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TRIBUTE

In Honor of Judge William W Schwarzer

*The Honorable William H. Rehnquist**

Five years ago, the Board of Directors of the Federal Judicial Center asked William W Schwarzer to become the Center's sixth director. His resume showed him to be a person of many interests: author of books on federal procedure, case management, and antitrust litigation, and a long list of articles — including one on how you devised and sent out a lawyers' questionnaire about your judicial performance, and another one on how fellow pilots should approach flying over the Canadian Rockies.

Judge Schwarzer was well known as an innovative and creative district judge and the source of many thoughtful proposals to improve the day-to-day operations of the judicial system — changes in federal procedure, particularly in the area of discovery; better ways of communicating with jurors, and improving the relationships between state and federal courts. But he came known as well for his ability to see the big picture. He chal-

* Chief Justice of the United States.

lenged judges and lawyers to make the federal courts do a better job because, as Daniel Webster said, "justice is the great end of man on earth."

I know, from the information about the Center's work that comes to me in presiding over its Board, that he has made sure that the Center provides judges and the supporting personnel of the courts with the practical training they need to do their job. He has made sure that it helps the courts and the committees of the Judicial Conference assess whether current structures and procedures are working as they should and whether different structures and procedures would work any better. He has prodded the Center in turn to prod the judiciary to look at the big picture, to plan for the future. But he has kept the Center's work directed toward the basic ends of the judicial system. As he wrote in the introduction to the Center's groundbreaking *Reference Manual on Scientific Evidence*, the "challenge the justice system faces is to adapt its process to enable the participants to deal with this kind of evidence fairly and efficiently and to render informed decisions."

The federal judiciary is fortunate to have the Federal Judicial Center as an instrument for research and education in the service of the judiciary. All of us associated with the Center, and indeed the entire federal judiciary, may take pride in what the Center has accomplished under Judge Schwarzer's leadership.

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*The Honorable Pamela Ann Rymer**

It was one of the first calls that I made after being appointed to the district court. I knew of him as an antitrust lawyer and had read his book on *Managing Antitrust and Other Complex Litigation.* I wanted to talk to him about judging, but was reluctant to impose. An old friend who was a San Francisco lawyer told me you're right, you *should* talk to Judge Schwarzer because he has much to say — and not to worry, he will be happy to talk to you because that's the kind of judge he is. He was. And

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* Circuit Judge, Ninth Circuit Court of Appeals.

that's the way Bill Schwarzer is: a judge's judge who has thought profoundly about the better administration of justice in our country, and who has tirelessly put pen to paper and time to the task of passing on what he has learned.

Of all that he has done, several things stand out to me: creative case management, resulting in a trial more clearly focused on what the issues in dispute are really about; better informed and more carefully reasoned decision-making, whether by judge or jury; and evenhanded justice, which at the end of the day is what the process is all about.

Judge Schwarzer published his first article on case management in 1978.[1] Before civil justice reform became a battle cry, he recognized that more active participation by the judge in pretrial activity would help the parties, and the courts, save time and money. As this article points out, judicial intervention leads to a better informed process, and in turn, to a more fair and reasoned treatment of the case from beginning to end. Ever since, Judge Schwarzer has encouraged judges to define the issues early, to control discovery and thus avoid unnecessary expense, to resolve those issues which can be resolved before trial, and to bring the parties together to facilitate settlement. For those matters that do go to trial, his blueprint makes for a more effective and impartial disposition because the trier of fact is able to concentrate only on what counts instead of being diverted by other things that don't.

Judge Schwarzer's article about summary judgment[2] was required reading in my chambers until it was replaced by the Federal Judicial Center's monograph on Rule 56,[3] which he also spearheaded. Characteristically, the introduction to the monograph notes:

> This monograph is intended to improve understanding and use of Rule 56. It does not claim to be a definitive statement. . . . The value of this exercise lies less in explicating a particular approach than in encouraging reflection on the

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[1] *See* William W Schwarzer, *Managing Civil Litigation: The Trial Judge's Role*, 61 JUDICATURE 400 (1978).

[2] William W Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465 (1984).

[3] WILLIAM W SCHWARZER ET AL., THE ANALYSIS AND DECISION OF SUMMARY JUDGMENT MOTIONS (1991).

