

## U.S. Circuit Court Judge Robert L. Wilkins Inspires at ABTL's First Dinner Program of 2017



Judge Robert L. Wilkins

By Luis Lorenzana

ABTL launched its 2017 dinner program series by welcoming the Honorable Robert L. Wilkins of the United States Court of Appeals for the District of Columbia Circuit back to San Diego, where he started his legal career clerking for the Honorable Earl B. Gilliam, Sr. While

clerking for Judge Gilliam, Judge Wilkins met ABTL's Judicial Advisory Board Chair, the Honorable Randa Trapp of the San Diego Superior Court, who introduced Judge Wilkins with a stirring review of Judge Wilkins' storied career and many accolades.

During his presentation, Judge Wilkins primarily focused on arguably two of his most inspiring and far reaching accomplishments: his role as the lead plaintiff in *Wilkins, et al. v. State of Maryland*, a landmark "driving while Black" civil rights lawsuit; and his recent, significant role in helping establish the Smithsonian National Museum of African American History and Culture on the National Mall in Washington, D.C.

Judge Wilkins captivated the audience by telling the story of the time three of his family members were driving back from his grandfather's funeral in 1992 when they were detained by the Maryland State Police, who demanded to search their car and belongings using a drug-sniffing dog. Apparently, the officer

(continued on page 8)

## Closing Argument and The Sense of Injustice With Gratitude to Harvey Levine



Mark Mazarella

By Mark Mazarella

Most of us have read more articles about closing arguments than any other legal topic. They typically discuss: "10 things you should do (or not do) in closing argument," "The 25 most common mistakes in closing argument," or something similar. The problem is, there is no one set of rules

that applies across the board. If you are giving a closing argument after a 2 day trial, rather than a 2 month trial, you don't need to go into great detail when you talk about the evidence. You can say, "You remember John Doe talking about his relationship with Jane Doe," and the jurors will replay it in their minds. Putting the testimony on a screen and reading it to the jury

(continued on page 5)

### Inside

#### President's Letter

By Paul Tyrell ..... p. 03

#### REMEMBERING A MAN Who Helped Create San Diego's Cordial and Professional Legal Community

By: Robin A. Wofford ..... p. 04

#### Appellate Tips

By Rupa Singh ..... p. 10

#### The Leadership Development Committee: Who, What, When, Where, and Why

By Sara McClain ..... p. 13

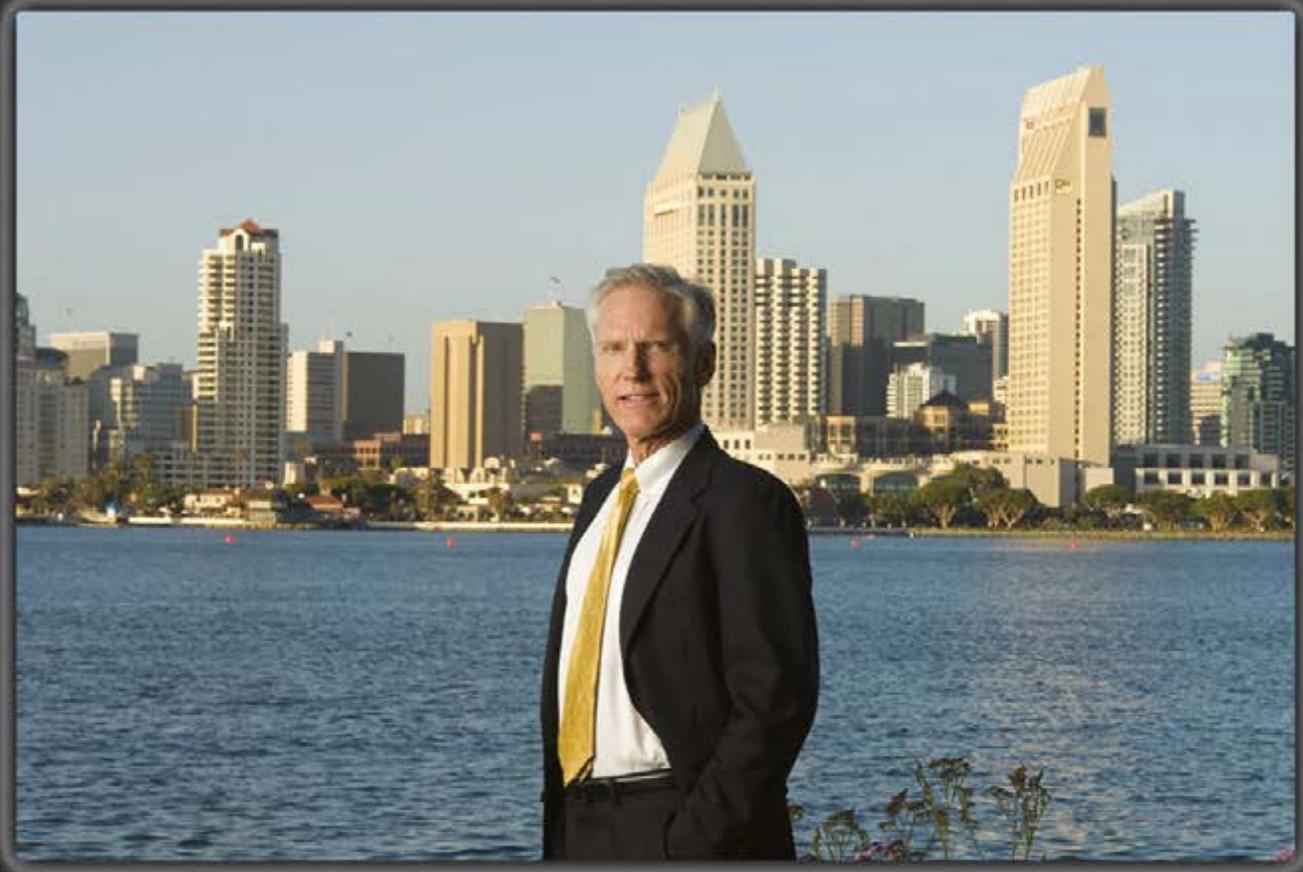
#### Use it or Lose it: Exercising Trial Skills and Techniques at the ABTL Teaching the Art of Trial Skills Seminar

