

abt REPORT

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The Nine Questions

A partner hands you a new file with brusque instructions to run the conflicts check and make sure the matter is clear by the time she gets back from that deposition in Waikiki. But you've never done a conflicts check. Your law school ethics class is long past your memory's expiration date; and anyway the prof spent

most of the time on lying witnesses, advertising, investing client funds, and such — all quite interesting, but of no use to you on your present task. And while you suspect the partner regards this as a pesky technicality, you know whose head will be on the block if anything gets missed.

Here is your road map of what you're looking for — the Nine Questions to ask on the conflict check for any new matter. Your firm's conflicts system and database should be constructed to help you find the answers to these questions. (If not, they need to be reworked.)



Hon. Charles S. Treat

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The Black Box Speaks: Juror Questions in the Hyper-Information Age

Jurors are the only fact finders in our judicial system that we expect to sit in silence, unable to ask questions for additional or clarifying information. It would seem absurd if, during a bench trial, a judge had a matter of confusion she could quickly clear up by asking a witness a simple question, but instead was required to sit in silence and hope the matter clarified itself during the trial. Similarly no one would expect an arbitrator to sit in confusion throughout the entire process until she rendered a decision.

California courts, both state and federal, traditionally require jurors to sit in silence throughout the trial, taking the information in and providing no feedback until the jury begins its deliberations — when it's too late to develop the evidence. But, as we explore here, the use of juror questioning of witnesses would result in much more effective administration of justice. Major benefits of juror questioning include better fact-finding, improved trials, and decreased risk of misconduct, and there is little downside. The law permits juror questions — but to realize this opportunity requires practitioners and judges willing to break the mold and embrace improved trial practices.

Why Let Jurors Ask Questions? Better Fact-Finding

Juries function best when jurors are invested and comprehend the issues. Juror questions promote maximum comprehension. A better informed juror helps assure the facts found at trial are the truth. *See United States v.*

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Jonathan Patchen

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But first, a few general observations that address all of the Nine:

The law involved: The first source of conflicts rules is, of course, California's Rules of Professional Conduct (RPC). But the Rules are incomplete and not self-explanatory. Most of the case law on lawyer conflicts arises from disqualification motions and malpractice suits, and the precedents often go beyond the RPCs as such.

The consequences of a conflict most likely to impress the partner are (1) malpractice, (2) disqualification, (3) State Bar discipline, and (4) client stiffing or bad-mouthing. But even if none of those is likely, both the partner and you have sworn to practice ethically. Thus, if a new matter presents an ethical conflict, you must deal ethically with it, even if you could get away with cutting corners.

"Adversity": A recurring theme in the Nine Questions is adversity. Don't equate "adverse" with "adversarial," in the sense of being hostile or contentious. If two parties want different things — even minor and easily resolved things — then their interests are adverse for conflicts purposes. Thus, even the friendliest of "win-win" transactions is still "adverse." Friendliness may make it easy to get consents — but it doesn't mean that the consents can be dispensed with. Indeed, even cross-examination, or taking a deposition, can be "adverse" in some cases.

Not worth the paper it's not written on: In California, if a consent (or notice) is required, it is required to be written. Probably an e-mail qualifies — but a phone call does not. And a written consent will be much easier to prove if a dispute ever arises.

Remember this criterion in drafting your consent letter: *When this letter is shown to a judge and a jury two years from now, will it be obvious to them that it means what you intended?* And I'll also offer Treat's First Rule of Legal Drafting: *Just say what you mean.* It's far easier than arguing over the meaning of what you said.

Yes, the whole firm: You'll notice that most of the Nine Questions operate at the level of the entire firm, not individual lawyers. For most conflicts purposes, an entire firm is treated as if it were a single lawyer. If any one lawyer has received confidential information, it is imputed to every lawyer in the firm — with no provision for the possibility that no one actually remembers it.

Walling off the problem: If your firm is of substantial size, you probably see a regular stream of "ethical walls" (or "screens") dictating that attorneys Tom, Dick, and Mary are walled off from the firm's representation of Acme. If you can't get client consents, can you use a wall instead?

Until recently, the clear answer in California was "no." Walls are often an invaluable tool in *obtaining* client consents (which is why you see that stream). But they were

legally ineffective as *substitutes* for required consents.

That may be changing. A few recent cases have signaled receptiveness to ethical walls, at least sometimes. The question remains open, however. Even if the Supreme Court ends up accepting walls, moreover, in practice this may end up being a "big firm only" rule, or "different offices only," or "laterals only." Further, a firm's actual fidelity to its walls will always remain a litigable fact issue. (And note that a wall could solve only a confidential-information issue. It does nothing for a duty-of-loyalty conflict.)

My advice: Don't rely on a wall in lieu of consent, unless you're prepared to litigate over it (and possibly lose). If a client's unwilling to consent with a wall, it's unlikely to go away without a fight just because you put up a wall.

Firing the client: Don't figure you can "solve" a conflict by dropping the existing client presenting the problem. This is called the "hot potato rule," as in "you can't cure a conflict by dropping a client like," well, you know. Even if you could do this without harming the client, the conflict will remain.

Now to the Nine:

1. Is there any current client of the firm who might be involved in this new matter (as a party or witness)?

The concern here is the duty of loyalty. Without consent, a firm cannot act adversely to an existing client. This applies even if the two matters — the one for the client, and the one adverse to it — are 100% unrelated to each other. However, this applies only to current clients, not past ones.

See the comments above on what's "adverse." Further, you must think about any reasonably foreseeable forms of adversity that may develop. If you can foresee some adversity arising later, it's usually best to try to line up the consents now, not later. And if you choose to defer consent for now, hoping the adversity won't arise, at a minimum you'd better warn your new client about the risk you're running. Just think about the phone call you'll have to make, telling your client you must resign a month before trial because a foreseeable (but undisclosed) potential conflict has become actual.

