ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

LOS ANGELES

SPRING 2024

THINGS THAT WORK

By Justice John L. Segal

There are a lot of articles and programs about judges' "pet peeves." While it can be useful for lawyers to know judges' preferences, sometimes the pet-peeves programs make judges sound whiny and ungrateful. "I hate it when lawyers take too much time"; "It drives me crazy when attorneys won't answer my questions"; "No one ever reads my local, local rules." We are very fortunate to have the opportunity to serve as judges; complaining about it makes us look like we do not remember how fortunate we are. Also, I kind of like lawyers (I was one, you know). I respect what they do, and (through associations like the ABTL) have made lasting friendships with many lawyers.

So this article is not about pet peeves. It's not about "common mistakes on appeal," the "top 10 ways attorneys can forfeit an issue," or "do's and don'ts from the judicial perspective." I decided to write about things that, in my

Continued on Page 8

— INSIDE —

WHAT?! BUSINESS CASES ON CONTINGENCY?

Christian Nickerson

As a lawyer at a plaintiff's firm, my friends and colleagues are often surprised to learn that we do business litigation. They are even more surprised when they find out that we do our cases for businesses on a contingency fee. While our firm is somewhat unique in this regard, representing businesses on a contingency fee has been both professionally and financially rewarding. We have had the pleasure of representing real-estate development firms, tech start-ups, toy innovators, large hospitals, entertainment writers and producers, and even insurance companies as plaintiffs on a variety of different matters. These cases present unique challenges and opportunities for plaintiffs' firms and require creative, "outside-the-box" strategy and thinking. This article examines some highlights and practice pointers for lawyers who litigate business cases on contingency.

Why some businesses seek lawyers on a contingency fee

First Question: Why would a business ever want to hire a lawyer to litigate its case on a contingency-fee basis? There are as many reasons as to why a business may want to choose a contingency fee law firm as there are different kinds of businesses. For example, a business may seek out a firm that has had past success on a particular kind of case in a situation that is similar to its own, and the firm just happens to be a contingency fee firm. That happens more than one might think.

At the end of the day, one point is obvious: the decisionmakers for the business know they must obtain

Continued on Page 10

PRESIDENT'S MESSAGE

Michael Mallow

After a decade of serving on the Los Angeles ABTL Board of Governors, I'm beyond thrilled to deliver the President's Message in this first ABTL Report of 2024. During my decade with ABTL, I have watched this organization grow and thrive from 1,500 hundred members in 2014 to over 2,500 the past few years. Even COVID did not slow us down. The reason for ABTL's continued success is its mission and its members. ABTL fosters community in what is otherwise viewed, and I believe inaccurately, as a hostile environment. It allows our common bond—a commitment to the professional, ethical and civil practice of law—to thrive. And most importantly, through our dinner programs, lunch programs, judicial reception, YLD events and our statewide annual meeting, ABTL gives us a chance to "break bread" in person and establish true, meaningful and lasting friendships.

This past year has marked an incredible achievement for ABTL, and specifically our chapter. As some may recall, about six years ago at an ABTL joint board retreat, an impromptu discussion about incivility occurred. Such discussions have happened frequently, but this one was different. This time the conversation did not just come and go. Action was taken. The Los Angeles chapter created a Civility Committee to identify ways to address incivility and to do something about it. From those early meetings, which were heavily attended by lawyers and judges, two immediate goals were identified: create a mandatory CLE specialty credit dedicated to civility and require all attorneys, not just those licensed after 2014, to confirm their commitment to civility by taking the revised California Attorney Oath. Fast forward a few years and these goals took flight. A California Civility Task Force was formed as a joint project of the California Judges Association and the California Lawyers Association and chaired by our very own board member, Justice Brian Currey. The Task force issued a report, "Beyond the Oath: Recommendations for Improving Civility," identifying and discussing the case for four proposals: requiring a CLE specialty credit for civility training in each CLE reporting cycle; requesting the Judicial Council and the Center for Judicial Education and Research Advisory Committee (and CJA) to provide specific training to judges on promoting civility inside and outside courtrooms; requesting an amendment to the Rules of Professional Conduct to clarify that repeated incivility constitutes professional misconduct; and requesting an amendment to Rule 9.7 requiring all attorneys to confirm the civility portion of our attorney oath. Through the incredible efforts of many members of ABTL chapters, but in a very substantial part our Los Angeles chapter, we are seeing the initial goals of our chapter's Civility Committee come to life. Starting in 2025, a Civility CLE credit is required and the proposed amendments—requiring all attorneys to affirm annually their commitment to practice civilly and clarifying that incivility is a breach of our ethics—is awaiting Supreme Court approval. While these changes will not end incivility, they are major steps in the right direction and steps that are traceable directly to ABTL and our chapter. We should all be incredibly proud of our organization and its commitment to its mission and our profession.

As we move through this election year, I hope we can serve as models for those inside and outside our profession. Models that demonstrate disagreement does not need to be met with disrespect; adversaries in the courtroom are not enemies outside the courtroom; and our system of justice mandates and embraces a diversity of thought, experience and background. To that end, I invite and urge everyone to engage in the incredible programs and opportunities ABTL offers. Attend our Judicial Reception in June and spend quality time in an amazing outside setting just talking with our judicial officer members and fellow lawyers. Calendar our next two dinner programs on September 26 and November 21 and make time to attend. Draft articles for the ABTL Report and encourage young attorneys to participate in the YLD. All of these opportunities are available to better ourselves and our profession.

