

ASSOCIATION OF BUSINESS TRIAL LAWYERS

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REPORT

LOS ANGELES

SUMMER 2017

MOCK ORAL ARGUMENTS



Justice Patti Kitching (Ret.)

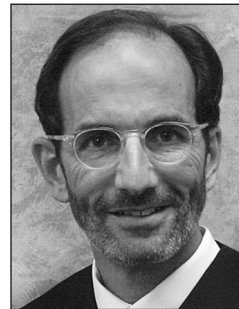
If you have an oral argument before a Court of Appeal or a Supreme Court, you must diligently prepare for that all-important appearance. The experience may be exhilarating, or it may be disappointing. One authority on the United States Supreme Court has said that an argument before the Supreme Court is a combination of a speech, a conversation

and an inquisition.

One way to increase your chances of presenting a successful oral argument is to participate in a mock oral argument beforehand. There you will have the opportunity to practice your argument before one or more persons. They will then critique your presentation and demeanor, discuss the strengths and weaknesses of your case, and provide constructive criticism for improvement.

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STAY CLEAR OF THE KENNEMUR OBJECTION



Hon. Lawrence P. Riff

I. A *Kennemur* Objection is a Showstopper

The two sure-fire ways to stop a trial dead are: spill coffee all over counsel table, or say “Objection, *Kennemur*.” Both cause a mess.

The objection decoded means: “The Court should not permit the pending question to the expert witness because of discovery abuse. At deposition, she was fully interrogated about all opinions she had formed in this case. She testified that she disclosed all her opinions. Counsel did not say otherwise, nor did counsel later tell me the witness had new opinions. The pending question elicits a new opinion. My client is prejudiced because he is now unable effectively to cross-examine or to marshal competing expert evidence.” A *Kennemur* objection thus implies ambush, sandbagging and foul play.

Because the objection asserts unfair surprise, it cannot be addressed pretrial. It arises in trial during a witness examination. It always requires a sidebar if not a full hearing. And it is an asymmetrical and awkward proceeding. The objection asserts: “Something pretrial [the expert proffering this opinion in discovery] did not happen.” The assertion is easily made. Objecting counsel’s mere words are enough. The burden shifts to the proponent of the witness to demonstrate, through documentary evidence and not mere words, that “yes *it did happen*.” Or more awkwardly, “it did not happen but it *could have happened* had objecting counsel done her job correctly—she brought this on herself.” It’s a lot to bite off at sidebar.

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PRESIDENT'S REPORT



Michael P. McNamara

I am thrilled to be the ABTL's new President. It is a true honor to serve alongside my fellow Executive Board members, including Sabrina Strong (Vice President), Valerie Goo (Treasurer) and Susan Leader (Secretary), as well as the other Board members and the Judicial Advisory Council.

As we assume the leadership of the ABTL, we are all mindful of the great traditions and values that embody this organization. While the ABTL's core mission is to foster "bench meets the bar" opportunities in the context of quality educational programs, the ABTL's role in the Los Angeles legal community has become even more important as part of the "glue" that binds us all as lawyers and judges. Without organizations like the ABTL, it would be easy to get lost practicing law in such a large metropolitan area as Los Angeles, with so many judges and lawyers. By providing a regular forum for social gatherings in a balanced setting with judges and both plaintiff and defense lawyers, we help make the legal profession more of a collegial community.

Indeed, it may sound corny, but some of my best friends are people I met at ABTL events and programs. I look forward to every program in part because of the traditional one-hour wine tasting that precedes each program, when I get to catch up with other lawyers and judges. As my day-to-day practice is busy, I have come to rely upon the ABTL's programs as a way to stay connected with others within our legal community. There have been many occasions when I have run into opposing lawyers at ABTL events, where we have shaken hands while having a glass of wine. There is simply no doubt that participation in the ABTL helps us all by promoting civility and collegiality in the legal profession.

With that said, I look forward to seeing all of you at upcoming ABTL events. We have some very special programs already planned. On September 19th, we are hosting a program with Dan Petrocelli featuring his reflections on the OJ Simpson trial. On November 14th, we are thrilled to host a program with four former Solicitors General of the United States.

Please show up and help make our Los Angeles legal community a better place. It takes a village!

Onward and upward!

Michael P. McNamara
Jenner & Block LLP
ABTL President, 2017-2018

ASSOCIATION OF BUSINESS TRIAL LAWYERS

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Mock Oral Arguments...continued from Page 1

There are different types of mock oral argument. For example, you may gather together one or more of your colleagues, or you may seek out a panel of retired judges or justices. Whichever model you choose, it is important that the people you choose be prepared and willing to offer suggestions and criticisms to improve your presentation. If you prevailed below, they will help you secure an affirmance, and if you lost below, they will help you improve your chances for a reversal.

In order to prepare the mock panel for your argument, you should provide the panelists with the briefs, any critical portions of the record (such as a dispositive agreement or ruling) and relevant case law. If there are amicus curiae briefs, you may also want to provide some or all of them. The panelists will then read the briefs, study the issues, and prepare questions. They may also decide to meet before the argument to discuss the case.