What if your pre-existing client and the proposed adversary are corporate affiliates? Good question. The case law is currently debating between the "alter ego test" (generally regarding different entities as separate parties) and the "unity of interests test" (complicated, but the short form is, do they use the same in-house counsel?). But if you can, just get the consent — it's easier. And if you can't, you'll know there's trouble ahead if you proceed.

2. Is the client in the new matter an opponent or co-party in any other matter the firm is currently handling for a different client?

This is the flip side of the duty of loyalty. Question 1 reflects that you can't represent Hatfield against McCoy, if

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McCoy is an existing client. This Question reflects that if you are already representing Hatfield against McCoy, you can't then take on McCoy as a new client — even on something completely unrelated, against other people entirely — without consent from both.

3. Is the matter substantially related to anything the firm has ever handled for any other past or present client?

This involves the other major concept in conflicts, the duty of confidentiality. What you — meaning “anyone in your firm” — have learned from other clients is confidential, and it's your duty to keep it that way. Moreover, even if you don't *disclose* the confidences, you can't *use* them for someone else's benefit either. Hence, if your firm has ever handled any matter for someone else that is “substantially related” to the present matter, you can't take the present matter, unless you can get consent.

What's “substantially related”? That's a moving pendulum. Some cases have suggested very broad formulations — representation in the same general area of the law, or familiarity with key decision-makers, or “knowing the playbook.” Current case law cuts that back to a more restrained scope. Given the nature of the prior representation, is it reasonable to think that some confidential information might have been conveyed, that could be material to the present matter?

Crucially, this inquiry is not answered by declarations or testimony about what confidential information *actually was conveyed* in the prior matter. That would defeat the purpose of keeping confidential things confidential. Instead, you must look at the general subjects of the two representations. If it can reasonably be supposed that something material to the new matter would have come up in the old matter, then it's *irrebuttably presumed* that it did come up. Yes, I said “irrebuttably.” Don't bother drafting that partner declaration swearing that “the client and I never discussed that.” It won't work.

This inquiry also includes confidential information from potential clients who ended up hiring someone else. So you must either make sure that your intake interviews and beauty contests don't involve any confidential information, or else enter these non-clients into your conflicts database.

4. Is the matter substantially related to anything handled by any of our lateral-hire attorneys at their prior jobs?

The point here is that it's not just your firm's prior matters that could be substantially related. It's also all the matters handled by all your lateral-hire attorneys at their former firms. Whatever confidences they learned from clients at the old firms, they carry over to their new firm too —

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So You Want Jurors to Let Your Client Out of a Contract?

Your client signed a contract and later decided to cancel the deal. The deal may have turned out to be more expensive than your client initially thought, they may have lost trust in the other party's ability to perform, or maybe a better opportunity came up. Now you need to ask a jury to rescind the contract or excuse your client's performance. Our jury research in breach of contract cases has shown that you face a significant challenge; jurors believe in the sanctity of contracts and require exceptional circumstances to let a party nullify or excuse one. As one mock juror commented during deliberations, “It's like a divorce. This is a business marriage. You don't just walk away.” If a contract is a business marriage, what is just cause for divorce? First we'll discuss some trial strategies that have *not* worked. In our mock trial research, these arguments have proven unpersuasive and have even backfired and angered jurors.



Jonas Jacobson

Inadequate Grounds for a Business Divorce: Arguments That Have Not Been Persuasive

Don't argue that your client did not read or understand the contract — Many jurors do not carefully read contracts themselves: in background surveys we give to jurors before mock trials, about 30% of jurors admit that they skim contracts rather than reading them carefully. However, jurors will not excuse a business for doing the same. In one case we consulted on, a union signed a long-term contract to lease office equipment. The financing terms were byzantine, the leasing company made misleading oral statements, and the ultimate cost of the equipment was outrageous. Union representatives signed the contracts based on blind trust in the leasing company, which was friendly with unions. Despite these facts, jurors were not willing to rescind the contract or excuse the union's performance. Jurors felt that the union was large and sophisticated enough to hire lawyers to carefully review leases and that it bore full responsibility for what its representatives signed. It did not matter whether the union actually understood the lease terms; it *could* have understood the terms with proper diligence. Throughout our experience in jury research, we have not seen a business breach of contract case in which “I did not under-

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stand the contract” was a helpful theme.

Don't argue that a potentially solvable problem justified cancellation — A single problem with a deal can cause one party to lose trust in the other party. Because trust is the backbone of many business deals, this loss of trust can seem like cause to cease performance and cancel the contract. Jurors, however, do not see it this way. They expect the two parties to a contract to work together to investigate and overcome problems. As one mock juror said, “When a company backs quickly out of a contract you immediately think breach of contract.” Cancelling the contract should be a last resort used only after repeated attempts to save the deal have failed. Again marriage is a good analogy: spouses must show they tried to work together to overcome issues before asking for a divorce.



David Graeven

In one case we consulted on, a baked goods manufacturer contracted with an egg supply company to supply regular shipments of eggs. After a few shipments of allegedly bad eggs, the baked goods manufacturer terminated the shipments. The egg supplier sued for breach of contract. After a mock trial exercise, most jurors sided with the egg supplier. Jurors felt that the baked goods manufacturer cancelled the contract too quickly, without making an adequate effort to work out the problem. Jurors expected the baking company to prove that it tried to work with the egg company to investigate, document, and attempt to remedy the bad egg shipments.