While this year is marked with achievement, I would be remiss if I didn't say a word about our former ABTL Board member, Judge Richard Burdge, Jr., who passed in January. I met Dick in a very contentious litigation about 15 years ago before he was appointed to the bench. I was a young partner. We each represented co-defendants with divergent interests. Dick

Continued on Page 3

was incredibly smart, kind, supportive and extremely effective for his client; an embodiment of ABTL values. I considered him a friend and looked forward to seeing him at ABTL events, which he always attended, health permitting. ABTL is where we would reconnect. Dick was a wonderful man and will be missed, and his memory serves as an example of how ABTL brings us together.

I have spent nearly a third of my professional career on the board of ABTL, dedicated to its mission. I have cherished all this time, the friendships it has created and the professional opportunities it has presented. I invite all of you to do the same.

Michael Mallow *is a partner at Shook, Hardy & Bacon L.L.P.*

ASSOCIATION OF BUSINESS TRIAL LAWYERS
abtl REPORT

8502 E. Chapman Avenue, Suite 443
Orange, California 92869
(323) 988-3428
Email: abtl@abtl.org • www.abtl.org

WILL YOUR SUMMARY JUDGMENT STICK? SUMMARY JUDGMENT REVERSAL RATES IN THE CALIFORNIA COURT OF APPEAL

Eric Boorstin

Arianna Lopez

You're elated that after years of discovery fights, you finally convinced the trial court to grant summary judgment and get rid of a meritless shakedown. Or, you're devastated that the trial court overlooked key evidence and took your righteous case from the jury. So now you're wondering: what are the odds the California Court of Appeal will reverse the summary judgment triumph/travesty in your case?

While your particular odds will depend on the particular facts, you can expect the California Court of Appeal to reverse, on average, about 29% of the summary judgments that are appealed. If you want a number, that's the bottom line. The rest of this article summarizes others' studies of the general appellate reversal rates, describes our methodology, and provides some more particularized summary judgment appellate statistics.

Others' Studies

The Judicial Council of California publishes the California Court of Appeal's reversal statistics in a yearly Court Statistics Report. (Judicial Council of Cal., 2024 Court Statistics Report <https://www.courts.ca.gov/documents/2024-Court-Statistics-Report.pdf> [as of May 1, 2024].) For fiscal year 2023, the Judicial Council reports that out of 2,601 appeals that terminated by written opinion, 70% were affirmed in full, 9% were affirmed with modification, 17% were reversed, and 4% were dismissed. These disposition rates remain fairly consistent from year to year. Based on these statistics, we tell clients that, practically speaking, the overall reversal rate for civil appeals in California is in the range of 20%.

Of course, summary judgments are reviewed de novo, whereas many other appeals require the Court of Appeal to deferentially review the case under the substantial evidence or abuse of discretion standards. Thus, we would expect the reversal rate following summary judgment to exceed the 20% overall civil reversal rate. The question is: by how much?

One article reviewed about 130 appellate decisions evaluating summary judgments in employment discrimination and retaliation claims under California's Fair Employment and Housing Act between 2017 and 2020. (See Dixler & Hamill, *Calif. Employment Law Cases Actually Favor Summary Judgment* (June 25, 2020) Law360 <https://www.law360.com/articles/1283989> [as of May 6, 2024].) This article found the reversal rate in such cases was about 24%.

Less rigorously, another article reported that unnamed California appellate justices "estimate" that about 35% of summary judgments are reversed on appeal. (Arkin, *Summary Judgment Motions Are Case Killers* (Dec. 2020) Advocate Magazine <https://www.advocatemagazine.com/article/2020-december/summary-judgment-motions-are-case-killers> [as of May 6, 2024].)

Our Methodology

To investigate for ourselves, we analyzed every California Court of Appeal opinion from 2023 that mentioned "summary judgment." We then assessed which appellate decisions actually decided whether the lower court's orders granting defendants' summary judgment motions should be affirmed or reversed. This resulted in our including 353 total cases in our study.

Apart from complete reversals, there were many instances where the Court of Appeal reversed the summary judgment in part—meaning it affirmed summary adjudication as to some causes of action but reversed as to others. For purposes of this article, we grouped "reversed in part" decisions with complete reversals. If the trial court enters judgment for the defendant, but the Court of Appeal revives some part of the plaintiff's case, most often that will be viewed as a "win" for the plaintiff-appellant.

Summary Judgment Reversal Statistics

Of the 353 appeals from defense summary judgments in 2023, the Court of Appeal reversed 68 in whole and 33 in part, yielding an overall reversal rate of 28.6%.

Published opinions made up less than 18% of the summary judgment decisions we analyzed. Of the published opinions, 34.4% were reversed, compared to only 27.4% of the nonpublished opinions. This disparity makes sense because

Continued on Page 14

JURY DE-SELECTION

Jay Spillane

The trial phase that takes place before opening statements and presentation of evidence is popularly referred to as jury "selection." This is a misnomer. The parties do not "select" jurors who will hear their case. Rather, after several rounds of vetting by courthouse staff and the judge, potential jurors are seated in the jury box and become jurors by default—except to the extent they are "excused," or "*de*-selected," before trial begins. Jury "selection" is therefore about removing bad jurors, not selecting good ones.