> critical issues. We suggest ways of thinking about summary judgment that can help judges and lawyers work more effectively with the rule. Better understanding of Rule 56 can reduce cost and delay in civil litigation by promoting a sounder and less error-prone application of the rule (which should lead to greater confidence in its use) and by reducing the frequency of wasteful summary judgment proceedings.[4]

Both of these publications discuss the most difficult part of ruling on summary judgment motions, that of identifying issues of fact, in a scholarly but straightforward way that is of particular value to judges on the firing line.

Understandable jury instructions are another hallmark of Schwarzer judging that has made a great difference in the way trials are conducted, at least in the Ninth Circuit in those courts which use the *Manual of Model Jury Instructions* that he pioneered. Judge Schwarzer chaired the circuit's first Committee on Jury Instructions. Again, characteristically, the work was intended to "help judges generally improve the quality of their communications with juries."[5] To that end, Judge Schwarzer has been a leading exponent of instructions that are brief, simple, direct, written in plain language instead of legalese, and are logically organized to guide a jury through the legal thicket that frames their fact-finding function.[6] In this way the trial judge creates an environment for more informed and better reasoned decision-making.

As a trial judge, Bill Schwarzer practiced what he preached in one respect that I have always thought was particularly remarkable. In complex cases he circulated proposed findings and conclusions to counsel for comment before rendering a final decision. Although it took more time and certainly was more trouble, this extra step is yet another measure of Judge Schwarzer's commitment to decision-making that is both sounder and less prone to error.

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[4] *Id.* at vii.

[5] *Introduction* to MANUAL OF MODEL JURY INSTRUCTIONS FOR THE NINTH CIRCUIT (1985 ed.).

[6] Judge Schwarzer published a complete set of instructions in 1981 that serve to this day as an exemplary sample of effective communication. *See* William W Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CAL. L. REV. 731, 759-69 (1981).

The Center's 1994 *Reference Manual on Scientific Evidence* is the ultimate Schwarzer. It is the single most timely and topical contribution to informed decision-making that I have seen. In a nutshell, the manual discusses the admissibility of expert evidence, proposes a framework for considering challenges to an expert's qualifications and opinions, and provides a reference guide for various areas of expert testimony "intended to assist judges in identifying the issues most commonly in dispute in these selected areas and in reaching an informed and reasoned assessment concerning the basis of expert evidence."[7] Both as a judge without a background in science or technology, and as a result of serving on the Task Force on Judicial and Regulatory Decision Making of the Carnegie Commission on Science, Technology, and Government, I know how much the judiciary can benefit from greater understanding of the principles and methods that underlie scientific studies. Scientific and technological analysis is now part of the trial of a great many cases, and characteristically, Bill Schwarzer once more has been in the forefront of helping judges perform their "gatekeeping responsibility"[8] with a greater sense of assurance and accuracy.

It would be fair to sum up Judge Schwarzer as a thoughtful, principled, innovative, tough-minded but even-handed jurist who has demanded much of himself and others privileged to be part of the administration of justice. But it would be incomplete.

> U.S. District Judge William Schwarzer choked with tears at the prospect of sentencing the Oakland longshoreman to 10 years in prison for what appeared to be a minor mistake in judgment.
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> Everyone in his courtroom watched in stunned silence as Schwarzer, known for his stoic demeanor, anguished over sentencing a man convicted of giving a ride to a drug dealer for a meeting with an undercover federal agent.
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> . . . .
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> "We are required to follow the rule of law . . . but in this case the law does anything but serve justice," Schwarzer began in a quiet voice. "It may profit us very little to win the war on drugs if in the process we lose our soul."[9]

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[7] William W Schwarzer, *Introduction* to REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 3 (1994).

[8] Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786, 2795 n.7 (1993).

[9] Harriet Chang, *New Drug Law is Backfiring, Judges Say*, S.F. CHRON., Sept. 25, 1989,

This, too, is Bill Schwarzer — anguished, and affected by the arbitrary consequences of a mandatory minimum sentence whose harshness he had no discretion to ameliorate.

As a judge and teacher of judges, Bill Schwarzer has stood for decision-making that is more open and organized, more thoughtful, more focused, better informed, and better reasoned. That is the heart of judging. By elevating our consciousness and educating us for the task, Judge Schwarzer has done great credit to the process of truth-seeking that our system of justice is, or ought to be, about.

"[S]o venerable," as Roscoe Pound put it, "so majestic is this living temple of justice, this immemorial yet ever freshly growing fabric of our . . . law, that the least of us is proud who may point to so much as one stone thereof and say the work of my hands is here."[10] Judge William W Schwarzer can point to many stones, and his hands have been there.