Don't let the jury think that your client quit the contract to pursue a better deal — Imagine a spouse that asks for a divorce every time a more attractive partner walks by. Similarly, jurors find it reprehensible when a business quits a contract just because a better opportunity comes along. Tess Wilkinson-Ryan, a professor at the University of Pennsylvania Law School, researches the moral nature of contracts. In one of her studies, mock jurors were asked to award damages in a breach of contract case. The plaintiffs in the case contracted to refinish the floor in their condo. They planned to sell the condo and projected that a re-finished floor would increase the value by \$10,000. In addition to this basic information, two experimental groups of jurors received more information about the case. One group heard that the floor contractor cancelled at the last moment to take on a higher paying job, forcing the plaintiffs to put the condo on the market at a lower price. A second group of mock jurors heard that the owners of the apartment next door negligently tried to move a gas line, resulting in a gas leak that prevented the

floors from being refinished. The outcome was the same in both scenarios: the condo owners had to put the condo on the market at a lower price.

Mock jurors felt that the floor contractor who intentionally breached the contract was morally worse than the negligent neighbors. Correspondingly, damage awards against the floor contractor were significantly higher than against the neighbors, despite identical economic damages (\$10,000) in both scenarios.

We have seen this problem in our jury research. Jurors are naturally suspicious of businesses and quick to attribute self-interest motives to a corporation's decisions. In the egg supply case, a number of jurors suspected that the real reason the baked goods company cancelled the contract was because they were courting a cheaper deal with another egg supplier. This angered jurors and drove up damage awards against the baking company. So how can a party that wants out of a contract persuade jurors to find in their favor? Our jury research has revealed strategies that are more likely to be effective.

Divorce Granted:

Arguments that have been Persuasive

Argue that you cancelled the contract to protect consumers — Jurors are more concerned with protecting consumers than they are with protecting the financial well-being of companies. In the egg shipment case, jurors worried about the people that would ultimately buy the baked goods. Bad eggs could mean sick consumers; thus a few bad shipments could be a serious problem worthy of cancelling a contract.

In another case we consulted on, a real estate company leased a hotel property to a hotel management company. The management company took over the property and let it become dilapidated, with multiple health and safety code violations in both the hotel rooms and public areas. The real estate company sued to terminate the lease agreement and reclaim the property. In a mock trial, most jurors let the real estate company terminate without penalty. They did not expect the leasing company to give the management company a chance to fix the health and safety violations because they worried about the patrons who might be harmed if the problems continued.

Argue that you exhausted all options before cancelling the deal — Jurors require parties to try hard to overcome problems with carrying out a contract, but they do not require them to try forever. If a party can show that repeated attempts to resolve problems went nowhere, jurors will be willing to find for them.

The baked goods company ran a second mock trial in the bad egg shipment case, armed with the findings from the first mock trial. This time, the baked goods company brought more evidence of documented problems with the egg supplier and repeated attempts to resolve them. This

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persuaded more jurors that the baked goods company had exhausted all options before terminating the contract. It also assuaged jurors' suspicions that the baked goods company quit the contract in order to find a better supply deal. Ultimately more jurors found that the baked goods company was excused from performance.

Emphasize the other party's immoral character — Divorce attorneys know that the character of the spouses is an important factor in determining who prevails at trial. The same is true for contract cases. In the hotel leasing case, the CEO of the hotel management company had little experience in the industry and a poor reputation. Together with his company's unsafe management of the hotel, this persuaded most jurors that he was unethical and sloppy. Jurors felt that his company did not morally deserve the leasing deal it signed and allowed the leasing company to cancel it.

Even if jurors do find your client in breach of contract, pointing out the other party's immoral character can reduce damage awards. In the office equipment leasing case, most jurors found that the union was in breach of its office equipment contract. However, jurors were reluctant to award the leasing company the full amount of profit due under the lease because the leasing company had obfuscated the pricing terms, abused the union's trust, and charged far above market rate.

Use jury selection to identify and strike jurors who are unlikely to excuse your client's performance — Many jurors come into court believing that there is no good reason to let a business cancel a contract. In initial surveys given to jurors before mock trials, a majority typically agree with statements like, "Once signed, a contract should never be broken." If your client is the party asking for excuse of performance, these jurors can be more likely to vote against you. When asking jurors about their contract attitudes, target only jurors with the most extreme feelings. If you ask, "Who feels that a signed contract should not be broken?" you will get universal agreement and learn nothing about which jurors to strike. It's better to ask a more extreme question like, "Who strongly agrees that once signed, a contract should never be broken under any circumstances?" Only a small minority of jurors will agree with this statement and it is these jurors you will want to consider striking.

General anti-corporate attitudes are also important in voir dire, as anti-corporate jurors will be more suspicious of a large business that does not honor the promises it has made. A juror who feels that large companies are motivated by greed will be more likely to think that your client quit the contract just to take a better deal. Again, ask extreme questions to reveal the most unfavorable jurors. For example, "Who feels that a corporation will almost

always engage in wrongful conduct if it is profitable?"

If you are going to trial on behalf of a party that wants a contract rescinded or excused, you face a significant challenge. Jurors see a contract as a moral promise, akin to a business marriage, and require exceptional circumstances to cancel one. The strategies suggested in this article are not meant to substitute for case-specific jury research, but they can point your trial strategy in the right direction.

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and everyone in the new firm is irrebuttably presumed to know the same confidences.

The good news is that this applies only to (1) matters substantially related to your new matter, and (2) matters actually handled by your lateral at the old firm. There is no "double imputation" — first from the lateral's old colleagues to him, and then from him to all of his new colleagues.

5. Will we have more than one client in this matter?

This is a realistic question, not a technical one. Parent and sub, or (usually) husband and wife, don't count as "more than one client" for purposes of this question. But for any other joint clients, no matter how friendly they may seem, this is a concern.

Technically, consent is required only if the two clients' interests actually or potentially conflict. Realistically, to be safe you had better assume that every set of unrelated joint clients may present at least potentially adverse interests. Remember what I said above about the breadth of "adversity." Even the most harmonious of joint defenses can turn adverse, if only in disagreement about how much to offer in settlement. Just get the consents.