By david Lichtenstein ..... p. 14

#### Another Post-Concepcion Twist - California Supreme Court Rules Claims for Public Injunctive Relief May Not be Subject to Arbitration

By Alan M. Mansfield ..... p. 17

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Paul Tyrell

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## **President's Letter**

*By Paul Tyrell*

### **Yute Movement**

Judge: Uh... did you say 'yutes'?

Vinny: Yeah, two yutes.

Judge: What is a yute?

Vinny: Oh, excuse me, your honor...Two *youths*.

*- My Cousin Vinny*

ABTL was founded in 1973, and the San Diego Chapter was founded in 1993. Some long-lived organizations start to show their age, but I am proud to say that ABTL is showing its yute. I mean, *youth*.

I'm referring, of course, to our younger members. Younger attorneys have long comprised a significant percentage of our overall membership, and for the past several years, ABTL has taken affirmative steps to get those younger attorneys more deeply involved in our great organization.

The Leadership Development Committee ("LDC") is the most visible embodiment of the ABTL's youth movement. The LDC is comprised of up-and-coming lawyers representing many of our member law firms. The LDC has become an integral part of our chapter, lending critical support to our Brown Bag and Specialty MCLE lunches, writing articles for the ABTL Report, and increasing ABTL's visibility in the community through its SideBar happy hour events.

Last year we adopted an initiative to encourage LDC members to attend the Annual Seminar by helping to offset the expense of the seminar for LDC attorneys whose firms did not provide full reimbursement. The 2016 Annual Seminar was well attended by our chapter's LDC members, and we hope to see that trend continue.

Another example of the ABTL's promotion of involvement by younger lawyers is the recent transformation of our all-day trial skills program affectionately known the "Mini-Annual Seminar". Historically, the Mini-Annual Semi-

nar featured some of San Diego's most experienced trial lawyers demonstrating – and then discussing – their skills. This year, however, the format was changed to feature junior attorneys from local firms who teamed up with their more senior colleagues. The trial by your peers format was a huge success.

Our Judicial Advisory Board has gotten into the act as well. If you have attended the Judicial Mixer in the past two years you know that Judge Trapp has gone out of her way to encourage younger attorneys to get to know our judges – with sometimes humorous results.

It's one thing to promote idealistic notions, but it's another thing to deliver. Are we making a difference? In some respects, only time will tell. Over time we hope to see our LDC members continue to take on leadership roles within ABTL and in their firms and in our community. Of course, patience and optimism alone won't be enough. I encourage all of our member law firms and more experienced attorneys to recognize and respect the talents of our younger members and to actively look for opportunities that will help them thrive within their firms and, of course, in court.

In the meantime, we'll continue to do our part, and we hope to see all of you – young and experienced alike – attend and enjoy our programs throughout the year.

# REMEMBERING A MAN WHO HELPED CREATE SAN DIEGO'S CORDIAL AND PROFESSIONAL LEGAL COMMUNITY

By: Robin A. Wofford



Michael J. Duckor died on March 6, 2017 after a valiant fight with brain cancer. He was 71 years old. If you never had the chance to meet Mike then you missed the opportunity to meet a man passionate about life, family and the law. As one of his former partners, John Wynne, recalls, when you first met him he was “larger than life, but he had a passion for people and for giving opportunities to young lawyers.” I was a beneficiary of that passion and I felt it apropos that I write a tribute to a man who helped shape the San Diego legal community over the past 47 years.