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*The Honorable Charles A. Legge**

It is a pleasure to contribute to this publication honoring William W Schwarzer. The perspective of my contribution is that of a fellow trial judge; that is, a personal view of Judge Schwarzer as a United States District Judge for the Northern District of California. Judge Schwarzer was a judge of that court from 1976 to 1990, and I have been a member of that court since 1984. Those quick in mathematics will deduce that he and I served together for six years, although my personal acquaintance with him both precedes his appointment to the bench, and happily has continued since his appointment to the Federal Judicial Center. Since my observations are about Judge Schwarzer as a colleague on the same court, I take the liberty of referring to him as Bill.

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at A1.

[10] Roscoe Pound, Remarks at the American Bar Association Medal for Conspicuous Service Annual Banquet, *in Award to Dean Pound*, 26 A.B.A. J. 800, 801 (1940).

* Judge, United States District Court for the Northern District of California.

I was asked to perform this happy task once before; that is, when Bill left our court to go to the Federal Judicial Center. At the "graduation" ceremony in Bill's honor, I was asked to give a verbal tribute to Bill on behalf of the judges of our court. This tribute was published in Volume 747 of the *Federal Supplement.* I am going to repeat the essence of that tribute here. That is not because Bill has not advanced in the eyes of the profession since then. Indeed, he has continued to advance the profession itself; but that is a subject for others in this publication. Nor is it from a lack of desire to have Bill on our bench again; indeed, we hope that upon his return to San Francisco we can convince him to write more in our book of justice. Rather, my repetition is because Bill's career as a trial judge did in fact end, or at least recess, at that time, and that chapter of the book of his accomplishments has been written with no further editing permitted.

So let me now again address Bill as I did on behalf of our court when he left us for his higher national calling in 1990.

Judge Schwarzer — Bill — The Chief Judge has asked me to express to you the thoughts of your colleagues on this bench. To be honest with you, Bill, this is not an easy task, because so many of us have so *many* opinions about you. I think, however, that I can sum up those opinions by saying that, frankly Bill, you have been a great embarrassment to us. An embarrassment because you have set and have accomplished standards that most of us can only look to in wonder.

Let's first look at the quantitative side of some of your accomplishments in your fourteen years on the bench. First of all, you have handled to conclusion approximately 4000 cases. That in itself is quite a number. You have written almost 200 opinions for publication. By the way, in going through some of those opinions for some Words of Schwarzer, I found a few interesting definitions that you use. I find that you use the word "crisis" to mean any situation that you want to change. That you use the word "simplistic" to mean any argument you disagree with but can't quite answer. And that you use the phrase "a matter of principle" when there is an argument you like but can't quite explain.

But to return to the numbers. You have written more than fifty law review articles, books, and pamphlets. And by the way, I

would like to say for Bill's benefit that his book, *Federal Civil Procedure Before Trial*, is still "must reading," if not "must buying," even though Bill is no longer a sitting district court judge.

Bill, over your career you have cited more lawyers for contempt and Rule 11 violations than the entire bar of the state of Rhode Island.

You have been given approximately 148 speeches and lectures, and I am not even including in that number those that you have given to your colleagues around the luncheon table. Those speeches have occurred all over the country — indeed, all over the world — and have justly earned you the title among your colleagues of "Marco Polo Schwarzer."

You have handled approximately 3000 status and case management conferences, which have justly earned you the title among the bar of "Managing Partner Schwarzer."

You have rewritten our local rules forty-seven times, so that what was once a few pieces of paper stapled together in the clerk's office now looks like a volume of *War and Peace*.

But enough of numbers. Let's look at the qualitative side of what you have accomplished. And it's here that you have really embarrassed us — both the bench and the bar. You have been what we called in college and law school a "damned average raiser."

You have demonstrated to us and to the bar that it's the quality of what we do that really counts. And that quality comes not just from the flashing light of genius, but from the heat of hard work.

You have demonstrated that legal scholarship is not just for scholars, but finds its highest and best use in the hands of judges and lawyers.