At your mock oral argument, the members of the panel should confirm that you understand the appropriate standard of review so that you frame your arguments appropriately. They should test your arguments by asking difficult questions and following up until you have sufficiently answered the questions. Depending on the case, they may ask you to explain the ramifications on other cases if the court decides in your favor. It is important that they ask you to distinguish cases that may be harmful to your position. They should also examine you regarding any procedural issues in your case, like waiver and invited error. Finally, they may ask you to explain how your case fits into the appropriate development of the law.

It is important to remember that the actual Court of Appeal or Supreme Court may view your case differently than you do. This is where the mock oral argument panel can be particularly helpful, because the panel members will be taking a fresh look at the issues in your case. You do not want to be surprised by a question from the actual court, and if there is a new issue or argument you have not considered, you want to learn about it at your mock oral argument—and not at the actual argument. The mock panel may also identify a procedural error you have made. If the panel does identify a problem area with your

case, it may be able to help you formulate an argument or strategy that deals with the problem.

The mock panel will also be extremely helpful in advising you how to organize and streamline your argument. For example, if you have five issues you think are important in your case, the panel may rank your arguments from very strong to very weak. It may advise you to omit one or more of your arguments so you have more time to emphasize your potentially winning arguments.

You should decide what main points you want to make in your oral argument and make them early. However, you should always be ready for the panel or the actual court to interrupt your presentation, even if you have decided you must make certain arguments and this interrupts your plan. If someone on the mock panel or the court asks a question, be sure you understand the question and then answer it right away. A question means that the questioner is interested in that issue – and if that person is interested in an issue, you must be interested in it too. You should treat this as an opportunity to have a conversation with the panel or court where you will have an opportunity to satisfy the panel's or the court's concerns. While answering the question, you may be able to incorporate into your answer the other important points you wish to make. After you have answered the question, you can go back to your prepared remarks if you have time. Some courts are more active than others, so it is a good idea to have a presentation that identifies areas that can be omitted if you run out of time.

I have had personal experience on both sides of mock oral arguments. When I was a Deputy Attorney General, the United States Supreme Court heard one of my cases. The case presented many interesting issues, including federal court jurisdiction, ERISA, preemption, and California personal income tax. At that time, the Association of Attorneys General prepared Attorneys General and their deputies for arguments in the United State Supreme Court. The association set up a mock oral argument for me in Washington, D.C., a day or two before my actual argument. The panel for my mock oral argument included former law clerks to the Justices of the Supreme

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COURTS MOVE CLOSER TO ALLOWING “E-SERVICE” OF PROCESS



David Fuad

After a plaintiff files a complaint, the next step is to serve the defendant. If the defendant is a corporation with an agent for service of process, service is a simple matter. But what if the defendant cannot be physically located? Basic due process considerations require that service be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Most communication today takes place online. If a plaintiff has reliable information about a defendant’s internet presence, including his or her social media accounts and e-mail addresses, why shouldn’t courts permit electronic service of process when all other efforts have failed?

In fact, courts have recently crept closer to allowing service of process via social media and e mail. While this may sound problematic—nobody wants to be hit with a default judgment because they haven’t checked Facebook in a while—it is a far more sensible and practical method of notifying a defendant about a lawsuit than other service-of-last-resort devices such as publication. Courts must balance a defendant’s right to receive proper notice of a lawsuit against the plaintiff’s right to have his or her case heard. Today, both of those rights are better protected by authorizing service in a manner consistent with how people actually communicate.

In California, there is no statute expressly permitting service by e-mail or social media. Code of Civil Procedure section 413.30, however, permits a court to authorize service in any manner “reasonably calculated to give actual notice.” Under the Federal Rules of Civil Procedure, several avenues allow service by electronic means. For domestic defendants, Rule 4(e) permits service of process on an individual in the United States under the laws of the state where the district court is located. If a state permits e-service, the district court can also authorize it. As to foreign defendants, the federal rules afford more leeway. Courts have wide discretion to

allow any means of service on a foreign defendant so long as the ordered method: (1) is not prohibited by international agreement; and (2) comports with constitutional requirements of due process. *See, e.g., S.E.C. v. Anticevic*, No. 05 CV 6991 (KMW), 2009 WL 361739, at *3 (S.D.N.Y. Feb. 13, 2009).

While no published California state court opinion has authorized e-service of process under Code of Civil Procedure section 413.30, at least two federal courts have allowed it under Rule 4(e) to permit service by email where the defendant’s physical location could not be found using “reasonable and diligent attempts.” *See Facebook, Inc. v. Banana Ads, LLC*, No. C-11-3619 YGR, 2012 WL 1038752, at *3 (N.D. Cal. Mar. 27, 2012); *Miller v. Ceres Unified Sch. Dist.*, No. 1:15-CV-0029-BAM, 2016 WL 4702754, at *3 (E.D. Cal. Sept. 7, 2016).