It's critical that the consent letters lay out specific ground rules for what happens if such a future conflict does develop. Will it be handled by in-house counsel? (That doesn't always work, by the way, if the point of difference would affect how you conduct the joint representation.) If you can't continue representing both clients, can you drop one, and if so, which one? And so on.

6. Is the client a partnership, joint venture, trade association, or the like?

In grammar there is the concept of a "noun of multitude" — a seemingly singular word for which it may be

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appropriate to use plural verbs, as in “the clergy were concerned but the laity were enjoying themselves.” If you’re not careful, that concept may be applied to the identity of your client. The solution here is really not that hard. It’s simply to spell out, carefully and precisely, who your client(s) are and are not.

7. Will anyone other than the client be paying our fees for the matter?

This covers any third-party payor — insurer, indemnitor, employer, etc. Consent is required. This doesn’t include pro bono representations, though, because no one’s paying there.

8. Could the firm, or any of its attorneys, be substantially affected by this matter?

This is a catch-all category created by RPC 3-310(B), for situations that don’t otherwise require consent. It requires only disclosure. It applies to the firm as a whole. Does it have an investment in the subject matter? Will success in the litigation result in bankrupting someone that owes the firm money? Would handling the matter harm the firm’s relationship with another client? And so on, and so on.

At the individual level, this Rule applies only if the attorneys actually working on the matter (1) themselves have the relationships or interests in question, or (2) know of anyone at the firm who does. Thus, you don’t have to run a search to find any such relationships. But if you know of them (from a search or otherwise), you have to disclose them.

That’s the good news. The bad news is that the Rule, as drafted, is breathtaking in its breadth, and there’s no authority cutting it back to a narrower scope. While some parts of the Rule contain express materiality filters (as to former relationships, for example), some do not. RPC 3-310(B)(1) requires disclosure of any “legal, business, financial, professional, or personal relationship with a party or witness in the same matter.” There is no express limitation on how remote or minor the “relationship” might be, nor on whether the party or witness is major or minor, friendly or adverse.

Despite this textual breadth, one wonders whether the Rule really contemplates — or whether your client really wants to hear — that you own ten shares in AT&T, or that a friendly co-defendant has a son on your kid’s Little League team, or that your dental hygienist was an eyewitness to the accident. Absent authority on point, I can’t give you any better advice than to use your common sense.

9. Could this matter, though free of conflicts at the outset, turn out to conflict us out of other matters in the future?

Any associate wants to build a track record of business development. But that thirty-hour matter you land for a small business won’t impress management so much when

it conflicts the firm out of a huge matter for an existing major client. And remember what I said above about the “hot potato rule.” The lesson here is a combination of selectivity in taking minor matters (including local-counsel gigs), plus insisting on appropriate, well-drafted waivers in advance.

Charles (Steve) Treat is a judge of the Contra Costa Superior Court.



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Sutton, 970 F.2d 1001, 1005 n. 3 (1st Cir. 1992) (“Juror-inspired questions may serve to advance the truth by alleviating uncertainties in the jurors’ minds, clearing up confusion, or alerting the attorneys to points that bear further elaboration. Furthermore, it is at least arguable that a question-asking juror will be a more attentive juror”). As was recognized nearly thirty years ago, “there may be a real benefit from allowing jurors to submit questions under proper control by the court... [and] the correct procedure is to have the juror write the questions for consideration by the court and counsel prior to their submission to the witness.” See *People v. McAlister*, 167 Cal.App. 3d 633, 644 (1985).

The Seventh Circuit recently conducted a pilot program in which members of juries in civil trials were allowed to submit questions to anyone testifying. While participants expressed concern beforehand that juror questions may confuse the issues and shift jurors’ focus to an irrelevant or inconsequential matter, surveys of the participants afterwards showed clear benefits. Two-thirds of attorneys reported the practice enhanced jurors’ understanding and 48 percent believed it enhanced fairness, with only 8 percent disagreeing. Steve Chapman, *When Jurors Talk Back: The Case for Letting Juries Ask Questions During Trial*, (last visited Nov. 1, 2013), <http://reason.com/archives/2009/04/13/when-jurors-talk-back>. Judges largely approved of juror questions, with 94 percent responding that juror questions helped jurors better understand the issues before them. *Id.* Similarly, jurors in a New Jersey pilot program permitting questions stated they were more attentive because they could ask questions. *Jury Questions — Pilot Program Reports*, NEW JERSEY COURTS, (last visited Nov. 1, 2013), <http://www.judiciary.state.nj.us/jurypilot/jurypilot.htm>.

Improved Trial Presentation

Trial attorneys also stand to benefit greatly if juror questions are permitted. One of the best — if only — window into the mind of the jury is when trial lawyers speak with jurors after trial. The feedback lawyers receive helps with future trial strategy by identifying what jurors liked and

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WALTER STELLA

On EMPLOYMENT

Since the U.S. Supreme Court handed down its decision in *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740 (2011), California courts have wrestled with the enforceability of arbitration agreements in the employment context. *Concepcion* held that the Federal Arbitration Act (FAA) preempts California's prior rule invalidating arbitration agreements that required employees to waive their rights to class-wide proceedings. The *Concepcion* holding creates tension between the FAA's strong policy favoring arbitration and California's precedent over the past decade applying the state's unconscionability doctrine to place limits on the enforcement of arbitration clauses in the employment setting.

A recent decision by the California Supreme Court in *Sonic-Calabasas A. Inc. v. Moreno*, 13 C.D.O.S. 11543, (*Sonic II*), does not help ease this tension. If *Sonic II* is any indication, California courts will walk a thin tight rope to avoid FAA preemption while continuing to apply the state's unconscionability doctrine to arbitration agreements. At issue in *Sonic II* was the enforceability of an arbitration agreement which waived an employee's right to first seek relief for wage claims before the Labor Commissioner (known as a Berman hearing). This was the second opinion from the California Supreme Court in this case; the first (which held the agreement was unenforceable) was vacated and remanded by the U.S. Supreme Court for further consideration in light of *Concepcion*.