You have taught us that communication should be the sharpest tool of our professional trade. And that communication means knowing what to say, saying it simply, and saying it clearly. Hear the Words of Schwarzer direct to lawyers on the subject of communication:

> Lawyers find it difficult to write plain English. As Richard Wydick observed, they use eight words when two would do. They use technical words and legal jargon to express commonplace ideas. Seeking to be precise, they become redundant. Seeking to be cautious, they become verbose.
>
> These occupational habits, hallowed by tradition, are not

> readily shed. The sense of security they provide to the practitioner is reinforced by the fact that it is easier to write ponderous legal prose than it is to write plain and precise English.[1]

But the Words of Schwarzer are also directed to colleagues on the bench. In giving us a lecture about how we should be less verbose in jury instructions, you finish up tersely: "Few cases, if *properly* prepared, should require instructions taking more than twenty to thirty minutes to read."[2]

You have also taught, Bill, and demonstrated that jurors are as important in this process of justice as are judges and lawyers, and that they should be made to feel equally important in the process. Again, the Words of Schwarzer:

> For best results, jurors should be treated considerately and with respect. Too often, counsel and the Court all but ignore them while the evidence is coming in and talk down to them when they do address them. Jurors should be made to feel that their role in the trial is co-equal and with that of the judge and the lawyers.

Bill, you have also demonstrated to us that there are other sharp tools in the judges' and lawyers' tool boxes waiting to be used: case management; summary judgment; and the intelligent use of discovery. Hear the Words of Schwarzer on the intelligent use of discovery: "For many lawyers, discovery is a Pavlovian reaction. When a lawsuit is filed and the filing stamp comes down, the word processor begins to hum and grind out interrogatories and requests for production. Deposition notices fall like autumn leaves."[3]

You have also taught us, Bill, that discipline — I hate to use the term — under Rule 11 is also a tool of our profession of interest to both the bench and the bar. Hear the Words of Schwarzer:

> Of all the duties of the judge, imposing sanctions on lawyers is perhaps the most unpleasant. A desire to avoid doing

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[1] William W Schwarzer, *Jury Instructions: We Can Do Better*, 8 LITIG., Winter 1982, at 6.

[2] William W Schwarzer, *On Communicating with Juries: Problems and Remedies*, 69 CAL. L. REV. 731, 747 (1981) (emphasis added).

[3] William W Schwarzer, *Mistakes Lawyers Make in Discovery*, 15 LITIG., Winter 1989, at 31.

> so is understandable. But if judges turn from Rule 11 and let it fall into disuse, the message to those inclined to abuse or misuse the litigation process will be clear. Misconduct, once tolerated, will breed more misconduct, and those who might seek relief against abuse will instead resort to it in self-defense.[4]

There is another lesson which I sense that you have been teaching us of late, and that is that our present adversarial system, to which we have all become so devoted over these years, could well benefit from the use of some of the tools of the continental law system, an idea that I think is still unfolding. Hear the Words of Schwarzer:

> Strangely, perhaps, in the face of experience our profession's commitment to the adversary process seems to be undiminished. For the most part, lawyers speak and act as though nothing has changed. Like the Bourbon kings of France, many appear to have learned nothing and forgotten nothing. The adversarial ideal remains the lodestar of our profession. As a result, there is a growing gap between the traditional conception of the lawyer's role and his or her function under the Federal Rules.[5]

I think that this modification of the adversary system is something we will hear more about from you. (Oh, most accurate prophet!)

Judge Schwarzer — Bill — you have also taught us that sometimes judges just plain have to endure. Hear the final Words of Schwarzer:

> The different views of judges and lawyers reflect the difference in their roles. The trial lawyer's object is to have his client's cause prevail over that of his adversary. Judges must not only rule on the merits, but also regulate the activities of lawyers to conform to the rules of the game. The litigation process places lawyers and judges in opposition, which inevitably breeds tension between them. Judges must realize that lawyers frequently will be made unhappy. Judges must be prepared to make unpopular rulings without looking over their shoulders or experiencing discomfort.[6]

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[4] William W Schwarzer, *Sanctions Under the New Federal Rule 11 — a Closer Look*, 104 F.R.D. 181, 205 (1985).

[5] William W Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 705 (1989).

[6] William W Schwarzer, *Grading the Judge*, 10 LITIG., Winter 1984, at 5.

In short, Bill, you have taught us that doing it better is one of our goals. In order to do it better, you have to care. That caring becomes devotion. And excellence in our profession demands devotion.

You have also taught us that collegiality — friendship — is an important factor in the functioning of any organization, particularly courts and law firms.

All of this and more you have demonstrated to us. So is it any wonder that your colleagues are embarrassed when we look at your accomplishments and compare our own.