Potential jurors are first contacted by courthouse jury commissioners through mail solicitations based upon a "master list." (Code Civ. Proc., §§ 191-195.) Based on their responses, potential jurors could be "deferred" or "excused" and the rest "qualified" to be summoned to the courthouse. (*Id*., § 194.) On the day trial is scheduled to commence, a "jury pool" will assemble in a large room. (*Id*., § 194, subd. (e).) There, courthouse staff weeds out those who are "ineligible" for reasons including lack of citizenship, felony convictions, or inability to understand English. (*Id*., §§ 196, 203, subd. (a).)

In some counties—for example, Los Angeles—the courthouses are exclusively devoted to either civil or criminal cases. In other counties, the courthouse holds both criminal and civil trials, and criminal trials are given priority. In those counties, if enough potential jurors remain after juries have been selected for the criminal trials, a group of jurors—maybe forty—will be seated in the courtroom's audience section. This is the "trial jury panel" (Code Civ. Proc., § 194, subd. (q)), popularly termed the "venire." (Perhaps a linguist or historian can explain why French terms such as "venire" and "voir dire," which hale from a nation without jury trials, are used for jury selection.)

The judge will briefly address the venire, likely reading a "Short Statement of the Case" filed by the parties. The judge may address any lingering "qualification" issues, and "hardship" grounds warranting dismissal of potential jurors for whom it would be "unreasonably difficult" to serve on the jury. (Code Civ. Proc., § 204, subd. (b); Cal. Rules of Court, rule 2.1008(b).)

In pretrial filings, business litigators commonly lapse into designating every possible witness and exhibit, yielding a bloated trial estimate. If not vetted before jury selection, and if the judge does not impose a time clock, this could have an unanticipated and possibly undesirable impact on jury selection. Anticipate audible groans from the venire when the judge announces the estimated trial length, and hands shooting into the air when the judge asks jurors about hardships. Depending on the judge, those who claim their employer won't pay for the estimated length of jury service and who could not pay for housing or food if they served can be dismissed for hardship.

There are many reasons counsel should trim their case before jurors are summoned. But among those to consider is whether the case is well-suited to jurors who can sit for a lengthy trial, which may trend toward those who are retired, unemployed, periodically employed, or homemakers.

Only after potential jurors have been "hardshipped" can counsel directly address the venire. Counsel has the right to give a "mini-opening," a short introduction to the case—maybe five minutes. (Code Civ. Proc., § 222.5, subd. (d).) Because consumer trial lawyers requested this right, corporate defense counsel may view this procedure with suspicion, but all counsel should consider the opportunity to introduce themselves along with the issues in the case. The prevailing theory is that litigators hold back the best parts of their case and preview difficulties to identify "bad" jurors who they wish to remove.

Trial judges may require potential jurors to fill out a questionnaire, a Judicial Council form. (Code Civ. Proc., §§ 205, subd. (c), 222.5, subds. (a), (f); Judicial Council Forms, form JURY-001.) The form contains useful questions that could supplement, or supplant, questions otherwise asked during selection (i.e., job, family, prior jury service). For cases with difficult issues, the judge may allow custom written questions. If a questionnaire is allowed, the judge may trim counsel's time, as the questionnaire would reduce time spent asking the questions verbally.

Commonly judges do not allow "voir dire,"—*i.e.*, questions and answers between counsel and prospective jurors—while potential jurors are still seated in the audience. However, there are exceptions. For example, in a case where we represented a plaintiff claiming breach of a joint venture to sell cold storage panels, typically used for food refrigeration,

Continued on Page 12

YOUNG LAWYERS DIVISION UPDATE

Dylan Noceda

Nalani Crisologo

Matthew Kaiser

The ABTL's Young Lawyers Division is enthusiastically planning for the remainder of 2024. In the second half of 2024, the YLD will continue its focus on presenting exciting and informative programming, as well as providing opportunities for younger lawyers to interact with the judiciary, network with fellow young lawyers, and deepen connections with the broader legal community. We also aim to organize a community-impact project to join the YLD members together in service to the broader Los Angeles community and continue the tradition of planning brown bag lunches with members of the judiciary. Be sure to keep an eye on the ABTL Report and your email inboxes for updates about upcoming YLD events. And if you are interested in helping plan YLD events, please reach out to YLD co-chairs Nalani Crisologo and Dylan Noceda or YLD vice-chair Matthew Kaiser about getting involved.

Dylan Noceda *is an associate at Gibson, Dunn & Crutcher LLP.*

Nalani Crisologo *is an associate at Shook, Hardy & Bacon L.L.P.*

Matthew Kaiser *is counsel at O'Melveny & Myers LLP.*

Experience. Skill. Subject Matter Proficiency.

Meet our newest Southern California neutrals.

Richard E. Buck, Esq.

Hon. Christine Byrd (Ret.)

Hon. Katherine "Kate" Chilton (Ret.)

Santiago "Sam" Fernandez, Esq.

Hon. Gerald G. Johnston (Ret.)

Rian W. Jones Esq.

Edith R. Matthai

Donna Marie Melby, Esq.

Daniel A. Platt, Esq.

Hon. Glenda Sanders (Ret.)

Hon. Bernard G. Skomal (Ret.)

