

ABTL Judicial Interview Project
Judge Victoria Chaney

Date of Interview: September 19, 2012

I. General Matters

Judge Chaney is an Appellant Court Judge for the State of California Court of Appeals 2nd Appellate District, Division 1. The appointment process can be improved in a couple of areas according to Judge Chaney: both the L.A. County Bar Association and the JNE Commission have a system that lets you know what negative comments are being stated, however, that's not the case with the Governor's special committee. As such, Judge Chaney does like the process that both the L.A. County Bar Association and the JNE Commission which allows you to have some feedback.

Communications with Law Clerks

Judge Chaney doesn't permit verbal communication with her law clerks, as she feels that it "smacks an *ex parte* communication". Judge Chaney sends down a Government Code letter making a request for further briefing. Communication with Judge Chaney's department should be done in writing and through the Clerk's office. While Judge Chaney sees no problem with comments to the media from either party regarding a pending case, however, she doesn't read anything if she is involved with the case. Judge Chaney's believes in having clarity in the process and having all sides participate in the process at the same time.

MOTION PRACTICE

Judge Chaney's solution for attorneys who want to make her job easier is to make very clear what relief you are seeking both in the beginning and in the summarization of the case. The biggest problem is not following the appellate court rules. Judge Chaney's Division handles both writs and stay requests under a different calendaring system. The panel meets once a week to discuss the upcoming writs. Judge Chaney chooses to first read the writs, then the full review by the writ attorney and finally the justices get together and discuss the writs and either make a joint decision or sometimes two to one decision. If the justices are ever unsure about something they will ask for an opposition. As for the requests for stay, they are brought to the justices in order of seniority. Judge Chaney being the third in seniority rankings would receive the stay request should Justice Rothchild be unavailable. Judge Chaney said, "we are asked for a stay but the requestor has forgotten to state what the immediacy of the situation is".

APPELLATE BRIEFS

Judge Chaney is very liberal when it comes to requesting a page limit increase, however, whoever asks for it needs to really use their additional space wisely. Judge Chaney does, however, accept letter briefs but only on certain occasions. There are two common errors that Judge Chaney has noticed in briefs, one is failure to discuss issues that are raised by the opposing party and worse than that if you didn't address it you have waived it. The second error is that the

appellant attorneys sometimes forget that they are not a Trial Court and they want us to change the finding of fact. Judge Chaney believes in order to write a good brief you need clarity. Judge Chaney's estimate that a relatively low percentage of briefs are really well written, approximately 25%-35%. Judge Chaney commented that a certain percentage of briefs that are too lengthy and it's a single issue case. Judge Chaney believes that the most important part of a brief is the beginning and the least important part of a brief is the footnotes.