There is, however, one field in which you have fallen down, or at least not exercised your talents, and that is expression in the poetic form. So I will fill that gap for you briefly:

> As our bench knows so well,
> this Court is at its best
> in our informal meetings,
> when each mingles with the rest.
> That's when we get to measure
> the depth of each one's worth,
> the breadth of life experience,
> the capacity for mirth,
> the use of common sense,
> the appetite for work,
> the sharing of our problems,
> those who do not shirk,
> the ideals that make the person
> revealed by some chance remark,
> the ideas for doing better,
> those who have the spark.
> If you believe, as I do,
> that there's a high ideal
> to which the law aspires
> that tests our work and zeal,
> then there must be a higher place
> where the *greatest* judges go.
> If there is not, or I don't make it,
> I'm not sure I want to know.
> But I know when we all gather
> to talk of law and pending cases,
> we will measure what we do
> by how Bill covered *all* the bases.

Bill — from your colleagues — keep on showing us the way. Keep on raising that damned average. And keep on embarrass-

ing us.

As we are all now well aware, Judge Schwarzer has continued to show us the way, to raise the average, and to embarrass us by his excellent example. But those are subjects for other contributors to this publication.

For myself, and for all of the other judges of our court, we heartily welcome Judge Schwarzer back as a senior judge, and look forward to many years of judicial and collegial association with him.

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*John N. Hauser**

It is with great pleasure that I write this tribute to my friend William W Schwarzer. Bill Schwarzer and I came to practice at the McCutchen firm in San Francisco in 1952; Bill from Harvard Law School and I from Yale. We both became partners in the firm in 1960, a relatively speedy track for those days.

In the period from 1960 until he left to become a federal judge in 1976, Bill became a legend at McCutchen firm both for the prodigious amount of work he did and for the guidance and respect he gave to young lawyers. Back in those days, before the term became overused, there really were mentors, and Bill was one of the best. He knew when to lean over the shoulder of a young lawyer and when not to. In all candor Bill intimidated some lawyers with his intellect. As those who worked with him or appeared before him when he became a judge soon learned, he did not suffer fools gladly. He set high standards for himself and expected the same from his associates, partners, and the lawyers who came into his courtroom.

As part of the management of our firm, Bill became relentless in pursuing us all to collect unpaid disbursements from our clients. He was an early advocate of law firm efficiency, foreshadowing the economy measures that most other firms have adopted recently. Bill and I were the first partners in the firm to share a secretary, which was somewhat revolutionary in its day. But those were days of great collegiality in the firm and in the practice of law generally, and I suspect that we all enjoyed the

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* Partner, McCutchen, Doyle, Brown & Enersen, San Francisco.

practice of law more than is common today. Scorched earth tactics in pursing a lawsuit were relatively rare. Courtesy between opposing counsel was at a higher level. However, we tried more cases than we do today and courtroom advocacy was valued more highly than endless pretrial discovery.

Bill was a superb trial lawyer, handling with great distinction major commercial litigation with a large load of cases involving trucking, rail and bus transportation, and other regulated industries. But the list doesn't stop there. Bill is a quick and thorough study, not at all reluctant to go to the library to get the right answer. He became expert in numerous fields in addition to regulated industries, including labor law, antitrust, product liability, banking, and even bowling alley scoring machines. He would come into the office each morning with a list of provocative questions and would send his assistants scurrying for answers. But if the answers were slow in arriving he would hit the books himself. Clients loved Bill and he was (and is) widely known and greatly respected by other litigators.

Bill was as energetic outside the office and courtroom as within them. He was a runner and an expert skier. Indeed, he has been helicopter skiing in the Bugaboos, a feat beyond the dreams of most of us recreational skiers. He flew his own plane and I believe gained a commercial license. I was a passenger sometimes, although on a gusty day I may have quivered and cowered a bit. Bill is a great family man with a son, daughter, grandkids, and Ann, one of the great wives of all times. And now a confession: I am in the position of having a lifetime indebtedness to Bill. He was the best man at my wedding back in 1955, thus sending me off on the best thing that ever happened to me. Flo (my wife) and I were glad to have Bill and Ann as friends in the Bay Area, sad to have them depart for Washington, D.C. when Bill started his five year term as head of the Federal Judicial Center, and now are happily looking forward to their return to California this spring. Anyway, it is clear that I can't pretend to be an unbiased witness where Judge Schwarzer is concerned.

Finally a poorly kept secret: Bill greatly dislikes it when people put a period after his middle initial. In "William W Schwarzer" the "W" is the total middle name. That's all there is, just as Harry S Truman (as Bill is likely to point out) had a middle

letter ("S") that was *his* total middle name. A good tip for those who will be appearing before him or taking a class from him in the future.