The 'Sonic I' Decision

The arbitration agreement in *Sonic* applied to all disputes that might arise in the employment context. While the agreement stated that it did not apply to or prevent the filing of DFEH or EEOC administrative claims, it otherwise applied to any claims which could have been brought before other agencies, such as wage claims with the state Labor Commissioner.

The California Supreme Court held that an arbitration agreement which waived an employee's rights to a Berman hearing before the Labor Commissioner was *per se* unenforceable. As the court explained, Labor Code provisions such as those governing the Berman process have a public purpose. Requiring employees to waive their Berman rights would undermine this public purpose. Therefore, the court concluded that the *Sonic* waiver was one-sided and unconscionable. The court, however, did not invalidate the arbitration agreement entirely. Instead, it held that the arbitration agreement could be enforced, provided that arbitration was preceded by the option of a Berman hearing at the employee's request.

The 'Sonic II' Decision

Upon a petition for review of the *Sonic I* decision, the

U.S. Supreme Court remanded the case to the California Supreme Court to reconsider its decision in light of *Concepcion*. On remand, the California Supreme Court held that the rule announced in *Sonic I* is preempted by the FAA as interpreted by *Concepcion*. In *Concepcion*, the U.S. Supreme Court stated that the primary purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms. In light of the *Concepcion* holding, the California Supreme Court stated that: "[b]ecause a Berman hearing causes arbitration to be substantially delayed, the unwaivability of such a hearing, even if desirable as a matter of contractual fairness or public policy, interferes with the fundamental attribute of arbitration — namely, its objective to achieve streamlined proceedings and expeditious results."

However, while the California Supreme Court's reversal in *Sonic II* opens the door for employers to use class action waivers in arbitration agreements, the court made clear that the unconscionability doctrine remains alive and well in California. The court held that *Concepcion* does not implicate state unconscionability rules so long as they do not interfere with the fundamental attributes of arbitration, which include lower costs and efficiency. According to the court, the fact that unconscionability rules may have a disproportionate impact on arbitration agreements, or would arise in the unique context of arbitration, does not necessarily mean they are preempted by the FAA.

The court remanded the case to the trial court to re-examine the arbitration agreement and determine whether it is unconscionable. However, in doing so, the court did little to clearly define the standard to be used in assessing whether an arbitration agreement is unenforceable. The test to be used was variously described as requiring a finding that the arbitration terms are "overly harsh," "unfairly one-sided," "unreasonably favorable to the more powerful party," or such as to "shock the conscience." This leaves open the very real possibility of confusion among lower courts as they attempt to give effect to *Concepcion's* holding and the FAA's strong policy favoring enforcement of arbitration agreements on the one hand, while applying California's unconscionability doctrine on the other.

As a result, it's safe to say that the tension between the FAA and California's unconscionability doctrine will continue. Employers who require employees to enter into arbitration agreements should proceed with caution. At a minimum, arbitration agreements should be drafted to comply with the requirements set forth in *Armendariz v. Foundation Health Psychcare Services*, 24 Cal.4th 83 (2000).

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what may have been confusing during the trial. Often jurors express confusion or concern about why a certain issue was not addressed during trial. But post-trial interviews help only with future trials. In-trial juror questioning allows real-time feedback for attorneys into the thought process of the jury. It allows attorneys to know what is confusing to the jury or what concerns the jury may have. Attorneys can use this information to alter their witness order, call new witnesses, resolve confusion, and adjust trial strategy in response to the jurors' questions. In the Seventh Circuit pilot program, 50 percent of attorneys reported permitting juror questions increased their satisfaction with the trial and only 17 percent disagreed.

Decreased Risk of Juror Misconduct

While increased juror comprehension and improved trial presentation have long justified juror questions, the emerging hyper-information age should compel widespread use of the practice. Jurors are routinely admonished not to seek extrajudicial information. *See, e.g.*, Ninth Circuit Model Jury 1.12; CACI 100. But despite these warnings, curiosity gets the best of some jurors and they seek out, and become exposed to, outside information, whether it be from watching the late night news or surfing the internet or talking with friends. And these impermissible actions are often



Nicolas Anderson

prompted by the understandable goal of the juror trying “to get it right.”

The inevitable reality of such juror misconduct is a problem that is will continue to grow, assisted by the ease by which information can be accessed on the internet. Prior to the online age, outside information was often limited to high profile cases or required visible efforts by a juror (*e.g.*, library research) to obtain information. Such constraints on access to information have evaporated. Any juror with a computer, smartphone or tablet can instantly search the internet for any person, company, product, or issue involved in the trial. Most companies and law firms have an online presence. And the rapid growth of social media — Facebook, Twitter, or LinkedIn — has made the same true for individuals. Equally important is the fact that jurors can conduct this research with little risk of disclosure. The trial judge and the parties will not know what is Googled late at night by a juror in the privacy of her own home.

While express juror instructions related to electronic information have been created to address these risks (*see, e.g.*, CACI 116), instructions may have little practical impact in deterring juror research. This was vividly demon-

strated in the recent California Court of Appeal decision *People v. Pizarro* (No. F057722 (May 21, 2013)). In that case, the Court overturned the murder conviction of the defendant Pizarro because a juror had conducted online research. The research exposed the juror to information that Mr. Pizarro had been convicted in a prior trial and testified in his own defense. Despite violating the Court's admonition, the juror provided an explanation for his actions which is sympathetic. He felt lost and just wanted to know where he was in the case. The juror just wanted to better understand the series of events and what he was listening to during the trial. He thought his online research was what was right for Mr. Pizarro.