As for the order in which the briefs are read, there are certain occasions where the reply brief or opposition brief are read first such as when there is a pro per who has written a brief or an attorney who is not particularly well versed in appellant work and you're not sure what's going on. The mist is not condensing and forming into objects that you can see, there is a fog out there over the whole brief and you need some help to kind of see what you're trying to see if not the reply brief sometimes the opposition brief will help with that. We do circulate a legal memorandum that is authored by each of us. In fact, everything including the Clerk's Transcript, Testimony will come in like Reporter's Transcripts. All justices are asked to draft an opinion. In her division the responsible justice is done by a random draw every week, in some divisions it's the Presiding Justice who decides justice a, b or c is going to write the opinion. Which justices are on the case is also done randomly as well there's some sort of a matrix system used. We do talk, picking up the phone, sometimes memos and sometimes you know you're assuming that the talking is done after the brief is written, sometimes, however, what happens if there is a thorny subject or one that's a close call and you'll get together with your colleagues and say, "Ok, I've got a case and x is the issue and as I understand the facts they are a, b and c and I'm leaning towards this or that do you have anything you want to say, since you have experience in this area, have you seen this before. It doesn't happen every time, but it does happen. After the brief is written it circulates, sometimes briefs or sometimes opinions the results are clear either it's going to be a clear affirmance or it's going to be a clear reversal and there's not much discussion about it. If it's a single issue case for example, a sentencing issue in a criminal case, it could be whether the statute of limitations applies and everybody either agrees that it does or doesn't apply. There's not much discussion, but when we get very complex cases with multiple issues we have different judicial philosophies to some degree, we have different judicial experiences as well as being in Trial Court, so we'll get together after the summary is written and talk about it, for example sometimes its 10:00 at night and Judge Chaney will think about a brief and start writing up a memo and then the next day she comes in and gives it to her colleagues. It is against one's better judgment to use citations from unpublished authorities, however, the use law review or other materials apart from the case law can actually be quite helpful when used appropriately, especially if you're talking about a relatively new principal. One of Judge Chaney's biggest pet peeves is the Respondent's Briefs failure to address everything that is raised in the Opposition, Oral argument if a justice asks a question please answer it, don't just ignore it there may be reasons why a judge asked the question 1. Justice doesn't understand something and wants to work through it, 2. Justice is trying to convince his/her colleague sitting up there about a particular position and wants you to say something and/or 3. Justice is trying to get you to articulate something so that when the Opposing side stands up then you can say to your colleague the opposing counsel just said whatever it might be and do you agree with this and if not why not or take it from there.

ORAL ARGUMENT

According to Judge Chaney Division 1 places a time limit on oral argument unless something is really a very new area of the law or very complex you say you want 20 minutes or 10 minutes whatever it might be you will be held to that. If you are going to require more time it is best to request it in advance because you're unlikely to get more time on the fly. The most they give is a half an hour now that doesn't mean occasionally that they don't get more time and also please remember that different Divisions do things differently. Justice Milano is very conscience of the amount of time that is ticking by and realizes that there are a lot of people out there waiting to give their oral argument and so if you want ten minutes then you'll get ten minutes, you might get ten minutes and fifteen seconds but you're not going to get thirty minutes from that ten minute, unless it's the last case on calendar and it's something that is so very complex and the three justices are really grappling with an issue then you might find yourself staying there. Other divisions may be more flexible in their time. Division 1 is not set-up for demonstrative exhibits, though she found demonstrative evidence very helpful when she would have motions for summary judgments or demurrers that went on for three hours or five or six hours if they were really complicated and it's cases like that they were helpful later on when I would go back and start thinking about it. I want to make sure I understood your brief, what it is you are arguing, what it is you want, your point of view. Sometimes in oral argument somebody will start talking and you realize that they didn't include something in a brief or it's vague or they didn't say it very well and therefore it wasn't very clear and so I want to make sure I understand all the basis on which a lawyer will make for me to come onto his side is based on their argument. Secondly, sometimes a justice will use oral argument to try to convince another justice or themselves perhaps if they're on the brink it's a time where if there is any new law that has come out. When you get the people together and the interplay that occurs and you'll have a sudden flash of inspiration that you may not have just reading and so I look for an instinct. Judge Chaney recommends practicing and learning the mechanics of the stage or the podium, the podium is adjustable and can go up and down, sometimes you will have a very short person followed by a very tall person and the very tall person doesn't know how to bend he or she will bend over trying to sneak into this little tiny podium and know where the microphone is, so first adjust things where you can get to it, acoustics in that room can be difficult at times so keep your voice up, don't speak so rapidly that you're crawling over your words and please announce clearly we don't all hear as well. Doesn't mean we need hearing aids but it is the acoustics in that room, it can bounce voices around so please pay attention to that. Look at the justices, address the justices don't get the names confused, you know Justice Rothchild and I might both have short hair but we are different people so don't be calling her Justice Chaney or me Justice Rothchild. In the beginning you will be told who is participating, all four of us will be sitting there but Justice Milano will state who is on that particular case and who to address your arguments to. One other thing that you need to do, is sometimes one of the justices may not remember something the way you do or the opposing side won't remember something the way you do, so we'll say such and such never happened and you knew it did, you need to say, "Your Honor there was an argument to this about this in the Trial Court or it was on page 27 in the Motion for Summary Judgment", or whatever in other words it was raised before and you can find it here on the record, if you don't have time say, "Your Honor it was in the record may I have permission to send a letter brief just saying where it can be found", because some of these records are voluminous and something can be confusing you can forget you can overlook something accidentally. She tends to keep her notes to a minimum as she prepares for argument by putting a summary of what the

