a certification procedure had grown to only 15. Bassler and Potenza, *Certification Granted: The Practical and Jurisprudential Reasons Why New Jersey Should Adopt a Certification Procedure,* 29 Seton Hall L Rev 491, 495 n17 (1998). In that year, the Supreme Court gave certification another boost in *Bellotti v Baird* (1976) 428 US 132, 150, 49 L Ed 2d 844, 96 S Ct 2857, holding that the lower federal court should have certified the question at issue to a state's high court as opposed to trying to resolve the issue itself.

Armed with the Supreme Court's repeated admonitions, in 1977, the American Bar Association urged adoption of certification, and thereafter various federal appellate opinions began to extol the virtues of the process as well. See, *e.g., Strange v Krebs* (5th Cir Unit A Sept. 1981) 658 F2d 268, 269 (extolling "remarkable device" of certification); *American E. Dev. Corp. v Everglades Marina, Inc.* (5th Cir 1979) 608 F2d 123, 125 ("both federal and state judicial systems are the beneficiaries of a procedure rooted in cooperative federalism"). With these and other endorsements, by 1997, 44 states (plus Puerto Rico and the District of Columbia) had certification procedures. 29 Seton Hall L Rev at 493 n9. California, however, was not one of them. In *Kopp v Fair Political Practices Comm'n* (1995) 11 C4th 607, 621, 47 CR2d 108, the California Supreme Court noted, "[I]n most jurisdictions, federal courts are considerably assisted [in resolving a question of state law] by the ability to certify such a question to the state's highest court. California, however, is one of the few states in the country—and the only one in the Ninth Circuit—that has no procedure for federal courts to certify questions of state law to the state's highest court."

The Ninth Circuit noted the anomaly and occasionally would point out (if not lament) California's lack of such a procedure. See, *e.g., Nunez v City of San Diego* (9th Cir 1997) 114 F3d 935, 942 ("[w]e cannot certify this matter to the California Supreme Court . . . because California does not have a certification process"); *Skillsky v Lucky Stores, Inc.* (9th Cir 1990) 893 F2d 1088, 1093 ("[w]e may not certify this issue to the California Supreme Court because California law does not provide a certification process."); *Los Angeles Mem. Coliseum Comm'n v National Football League* (9th Cir 1986) 791 F2d 1356, 1362 ("[u]nfortunately, the State of California, unlike the majority of states in this Circuit, has not yet seen fit to follow the exhortation of the Supreme Court to create legislatively a certification process"). In the mid-1990s, members of the California State Bar sought to close this "regrettable gap in California law" by recommending the adoption of a certification rule and even proposed a draft rule. Braun, *A Certification Rule for California,* 36 Santa Clara L Rev 935, 936 (1996).

California Joins the Majority

The omission was finally rectified in 1998. Effective January 2 of that year, former Cal Rules of Ct 29.5 created a procedure that allowed sister-state courts of last resort and federal appellate courts to certify unresolved questions of California law to the California Supreme Court. The rule gave the supreme court discretion to accept and answer those questions in a published opinion carrying the same precedential value as any other high court opinion.

Effective January 1, 2003, former Rule 29.5 was revised and renumbered, becoming Rule 29.8. The revised version altered the rule's original language, which had borrowed heavily from certification rules from other states, to better mirror California practice and procedure. Under the old version the supreme court would "accept" a request and then provide an "answer"; under the new language, the court would "grant" a request and issue a "decision."

Rule 29.8 also improved the former rule by streamlining the procedure in two ways. First, under former Rule 29.5, the requesting court had to issue a formal "certification" using the requesting court's "official seal," but under the revised rule an ordinary court "order" suffices. Cal Rules of Ct 29.8(b). Second, former Rule 29.5 required the parties to formally brief their support or opposition to a certification request, and then, if the question was "accepted," required the parties to file briefs again, this time addressing the substantive issues. The current rule does away with "double-briefing," reserving formal briefing for requests the supreme court grants.