Jury instructions targeted at electronic information are unlikely to adequately address the risk of juror research because such instructions fail to address the underlying juror motivation. Such motivation was made clear in *Pizarro* — jurors are seeking information that they did not get in the courtroom. A juror may be confused because of how the lawyers are presenting the case. The juror may have simply missed some key fact. Or the information sought by the juror may not be admissible. If the juror is unable to ask clarifying questions of witnesses, the juror faces the Hobson's choice of reaching a verdict in that state of confusion or violating the jury instructions to answer the question. In this situation, a juror wanting to “get it right” may well conduct an internet search of the case and the parties involved to quickly learn more information, just as a juror would likely do in every other aspect of her life. Telling jurors early that they will be able to ask questions and warmly welcoming their questions gives an outlet for juror curiosity and assures them no outside research is needed to “get it right.”

There is Little Downside to Juror Questions

Attorneys and judges reluctant to allowing juror questions have raised concerns about the practice. The two major fears are (1) that jurors, typically unfamiliar with the rules of evidence and other restrictions on what is permissible in court, will ask witnesses improper questions, and (2) that juror questions will cause inordinate delay in trial proceedings. Neither of these concerns have been born out in practice.

Improper Questions

No attorney wants to have to object to a juror's question in front of the juror. The justified worry is that objecting to a juror's question will upset the juror and may create an adversary in the jury box. A juror unfamiliar with the rules of evidence may take such objection personally, and may take out his offense on the objecting attorney, or even worse the client. Forcing the attorney to choose between objecting to a juror's question and risking alienating a juror or allowing an impermissible question to be

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JOHN GREEN

On INSURANCE

Insurers and insureds have long disagreed whether an insurer's duty to settle is limited to the duty to accept a reasonable settlement offer made by a plaintiff, or whether the insurer has a duty to affirmatively seek a settlement within limits. This issue was recently addressed in *Reid v Mercury Insurance Co.*, 220 Cal.App.4th 262 (2013). In *Reid*, the insurer recognized shortly after the accident that the exposure exceeded the \$100,000 policy limits, but decided it needed a witness interview and the claimant's medical records before making a policy limits offer. It requested this information, but didn't tell the claimant it was considering a policy limits offer. While the claimant later testified he would have accepted \$100,000 to settle at that time, his counsel did not make a policy limits demand. A few months later, after getting the medical information, the insurer offered policy limits, which the claimant promptly rejected. The matter went to trial and judgment was entered for \$5.9 million, forcing the insured into bankruptcy.

The Court found the insurer was not liable for the judgment. The Court stated:

An insurer's duty to settle is not precipitated solely by the likelihood of an excess judgment against the insured. In the absence of a settlement demand or any other manifestation the injured party is interested in settlement, when the insurer has done nothing to foreclose the possibility of settlement, we find there is no liability for bad faith failure to settle.

Id. at 266.

In reaching this conclusion, the Court of Appeal surveyed prior cases, and concluded that most of the prior cases treated the insurer's obligation as a duty to accept a reasonable settlement, and that no conflict between insurer and insured arose until there was a demand within limits.

The Court of Appeal did acknowledge that other California decisions have disagreed and "have found a conflict of interest can arise, and an insurer may be liable for bad faith refusal to settle, without a formal settlement offer." *Id.* at 273. In one case, the insurer had an internal policy not to disclose limits, effectively foreclosing early settlements within limits. The court cited other cases in which a formal settlement demand was not required, stating they "involved evidence the insurer knew of the claimant's interest in settlement, and the insurer has rejected or ignored the opportunity to negotiate a settlement." *Id.* at 274. After reviewing these various cases, the Court of Appeal concluded that liability could arise not only for failure to accept a reasonable settlement but also:

when a claimant clearly conveys to the insurer an

interest in discussing settlement but the insurer ignores the opportunity to explore settlement possibilities to the insured's detriment, or when an insurer has an arbitrary rule or engages in other conduct that prevents settlement opportunities from arising.

Id. at 278.

This standard is much more favorable to insureds than the passive "duty to accept a settlement limit within limits" often advocated by insurers. If a claimant conveys an interest in discussing settlement, the insurer can breach its duty to its insured if "the insurer ignores the opportunity to explore settlement possibilities..." *Id.* Thus, if a plaintiff makes an above-limits demand, the insurer is now under an duty to explore whether it is possible to settle within limits by making a within-limits counter-offer. In addition, even if there is no demand from plaintiff, if plaintiff has given some indication of a willingness to consider settlement, that will also trigger an affirmative obligation on the insurer to pursue a settlement within limits.

This raises the question, of course, of what an insured can do to protect itself from excess exposure, in cases where the claimant has not made any unprompted indication of interest in settlement. That was the situation in *Reid*, and the insured suffered a \$5.9 million judgment as a result, with no recourse against the insurer for the excess portion. The solution, of course, is for the insured, or his counsel, to explore that question directly with the claimant, and then to quickly advise the insurer if there has been any expression of interest in settlement by the claimant.

Interestingly, this highlights a conflict of interest which the court in *Reid* seems to have overlooked. The rule set out by *Reid* creates a potential conflict of interest because the insurer would prefer that the claimant *not* be contacted regarding its interest in settlement, since the absence of an expressed interest in settlement could insulate the insurer from bad faith; the insured, on the other hand, would want the claimant to be contacted immediately, to seek to establish the claimant's interest in settlement. Given this divergence in interest — and the serious potential consequences — this conflict would seem to be the type that gives the insured the right to hire independent counsel of his own choice, paid for by the carrier. See *San Diego Navy Federal Credit Union v. Cumis Insurance Society, Inc.* 162 Cal.App.3d 358 (1984).

This also raises the equally interesting question of whether an insurer has a duty to advise its insureds of the right to independent counsel, and whether the failure to advise of this right is "conduct that prevents settlement opportunities from arising" under *Reid*.