Local Solutions. Global Reach.®

JAMS®

Things That Work...continued from Page 1

experience, litigators do well and that judges respond favorably to. In other words, things that work. These are some of those things.

Strategic concessions

In my view, few things are as powerful as an appropriate, strategic concession. You don't have to win every point on every issue to win a case. Few things are as refreshing and persuasive as when an advocate concedes what he or she must, so the attorneys and the court can focus on the issues that are genuinely contested and that need addressing and deciding. If a particular interpretation of a contractual provision really means you don't have a claim, concede the point, and argue why that interpretation is wrong (and yours is right). If a published decision from a different district or division compels an adverse result and is not distinguishable, acknowledge that fact, but argue why the decision was wrongly decided. If the court's hypothetical question goes too far, admit your argument would fail under that hypothetical, but explain how your case is different and why that is significant. These kinds of concessions not only gain credibility (judges tend to trust advocates who concede points when they should), they save time and breath that could be spent on more productive and impactful arguments.

I recognize not everyone agrees with making any, let alone strategic, concessions. But I have seen concessions, where appropriate and not prejudicial to the attorney's case, work many times in many contexts. In the right circumstances, concessions can be remarkably effective.

Civility as advocacy

Civility is more than a professional responsibility. (See *Masimo Corporation v. The Vanderpool Law Firm, Inc.* (2024) ___ Cal.App.5th ___, ___ [2024 WL 1926197, p. 4] ["Incivility slows things down, it costs people money—money they were counting on their lawyers to help them save."]; *Hansen v. Volkov* (2023) 96 Cal.App.5th 94, 107 [the California Civility Task Force has "warned that '[d]iscourtesy, hostility, intemperance, and other unprofessional conduct prolong litigation, making it more expensive for the litigants and the court system,'" quoting Beyond the Oath: Recommendations for Improving Civility, Initial Report of the California Civility Task Force (Sept. 2021) p. 2].) It is an advocacy tool. Juries, trial judges, and appellate judges all respond favorably to attorneys who are civil to court staff, opposing counsel, court reporters, law firm receptionists, and everyone else working in our legal system. Incorporate civility into your practice, and it will pay litigation dividends.

One trial lawyer I had several cases with once told me (at an ABTL dinner program and, yes, long after the trial was over and all appeals exhausted) that he always tries to treat opposing counsel as a friend and colleague and, as important, makes sure the jury can see it. He said he wants the jury to think he is not trying to win the case by quarreling with opposing counsel on technical points or making objections that seem as though he is trying to keep the jury from hearing the truth. He wants the jury to know that all he needs to win is the evidence, which will support his case. Successful attorneys are civil because civility is a winning strategy. Everybody likes a civil lawyer; no one likes a jerk.

Answering questions

Judges ask questions for a lot of reasons: to clarify positions, to test arguments, to reveal concerns or weaknesses in an argument, to show they are paying attention, to ensure both sides feel the court is hearing and understanding their positions, or to consider the effect a particular decision may have on the law. I have asked questions for all these reasons.

Questions from the bench in the trial court (except during a jury trial) and on appeal are blessings. Do you ever wonder what on earth the judge is thinking? When you get a question, you know! But questions are also an invitation to engage, a request to exchange ideas, an opportunity to emphasize important points and correct misunderstandings. So . . . answer the question! Even if you think it's not a good question, and I have asked my share of bad ones, the one asking the question is the decisionmaker. I have heard many thorough, intelligent, and well-presented responses to questions that . . . do not answer the question. Countless times I have said something along the lines of, "Thank you, counsel, for your answer. I understand your argument. Now, let's go back to my question." If a question throws you off your prepared remarks, you'll find a way to get back to your outline if it's important to do so (and often it's best to abandon your outline), but for now . . . answer the question. That's always something that works.

Stating what the evidence isn't

Our Court of Appeal summer externs often ask me: what facts should I put in the Statement of Facts section of my memo or draft opinion? I answer: put in all the facts you need, and none of the ones you don't. The law students

Continued on Page 9

Things That Work...continued from Page 8

uniformly find this answer unsatisfying. But it's true: in your briefs and motion papers, you should include every fact from the deposition or trial testimony you need to make your argument, and leave out all the unnecessary or distracting ones.[1]

Most everyone can state the facts. But not everyone thinks to state some of the facts that aren't. I often find persuasive procedural and background summaries that state what facts are not in the record. Simple example: "The contracting party testified she signed the contract on May 2, 2023. She did not state that she had any discussions with the other side about the contract or that she was confused about any of its terms." Okay, good, now I know she's not going to be a source of any extrinsic evidence and I'm thinking, well, she seemed to understand the contract when she signed it. Or: "The company representative told the employee that, if he continued to come to work, the company would assume he agreed to the arbitration agreement, even if he did not sign it. There was no evidence the employee complained, objected, or said anything about the arbitration agreement during the next nine months he continued to work at the company." Good, now I know that we're going to be talking about an employee that the company claims agreed to arbitration by his conduct and that the employee has no evidence (at least from him) to show there was not an implied agreement. Stating the facts clearly and concisely is good legal writing. So is stating the non-facts.