Significantly, federal district courts are not among the courts that may certify questions under revised Rule 29.8. Of course, these courts often find themselves having to address unsettled issues involving California law, and many have voiced regret at not being able to invoke the procedure. See, *e.g., Bryan v United Parcel Serv., Inc.* (MD Cal 2004) 307 F Supp 2d 1108, 1115; *Campanelli v Allstate Ins. Co.* (CD Cal 2000) 85 F Supp 2d 980, 986; *Stonewall Ins. Co. v Argonaut Ins. Co.* (ND Ill 1999) 75 F Supp 2d 893, 906; *California Teachers Ass'n v Davis* (CD Cal 1999) 64 F Supp 2d 945, 951 n3; *Conopco, Inc. v Roll Int'l Corp.* (SD NY 1999) 75 F Supp 2d 196, 201; *Lett v Paymentech, Inc.* (ND Cal 1999) 81 F Supp 2d 992, 1001 n5.

At least one district judge, however, has taken note of California's adoption of the certification procedure in certifying a ruling for interlocutory appeal under 28 USC §1292(a), indicating that "[g]ranting an interlocutory appeal should not represent an undue burden on the Ninth Circuit as the determinative matter here turns initially on an issue of California law susceptible to certification to the California Supreme Court." *Brewster v County of Shasta* (ED Cal 2000) 112 F Supp 2d 1185, 1192 n18. See also *California Prolife Council Political Action Comm. v Scully* (ED Cal 1998) 989 F Supp 1282, 1290 (same judge notes that "unfortunately" California's new rule allowing certification does not extend to district courts).

Initiating the Process

California Rules of Court 29.8(a) empowers the United States Supreme Court, a United States court of appeals, or the court of last resort of any state, territory, or commonwealth to "request" that the California Supreme Court "decide" a question of California law on two conditions. First, the question must be the outcome determinative of the matter pending in the requesting court. Second, there must be no controlling precedent. Cal Rules of Ct 28.9(a)(1).

Confronted with such an issue, any party or even the court can propose a question be certified. See, *e.g., California ex rel RoNo, LLC v Altus Finances S.A.* (9th Cir 2003) 344 F3d 920 (granting appellant California Attorney General's motion to certify); *Waremart Foods v NLRB* (DC Cir 2003) 333 F3d 223 (petitioner's motion to certify granted); *Vu v Prudential Prop. & Cas. Ins. Co.* (9th Cir 1999) 172 F3d 725 (panel of judges certifies the question on its own motion). If this motion is denied, however, the procedure cannot advance. Thus, demonstrating that the issue of law is significant and unsettled is essential. See, *e.g., Freund v Nycomed Amersham* (9th Cir 2003) 347 F3d 752, 759 n7 (court denies party's request to submit question to California Supreme Court because "California precedent is clear"); *Delgado v Rice* (9th Cir 2001) 236 F3d 548 (appellants' motion for certification denied); *Cucamongans United for Reasonable Expansion v City of Rancho Cucamonga* (9th Cir, Jan. 21, 2000, No. 98–55262) 2000 US App Lexis 954 (unpublished opinion) (same); *Ashmus v Woodford* (9th Cir 1999) 202 F3d 1160, 1164 n6 (same).

The case law shows a healthy divergence of views among judges on when the procedure is properly invoked. In one instance, a request for rehearing en banc by the Ninth Circuit included a request for certification to the Supreme Court. Eight Ninth Circuit judges dissented from the court's denial of rehearing en banc, noting that the Ninth Circuit "could have, and should have, certified the issues of California law to the California Supreme Court," because the legal theory adopted represented a novel expansion of existing California tort law. *Ileto v Glock, Inc.* (9th Cir 2004) 370 F3d 860, 866.