Other courts around the country have also permitted service by email and social media where the defendant could not be located using traditional means. In *WhosHere, Inc. v. Orun*, No. 1:13-CV-00526-AJT-TRJ, 2014 WL 670817, at *1 (E.D. Va. Feb. 20, 2014), the court permitted service via two email accounts believed to belong to the foreign defendant, as well as via Facebook and LinkedIn. The court found that the defendant had previously identified himself in response to an email sent to one email address, had provided an alternate email address, and had stated he was on several social media sites. In addition, the email addresses and social media sites all contained personal information consistent with the defendant’s identity. The court found that the “defendant is presumably abreast of both [sic] the subject matter of the litigation and is likely already in receipt of the complaint. For these reasons, the court finds that the proposed methods of service comport with due process because they are reasonably calculated to give defendant notice of the suit.” *Id.* at *4. Other courts have permitted service by email and social media on foreign defendants who could not be served otherwise. *See, e.g., Lipenga v. Kambalame*, No. GJH-14-3980, 2015 WL 9484473, at *4 (D. Md. Dec. 28, 2015) (holding that service on defendant located in Malawi via email and Facebook was appropriate where defendant was recently actively using both accounts); *U.S. ex rel. UXB Int’l, Inc. v. 77 Insaat &*

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Allowing “E-Service” of Process... continued from Page 4

Taahhut A.S., No. 7:14-CV-00339, 2015 WL 4208753, at *3 (W.D. Va. July 8, 2015) (holding that email service on owner of Iraqi and Afghan corporate defendants was proper where owner and defendants were “more than likely” already aware of litigation); *St. Francis Assisi v. Kuwait Fin. House*, No. 3:16-CV-3240-LB, 2016 WL 5725002, at *2 (N.D. Cal. Sept. 30, 2016) (holding that service via Twitter was proper on defendant in Kuwait).

In other cases, federal courts have refused to allow service on domestic defendants via email or social media where electronic service is not permitted. For example, in *Joe Hand Promotions, Inc. v. Shepard*, No. 4:12CV1728 SNLJ, 2013 WL 4058745, at *2 (E.D. Mo. Aug. 12, 2013), the court held that a domestic defendant could not be served electronically because “the federal rules do not permit electronic service,” and under Rule 4(e), Missouri law authorizing substitute service by mail or publication did not extend to “electronic mail.” The Oklahoma Supreme Court has stated that “[t]his Court is unwilling to declare notice via Facebook alone sufficient to meet the requirements of the due process clauses of the United States and Oklahoma Constitutions because it is not reasonably certain to inform those affected.” *In re Adoption of K.P.M.A.*, 2014 OK 85, ¶ 37, 341 P.3d 38, 51. In *Fortunato v. Chase Bank USA, N.A.*, No. 11 CIV. 6608 JFK, 2012 WL 2086950, at *2 (S.D.N.Y. June 7, 2012), the court, applying New York law, rejected service of process via Facebook where the party attempting service did not provide “any facts that would give the Court a degree of certainty that the Facebook profile its investigator located is in fact maintained by [the defendant],” or that “the email address listed on the Facebook profile is operational and accessed by [the defendant].” The court noted that anyone could create a fake profile, and therefore “there is no way for the Court to confirm” whether the person located by an investigator was in fact the defendant. *Id.* Instead, the court allowed service by publication, reasoning that “under the circumstances presented, a local newspaper is the most likely means by which to apprise” the defendant of the complaint. *Id.* at *3. Ironically, the court used the location listed in the ostensibly-unreliable Facebook profile to determine where the summons should be published. *Id.*

For anyone wondering how service by publication in a newspaper is more likely to apprise a defendant of pending litigation than an email or message to the defendant’s social media account, you are not alone. A recent decision from New York authorized service of a divorce summons solely by Facebook under a New York statute that permits courts to fashion a method of service where the plaintiff can demonstrate that personal service, substitute service, or “nail and mail” service are “impracticable.” See N.Y. C.P.L.R. 308(5) (McKinney 2017); *Baidoo v. Blood-Dzraku*, 5 N.Y.S.3d 709, 712 (Sup. Ct. 2015). The defendant had no address or place of employment, and the plaintiff’s investigators were unable to locate him. The court found that personal service was “an impossibility” and that attempting substitute or “nail and mail” service would be an “exercise in futility.” *Baidoo*, 5 N.Y.S.3d at 712-13. The plaintiff provided evidence that she had previously communicated with the defendant through his Facebook account, and that she had a phone number for him that she could use to text or leave a voicemail alerting him to the Facebook message. The court recognized that service by publication “is essentially statutorily authorized non-service” and declined to require backup service by publication, reasoning it was both useless and unduly expensive for the plaintiff. *Id.* at 715. The court ordered the plaintiff’s attorney to log into the plaintiff’s Facebook account, identify himself, and send the summons to the defendant once a week for three weeks, along with calls and text messages to the defendant’s cell phone alerting him to the Facebook message. *Id.* at 716.

While service by email or social media may be novel and unorthodox, it is also a practical and realistic method for notifying defendants of pending litigation. Email and social media accounts are free, widely used, and accessible anywhere at any time. Furthermore, a defendant’s account is often known to the plaintiff before litigation arises. Legislatures and courts should therefore consider whether in the twenty-first century anachronistic and ineffective methods of service such as service by publication are still “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action.” *Mullane*, 339 U.S. at 314.

