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PERSPECTIVE

The civility and decency of a legal titan: Maxwell M. Blecher

By David Kesselman

At a time when our society's civility and decency are being threatened every day, I feel compelled to write about the passing of a true legend in the legal profession who embodied civility and decency in everything that he did. Last October, we unexpectedly lost a giant of the antitrust bar: Maxwell M. Blecher. A truly gifted lawyer for more than 60 years, Max was a throw-back to another era. In his view, the practice of law was a profession in which your word was your bond and a handshake meant more than any document drafted by the ablest of counsel. The highlights of Max's remarkable career are worth recounting.

In 1955, at the tender age of 20, Max graduated USC School of Law during the height of the Cold War. After a stint in the military as an enlisted man (something he always noted whenever I attempted to call him "sir"), Max originally wanted to join the ranks of a leading Los Angeles civil litigation firm. He was told that while the firm was interested in him, he could not join as an associate because, as he was a Jew, he would be unable to attend "the club" with the other lawyers. Undeterred, Max joined the Eisenhower administration's Justice Department and became a young "trust buster." With his prodigious legal mind and remarkable capacity to multi-task, Max fast became a rising star. By the early 1960s,

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the Kennedy administration appointed Max to lead the west coast Antitrust Division (then based in Los Angeles). He was only 28 years old but he had already begun to establish his reputation as a top flight trial lawyer under Robert Kennedy. He led the Justice Department's prosecution against General Motors for boycotting independent dealers — a case that would ultimately end up at the Supreme Court.

By the mid-1960s, Max left the government to join forces with Joseph Alioto, then the preeminent plaintiff-side antitrust lawyer based in San Francisco. As Alioto entered the political arena and ultimately was elected mayor of San Francisco, Max was entrusted with managing their busy antitrust practice. By 1973, Max had cemented his own outsized reputation and decided to join with Harold Collins to open what later became known as Blecher Collins & Pepperman in Los Angeles. The firm would become a powerhouse antitrust litigation firm for the next 44 years. From landmark decisions in the United States and California Supreme Courts, to dozens upon dozens of published cases in the 9th Circuit and elsewhere, Max helped frame antitrust law for generations to come. A treatise could be written on his leading decisions but I will highlight just a few of his better known cases.

Although he was already a famous antitrust lawyer, Max became known to sports fans across America when, in the late 1970s and into the 1980s, he agreed to represent the Los Angeles Memorial Coliseum and, teaming up with Alioto and the Oakland Raiders, challenged the NFL's then restrictions on allowing NFL teams to relocate to other cities. After two trials and published decisions in the 9th Circuit — which made clear that he Raiders could move to Los Angeles — Max helped establish the modern rule (later adopted by the Supreme Court) that professional sports leagues can be sued under Section 1 of the Sherman Act. *See Los Angeles Memorial Coliseum Comm'n v. NFL*, 726 F.2d 1381 (9th Cir. 1984); *Los Angeles Memorial Coliseum Comm'n v. NFL*, 792 F.2d 1356 (9th Cir. 1986). Shortly thereafter, Max represented the Clippers and successfully led a similar challenge to the NBA, paving the way for the Clippers to move from San Diego to Los Angeles. *See NBA v. SDC Basketball Club, Inc.*, 815 F.2d 562 (9th Cir. 1987).

In antitrust claims arising out of the abuse of patent litigation, Max is credited in the 1980s with creating a new doctrine of antitrust law called Handgards claims. *See Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282 (9th Cir. 1984). It had long been the law that a patent procured by fraud on the patent office could give rise to antitrust liability. But Max and his team framed a related but distinct claim — in which a defendant could be held liable for maintaining a patent suit against a competitor, not for initially procuring a fraud on the patent office, but for maintaining the lawsuit even after learning that the patent was invalid.

Max especially loved representing the underdog and relished the David versus Goliath aspect of taking on the Fortune 500 (though he was always clear-eyed and would often note that even the underdog occasionally will have fleas). Perhaps his most famous case for monopolization under Section 2 of the Sherman Act came in representing independent service companies against Eastman Kodak. Upon remand from the Supreme Court, Max took over the case and led the way to a major trial victory, which was ultimately

upheld by the 9th Circuit. The Image Tech decision remains one of the standard cases for analyzing Section 2 cases in the country. *See Image Tech. Servs. v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997)

And Max's impact was not just in the federal courts. In the California Supreme Court, Max's advocacy helped define the scope of California's price discrimination statute and made it easier for plaintiff's to sue and prevail. *See ABC Internat. Traders v. Matsushita Electric Corp.*, 14 Cal. 1247 (1997). Similarly, in *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134 (2003), another California Supreme Court decision, Max helped establish the modern elements of the intentional interference with prospective economic advantage tort — a claim that is often included in competition cases.

Even in defeat Max had an outsized impact on the profession. In the late 1970s, Max lost a major litigation against IBM. Yet, that loss helped launch the reputation of his adversary who needs no introduction today: David Boies. Similarly, Max's losses at the *U.S. Supreme Court in Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), Atl. *Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990), and *Pac. Bell Tel. Co. v. Linkline Communs., Inc.*, 555 U.S. 438 (2009) — are now required reading in every antitrust law textbook. Indeed, his loss in the *Hawaii* case was short lived. Congress decided the very next term to overrule the Supreme Court's interpretation and allow states to bring parens patriae suits on behalf of their citizens.

But in the end, what set Max apart from so many other leading lawyers was not simply his brilliant legal mind. Yes, he had an uncanny ability to take the most complex subjects and break them down into concepts that jurors could easily grasp. And yes, he could thunder away in closing argument as one of the best orators of his generation. I'll never forget the first time I watched Max give a closing argument to a jury — everyone in the courtroom sat spellbound as he pounded the lectern and preached the importance of fair competition to our free market system, and quoted Winston Churchill to punctuate his point. No, what set Max apart was his sense of decency and honor; his willingness to volunteer to a court that the other side had made a valid argument; and his tactical decisions to only fight when it mattered and to accommodate when it did not. Max once told a judge that while he disagreed with the other side's argument he would stipulate due to the shortness of life. His respect for opposing counsel, and the need to maintain integrity at all costs, is what made him a true role model for our profession.

Max's loss cannot be measured. He was a legal giant — and no one will ever replace him. But those of us who benefitted from his mentorship and friendship have a duty to try to carry on his core sense of civility and decency. We need it now more than ever.

David W. Kesselman *is a partner of Kesselman, Brantly & Stockinger LLP.*


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