In another case, *Kremen v Cohen* (9th Cir 2003) 325 F3d 1035, two Ninth Circuit judges certified a question, and one, Judge Alex Kozinski, dissented from the order. Judge Kozinski pointed out that none of the parties had requested certification, and indeed the plaintiff expressly opposed doing so, based on the delay that it would cause. Further, Judge Kozinski believed that certification was unjustified because existing California precedent either already answered the question or made the answer "obvious"; thus, the Ninth Circuit was "perfectly capable" of resolving the appeal before it without burdening the supreme court. *Kremen v Cohen,* 325 F3d at 1044. As Judge Kozinski put it, "Certification is justified only when the state supreme court has provided no authoritative guidance, other courts are in serious disarray and the question cries out for a definitive ruling." *Kremen v Cohen, supra.*

Actions by the Certifying Court

Assuming an appropriate question is involved, the requesting court must then issue an order containing the fol-

lowing information: (1) the case caption of the pending matter, the names and addresses of counsel and unrepresented parties, and a designation of which party or parties should be deemed the petitioner; (2) the question to be decided, with a statement that the requesting court will "accept the decision," that is, make its ruling in accord with the supreme court's decision; (3) a statement of the relevant facts; and (4) an explanation of how the decision is outcome determinative and unanswered by existing law. Cal Rules of Ct 29.8(b).

The requesting court must file an original and ten copies of the request, along with a proof of service on the parties. Cal Rules of Ct 29.8(d). Further, the requesting court must supply copies of all relevant briefs and stand ready to furnish any additional materials from the record, including exhibits or transcripts. Cal Rules of Ct 29.8(c).

The Parties or Others Weigh In

Once the request is filed, "any party or other person or entity" has 20 days to submit to the court a letter supporting or opposing the request. Cal Rules of Ct 29.8(e)(1). After the filing of such a letter, any party may send a reply within 10 days of service of the letter. Cal Rules of Ct 29.8(e)(2). All such letters must be served on the parties and the court requesting certification. Cal Rules of Ct 29.8(e). If a letter asks the supreme court to restate the question, then the letter must propose new wording. Cal Rules of Ct 29.8(e)(3).

Supreme Court Action on Certification Requests

Merely asking is no guarantee that the supreme court will grant review. An order granting review requires at least four justices to vote to accept the matter. Cal Rules of Ct 29.8(f)(2). A denial order may be signed by the Chief Justice alone. Cal Rules of Ct 29.8(f)(2).

The supreme court has denied certification requests seven times since the rule was passed. See *Waremart Foods v NLRB* (DC Cir 2003) 333 F3d 223; *Kremen v Cohen* (9th Cir 2003) 314 F3d 1127; *Friery v Los Angeles Unified Sch. Dist.* (9th Cir 2002) 300 F3d 1120; *In re Renovizor's, Inc.* (9th Cir 2001) 236 F3d 518; *Marin Tug & Barge v Westport Petroleum, Inc.* (9th Cir 2001) 238 F3d 1159; *Bunney v Mitchell* (9th Cir 2001) 249 F3d 1188.

In several instances, justices have dissented from those denials. In *Renovizor's,* for example, Justice Joyce Kennard voted for review; in *Marin Tug & Barge,* Justices Ming Chin and Janice Rogers Brown voted for review; in *Waremart Foods,* Justices Kennard and Brown voted for review. The supreme court, however, does not provide reasons for denying review. Cal Rules of Ct 29.8. Commentators have suggested that providing reasons would be instructive to courts and litigants using Rule 29.8. See Goar, *California's Certified Question Procedure: From Birth to First Steps,* 17 Cal Litig 4, 12 (2004). Apart from simply granting review, the supreme court can restate the questions or even raise a question of its own. Cal Rules of Ct 29.8(f)(5). See, *e.g., Southern Cal. Edison v Peevy* (2003) 31 C4th 781, 787, 3 CR3d 703 (modifying one question); *Great W. Shows, Inc. v County of Los Angeles* (2002) 27 C4th 853, 858, 118 CR2d 746 (rephrasing one question, without objection); *Asmus v Pacific Bell* (2000) 23 C4th 1, 6 n2, 96 CR2d 179 (changing the word "rescind" to "terminate"); *Los Angeles Alliance for Survival v City of Los Angeles* (2000) 22 C4th 352, 360 n2, 93 CR2d 1 (modifying question, without objection).