Mike made many contributions to the legal community, first establishing his own firm, Duckor & Spradling in 1977 at a time when such a thing was not the norm. It was a risky move for two young lawyers from Gray Cary Ames & Frye to leave the big firm and start their own. His founding partner Gary Spradling notes “Mike and I were very different personalities but like-minded with respect to the practice of law. That’s what kept us together for many years.” That philosophy about how to practice law carried over in Mike’s efforts to help to establish the San Diego Chapter of the Association of Business Trial Lawyers (ABTL) in 1992. When Mark Mazzarella was approached about starting the San Diego Chapter of ABTL he immediately reached out to Mike, and as Mark will tell you Mike was, “one of those guys who always took charge, got it done and got it done well. He never did things halfway.” The two of them started reaching out to their contacts throughout the San Diego legal community and within a year everyone that was anyone in the legal community became a part of ABTL. Mike served as the San Diego ABTL President from 1994-1995 but his legacy lives on. The goal of ABTL is to “promote the highest ideals of the legal profession—competence, ethics, professionalism and civility” through programs and interactions between the bench and bar and Mike was passionate about promoting those ideals. Scott Metzger describes Mike as a very inclusive person who made sure to give attention to everyone and anyone at firm functions and ABTL events. Mike would go out of his way to make the new lawyer in town or the young associate feel part of the community.

He believed that while you needed to advocate with passion for your client there was no reason you could not be professional with your adversary. Charles Dick, another founding member of this ABTL chapter, said, “Mike never got emotionally wrought up in his cases. He maintained an equipoise that was very admirable.” Mike maintained that equipoise because he was genuine and wanted to be your friend. He felt like doing battle in court was one thing, but being able to share a meal, resolve a problem and tell war stories was just as important.

Indeed, one of Mike’s legacies at ABTL was to help create and promote the Ethics, Professionalism and Civility Guidelines that the San Diego Chapter adopted in the late 1999 or early 2000 timeframe and which remain in effect today. Mike would pass those rules out at his mediations and made sure every lawyer at his firm was well aware of them. He would also remind each of us to “take the high road” because “your word is your bond and your reputation could be lost in a flash.” Mike embodied the spirit of professionalism and civility everyday he came to the office, and our legal community is better off because of him. In honor of Mike Duckor I ask each of you to reread the Ethics, Professionalism and Civility Guidelines at [www.abtl.org/sd\\_guidelines.htm](http://www.abtl.org/sd_guidelines.htm) and share them with every attorney you know. This will ensure Mike’s continuing positive impact on the legal profession.

*Robin Wofford worked at Duckor Spradling Metzger & Wynne for 16 years before joining Wilson Turner Kosmo.*

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## Closing Argument and The Sense of Injustice...

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is unnecessary, and will just detract from your argument. If the issues in your case are easy to understand, you don't need or want to use a PowerPoint tutorial. If your client is a poor working stiff, you may be wise to pass on all the bells and whistles that would be expected if you were representing a high tech firm.

That is not to say that we don't benefit from being reminded of all the options we have when presenting our closing arguments. Just Google "How to give a closing argument," and you will find there is no shortage of articles that cover the minutia. This is not one of them. This article looks at closing arguments from 10,000 feet through the lens I was taught to use by one of my idols, Harvey Levine. The lesson I learned from Harvey has had, by far, more impact on the quality and success of my closing arguments than anything else.

Harvey believed that every argument, and every case for that matter, should be structured around the answer to the question: "What is it about my client's case that will cause the jurors to feel it would be **unjust** for my client to lose?" The arguments you stress, the facts you use to support them, even the way you discuss the jury instructions, should emphasize the answer to that question.

To know how to answer that question, however, you have to know what triggers a sense of injustice in all of us, including jurors. Harvey found the answer in a book written in 1949 by an NYU Law School professor, Edmund Cahn, entitled "The Sense of Injustice." He was fond of quoting one passage in particular:

"The sense of injustice...denotes that sympathetic reaction of outrage, horror, shock, resentment, and anger, those affections of the viscera and abnormal secretions of the adrenals that prepare the human animal to resist attack. Nature has thus equipped all men to regard injustice to another as personal aggression. Through a mysterious and magical empathy or imaginative inter-change, each projects himself

into the shoes of the other, not in pity or compassion merely, but in the vigor of self-defense."

Professor Cahn's conclusion is that people are motivated much more by a desire to prevent injustice than to see justice done, because injustice is perceived as a personal threat to each of us, while justice for another is not perceived as an award to anyone else. To influence jurors' decisions most effectively, therefore, we should not stress why jurors should think it would be just for our client to win. We need to present our argument in a way that will make jurors feel it would be unjust for our client to lose.

If you think about it, I'm sure you will agree that people react with much more emotional vigor when they perceive an injustice to have occurred than when justice has been done. What makes the people in the office gather around the water cooler and talk in brisk tones about who received the latest promotion? Is it when someone who deserves a promotion gets promoted over someone who was less deserving? That's justice. Or, is it when someone who is not deserving gets promoted over

someone who is? (That is injustice.) Does an innocent defendant getting acquitted (justice) produce the same reaction as when an innocent defendant is convicted (injustice)? And, do we react the same if a guilty defendant is convicted (justice) as we do when a guilty defendant is acquitted (injustice)? The answers are obvious.