Accepting the panel

Of jurors, not appellate judges. (But see Assembly Bill No. 2125 (2023-2024 Reg. Sess) [proposed legislation to amend Code of Civil Procedure section 170.6 to authorize an attorney or party to disqualify appellate justices for prejudice].) How great is it to announce, when the court asks for your first peremptory challenge, "Your Honor, ladies and gentlemen of the jury, the plaintiff/defendant accepts the panel as presently constituted!" You only have to do it once, at the beginning, and the jurors know you are so confident about your case and the evidence that you are happy with *any*[2] group of jurors (after cause challenges), including the ones currently in the box. It sends the signal: we trust you, ladies and gentlemen, just as you are, to do the right thing. Then, when opposing counsel starts exercising peremptory challenges, you can exercise yours with impunity: I was ready to accept the jurors we started with, but now that my has opponent has messed things up by questioning the jurors' ability to be fair and impartial, I have to respond. In my experience, that works.

Using verbs rather than nouns

I had never heard the term "nominalization" until a few years ago. (See *American Lung Assn. v. Environmental Protection Agency* (D.C. Cir. 2021) 985 F.3d 914, 948 [nominalization is "a 'result of forming a noun or noun phrase from a clause or a verb'"], reversed on a ground having nothing to do with nominalization in *West Virginia v. Environmental Protection Agency* (2022) 597 U.S. 697, 700; *In re Marriage of Phillips* (April 9, 2002, G027518) 2002 WL 524301, at p. *4, fn. 5 [nonpub. opn.][3] ["Ah, the power of nominalizations to obscure what is really going on."].) But I knew I preferred verbs to nouns.

Verbs move, excite, inspire. Nouns are slow, clunky, methodical, and don't go anywhere. So use verbs, not nouns. The ruling of the court was –> The court ruled. The court's weighing of the factors was erroneous –> The court erred in weighing the factors. The People alleged the defendant used a firearm in the commission of the offenses –> The People alleged the defendant used a firearm in committing the offenses (or, if you like commas, the People alleged that, in committing the offenses, the defendant used a firearm). The court denied the motion for a continuance of the trial –> The court denied the motion to continue the trial. Look for the "of"; it's a dead giveaway. Verbs work; nouns get in the way.

Making transitions

We have shown that strategically conceding when appropriate is a strength, that lawyers should answer questions from judges, and that verbs are better than nouns. We now show that, even if those suggestions are wrong, transitions

Continued on Page 10

1 Dates are a good example of this: On May 1, 2023 this happened. On May 5, 2023 that happened. On June 3, 2023 plaintiff filed the original complaint. On July 5, 2023 plaintiff filed a first amended complaint. On September 6, 2023 the plaintiff filed the operative second amended complaint.* Keeping track of all the dates is mentally taxing and, unless the case involves the statute of limitations or the relation-back doctrine, unnecessary. So I try to include all dates I need and none of the ones I don't.

* Despite my intro, here's a pet peeve: "FAC" and "SAC." Also, note there is no comma after the years because they are prepositional phrases ("on" is the preposition).

2 Okay, one more pet peeve: italics, bold, and underlining. On the other hand, footnotes don't bother me.

3 Not cited or relied on in an "action." (Cal. Rules of Court, rule 8.1115(a).)

Things That Work...continued from Page 9

like this paragraph are helpful in reminding the reader where we have been and where we are going.

These kinds of transitions, guideposts, summaries, or roadmaps work because they make it easier for the reader (usually, the judge) to follow what you have argued so far, understand what you are going to argue next, and show there are many ways for the court to rule in your favor. So: We have shown the statute of limitation bars the plaintiff's causes of action. We now show that, even if it does not, the court properly ruled plaintiff's causes of action are meritless. (Oh, and in the next section, we will show why any error by the trial court was harmless.)[4] These kinds of transitions also brim with confidence: Look, judge, our first argument is solid. But even if you don't think so, our second and third arguments are even better. We have so many ways to win, just pick one and rule in our favor.

These are some of the things that work for me.

***Justice John L. Segal** is an Associate Justice on the California Court of Appeal, Second Appellate District, Division 7.*

4 One more thing. If you are working on an appeal, remember every appeal at some point involves three issues: (1) forfeiture (is the issue preserved), (2) merits (did the trial/district court err), and (3) prejudice (is the error harmless). Just so you know, that's what every appellate judge is thinking about.

What?! Business Cases on Contingency?...continued from Page 1

the best possible representation that is feasibly within their means to give the business the best potential outcome for success. For example, a business may be a start-up and may have limited funding for litigation. It may be close to, or in excess of, its litigation budget for the year. It may be in a poor financial situation because of the damages it suffered due to the conduct of the opposing party. Whatever the case may be, sometimes it simply makes the most financial sense for a business to enter an attorney-client relationship on a contingency-fee basis. In dire cases, a contingency law firm may be the only option for a business that has been severely wronged and has no other choice. A contingency fee lawyer may be a business's last chance for survival.

Types of business cases for a contingency fee lawyer

As all members of our organization know, no two business cases are ever the same. However, most of the business cases handled by our firm have involved one or more of the causes of action identified in the paragraphs below. A brief refresher is also included for each cause of action, although deeper research will be necessary for each individual case. Reminder: It is important to keep in mind that a plaintiff may allege alternative, and even inconsistent, theories in a complaint. (*Adams v. Paul* (1995) 11 Cal.4th 583, 593 ["a party may plead in the alternative and may make inconsistent allegations"]; see also *Rader Co. v. Stone* (1986) 178 Cal. App.3d 10, 29.) "Tolerance for such pleading rests on the principle that uncertainty as to factual details or their legal significance should not force a pleader to gamble on a single formulation of his claim if the facts ultimately found by the court, though diverging from those the pleader might have considered most likely, still entitle [the plaintiff] to relief." (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858 , 886.)