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John Green

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The Black Box Speaks

asked would seem grave enough of a concern to preclude juror questions altogether.

But courts that have allowed juror questions have developed a procedure to prevent jurors from asking impermissible questions and not force attorneys to object in front of the jury. In the Seventh Circuit pilot program and many of the jurisdictions which allow juror questions, jurors receive instruction at the beginning of the trial they are allowed, but not required, to submit written questions for a witness at the conclusion of the testimony. Once any questions are submitted, the court makes the question part of the record and discloses questions to the attorneys outside of the presence of the jury. This allows the opportunity for attorneys to object to questions and for possible modification of questions so they are asked in a permissible manner. After ruling on objections to questions, the court then brings the jury back into the court for the judge to pose the question to the witness. Once the witness has answered, the attorneys can ask follow-up questions limited to the scope of the particular juror's question. If an objection to a question is sustained and the question cannot be properly modified, the judge can address the jury and let them know that while a question was asked about a certain topic or issue, the rules of evidence do not allow for that particular question and that the jury is to make no inference and attach no significance to questions not asked.

Trial Delay

Another concern is that jurors questioning witnesses will cause delay and extend trial time, further crowding an already jammed docket. This possibility was illustrated in the recent Arizona murder trial of Jodi Arias, in which when Arias' psychologist testified jurors submitted over 100 questions and he was on the stand for five days. Diane Diamond, *Let All Jurors Ask Questions*, THE HUFFINGTON POST, (last visited Nov. 1, 2013), http://www.huffingtonpost.com/diane-diamond/let-all-jurors-ask-questi_b_3003224.html. When Ms. Arias testified, jurors submitted about 200 questions and she was on the stand for 18 days. *Id.*

But such delays are uncommon in practice. A Texas chief district judge hearing a complicated corporate damages case allowed juror questions and reported the questions added only about 15 minutes per witness and he saw no downside to allowing the practice in future trials. *Id.* In experiments permitting notes and questions in Wisconsin state courts and another in state and federal courts, jurors asked 2.3 to 5.1 questions per trial which came to less than one question per hour of trial. Andrea Krebel, *Juror Questions: Why Attorneys Should Embrace Allowing Jurors to Ask Questions of Witnesses*, THE JURY EXPERT, (last visited Nov. 1, 2013), <http://www.thejuryexpert.com/2012/05/juror-questions-why-attorneys-should-embrace-allowing-jurors-to-ask-questions-of-witnesses/>. In Arizona a study revealed juror questions added just over 30 minutes per trial, which included the time the judge spent reviewing the questions with attorneys, asking the question, and attorney follow-up questions. *Id.* Nor did the Seventh Circuit surveys reveal any inordinate delay. Chapman, *supra*. There have not been reports from jurisdictions permitting jury questions that trial time was greatly extended. While the "celebrity" trial or infamous cases such as the Arias murder trial may draw more juror questions than usual, the court can impose safeguards to limit the amount of additional time such as capping the number of questions or limiting the time in which juror questions are addressed.

California is Primed for Jury Questions

California Rules Encourage Jury Questions

Although California courts have long permitted the trial judge in her discretion to allow juror questions (*see, e.g., People v. Cummings*, 4 Cal. 4th 1233 (1993)), on January 1, 2007, California adopted Rule 2.1033 of the California Rules of Court to promote the use of such a practice. That rule provides: "A trial judge *should* allow jurors to submit written questions directed to witnesses. An opportunity must be given to counsel to object to such questions out of the presence of the jury." And CACI even has a model instruction. CACI 112 — Questions from Jurors.

Federal Rules Permit Jury Questions

While there is no express Federal rule of evidence or civil procedure related to juror questions, Federal Rule of Evidence 611 provides sufficient authority to the federal courts to use non-traditional trial procedures to effectively assist the jury find the truth. Rule 611 has been used to permit summary witnesses (*United States v. Harms*, 442 F.3d 367 (5th Cir. 2006)) and testimony in narrative form (*Hutter Northern Trust v. Door County Chamber of Commerce*, 467 F.2d 1075 (7th Cir. 1972)). It also permits the trial court to allow juror questioning. The Ninth Circuit held it was not error when the trial judge permitted a juror to submit a question to the court. *United States v. Gonzales*, 424 F.2d 1055, 1056 (9th Cir. 1970).

The California Rules of Court directs judges to allow jurors to submit written questions for witnesses with an opportunity for counsel to object outside the presence of the jury. The Ninth Circuit has held it is not error for a juror to submit a question to the court. In light of the largely positive experiences and reported better juror understanding, fairer outcomes, and a better trial experience for attorneys, it appears that California courts should allow, and California trial lawyers should welcome, more frequent use of juror questions.

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PETER BENVENUTTI

On CREDITORS' RIGHTS

When it decided *Stern v. Marshall*, 564 U.S. 2 (2011), the Supreme Court set off much sound and fury among bankruptcy lawyers, academics and panel junkies over bankruptcy courts' authority to decide disputes they have routinely resolved for decades. In *Stern*, the Court concluded that Article III of the Constitution prohibits non-life tenured bankruptcy judges from entering final judgments in some "core" bankruptcy disputes involving private rights even though the governing statute confers that authority on them. Most lower courts have held that a party in these cases can require that judgment be entered by a district judge after "*de novo*" review, a procedure already available to litigants (but little used) in "non-core" bankruptcy disputes. [See my column in the Summer 2011 issue of ABTL Reporter for a fuller discussion of *Stern* and the core/non-core distinction.]

In *Stern's* wake followed waves of proceedings to determine when *de novo* review is required in core bankruptcy matters. Often missing from these intellectually stimulating discussions of Constitutional principles is an appreciation of what happens in practice when a district court conducts *de novo* review. *De novo* review just doesn't happen very often, even in non-core proceedings; the common path to district court review of bankruptcy court decisions, employed almost always, is by appeal.