Questions Taken on Review

California Rules of Court 29.8 does not suggest any substantive limits on the unsettled questions of law the supreme court might be asked to review. The questions simply must be outcome determinative and lack precedent. The decisions on certified questions accordingly reflect a great deal of diversity as well.

Constitutional Issues

Many of the issues accepted for decision involve open questions implicating California's Constitution. Thus, in *Los Angeles Alliance for Survival v City of Los Angeles* (9th Cir 1998) 157 F3d 1162, the Ninth Circuit faced the question of whether a ban on aggressive panhandling violated the free speech clause of California's Constitution. The supreme court rephrased the question slightly, and issued an opinion upholding the ban. *Los Angeles Alliance for Survival v City of Los Angeles* (2000) 22 C4th 352, 93 CR2d 1.

In *Ventura Group Ventures, Inc. v Ventura Port Dist.* (9th Cir 1999) 179 F3d 840, the Ninth Circuit certified two questions concerning the California Constitution and California's statutory writ of mandate process regarding the payment of judgments by local public entities. The supreme court answered these questions in *Ventura Group Ventures, Inc. v Ventura Port Dist.* (2001) 24 C4th 1089, 104 CR2d 53 (county may not levy property taxes in excess of 1 percent to pay money judgments; port district has independent authority to impose assessments under Harb & N C §6365, but not in this case).

In two other cases, the Ninth Circuit requested guidance about the constitutional limits of local government regulation of gun shows. *Nordyke v King* (9th Cir 2000) 229 F3d 1266; *Great W. Shows v County of Los Angeles* (9th Cir 2000) 229 F3d 1258. In response, the supreme court issued two opinions analyzing the possible preemption of local gun control ordinances. *Great W. Shows v County of Los Angeles* (2002) 27 C4th 853, 118 CR2d 746; *Nordyke v King* (2002) 27 C4th 875, 118 CR2d 761.

Insurance Questions

Insurance issues also have arisen with some frequency. In a quintessentially California matter, *Vu v Prudential Prop. & Cas. Ins. Co.* (9th Cir 1999) 172 F3d 725, the

Ninth Circuit certified the question of whether and to what extent an insured could rely on an insurer's loss investigation in asserting that the insurer was estopped from asserting a statute of limitations defense to the insured's earthquake claim. The Ninth Circuit noted that if the question was not answered, it would have to resolve the issue according to its own understanding of California law, "misguided though it be." *Vu v Prudential Prop. & Cas. Ins. Co.,* 172 F3d at 731. The supreme court answered the question in *Vu v Prudential Prop. & Casualty Ins. Co.* (2001) 26 C4th 1142, 113 CR2d 70 (insurer may assert statute of limitations defense when insured brings suit more than 1 year after unconditional denial of coverage; however, insurer may be estopped from raising such defense if insured proves that he reasonably relied on insurer's representation in not bringing timely suit).

That same year, the Ninth Circuit certified and the supreme court resolved an unsettled question concerning an insurer's right to reimbursement of settlement proceeds in a case settled after a reservation of rights by the insurer. *Blue Ridge Ins. Co. v Jacobsen* (9th Cir 1999) 197 F3d 1008; *Blue Ridge Ins. Co. v Jacobsen* (2001) 25 C4th 489, 106 CR2d 535 (insurer defending personal injury case under reservation of rights may recover settlement payments made over insured's objections when it later determines there was no coverage).

Two years later, in *California ex rel RoNo, LLC v Altus Fin. S.A.* (9th Cir 2003) 344 F3d 920, the Ninth Circuit certified a question concerning the seizure of a junk bond portfolio of an insolvent insurance company in a case in which California's Insurance Commissioner was acting as conservator in liquidation. The supreme court accepted the question and is expected to issue an opinion in or before September 2005. *State v Altus Fin. S.A.* (Jan. 14, 2004, S119046) 2004 Cal Lexis 46.