While facts, exhibits, testimony, jury instructions, and how to present them most effectively are all important to fashioning a great closing argument, if your efforts are targeted solely at the jurors' "rational brain," rather than the "emotional brain" which, as Professor Cahn notes, is what produces "viscera and abnormal secretions of the adrenals," you are missing the mark. The function of the human brain is divided into three parts: (1) the brain stem (sometimes called the Reptilian Brain) which

*(continued on page 6)*

*Harvey believed that every argument, and every case for that matter, should be structured around the answer to the question:*

*"What is it about my client's case that will cause the jurors to feel it would be unjust for my client to lose?" "*

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## Closing Argument and The Sense of Injustice...

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*(continued from page 5)*

is where instinctive behaviors are triggered; (2) the limbic system (sometimes referred to as the emotional brain) which is the origin of emotion and memory; and (3) the cerebrum (or rational brain) where all cognitive functions originate. Only about 10% of the brain's activity is generated by our rational brains, and that 10% is greatly influenced by messages sent to it by our emotional brains. If you think our emotions cannot over-ride cold hard logic, ask yourself why you get frightened in a scary movie? Don't you realize the girl who just backed into the dark garage isn't really going to get stabbed by whoever is the villain de jour? Or why do some people freak out if enclosed in a small space. If you think about it, there is no rational reason to be concerned. There are thousands of similar examples. The fact is, our emotions control our thoughts and behaviors at least as much as our grey matter does.

We react as we do to injustice because we fear injustice; and the greater the risk that the injustice will impact us, the more we fear it. And that fear can be very motivational, even if it is irrational. The most effective closing arguments must make the jury feel that a result contrary to your client's interests somehow threatens them. Harvey used a fact pattern with which he was very familiar to illustrate the concept that no matter who your client is, or what your case is about, you can make the jury relate to and empathize with your client. When Harvey represented a large company who was suing an equally large insurance company for bad faith the message he delivered was, "If BigInsurer, the biggest insurance company in the world, can get away with jerking BigCo around, with the hundreds of lawyers BigCo has on retainer, what do you suppose they would do to you?" Who's side do you think jurors hearing this argument would be drawn to?

I like to visualize the jury as a tight circle of Yaks, butts pointed to the center of the circle, heads down, shoulder to shoulder, with a pack of hungry wolves pacing nervously around the perimeter looking for an opening which will allow them to get past those formidable horns and hooves to the inside of the yaks' circle where the yaks are vulnerable. We need to put



our clients in the circle with the yaks, and the other party on the outside with the wolves. If we are successful, our client's loss would leave the herd of juror yaks at the mercy of the wolves. The jurors' emotional brains won't like that.

Every party to every case can be presented either as a yak or a wolf with a little effort. Don't wait until closing argument to figure out how to do that. You should start from day one. You may think it is impossible to make your client a yak in every case; but I know from personal experience, once you think about any case with this approach in mind, you will see how it can be applied to your facts. I would suggest you take one of your cases and ask several people who are familiar with the facts (or become familiar with the facts) and spend a little time tossing around ideas about how you can make your client's loss an injustice, or, if that is difficult, how you can make the opposing party's victory an injustice. It doesn't matter whether the jury wants your client to win, or the opposing party to lose.

Once you have hit upon the best argument to make your client a yak and/or the opposing party a wolf, then you can turn to a couple of those articles on what to do and what not to do in closing argument. If you have your target in mind, they'll help you hit it.

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## U.S. Circuit Court Judge Robert L. Wilkins

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was unfamiliar with the U.S. Supreme Court case cited on the side of the road by Judge Wilkins, who at the time was with the Public Defender Service, because the officer ignored the law and proceeded with the intrusive and humiliating search without probable cause. Judge Wilkins subsequently filed a civil rights lawsuit asserting that he and his family were the victims of racial profiling. The settlement of the lawsuit required the Maryland State Police to keep statistics on who they searched, including the individual's race. Soon thereafter, the reports demonstrated that African Americans were being searched four times more than Whites. This led to greater awareness and forced the department to take steps to try to prevent racial profiling.

As Judge Wilkins explained during his presentation and in his book, *Long Road to Hard Truth: The 100-Year Mission to Create the National Museum of African American History and Culture*, his role as lead plaintiff in this matter, along with his time at the Public Defender Service, inspired him to get involved with the effort to establish a place where the public could see all the contributions African Americans have made in the United States. Judge Wilkins' inspiration quickly became a passion and obsession in 1996, when he dedicated himself to help ensure that an African American museum on the National Mall became a reality.

*When President Obama nominated Judge Wilkins to the D.C. Circuit Court, he said that "throughout his career, Robert has distinguished himself as a principled attorney of the utmost integrity."*

ABTL members and guests were treated to Judge Wilkins chronicling the 100-year effort of museum advocates. Judge Wilkins explained that the movement began in 1915 in response to Black soldiers who had fought for the Union being unceremoniously excluded from the celebrations marking the fiftieth anniversary of the end of the Civil War, and in response to the release of the racist movie, *Birth of a Nation*. After a series of steadfast attempts were derailed by things such as the Great Depression and politics, a group of dedicated private citizens and public officials, that included Judge Wilkins, led a successful, bipartisan effort to build the Museum on the National Mall.