In an appeal, a district court applies the deferential "clearly erroneous" standard to review bankruptcy court fact findings. Bankruptcy Rule 8013. On *de novo* review, no such deference is required. This is the sole *substantive* difference, since under either procedure the district court reviews *legal* conclusions without deference: *i.e.*, *de novo*. In either case the district court is reviewing a cold record (including the transcript) of proceedings in the bankruptcy court, and a bankruptcy judge's fact findings and legal conclusions. So what's the real difference in practice?

Bankruptcy appeals have an extensive framework of procedural rules and case law guidance, but *de novo* review occurs in a procedural and jurisprudential near vacuum. The governing statute (28 USC §157(c)(1)) simply states that the district court shall "review[] *de novo* those matters to which any party has timely and specifically objected." Bankruptcy Rule 9033(b) sets deadlines for seeking *de novo* review and requires the objector to prepare the record and "identify the specific proposed findings or conclusions objected to and state the grounds for such objection." Rule 9033(d) directs the district judge to "make a *de novo* review upon the record or, after additional evidence, of any portion of the bankruptcy judge's findings...or conclusions...to which specific written objection has been made.... The district judge may accept, reject, or modify the proposed findings...or con-

clusions..., receive further evidence, or recommit the matter to the bankruptcy judge with instructions." That's pretty much all the specific guidance there is, though the legislative history of Rule 9033 states the drafters used FRCP 72 (dealing with review of magistrate judge decisions) as a model. Advisory Committee Note to Bankruptcy Rule 9033. Northern District Bankruptcy Local Rule 9033-1 elaborates a bit on the form of objections, preparation of the record and its transmittal to the district court, and how to deal with failure to object or procedurally inadequate objections to proposed findings and conclusions, but it is silent on proceedings before the district judge other than to state a presumption of no hearing.

Consequently, how *de novo* review is conducted is left almost entirely to the discretion of the assigned district judge. This presents a host of uncertainties for lawyers and litigants. Here are some of the more significant ones:

How much of the record is the district judge obliged to review? How much will the judge actually look at? The statute and rules don't say, but the requirement that an objection identify specific findings implies it must also identify the germane parts of the record. One should not expect the district court to consider any parts not identified, and certainly not to search through the entire record. But too broad a designation risks burying golden nuggets in barrels of sand.

What rules and limits apply to briefing? Bankruptcy Rule 9033 requires the objector to identify in writing the objectionable findings and conclusions and "state the grounds" for objection, and it permits a written response, but the Rule does not prescribe form or page limits and does not authorize a reply. There is no authorization for further briefing in the district court, so presumably that would occur only if the district judge could be persuaded to permit it.

Will the district judge hear live testimony? Can the district judge assess credibility without seeing witnesses on the stand? Again, the statute and rules don't provide guidance, aside from Rule 9033(d)'s statement that the district judge can "receive further evidence." But what standards apply? The rules are silent.

Will the district judge hold a hearing? It's nowhere expressly required, and BLR 9033-1(c) states a presumption there will be none. Contrast bankruptcy appeals, where oral argument "shall be allowed in all cases" unless the appellate tribunal decides, after examination of the briefs and record, that oral argument is unnecessary. Bankruptcy Rule 8012.

The upshot, then, is that when it comes to *de novo* review, litigants and courts are largely flying blind — something you may wish to consider before you insist on taking that route.

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Peter Benvenuti



Letter from the Editor

One year done... This has been my first year as the Editor of the *ABTL Report* for Northern California. I hope the membership has enjoyed the Report as much this year as I've enjoyed editing it. The opportunity to work with excellent lawyers and judges to present articles and columns that cover a broad range of legal questions and practice issues is a true pleasure. I encourage all readers of the *ABTL Report* to consider submitting articles on the issues they deal with in their practice. The *ABTL Report* is distributed to more than 4,000 people, including all Northern California and San Joaquin chapter members, major law libraries, judges throughout California, and

reporters who cover *ABTL* programs and events. Writing an article for the *ABTL Report* gives authors a chance to think through a particular legal question, tactical problem, or practice issue, and to present their thoughts in a way that demonstrates the authors' mastery of a subject while helping to sharpen the skills and knowledge of our readers.

The *ABTL Report*, of course, is just a small part of the work that the Northern California chapter does — with the greater part of the work being the excel-

lent programs that are presented throughout the year. The programs this year have been extraordinary. While the *ABTL* is always proud to have the strong support of the judiciary and the ability to present panels with excellent judges, the Northern California chapter reached new levels this year with panels featuring Justice Antonin Scalia, Justice Sandra Day O'Connor, and Chief Justice Tani Cantil-Sakauye. Other programs included presentations from some of the finest lawyers in the Bay Area, whose experiences and insights were a benefit to lawyers at all levels of practice. And the programs themselves took a new turn, with a very deep and precise focus on specific issues such as "Mock Trials," "Arbitration (Trials Without Rules)," and "Impeachment!" — the last being my personal favorite, not only for the dramatic title but for the content, including video clips of a deponent familiar to all audience members, and nuts-and-bolts guidance from trial lawyers with deep and varied experience. Indeed, as I am writing this letter I am in the midst of preparing for an upcoming "trial without rules" and remembering Cris Arguedas' guidance: I am setting up my cross-examination outlines so that, when I get to the impeachment issues, "I know it's important — because it's in red!"



Frank Cialone

The coming year promises to be equally exciting and informative for all members of the *ABTL* Northern California Chapter. I hope to see everyone at the upcoming meetings, and to hear from members and readers who want to contribute articles and columns to this publication. The law continues to change, the practice of law continues to evolve, and the fine authors who contribute to the *ABTL Report* can help us all learn how to deal with the challenges and opportunities that these developments present.

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