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**HANDLING POTENTIALLY
PRIVILEGED DOCUMENTS AND
MANAGING DISQUALIFICATION
RISK AFTER
MCDERMOTT WILL & EMERY LLP
V. SUPERIOR COURT**



Jim Ham

In April of 2017, the Fourth Appellate District disqualified Gibson, Dunn & Crutcher LLP from further representing its client, McDermott, Will & Emery LLP, in a dispute with former clients. (See *McDermott Will & Emery LLP v. Superior Court* (2017) 10 Cal.App.5th 1083.) Gibson Dunn was disqualified

for using an email originally sent by a lawyer to his client and forwarded by the client to others, which Gibson Dunn found in McDermott’s files. The Court of Appeal concluded that the email was presumptively privileged, and sustained the trial court’s factual finding that no waiver had occurred because the client’s disclosure was inadvertent. Gibson Dunn was disqualified for failing to follow the procedure for handling inadvertently disclosed privileged communications articulated in *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644 and *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, because (a) it did not notify the client or his attorney it had obtained a copy of the email; (b) it reviewed and analyzed the email; and (c) it used the email in the lawsuit after objections were asserted based on attorney-client privilege.

Lawyers concerned with the development of the law of privilege, waiver and attorney disqualification have greeted the *McDermott* opinion with enthusiastic disagreement. The disagreement mostly arises from differing interpretations of the dense, complicated and conflicting facts of the case and differing conclusions about the proper inferences to draw from those facts. Virtually all of these disagreements boil down to the simple contention that the trial court could have decided the case differently. But, given the highly deferential standards of appellate review of a trial court’s privilege rulings (substantial evidence) and disqualification orders (abuse of discretion), there is no assurance that the

next case will come out any differently. McDermott thus presents a cautionary tale. It must be recognized that trial courts are given very broad discretion in deciding these issues. (This article addresses only California law. Federal law is quite different. In the Ninth Circuit, for example, the existence and scope of the attorney-client privilege is reviewed de novo by the appellate court, and factual findings are reviewed for clear error. Federal courts construe the privilege narrowly and appear to be more receptive to waiver arguments. (E.g., *United States v. Ruele* (9th Cir. 2009) 583 F.3d 600, 606-607 [“(T)he privilege stands in derogation of the public’s right to every man’s evidence and as an obstacle to the investigation of the truth, [and] thus, . . . [i]t ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle,” internal quotation marks omitted].)

Space does not permit a complete recitation of McDermott’s facts. Nonetheless, there are some key teachings that one should heed when addressing information that appears privileged and determining what to do when a dispute over waiver arises. The bottom line is that lawyers who confront these issues without following *State Fund* procedures risk disqualification.

State Fund’s requirements. *State Fund* holds that when a lawyer receives materials that “obviously” appear to be subject to an attorney-client privilege or “clearly appear” to be confidential and privileged, and where it is “reasonably apparent” that the materials were provided or made available through inadvertence, the lawyer receiving the materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and should immediately notify the sender that he or she possesses material that appears to be privileged. “The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance” (*State Fund, supra*, 70 Cal.App.4th at pp. 656-657.)

A communication “obviously” or “clearly” appears privileged when it is between lawyer and client and its purpose is consultation or advice. If third parties are copied on the communication or if it is later distributed beyond lawyer and client, waiver issues may exist. Surrounding

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Handling Potentially Privileged Documents...continued from Page 6

circumstances, later-acquired information or a seasonably-asserted objection may be enough to make it “reasonably apparent” that the document was inadvertently disclosed, triggering *State Fund* duties.

A lawyer who decides these issues for himself or herself risks the court deciding them differently. That happened in *McDermott*, where the court found that an 80-year-old client with multiple sclerosis unknowingly and accidentally forwarded a privileged email from an iPhone. The recipient thereafter forwarded the message to another, who in turn distributed the email to others. None of the subsequent events altered the presumptively privileged nature of the original communication, and because the client’s disclosure was inadvertent, the subsequent disclosures to third parties did not waive the privilege.

State Fund should be considered applicable to all documents that appear to be privileged, regardless of source or republication. The problem in *McDermott* arose when Gibson Dunn continued to use the presumptively privileged email after the client’s counsel objected that the email had been inadvertently disclosed. Once the trial court concluded the communication was privileged and that no waiver had occurred because the email had been inadvertently disclosed, Gibson Dunn’s fate was all but sealed.

Until the California Supreme Court rules otherwise, caution dictates viewing *State Fund* as applicable whenever the circumstances present a presumptively privileged communication and there has been no confirmation or agreement regarding waiver by the holder of the privilege. It does not matter whether the document came from your client’s own file, or from a third party, opposing counsel, or another source. It makes no difference whether the matter is transactional or litigation. And, it does not matter how many people may have subsequently received the communication, or how many times it may have been forwarded or published online. This is because the holder of the privilege is the client, and only the holder can waive the privilege. (See Evid. Code, § 954.) The attorney-client privilege is, after all, a rule of evidence. It precludes use or introduction of privileged communications in a proceeding governed by those rules.

Once the proponent of the privilege makes a prima facie showing of a confidential attorney-client communication, it is presumed the communication is privileged, and the burden shifts to the opponent to establish waiver, an exception, or that the privilege does not apply for some other reason. (*DP Pham, LLC v. Cheadle* (2016) 246 Cal.App.4th 653, 659-660.) Making a prima facie showing requires only that the client establish a confidential communication between client and lawyer under Evidence Code section 952. Once that showing is made, the communication is presumptively confidential. The proponent of the privilege need not negate facts suggesting waiver in order to preserve the claim. That burden rests with the party claiming waiver.