In September 2016, ten years after Judge Wilkins joined the 100-year effort, Judge Wilkins' former Harvard Law School classmate, President Barack Obama, welcomed the public to the Museum's grand opening. When President Obama nominated Judge Wilkins to the D.C. Circuit Court, he said that "throughout his career, Robert has distinguished himself as a principled attorney of the utmost integrity." Judge Wilkins' principles and integrity were on full display as he shared his remarkable experiences and accomplishments with ABTL.



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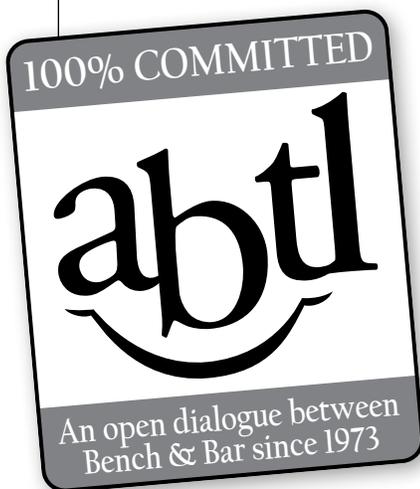
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## The First Hundred Days of An Appeal: A Fine-Tuned Machine

Rupa G. Singh



Rupa G. Singh

The first hundred days of a President's first term are sometimes used to measure the presidency's successes and accomplishments during the time that the president's power and influence are at their greatest. The term was coined by President Franklin D. Roosevelt during a radio address on July 24, 1933, though he was referring to the 100-day special session of Congress between March 9 and June 17, 1933 that led to the enactment of a record-breaking number of laws, rather than the first 100 days of his administration.

While the first hundred days of a civil appeal might not reliably measure its ultimate success given the speed and deliberation of our justice system, they can definitely predict and shape such success. Much is written about the art of oral argument, which comes at the tail end of the appellate process, and the craft of written advocacy, which too comes in the latter, formative stages of the appeal. But much more mundane efforts during the first hundred days are critical for not just the perceived, but the actual, success of an appeal.

**Moving for Post-Judgment Relief.** Before appealing the adverse ruling at issue, counsel must consider if more can be done at the trial level; after all, the best way to prevail on appeal is to win in the trial court. In the case of an otherwise non-appealable interlocutory ruling, the only thing left to do may be to seek certification for appeal or to dismiss any remaining claims and seek entry of judgment. Or, in the case of a final judgment, it might mean moving for judgment as a matter of law or seeking reconsideration, if there are grounds for such relief, which allow the parties to create a full record for appeal and extend the deadline to appeal until the trial court's decision.

**Filing the Notice of Appeal.** Filing a timely notice of appeal, generally within 30 days in federal court and 60 days in state court, is of jurisdictional significance both in state and federal court. If the appeal is from a final judgment,

simply noting as much is sufficient to preserve for appeal all interlocutory orders that preceded judgment, though the best practice is nonetheless to identify the orders on appeal. But if the appeal is from an interlocutory order made appealable by one or more doctrines—such as the denial of class certification in state court, a summary judgment ruling on qualified immunity grounds in federal court, or the grant or denial of preliminary injunction either court—the notice of appeal must specify the order on appeal, and, in some cases, attach a copy, to preserve appeal.

**Posting an Appeal Bond or Other Deposit.** An appeal from a money judgment does not automatically stay collection efforts during the pendency of the appeal in either state or federal court, with some exceptions related to appeals from the award of prevailing party costs or attorneys' fees. Therefore, either right after the entry of judgment, or while there is a prescribed time of an automatic stay of collection following judgment (as there is in federal court), counsel must identify the need for an appeal bond or notice of deposit, and make arrangements to post the same. There are also rare and limited instances in which the trial court might excuse posting a bond, but counsel must seek such leave before the automatic stay of judgment expires, making the judgment vulnerable to collection.

*(continued on page 11)*

## The First Hundred Days of An Appeal

(continued from p. 10)

**Post-Appeal Information Sheets and Questionnaires.** Neither counsel nor the client can sit back after filing the notice of appeal to await the usually reasonable briefing schedule set out for a civil appeal. Rather, there is much to be done, including filing civil information sheets, submitting appellate settlement or mediation questionnaires, and finalizing the issues to raise on appeal. While rarely mandatory, appellate mediation can be matter-of-course in some courts, so counsel should complete the mediation questionnaires thoughtfully. And while court staff will review the entire file an appeal to identify the issues and assign a weight to the appeal before it is assigned to a panel, the information sheets are part of this evaluation, and should also be completed with care and precision.

**Reviewing Transcripts and Designating the Record.** Counsel's main job after filing the notice of appeal is to review again the transcripts of various hearings that will need to be made available to the appellate court, and to make arrangements to secure the submission of the official transcripts, including paying deposits or getting fee waivers from court reporters. Many a briefing schedule is triggered by the submission of reporter's transcripts. Within the first hundred days, counsel should also become familiar with the relevant appellate and local rules regarding the designation of the rest of the record, and be prepared to meet deadlines that often depend on the nature of the record.