case is about, any issues or questions that she wants to ask making the process of her actually listening to oral argument easier.

APPELLATE OPINIONS

Judge Chaney being only human has penned decision she wished were done differently. It is hard to see the consequences until your decision is cited back to you. As for the decision of her and her colleagues, most of the time they tend to be together there are discussions in which there are things tweaked or they take something out or add something but they try to keep our bearings and issue an opinion without dissenting. She believes that there are too many cases published, why publish something if it's already been published. However, if there is some new slant on the law that needs to be published. The amount of depublications is dropping over the years at one point in time there was a lot of depublications. You have to realize that there's a couple of things going on until it's published 1. We on the Court of Appeals only see our case here, we don't know that there is a trend going on all over the State, that is dealing with a particular matter and so they only see a micro topic they see the macro, so that may be one of the things that is going on. For example, Labor Code cases have been in the forefront in the last ten years, wage and hour cases somebody in San Diego, somebody in L.A., somebody in San Francisco, somebody in Fresno, somebody in Sacramento all may be confronted with the same issue, but facts for the one in Fresno may be the best ones to use for the rule and they may know that the Fresno one is coming along so whatever happened in San Diego for example or in L.A. that case might get depublished if they know that another one is going to come through where the facts are maybe a little bit more clear, not as muddy for some reason. So that's one of the things. The reality is that the Supreme Court can only take a certain number of cases per year, let's say a 100 it may be a little bit more or it may be a little bit less some of those have to be death penalty cases so that takes up a certain percentage of their calendar, their time, their oral argument time that leaves only a certain amount of time available to deal with x issue or y issue, so it's telling of the time to do it.

We don't issue tentative decisions in our District even though the Bar has asked us to for a long time. We don't issue a tentative because the decisions sometimes aren't ready to go. She believes that it's good practice to issue a dissent especially if you totally disagree with the law that was relied on. She finds it difficult to know any specific area of the law best and there is a significant learning curve for example, in a dependency case having never practiced dependency in my career until she came to Appellate Court, what is Section 300?, what is a jurisdictional hearing versus other hearings. You get more comfortable over time because now I've learned the lingo. But the reality is that the law changes as time goes on and she thinks it would be unwise for her to say that I really know this area of the law because tomorrow there may be another Opinion that comes down that changes everything. As with the recent Arbitration cases with Conception vs. AT&T. My point is simple that I could really know this one little area based on this and then all of a sudden this big case that comes along and it's a game changer. She does consult law from other jurisdictions on occasion or if it is raised.