Breach of Contract: A cause of action for breach of contract requires the pleading of a contract, plaintiff's performance or excuse for failure to perform, defendant's breach, and damage to plaintiff resulting therefrom. (4 Witkin, California Procedure (4th ed. 1997) Pleading, § 476, p. 570; see *McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457 , 1489.) "The manifestation of assent to a contractual provision may be 'wholly or partly by written or spoken words or by other acts or by failure to act.'" (*Merced County Sheriff's Employee's Assn. v. County of Merced* (1987) 188 Cal.App.3d 662 , 670, quoting Rest.2d Contracts, § 19.)

Continued on Page 11

What?! Business Cases on Contingency?...continued from Page 10

Breach of the Implied Covenant of Good Faith and Fair Dealing: "There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658.)

Intentional Misrepresentation: The necessary elements for intentional misrepresentation are: (1) that defendant represented to plaintiff that a fact was true; (2) that defendant's representation was false; (3) that defendant knew the representation was false when he/she/it made it, or that he/she/it made the representation recklessly and without regard for its truth; (4) that defendant intended that plaintiff rely on the representation; (5) that plaintiff reasonably relied on defendant's representation; (6) that plaintiff was harmed; and (7) that plaintiff's reliance on defendant's representation was a substantial factor in causing his/her harm. (CACI 1900; *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974; *Service by Medallion, Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1816.)

Negligent Misrepresentation: The necessary elements for negligent misrepresentation are the same as intentional misrepresentation with the exception of the third element: (3) that although defendant may have honestly believed that the representation was true, defendant had no reasonable grounds for believing the representation was true when it was made. (CACI 1903; see *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 407-408; *SI 59 LLC v. Variel Warner Ventures, LLC* (2018) 29 Cal.App.5th 146, 154.)

Tortious Interference with Prospective Economic Advantage / Contract: "The tort of interference with prospective economic advantage protects the same interest in stable economic relationships as does the tort of interference with contract, though interference with prospective advantage does not require proof of a legally binding contract. The chief practical distinction between interference with contract and interference with prospective economic advantage is that a broader range of privilege to interfere is recognized when the relationship or economic advantage interfered with is only prospective." (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126.)

Breach of Implied-in-Fact Contract: This cause of action may be applicable to idea-theft cases. The elements for a cause of action for breach of an implied contract are as follows: (1) the plaintiff prepared the work; (2) the plaintiff disclosed the work to the offeree for sale; (3) under all circumstances attending disclosure it can be concluded that the offeree voluntarily accepted the disclosure knowing the conditions on which it was tendered (i.e., the offeree must have the opportunity to reject the attempted disclosure if the conditions were unacceptable); and (4) the reasonable value of the work. (*Faris v. Enberg* (1979) 97 Cal.App.3d 309, 318; *Desny v. Wilder* (1956) 46 Cal.2d 715, 741-743; *Minniear v. Tors* (1968) 266 Cal.App.2d 495, 500 ["[I]t is understood in the industry that when a showing is made, the offeror shall be paid for any ideas or material used therein"].)

Breach of Fiduciary Duty: A fiduciary relationship is "any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent . . . ." (*Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 29.)

Rescission of Contract: Given some of the limitations and restrictions that a contract may impose as set forth below in the next section of this article, it may be advantageous for a business client to rescind the contract if the evidence warrants rescission. Under Civil Code section 1689(b), grounds for rescission include but are not limited to mistake, fraud, duress, and/or undue influence.

Evaluating business cases on a contingency fee

Case choice and evaluation are critical to the survival of any law firm that operates on a contingency fee basis. The contingency plaintiff's firm that takes on frivolous cases will soon be heading to bankruptcy. Indeed, the contingency fee system encourages contingency fee law firms to weed out bad cases and accept only those believed to be viable. This is especially true in business cases, which typically require more time, labor, expert analysis, expense, staff, and law and motion work than, for example, a straightforward auto-accident injury case.

Accordingly, the following criteria are important factors to consider when deciding whether to take a business case on contingency: (1) ***age and success of the business***; (2) ***nature and extent of damages*** ("'Where the *fact* of damages is certain, the amount of damages need not be

Continued on Page 12

What?! Business Cases on Contingency?...continued from Page 11

calculated with absolute certainty. The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation. This is especially true where . . . it is the wrongful acts of the defendant that have created the difficulty in proving the amount of loss of profits . . . or where it is the wrongful acts of the defendant that have caused the other party to not realize a profit to which that party is entitled.'" *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 774-775, internal citations omitted, first ellipses in original); (3) ***estimated costs versus estimated recovery***; (4) ***contractual limitations*** (such as arbitration, venue, choice of law, or liquidated damages); (5) ***issues relating to potential cross-complaints***; (6) ***potential conflicts***; (7) ***staffing the case*** (since the case is likely be document intensive, the plaintiff's firm must ensure it has the appropriate support staff and resources available); and (8) ***statute of limitations issues.***

Also, who will be the face of the business when the case goes to trial? Who will be your person or persons most qualified when the Person Most Qualified request is made? Will the jury be able to relate to him or her? Will they be able to convey the damages that the business has suffered in an effective and impactful way? Is this a person who you want to represent on a contingency fee basis?