**Calendaring Deadlines and Seeking Extensions.** Most appellate courts set forth a briefing schedule for the appeal within the first hundred days of its pendency, barring unforeseen circumstances (such as delay in submission of reporter's transcripts). And while appellate courts are more lenient in granting extensions, particularly if unopposed, such requests must be filed before the expiration (or the near-expiration) of the deadline at issue. For example, a party appealing the denial of a preliminary injunction



on the grounds will lose credibility in seeking multiple or lengthy extensions when later trying to argue irreparable harm.

Appeals, much like trial court proceedings, are comparable to chess—they can be won by strategy and thinking several moves ahead. And the first hundred days of an appeal are the best time to think ahead, plan for the expected, and anticipate the unexpected. It is during this time that counsel should pro-actively assess the need for post-judgment motions, post any necessary appeal bond or seek a waiver, file the jurisdictional notice of appeal, identify the key claims of error on appeal, and designate the appropriate transcripts and record.

Call it the presidential approach to appeals, where a fine-tuned first hundred-day effort will save counsel a hundred sleepless nights. Otherwise, the first hundred days of an appeal may well prove to be the self-fulfilling prophecy of its doom, not the measure of its success.

*Rupa G. Singh handles complex civil appeals and critical motions at Niddrie Addams Fuller LLP, San Diego's only appellate boutique, and is the founding president of the San Diego Appellate Inn of Court.*

# LOCAL PERSPECTIVES



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# The Leadership Development Committee: Who, What, When, Where, and Why

By Sara McClain

LDC  
LEADERSHIP DEVELOPMENT COMMITTEE

## WHO

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The Leadership Development Committee (“LDC”) is comprised of newer attorneys, generally ranging between five to ten years of practice. Each member is appointed for a three-year term.

## WHAT

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The LDC is involved in various events over the course of the calendar year:

### NUTS & BOLTS

These lunches are geared toward newer attorneys, though all ABTL members are welcome and encouraged to attend. The focus is on fundamental skills relating to a variety of litigation and trial topics. These sessions offer one hour of MCLE credit and a free lunch.

### SIDEBAR!

Sidebar! is an informal happy hour held at a fun and hip local watering hole where ABTL associates can mingle and get to know each other in an intimate setting. Two drinks and hors d’oeuvres are included free of charge.

### JUDICIAL MIXER

This the LDC’s flagship event co-organized with the Judicial Advisory Board. Held in early summer, the Judicial Mixer provides a unique opportunity for attorneys to meet and converse with members of the judiciary in an informal setting. Fully hosted thanks to our generous sponsors, it is always an enjoyable event not to be missed.

### ANNUAL SEMINAR

This year includes an additional opportunity for the LDC to get involved because our chapter is hosting the Annual Seminar at the Omni La Costa Resort & Spa October 5-8. The LDC will assist with organizing and moderating the Judicial Breakout sessions held at the end of the conference.

## WHEN & WHERE

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The LDC meets approximately five times per year on the day of the Dinner Programs. The meeting is held at 4:30 p.m. so members can also sit in on the Board of Governors meeting that immediately follows.

## WHY

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The overall objective of the LDC is for its members to matriculate to the Board of Governors following the three-year term. The more immediate benefits include the opportunity to meet and converse with other newer lawyers as well as seasoned lawyers and judges from both state and federal courts.

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## Use it or Lose it: Exercising Trial Skills and Techniques at the ABTL Teaching the Art of Trial Skills Seminar

By David Lichtenstein



Eeyore's Syndrome is no laughing matter. That is why BioMio, a three-year old biotech startup company is developing an in-home, self-diagnostic device called Crystal Ball, which will analyze a small amount of genetic material for markers indicating tendencies to develop the extremely rare disease called Eeyore's Syndrome, which gradually destroys its victim's sense of humor. But BioMio's management, including

Project Manager Carrie Conflict and Director of Strategic Marketing Bob Weaver, along with BioMio's investors, recognize that there is not a lot of money to be made in developing an orphan drug to treat Eeyore's Syndrome, which is why the company is pressed to expand Crystal Ball's applications to detect other, more common diseases like diabetes. However, one of BioMio's junior scientists, Thor Milquetoast, told his superiors, including Ms. Conflict, that he believed the science behind using Crystal Ball to detect diabetes was unsound. Undeterred by this warning, BioMio pressed forward and included in its IPO registrations information about Crystal Ball's potential to detect diabetes. BioMio went public, and the stock eventually crashed, in part due to a whistle-blower press conference held by Mr. Milquetoast. Investors sued BioMio, and the key liability issue at trial was whether BioMio made a material misrepresentation about the size of the Eeyore's Syndrome market as well as the possibility that Crystal Ball could work for illnesses such as diabetes.