ADMINISTRATION OF JUSTICE

Judge Chaney believes that neither legislature nor the attorney general understand what the Courts really do. Instead they maybe see the underbelly, the nasty underbelly of the Court. As for changes in the appellate system, an attorneys' quality of work, she wonders if somebody's position was not clearly set forth and one will never know this because of the quality of the work. Judge Chaney likes the idea of the appellate certification. However, the appellant court appointed attorneys for criminal appeals, they tend to be very good, they're well supervised and it's a really well run project. They are graded somehow of how much experience they have so they might come in to a petty theft case, and she doesn't see petty theft cases here but, for example, they may come in on representing somebody in a petty theft case and they're not put immediately on a murder case right away and they work their way up so they are well supervised, she wish they had a similar program for civil. Judge Chaney has also seen the need for improvements with the California Jury Instruction as some of the jury instructions seem to be at war within itself, depending on who was arguing for different factions so that's a problem with them and that has got to change. Judge Chaney said she would be very curious to see the interplay between the cap on donations that's allowed by judges which is \$500 unless it's for a judge then you can give more than \$500, given recent Federal cases she recognizes that she is an individual and the federal case of Citizens United which involved four larger donations by a company, allows other individuals to give more, not in the California context but for example, if I wanted to give \$1,000 or \$10,000 to a Presidential candidate or to someone who's running for a State senator she couldn't do that. Judge Chaney advised that specialized tribunals may be a good idea but has a lot of major drawbacks, there would be areas of the law that are looked down on or areas that pull the smarter the better justices. One of my concerns is that cases that can be very hard mentions are the dependency cases. If you could have judges that could specialize in contract cases, construction defect cases so they would get the better judges or able judges the more senior judges gravitating in one area so that they wouldn't have to have heart wrenching cases or in criminal such as a rape and some of the senseless murders or there might be a hierarchy of some sort as well you know you have to spend a certain amount of time doing case type a that's somehow viewed as the bottom of the rung before you could get to d, before you could get to c so you might end up with enough unbalanced new judges or justices doing one kind of a case and the experienced ones doing another. As for technology Judge Chaney advised that they have relatively good computers. We have like a double computer screen, so we can have a document being written on one side and a case on the other side and I can flip through them and merge them and do that kind of thing. She would wish that the briefs were done all electronically with hyperlinks to things, the reason is 1. It's searchable, so she might know she's read such and such and she might have a memory of the general subject but it's hard to find again quickly, 2. Hyperlinks that allow them to look at that contract or that testimony or that picture or whatever it is if they are saying that a picture should not have been introduced into evidence for example without having to have huge files. She is comfortable with her pay as she is also married and have a husband who contributes. The reality of the situation is that she would probably make more if she were out in the big world in a large firm. Judge Chaney believes that judicial activism is in the eye of the beholder. She also believes that the public's understanding of her and the Court's role as poor, both for the appellate court and the trial court. Especially for the appellate court, they have no idea what we do. The Los Angeles County Bar Association

could help by providing some form of public education, getting the word out there what the appellate courts do, what the trial courts do, maybe try to get more clinics. More legal aide type efforts out there so people will be better represented. The saddest thing is that it's the little guy that's going to get hurt, the amount of small claims courts that are available will get cut down, the time that it will take to get to trial will suddenly go back to where it was twenty years ago, when she was a trial attorney and she filed her paperwork in downtown.

CASE ASSIGNMENT AND WORK-UP

Judge Chaney advised that each of the justices has a different way of assigning judicial attorneys, for example some justices here have attorneys that specialize in civil or in criminal or in family law and then some justices for example me, would rather they try and cover the whole so that they would be general so they can cover everything and that's because she thinks there is a depression factor that happens when you only do dependency or potentially only did criminal that you always saw the worst of the world. You might start looking at things in terms of blocking the mind, sure you'd specialize, but at what cost. She has her own personal system for reviewing and analyzing briefs before assigning them. She thinks the attorneys know their case load best they know what they are looking at. They might also remember for example, she had an arbitration case last month, another arbitration case, the issue was more or less saying she thinks she'll take it, that way you don't have to reinvent the wheel. Occasionally she does if she knows about a case and she knows somebody has a lot of expertise in the area. For example, if she has a sea court case and knows someone who has done sea court before, he wouldn't have to learn the language all over again. Her involvement in the bench memorandum being worked up is heavy when they get done reading the case and getting it over to us, we talk at that point she may be reading the briefs with them, they talk to me along the way about some various issues that they are encountering, some of the time they have finished with their first draft, a draft opinion and it's going to come out under my name to circulate to the other justices. The judicial attorneys have the freedom to tell her that she is all wet and that they think her opinion is wrong or where she wants to go is wrong and they do that, she encourages that because she doesn't know everything, and often she is wrong in many areas. But she encourages their influence and their dissent.