Resolve the dispute before using the information. It is risky to reject a privilege claim and take the position that the holder waived the privilege because the holder didn’t bring a motion to resolve the dispute. In *McDermott*, the privilege holder’s attorney objected to use of the privileged email when the opposing party tried to examine a witness about it. The attorney did not instruct the witness not to answer, and did not bring a motion to address the inadvertent disclosure. Although the lawyer might have been found to have waived the privilege as the agent of her principal under those circumstances, the trial court found that the lawyer’s objection was enough to preserve the holder’s privilege claim. (*McDermott, supra* 10 Cal.App.5th at pp. 1113-1115.) Therefore, counsel may not be able to safely rely on arguments that an attorney allowed questioning about a privileged document or that the privilege was waived by failing to bring a motion to resolve the assertion of privilege.

The temptation to take advantage of inadvertently-disclosed privileged information, especially when there seems to be a clear waiver, must sometimes be almost irresistible. *McDermott* teaches that we must resist – not just because it’s the professional thing to do, but because the risk of not playing by the *State Fund* rules is simply too high.

James I. Ham is a partner at Pansky Markle Ham LLP in South Pasadena.

NEW WARP-SPEED APPELLATE PROCESS FOR ELDER ABUSE CASES



Marc J. Poster

The Legislature Discerns A Problem With Appeals From Certain Orders Denying Petitions to Compel Arbitration.

Compared with trial court proceedings, appeals often proceed at a leisurely pace. Until recently, this was true of appeals from orders dismissing or denying petitions to compel arbitration. These are appealable orders (Code Civ. Proc., § 1294, subd. (a)), and an appeal stays all proceedings in the trial court until the appellate result is final (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 190). In the ordinary course, the unsuccessful petitioner would have 60 days or more to file an appeal (Cal. Rules of Court, rules 8.104, 8.108); preparation of the appellate record could take months; and, although arbitration proceedings are supposed to have preference (Code Civ. Proc., § 1291.2) and the Court of Appeal can grant a preference (Cal. Rules of Court, rule 8.240), it may still take many more months or even years to reach a decision (e.g., *Young v. Horizon West, Inc.* (2013) 220 Cal.App.4th 1122, 1126 [even with preference, unsuccessful appeal took almost a year and a half]).

No more. Having found that delays can be problematic in elder abuse litigation, the Legislature has carved out certain cases for rocket-docket treatment. (Stats. 2016, ch. 628, § 1.)

The Legislature’s Fix: A Fast-Track Appeal.

One proposed legislative solution to the perceived problem was to eliminate the right of immediate appeal from an order refusing to compel arbitration in an elder abuse case where the trial court has granted a trial preference. The arguments for this were that there is no comparable right of immediate appeal from an order granting a petition to compel arbitration. The aggrieved party should either file a writ petition for extraordinary relief, which rests entirely within the discretion of the reviewing court, or await review as a matter of right on appeal from a final judgment. Because a

trial preference has been granted, the case should go to trial within 120 days, long before an appeal is usually heard.

The Legislature did not go so far as to eliminate the right of immediate appeal, but it did speed up the appellate process dramatically and place potential appellants in a difficult spot. New Code of Civil Procedure section 1294.4, effective January 1, 2017, mandates that where an action involves an elder abuse claim (Welf. & Inst. Code, § 15600 et seq.) and a trial preference has been granted (Code Civ. Proc., § 36), the Court of Appeal shall decide the appeal within 100 days after the filing of the notice of appeal. The Court of Appeal may extend the time for decision, but only for good cause and if it would promote the interests of justice.

The Judicial Council Implements The Fix With Dramatically-Shortened Deadlines.

Code of Civil Procedure section 1294.4 left it to the Judicial Council to formulate rules implementing the statute and shortening the time for filing the appeal. The result is a new chapter 12 to part 8 of the California Rules of Court, rules 8.710-8.717, effective July 1, 2017.

Unlike the usual measured pace of the appellate process, the new rules call for extremely rapid action, as the Legislature directed. Traps for the unwary lurk all along the way.

Shortened time to appeal. The time to file the notice of appeal is not the usual 60 days (rule 8.104), but just 20 days from notice of entry of the order denying the petition to compel arbitration (rule 8.712(b)). A valid reconsideration motion will extend the time to appeal for only 5 days after service of notice of entry of the order denying reconsideration. (Rule 8.712(c)(1).) Any other party may cross-appeal from the order denying arbitration, but only within 5 days after the clerk serves notification of the first appeal. (Rule 8.712(c)(2).)

Unlike a standard notice of appeal, this one must state that the appeal is governed by the new rules, and copies of the order appealed from and the order granting a trial preference must be attached. (Rule 8.712(a).)

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New Warp-Speed Appellate Process...continued from Page 8

Rapid record preparation. There will be none of the typical delays in preparation of the record on appeal. At the same time the appellant files a notice of appeal, the appellant must also file notice either stating that the appellant elects to proceed without a reporter's transcript or designating a reporter's transcript. (Rule 8.713(b)(1).) The reporter must prepare the transcript within 10 days after the superior court clerk notifies the reporter to prepare the transcript. (Rule 8.713(b)(2).) And there is no waiting for the superior court clerk to do anything else. The appeal must proceed by way of an appendix or appendices in lieu of a clerk's transcript, which are filed with the briefs. (Rule 8.713(a).)

Briefs filed lickety-split. Unless the Court of Appeal orders otherwise, the appellant must file its opening brief within 10 days after filing the notice of appeal. (Rule 8.715(a)(1).) The respondent must file its brief within 25 days after that. (Rule 8.715(a)(2).) And the appellant may file a reply brief within 15 days after that. (Rule 8.715(a)(3).)