Finally, in *Philadelphia Indem. Ins. Co. v Findley* (9th Cir 2004) 395 F3d 1046, the supreme court agreed to answer the question of whether an insurer's duty to investigate the insurability of an insured applies to an automobile liability insurer that issues an excess liability insurance policy for a rental car. This case is fully briefed and awaiting oral argument. *Philadelphia Indem. Ins. Co. v Blanca Montes-Harris* (Mar. 2, 2005, S130717) 2005 Cal Lexis 2320.

Tort Law

More activity also is arising on substantive tort law issues. In *Cadence Design Sys. Inc. v Avant! Corp.* (9th Cir 2001) 253 F3d 1147, the Ninth Circuit questioned whether a claim for trade secret infringement under California's Uniform Trade Secrets Act (CC §3§426–3426.11) arises only once, when an initial misappropriation occurs, or with each subsequent misuse of the trade secret. Interestingly, although the parties settled the case after oral argument in the supreme court, the supreme court nevertheless exercised its discretion to resolve the "moot" question anyway, finding that continued improper use or disclosure of a trade secret after an initial misappropriation is part of a single claim of "'continuing misappropriation,' accruing at the time of the initial misappropriation." *Cadence Design Sys., Inc. v Avant! Corp.* (2002) 29 C4th 215, 217 n2, 127 CR2d 169.

Myers v Philip Morris Cos. (9th Cir 2001) 239 F3d 1029 concerned the open question of whether the statute repealing statutory immunity for tobacco companies in certain product liability lawsuits applied retroactively. After granting review, the supreme court ruled that neither the repealed statute nor the legislature gave any clear indication of retroactivity, and thus the immunity statute continued to shield tobacco companies for conduct engaged in when the immunity statute was effective. *Myers v Philip Morris Cos.* (2002) 28 C4th 828, 123 CR2d 40.

In another tobacco-related matter, *Grisham v Philip Morris U.S.A.* (9th Cir 2004) 403 F3d 631, the Ninth Circuit certified the question of whether a plaintiff's personal injury cause of action for damages from tobacco addiction accrues when the plaintiff recognizes his or her addiction if the plaintiff has not yet been diagnosed with any injury arising from tobacco use. The supreme court has not yet decided whether to grant review.

Employment

In *Asmus v Pacific Bell* (9th Cir 1998) 159 F3d 422, the Ninth Circuit confronted an unsettled question regarding an employer's ability to unilaterally rescind an employment policy. The supreme court took up the question and answered it in *Asmus v Pacific Bell* (2000) 23 C4th 1, 96 CR2d 179 (employer may modify or revoke promises of job security on reasonable notice to employees).

Public Utilities Law

In *Southern Cal. Edison Co. v Lynch* (9th Cir 2002) 307 F3d 794, a nonprofit consumer protection organization intervened in an action by an electric public utility against the California Public Utilities Commission (PUC) and objected to a stipulated judgment entered into by the utility and the PUC. The Ninth Circuit recognized that a "serious question" existed about whether the stipulated judgment violated state laws, including laws requiring open public meetings involving utility rates. The court certified three questions about the stipulated judgment and whether the process that led to it violated California law. The supreme court accepted the questions, restating one of them. *Southern Cal. Edison Co. v Lynch* (Nov. 20, 2002, S110662) 2002 Cal Lexis 7961. After briefing, the supreme court then posed an additional question, pursuant to Cal Rules of Ct 29.8(f)(5), and requested additional briefing from the parties. *Southern Cal. Edison Co. v Lynch* (Mar. 5, 2003, S110662) (order requesting additional briefing). Ultimately, the supreme court

upheld the stipulated judgment. *Southern Cal. Edison v Peevey* (2003) 31 C4th 781, 3 CR3d 703.