This was the fact pattern used during ABTL's Teaching the Art of Trial Skills Seminar on January 28, 2017 at Robbins Geller Rudman & Dowd, LLP. Ten young attorneys from some of San Diego's most well-respected law

firms, with anywhere from three to ten years of experience, performed statements and witness examinations using this fact pattern in front of the Hon. Judge Randa Trapp and the Hon. Magistrate Judge Barbara Major, and a panel of experienced trial lawyers and ABTL Boardmembers, including Judge Robert Dahlquist, Randy Grossman from Jones Day, Brian Foster from DLA Piper, and Jack Leer from Caldarelli Hejmanowski Page & Leer. The purpose of the seminar was for the young attorneys to showcase trial techniques and then receive instruction and tips from the judges and senior trial attorneys, which is especially helpful given that less than ten percent of all civil cases in California go to trial, making trial preparation and performance a lost art. Indeed, many of the young attorney participants never participated in an arbitration or trial, while even some of the senior associate and junior partner-level presenters had only been to trial or arbitration once or at most a handful of times, thereby making this mock trial experience in front of senior trial attorneys and judges even more valuable.

Deborah Dixon, a plaintiff's products liability and consumer class action trial attorney at Gomez Trial Attorneys with nearly ten years of experience, performed one of the closing arguments at the trial skills seminar. Even though Ms. Dixon was one of the more seasoned young attorney presenters with eight trials and several arbitrations under her belt, she decided to participate because she loves to learn and hone her courtroom skills by watching others. When asked at the end of the seminar what the most important thing she took away from it, Ms. Dixon said the experience reinforced in her the importance of being herself: "Don't pretend to be someone else because the jury will find it disingenuous."

Daniel Gunning, who has eight years of experience, is a newly minted partner at Wilson Turner Kosmo LLP where his practice focuses on employment defense. Mr. Gunning has one jury trial under his belt, with the prospect of doing two more in the near future. He decided

*(continued on page 15)*

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## Use it or Lose it

(continued from page 14)

to be a presenter at the seminar because he wanted to develop additional skills: "I previously attended the ABTL trial skills seminar, but never participated. I thought this experience was even more beneficial after having attended a previous seminar because I could take what I learned previously and continue to apply it." Like Ms. Dixon, the experience reinforced in Mr. Gunning the importance of being himself in the courtroom and being confident in his abilities.

Randy Grossman, one of the attorney panelists who's tried more than 80 jury trials to verdict, also helped organize the event on behalf of ABTL. "Working with mock trial competitors is one of the most enjoyable aspects of my service on the ABTL Board," Randy said. When asked about advice to impart on new trial lawyers, Randy said: "Be yourself, breath, and don't be afraid to laugh at your mistakes."

The day-to-day tasks of civil litigation often make it feel like trial is many months if not years away, if trial even happens at. Yet the stakes of a case, both for the client and the attorney's professional reputation, are never higher than they are at trial. The ABTL trial skills seminar is an excellent place to learn and reinforce good trial practices. Please consider joining ABTL for the trial skills seminar next year!



*David Lichtenstein is a business and real estate litigator at Caldarelli Hejmanowski Page & Leer and was a presenter at this year's ABTL Teaching the Art of Trial Skills Seminar. He is also the Co-Chair of the ABTL Leadership Development Committee.*



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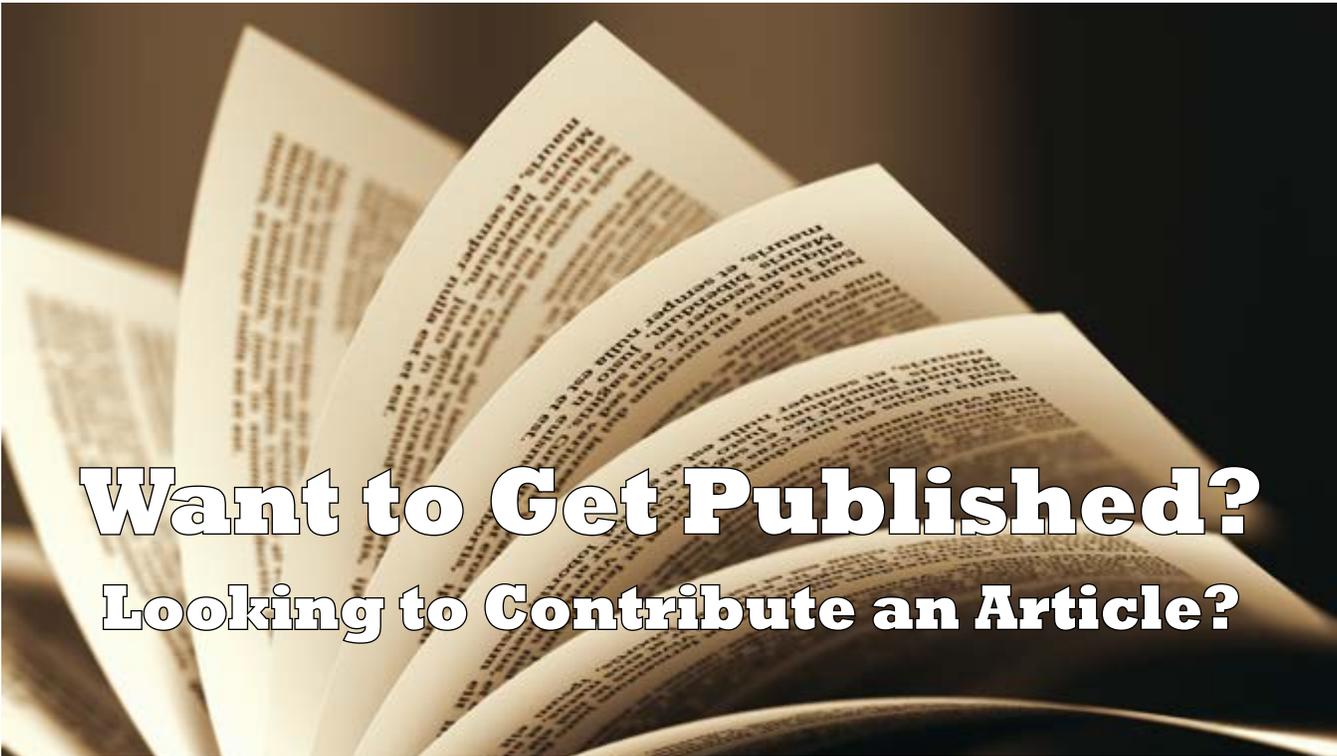
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# Another Post-*Concepcion* Twist - California Supreme Court Rules Claims for Public Injunctive Relief Might Not be Arbitrable