There is a novelty in preparation of briefs that would not be tolerated in the usual appeal. If a reporter's transcript has not been filed at least 5 days before the date a brief is due, the brief may be filed with references to matters in the reporter's transcript but without supporting citations. Within 10 days after the reporter's transcript is filed, a revised version of the brief must be filed with the missing reporter's transcript citations, but no other changes. (Rule 8.715(b)(2).)

If a party fails to file a brief on time, the Court of Appeal clerk gives notice that if the brief is not filed within a mere 2 court days of service of the notice (the usual rule is 15 days), then (1) in the case of an appellant's opening brief, the court may dismiss the appeal, and (2) in the case of a respondent's brief, the court may decide the appeal on the record, the opening brief, and any oral argument. (Rule 8.715(d).)

The parties may still stipulate to extend briefing deadlines under rule 8.212(b) (up to 60 days for each brief), and that will also extend the court's 100-day time for deciding the appeal by the number of days of the extension(s). (Rule 8.715(c).) Presumably, elderly or infirm litigants who already have a trial preference will not enter into such

stipulations lightly.

Oral argument in a flash. The Court of Appeal need give only 10 days' notice of oral argument, or less if the court finds good cause. (Rule 8.716.)

Some extensions allowed. Some of the draconian aspects of this rocket-docket appeal process may be ameliorated by rule 8.717, which provides: "The Court of Appeal may grant an extension of time in appeals governed by this chapter only if good cause is shown and the extension will promote the interests of justice." It remains to be seen how liberal the Courts of Appeal will be in granting extensions.

It also remains to be seen whether rule 8.717 would permit the Court of Appeal to extend the time to file a notice of appeal as specified by rule 8.712(b). In appeals not governed by new chapter 12, "no court may extend the time to file a notice of appeal." (Rule 8.104(b).) There is no similar rule in new chapter 12.

Appellants Thus Find Themselves

Between A Rock And A Hard Place.

The Legislature has not done away with appeals from orders refusing to compel arbitration in elder abuse cases with a trial preference, but it has made the process far more challenging than the usual appeal. Perhaps as an unintended consequence, the Legislature has put a party aggrieved by an erroneous order refusing to compel arbitration between a rock and a hard place. The onerous fast-track appellate process must be followed, or the right to appellate review of the order will be forfeited. Because the order remains immediately appealable, it cannot be reviewed on appeal from a subsequent final judgment. (Code Civ. Proc., § 906.)

If you find yourself in a dispute over the enforceability of an arbitration clause in an elder abuse case, study the new appellate rules right away, and if you are aggrieved by an order dismissing or denying a petition to compel arbitration, be prepared to act swiftly.

Marc Poster is a partner at Greines, Martin, Stein & Richland LLP in Los Angeles.

“*Stay Clear of The Kennemur Objection*”...continued from Page 1

Proof that the witness did proffer the opinion, or that opposing counsel unreasonably failed to inquire, often requires resort to a single question buried in voluminous deposition transcripts, expert reports, discovery disclosure documents and correspondence. Thus, a *Kennemur* objection frequently results in frenzy as counsel dig to find the needle in a haystack while the judge’s and jury’s patience wears thin. The objection is a major monkey wrench, and accordingly the potential for its abuse abounds. At a minimum, the objection badly interrupts the flow of the witness’s evidentiary presentation. If sustained, it can devastate. It may lead to a judicial death sentence by excluding critical evidence.

It is serious business.

II. The Law Behind the Kennemur Objection

Kennemur v. State of California (1982) 133 Cal.App.3d 907, 917 (*Kennemur*) construed then-novel legislation requiring a civil litigant to identify experts expected to offer an opinion at trial and to serve on the opposing party a declaration describing “ ‘a brief narrative statement of . . . the general substance’ ” of that testimony. (Emphasis omitted.) Those same rules apply today. (See generally Code Civ. Proc., § 2034.210 et seq.) (The important ins, outs and pitfalls of expert demands and disclosures are beyond the scope of this article.)

Kennemur concerned an accident reconstruction expert’s undisclosed opinion that plaintiff sought to elicit following the defense case. Plaintiff asserted, among other arguments, that he simply was not required to disclose the proposed opinion pretrial. The court disagreed:

The Legislature has singled out the pretrial discovery of expert opinions for special treatment. When appropriate demand is made for exchange of expert witness lists, the party is required to disclose not only the name, address and qualifications of the witness but the general substance of the testimony the witness is expected to give at trial. In our view, this means the party must disclose either in his witness exchange list or at his expert’s deposition, if the expert is asked,

the substance of the facts and the opinions which the expert will testify to at trial. Only by such a disclosure will the opposing party have reasonable notice of the specific areas of investigation by the expert, the opinions he has reached and the reasons supporting the opinions, to the end the opposing party can prepare for cross-examination and rebuttal of the expert’s testimony.

(*Kennemur*, *supra*, 133 Cal.App.3d at p. 919, internal citations omitted.)