Attorney Fees

In *Tipton-Whittingham v City of Los Angeles* (9th Cir 2003) 316 F3d 1058, the Ninth Circuit requested resolution of two questions relating to an attorney fees award to a plaintiff who was the catalyst in bringing about relief sought in litigation. The Ninth Circuit noted that the United States Supreme Court had recently rejected the catalyst theory in *Buckhannon Bd. v West Va. Dep't of Health & Human Resources* (2001) 532 US 598, 149 L Ed 2d 855, 121 S Ct 1835, and the court was unsure whether the *Buckhannon* decision would change California's adherence to the catalyst theory. The California Supreme Court was already considering essentially the same issue in another case, *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 21 CR3d 331, and thus accepted the Ninth Circuit's request and then issued a decision based on its determination in the *Graham* case. *Tipton-Whittingham v City of Los Angeles* (2004) 34 C4th 604, 21 CR3d 371 (catalyst theory preserved as basis for attorney fees award under California law).

Conclusion

Like the party host who simultaneously worries about "nobody coming" or "too many guests showing up," apprehension about California's certification rule centered on whether, and how often, foreign courts would invoke the rule. Braun, *A Certification Rule for California,* 36 Santa Clara L Rev 935, 944 (1996). After eight years, it appears safe to say that the rule is working as intended without any extreme consequences. The supreme court has averaged less than three requests per year, putting to rest the concerns that adopting a certification process might provoke an avalanche of questions from foreign courts. Indeed, the only foreign court to invoke the rule regularly—and successfully—has been the Ninth Circuit. The D.C. Circuit is the only other court ever to submit a question. These few cases added to the supreme court's docket do not seem to be unduly burdening the court. See Martin & Shatz, *Certification Process Does Not Appear To Burden High Court,* Los Angeles Daily Journal, May 7, 2003, Focus, p 7.

Practitioners considering a certification request should seek guidance from the cases in which certification has been granted. Review of Judge Kozinski's dissenting opinion in *Kremen v Cohen* (9th Cir 2003) 325 F3d 1035 also provides an excellent starting point for how best to convince a foreign court to certify a question. Counsel should carefully and thoughtfully explain why the proposed question is novel, substantively important, unresolved by existing California law, and outcome determinative. The question should be phrased as succinctly and crisply as possible to ease the foreign court's job in granting the request and passing the matter on to the supreme court.

The brief to the supreme court in support of certification should underscore why resolution of the proposed question will have special importance to California's jurisprudence and widespread application beyond the parties' particular dispute. The benefits to the other litigants, courts, and the public from prompt resolution should be highlighted. Finally, the petition should fairly present the applicable law to demonstrate the concrete nature of the controversy and the need for a definitive statement on what the controlling law should be.

JUDGE'S PERSPECTIVE

Effective Use of Motions In Limine

The Honorable George P. Schiavelli, Judge of the United States District Court for the Central District of California

An All Too Common Scenario

It is a Tuesday afternoon and the trial has moved into its third of many weeks. Plaintiff has an expert witness on the stand and, as is not uncommon during expert testimony, time appears to have slowed to a crawl. As plaintiff's counsel takes the expert into a new area of inquiry, the cloud of ennui that has settled over the courtroom is broken with a vengeance. Defense counsel turns a deep purple, leaps to his feet, and in a voice at a decibel level generally reserved for small children and banshees, bellows, "Objection your honor. The question calls for speculation, conclusion, and an improper expert opinion. The expert is not qualified to opine in this area. Moreover, even if the witness could testify, she should not be permitted to do so because plaintiff failed to serve the appropriate expert declaration."

The judge, after looking wistfully at the clock in the forlorn hope that it will indicate that it is time to recess for the day, sighs, and says, "Counsel, please approach." As plaintiff's counsel comes to the bench, she, in a voice rivaling that of her adversary both in volume and indignation, says, "Defense counsel is well aware the witness is qualified and the question is well within his expertise. Moreover, we have complied in full with all expert discovery requirements."

The judge now has two equally unpalatable choices: (1) recess to allow argument and to permit himself and his clerks to research the matter, thus earning the enmity of the jurors, or (2) "shoot from the hip" and hope that if he commits error, the appellate court will, at least, conclude it is harmless. At that point, one of the lawyers adds insult to injury by saying, "Counsel and I have been ar-