Finally, and perhaps most importantly, go with your gut. If it feels like the right thing to do, go for it. If something doesn't feel right, decline the case.

Christian Nickerson *is a partner at Greene, Broillet & Wheeler, LLP.*

Jury De-Selection...continued from Page 5

to customers who were building cannabis grow facilities, we wanted to avoid jurors who would nullify a verdict due to their aversion to cannabis. The judge permitted us to draft custom written questions about cannabis and allowed counsel to question the venire and challenge jurors for cause based upon their answers.

Only after these layers of vetting—qualification, hardship and any cause challenges to the entire venire—does the clerk call potential jurors into the jury box. Counsel receives a sheet with all jurors in the venire in alphabetical and number order. (Code Civ. Proc., § 222.5, subd. (g).) As jurors were excused while in the audience, counsel should have been scratching them off the list. The top remaining twelve are called to sit in chairs in the box numbered one through twelve. Commonly, another six are called to sit in chairs placed before the box and numbered thirteen through eighteen. The twelve jurors in the box are, by default, the jury. Assuming there are alternate jurors, say two, then those in chairs thirteen and fourteen become the default alternate jurors. These numerical designations change only if jurors are removed, in which case jurors in the six chairs in front of the box move up, in order. In other words, if Juror No. 7 is removed, Juror No. 13 moves into the box and Juror Nos. 14-18 slide over.

It may be useful to have a poster board with eighteen numbered squares and larger post-it notes with information about the jurors, which can be removed and moved as some jurors are removed and others move up. The clerk may have a seating chart on legal paper, but using this method requires using small post-its or teeny writing in pencil with lots of erasing.

Counsel then begins "voir dire": the "right to examine . . . prospective jurors . . . to intelligently exercise both peremptory challenges and challenges for cause." (Code Civ. Proc., § 222.5, subd. (b)(1).) Counsels' questions should be "calculated to discover bias or prejudice with regard to the circumstances of the particular case." (*Ibid.*) Attorneys must not "precondition the prospective jurors to a particular result," "indoctrinate the jury," or pose questions about "applicable law." (*Id.*, § 222.5, subd. (b)(3).) The questions should be addressed to all eighteen brought forward.

Challenges for "cause" must be based upon "implied

Continued on Page 13

Jury De-Selection...continued from Page 12

bias,"—a list of factors putting the juror too close to counsel, the parties or the outcome (Code Civ. Proc., §§ 225, subd. (b)(1)(B), 229)—or "actual bias," meaning a "state of mind . . . which will prevent the juror from acting with entire impartiality" (*id.*, § 225, subd. (b)(1)(C)).

In civil cases, parties are entitled to six peremptory challenges, a number that can be altered if there are more than two parties. (Code Civ. Proc., § 231, subd. (c).) Peremptory challenges may be exercised "for any reason, or no reason at all" (*People v. Armstrong* (2018) 6 Cal.5th 735, 765), save for reasons excluded by public policy, such as excluding jurors based upon race or gender (Code Civ. Proc., § 231.5).

After introducing themselves and their clients, counsel should orient the jury to the purpose of voir dire. They should not tell the jury that they are probing for "bias," which may sound like they are hoping to identify stubborn jerks. Instead, counsel can tell prospective jurors that they are looking for jurors who are neutral to start, "on the 50-yard line," but whose personal experiences may render it difficult for them to be impartial for this case. For example, in a case where our client was aligned with a surgeon who was charged with performing unneeded surgeries on patients, we wanted to know which potential jurors had bad experiences being treated by doctors, and who thus might not be neutral given the issues.

Once the purpose of voir dire is explained, counsel should get into the facts and issues that will be presented. Counsel should generally identify the themes they intend to elicit at trial but should avoid getting jurors too enthused over their cause. The error in preconditioning the jury, aside from being against the law, is that doing so too vigorously could highlight the jurors who view your case favorably, flagging them for challenge by the other side.

Counsel could start with questions to generally identify liberal or conservative jurors. For example, corporate defense counsel could ask which jurors think citizens cannot get a fair deal from companies, while plaintiff's counsel may ask which jurors worry about runaway verdicts against deep pockets (the "McDonald's coffee cup" bias). The judge may bar questions that sound like politics, but counsel could try probing topics revealing liberal or conservative views, such as government minimum guaranteed salaries or whether government went too far with Covid-19 mask and stay-at-home orders.

From that high level, counsel should preview potential weaknesses of one's case and find out who reacts poorly. Plaintiff's counsel could ask whether jurors would have difficulty awarding high damage figures even if the evidence supported that verdict. Defense counsel could disclose their client's worst conduct, or for corporate defendants, ask who has been treated poorly by corporations.

In an elder abuse case where we were adverse to an elderly surgeon complaining of signing estate documents that he said didn't reflect his wishes, we wanted to identify and eliminate any juror who felt that busy surgeons could sign lengthy legal documents without either reading them or being responsible for their contents. In the cold storage panel/cannabis case, where we sought to prove breach of an oral agreement where the parties circulated but never signed a term sheet, we wanted to identify and challenge prospective jurors who believe that only written contracts can be enforced or who would be reluctant to award damages based upon an oral agreement.