The California Supreme Court followed suit in *Bonds v. Roy* (1999) 20 Cal.4th 140, a medical malpractice case. The defendant’s expert witness declaration stated the expert would testify only about damages. The witness specifically so confirmed at deposition. But late in the trial, the defendant sought to elicit the expert’s opinion on the standard of care. The trial court sustained the plaintiff’s objection for two reasons: (1) there was not enough time to adjourn the trial to reopen the expert’s deposition, and (2) the resulting unfair surprise would prejudice the plaintiff. The Supreme Court affirmed: “[T]he very purpose of the expert witness discovery statute is to give fair notice of what an expert will say at trial. This allows the parties to assess whether to take the expert’s deposition, to fully explore the relevant subject area at any such deposition, and to select an expert who can respond with a competing opinion on that subject area.” (*Id.* at pp. 146-147.) Thus, “[w]hen an expert is permitted to testify at trial on a wholly undisclosed subject area, opposing parties similarly lack a fair opportunity to prepare for cross-examination or rebuttal.” (*Id.* at p. 147; see also *Jones v. Moore* (2000) 80 Cal.App.4th 557, 565 [“When an expert deponent testifies as to specific opinions and affirmatively states those are the only opinions he intends to offer at trial, it would be grossly unfair and prejudicial to permit the expert to offer additional opinions at trial”]; but see *Easterby v. Clark* (2009) 171 Cal.App.4th 772, 780 [party permitted to elicit opinion undisclosed in deposition when opposing counsel was explicitly advised post-deposition of that opinion].)

Continued on Page II...

“Stay Clear of The Kennemur Objection”...continued from Page 10

III. Advice for Counsel

Upon hearing “objection, Kennemur,” your trial judge will immediately look for evidence of ambush and undue prejudice. I suggest that the responding party (the proponent of the witness and the disputed opinion) faces only a modest burden to defeat the objection given judges’ inclination for trials to be resolved on the merits, not discovery sanctions. The responding party must show only that the objecting party had reasonable advance notice of the opinion and an opportunity to learn of it. But the judge will not be satisfied by mere words. “Oh, I’m sure this all came up in deposition, Your Honor; my associate who was there just texted me that it did, he thinks.” That won’t cut it.

The responding party’s goal is to get away from sidebar and back to eliciting killer expert testimony. Thus, on direct examination of an expert, counsel should have the following documents very handy—not in the trunk of a car or even in boxes in the back of the courtroom: (a) the disclosure documents, especially the “brief narrative statement of the general substance of the [expert’s] testimony” (Code Civ. Proc., § 2034.260, subd. (c)(2)); (b) a full-sized copy of the deposition with word index and all exhibits; and (c) any post-deposition communications with other parties concerning any new or different opinions of the witness. Note well: the key inquiry is not simply whether the expert expressed the opinion at her deposition (although if so, that is dispositive). It is whether the objecting attorney was on reasonable notice that she could have asked the witness about such an opinion. A lawyer who, whether for strategic reasons or from carelessness, fails to inquire about a topic staring him in the face during the deposition is not unfairly ambushed later at trial by that issue.

Thus, when objecting counsel at sidebar says, “The pending question on topic X was never covered at the witness’s deposition,” the objection will be overruled if the responding party can show the judge: (a) a Code of Civil Procedure section 2034.260 declaration that states that the witness is expected to offer opinion testimony on topic X; (b) a transcript showing that topic X was indeed discussed, however briefly, at the deposition—this is why one wants

a word index handy; (c) an expert’s writing produced before or at the deposition, and marked as an exhibit, that addresses topic X; or (d) a post-deposition letter or e-mail from the proponent counsel to the objecting counsel to the effect, “The witness has a new opinion on topic X and in fairness, you are entitled to depose her further to learn about that. Please call to discuss the arrangements.”

Indeed, it is preferable to cut off the objection even before getting to sidebar. Upon hearing the objection, the responding counsel should ask the court for a moment to confer with counsel *sotto voce*. The proponent can then show objecting counsel what she would show the judge at sidebar. This should result in a “never mind” withdrawal of the objection. This happy outcome accomplishes two things. First, it demonstrates responding counsel’s mastery of the courtroom—the jurors may not understand “*Kennemur*,” but they will see that objecting counsel was wrong and that responding counsel promptly schooled him. Second, it all but eliminates the interruption to the flow of the witness’s testimony.

Under the ounce of prevention rule, counsel shouldn’t be cute when it comes to expert disclosure. Some counsel are as unspecific as possible in the Code of Civil Procedure section 2034.260 “statement of general substance” declaration, believing this cleverly “keeps options open.” Thus, “The witness is expected to testify about liability, causation and/or damages.” Very bad idea. At the *Kennemur* sidebar scrum, the responding counsel is immediately on the defensive, sullied by his opacity where the law calls for transparency. And it deprives the responding party of the single easiest answer to the *Kennemur* objection: “Your Honor, it’s right there in my declaration—she was going to offer testimony on this topic. It’s not my fault if counsel didn’t ask any questions about it in deposition.”

Yes, embrace transparency; it is your friend. It is a good practice to produce a short “summary of expected opinions” at the beginning of your expert’s deposition. Mark it as an exhibit. Counsel who grumble that this is too much “helping the other side” misapprehend the situation: it is self-immunization against a potentially fatal disease at trial.

Continued on Page 12...