By Alan M. Mansfield, Whatley Kallas LLP

In a long-awaited decision further developing the contours of the U.S. Supreme Court's decision in *AT&T Wireless v. Concepcion*, 563 U.S. 33 (2011), on April 6, 2017 the California Supreme Court issued its ruling in *McGill v. Citibank, N.A.*, 2017 WL 1279700 (Cal., Apr. 6, 2017). Originally the issue in *McGill* was whether claims for injunctive relief, if public in nature, might be subject to arbitration under *Broughton v. Cigna Health Plans*, 21 Cal. 4<sup>th</sup>, 1066, 1077 (1999) and *Cruz v. PacificCare Health Systems, Inc.*, 30 Cal. 4<sup>th</sup> 303, 315-16 (2003). The California Supreme Court unanimously ruled, while not addressing that question, a provision that waives the right to seek public injunctive relief in any forum was invalid and not preempted by the Federal Arbitration Act ("FAA").

## Background of *McGill*

In 2011, Sharon McGill filed a class action lawsuit challenging Citibank's allegedly misleading promotion of a credit protection plan that would defer payments of certain amounts based on satisfying certain conditions (e.g. unemployment or hospitalization). Asserting claims under California's consumer protection statutes for false and misleading advertising, she sought, among other remedies, an injunction prohibiting Citibank from continuing to engage in misleading marketing and promotion of that plan.

Based on several clauses contained in the credit card agreement, Citibank moved to compel individual, non-class and non-representative arbitration of her claims. The Court of Appeal ultimately ruled that under *Concepcion*, all claims, including claims for injunctive relief, must be arbitrated on an individual, non-class basis. The Court of Appeal did not address whether the clause was invalid because it purportedly waived the right to seek public injunctive relief in its entirety in any representative capacity in any forum, as asserted by McGill on appeal.

## The Supreme Court's Ruling

In reversing the Court of Appeal, the California Supreme Court focused on several clauses in the arbitration provision, which stated that no claim for relief on a representative or class basis could be brought in any forum. The Court explained there was a fundamental difference between an injunction that seeks to primarily resolve a private dispute and one that by and large is intended to benefit the gen-

eral public and only incidentally benefits the plaintiff. While citing *Broughton and Cruz* for the general law on this subject, the Court concluded: "it is now clear that the *Broughton-Cruz* rule is not at issue in this case". McGill, at \*4. Rather, the Court focused on the fact, conceded by Citibank, that the provisions as written precluded plaintiff from seeking public injunctive relief in any forum. The Court found it need not address the continued viability of that rule.

Instead, the Court found that plaintiffs had the right to seek such public injunctive relief based on the allegations such conduct was on-going, and there was no evidence such practices were not likely to recur. Plaintiff would seek relief even where they might no longer be subject to the practice, because they had standing to seek all available forms of relief if they could show they suffered damage or lost money or property as a result of the challenged practice. Any waiver of the right to seek such public injunctive relief "would seriously compromise the public purposes the statutes were intended to serve." Id. at \*7. And because this was a right provided and protected by state law as an unwaivable public right, it was not preempted under the FAA.

## Impact on Litigants and Courts

It will be interesting to see if the U.S. Supreme Court decides to take up *McGill* in light of the limited provisions the Court focused upon in its ruling and the fact its ruling is based largely on statements from *Concepcion*.

In framing both arbitration provisions and Complaints, parties do not typically focus on whether the specific injunctive relief that may be sought is "public" versus "private" in nature. Both clause drafters, litigants and courts will likely spend time more carefully considering both the precise wording of those clauses and the specific nature of any injunctive relief sought.

Finally, the Court stated it was not addressing whether the *Broughton-Cruz* rule remains viable. The split among courts, both state and federal, on that issue will likely to continue to exist, left for the Court to address another day. Thus, parties will still argue about the continued viability of that rule. (See, e.g., *Ferguson v. Corinthian Colleges, Inc.*, 733 F. 3d 928 (9th Cir. 2013)). The outcome of these questions will slow whether the implications *McGill* will be limited or suite broad.



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