When counsel identifies prospective jurors they want to remove, they should ask them to admit, based on their experiences, that they would have difficulty being impartial. If they say so, this will support a challenge for cause, saving a valuable peremptory challenge.

After the questioning concludes, the judge accepts challenges for cause, first from the defense and then from plaintiff. (Code Civ. Proc., §§ 226, subds. (c) & (d), 230.) After challenges for cause are concluded, the parties are allowed peremptory challenges. (*Id.*, §§ 226 subd. (b), 231, subd. (c).)

At that point, counsel should know which of the first twelve they would like to challenge, tempered by the knowledge that this could bring onto the panel someone else they don't like in chairs thirteen through eighteen.

The judge may take challenges for cause at sidebar, to avoid the embarrassment of counsel raising a for cause challenge that is denied.

Peremptory challenges will usually be taken in open court, by counsel "thanking and excusing" a juror by name and seat number. The judge may first hear challenges only as to the twelve in the box before allowing another round as to jurors who move into the box from seats thirteen through eighteen.

Continued on Page 14

Jury De-Selection...continued from Page 13

If the number of jurors has been sufficiently depleted before challenges are exhausted, the judge may pause the process and the clerk may call jurors left in the audience, if any, to sit in the vacant chairs. The judge will likely permit another, shorter, round of voir dire, only to those newly called forward. This may be followed by another round of challenges, likely directed only at the new potential jurors.

Jury "de"-selection is completed after both sides pass on challenges, or in a multi-party case, when all parties consecutively pass on challenges. (Code Civ. Proc., §§ 231, subds. (d), (e).) The twelve in the box and the chosen number of alternate jurors in the next seats outside the box are then sworn, and the trial may commence.

In the realm of California courtrooms, selecting a jury is the ultimate chess game where peremptory challenges are the bishops, jury de-selection is the queen's gambit, and every juror is a potential checkmate.

Jay Spillane *is a shareholder at Spillane Trial Group PLC.*

Will your Summary Judgement Stick?...continued from Page 4

the Court of Appeal is more likely to publish an opinion where reasonable judges can disagree with the result, rather than cases where all judges agree. But the overrepresentation of reversals in published summary judgment authority may lead to the misimpression that summary judgment reversals are more common than they actually are.

We also analyzed the summary judgment reversal rates in three general areas of the law: employment, contract, and tort. We found that there is some—but not much—variation. The reversal rate was 27.7% in contract actions (18 out of 65), 29.1% in employment actions (23 out of 79), and 30.2% in tort actions (48 out of 159). Before drawing any conclusions from these reversal rates, we would want to see if this pattern holds over several years.

We also studied whether the particular appellate district where the case is heard informs the probability of reversal. The Sixth District had the highest reversal rate in summary judgment appeals by far, reversing 37.5% of the time (6 out of 16)—but it also handled the fewest number of such cases. The Fourth District reversed 32% of the summary judgment appeals it considered (24 out of 75). The Second District reversed 31.5% (47 out of 149). The Third District reversed 21.4% (6 out of 28). The First District reversed 21.2% (14 out of 66). And the Fifth District reversed 21.1% (4 out of 19). At first glance, it appears that the Second, Fourth, and Sixth Districts reverse at a higher rate than the First, Third, and Fifth Districts. However, without examining the data over more years, one cannot draw any definite conclusions about any district's inclination to reverse summary judgments.

* * *

There was once a time in California where terminating a case through summary judgment was disfavored. But the Legislature amended Code of Civil Procedure section 437c in 1992 "to liberalize the granting of such motions." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 848.) Summary judgment "is now seen as 'a particularly suitable means to test the sufficiency' of the plaintiff's or defendant's case." (*Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 542.) By affirming around 70% of the summary judgments before them—across various subject matter areas and in various appellate districts—the Courts of Appeal have generally stayed true to this liberal policy.

Eric Boorstin *is a partner at Horvitz & Levy LLP.*
Arianna Lopez *is an appellate fellow at Horvitz & Levy LLP.*

abtl

50th Annual Seminar

Celebrating a Half Century of ABTL: Streamlining & Improving Business Litigation Going Forward

October 17 - 20, 2024
The Meritage Resort & Spa
Napa Valley, CA

www.abtl.org/annualseminar

ASSOCIATION OF BUSINESS TRIAL LAWYERS
abtl REPORT
8502 E. CHAPMAN AVENUE
SUITE 443
ORANGE, CA 92869

CONTRIBUTORS TO THIS ISSUE:

Michael Mallow is a partner at Shook, Hardy & Bacon L.L.P.

Justice John L. Segal is an Associate Justice on the California Court of Appeal, Second Appellate District, Division 7.

Christian Nickerson is a partner at Greene, Broillet & Wheeler, LLP.

Eric Boorstin is a partner at Horvitz & Levy LLP.

Arianna Lopez is an appellate fellow at Horvitz & Levy LLP.

Jay Spillane is a shareholder at Spillane Trial Group PLC.

Dylan Noceda is an associate at Gibson, Dunn & Crutcher LLP.

Nalani Crisologo is an associate at Shook, Hardy & Bacon L.L.P.

Matthew Kaiser is counsel at O'Melveny & Myers LLP.