Mock Oral Arguments...continued from Page 3

Court. Needless to say, they were immensely helpful, particularly because my case involved esoteric issues. They were able to critique my presentation and suggest ways to craft my arguments so they would appeal to the members of the Court. Although I had spent many hours trying to anticipate questions from the Court, they raised questions I had not anticipated, and they helped me formulate answers to those questions. Those former law clerks improved my argument and gave me confidence, which led to a favorable result for my client. (A special feature of my case is that it was argued on Justice Ruth Bader Ginsburg's first day on the Court.)

Since I retired, I have served on panels for mock oral arguments. The attorneys have presented their oral arguments, and the panels have treated the arguments as though we were in an actual court proceeding. We have asked difficult questions, interrupted the attorneys, asked the attorneys to distinguish cases, and asked the attorneys to discuss the ramifications of a decision in their favor. After the argument, we have critiqued such things as the strength or weakness of the arguments, the demeanor of the attorney, and the quality of the attorney's responses to our questions. We have given our opinions regarding whether the judges or justices would be satisfied with the answers the attorneys have given to our questions. Our goal was to improve the presentation the attorney ultimately would make to the appellate court.

A stimulating oral argument can be an exhilarating experience. At its best, oral argument helps the court achieve its goal, which is to make the correct decision. Justice William Brennan once said that oral argument was the indispensable ingredient of appellate advocacy and that his whole notion of the case crystallized at oral argument. For these and other reasons, the appellate attorney has the responsibility to present the best possible oral argument to the court. A mock oral argument can be a significant tool in helping the attorney accomplish that task.

Patti Kitching is a retired Justice of the Court of Appeal, Second Appellate District, Division Three.

"Stay Clear of The Kennemur Objection"...continued from Page 11

At the deposition, listen carefully for the *Kennemur* "cut-off" question: "Have we now discussed at least the gist of all the opinions you have formed in this case?" (Asking for "the gist" rather than "each and every opinion and the bases therefor" will save a great deal of expert pettifogging at the deposition.) Recall, if no "cut-off" question is asked at deposition, then no *Kennemur* objection may be made at trial. Thus, counsel making the objection must be ready to show the judge immediately where in the transcript that question was asked. (It is plainly insufficient to say "I'm sure it's in there Your Honor; I always ask it.") When the "cut-off" question is asked at deposition, and counsel realizes that for whatever reason, the witness's opinion on topic X has not yet come up, she should immediately pipe up: "Counsel, I also expect at trial the witness will offer an opinion on X. You may wish to inquire about that now." Examining counsel who says, "Sorry, too late, she already said she gave me all her opinions, and I need to get to the airport" is unlikely to prevail on that point at sidebar during trial.

Lastly, the moment you realize that your expert's opinion on topic X was not disclosed and the cut-off question was asked in deposition, notify opposing counsel in writing of the omitted or new opinion, and offer to make the expert available for further deposition. Consider offering to pay the associated expense; that shows good faith. Be prepared to cite *Easterby* to the trial judge at sidebar for the proposition that a party is permitted to elicit an opinion that was not disclosed in deposition when opposing counsel was explicitly advised post-deposition of that opinion. And if your expert has now developed critiques of the opposing experts' opinions that were not available to the expert at the time of her deposition, the safest course is to let opposing counsel know in advance and be prepared to disclose those critiques, perhaps in a short expert report. You may not be required to do so, but you may save yourself heartache at trial if you do.

Bottom line: keep your trial moving. Don't let it become a *Kennemur* quagmire.

Hon. Lawrence P. Riff is a Judge of the Los Angeles County Superior Court.

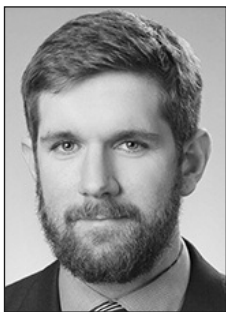
ARE COMMUNICATIONS WITH A LAW FIRM'S IN-HOUSE COUNSEL PRIVILEGED?



Kirsten Hicks Spira

Can you have privileged communications about an ongoing matter with your law firm's General Counsel? Good question. The answer is evolving and not entirely clear. Although historically courts held there was no privilege, more recently courts—including one California court—have concluded that communications between attorneys and their firm's in-house counsel are privileged.

In re Sunrise: The “Fiduciary” Exception to the Attorney-Client Privilege



Alex Smith

Until roughly five years ago, most courts held that communications between an attorney and her in-house counsel about a potential claim by a client were not privileged. These earlier opinions generally reasoned that extending the privilege to these communications would raise a conflict of interest between the firm's representation of its clients and its representation of its own attorneys.

In re Sunrise Securities Litigation, 130 F.R.D. 560 (E.D. Pa. 1989), is representative of this line of cases. There, the law firm Blank Rome, which acted as general counsel to Sunrise Savings & Loan Association, was named as a defendant in multidistrict proceedings after Sunrise became insolvent. Blank Rome attempted to withhold several documents sought by Sunrise's outside directors on the basis that they constituted privileged communications between Blank Rome attorneys and the firm's in-house counsel concerning a potential claim against the firm. The court rejected Blank Rome's position and held that “a law firm's communication with in house counsel is not protected by the attorney client privilege if

the communication implicates or creates a conflict between the law firm's fiduciary duties to itself and its duties to the client seeking to discover the communication.” *Id.* at 597.

Numerous courts extended *Sunrise* to communications with in-house counsel concerning the possibility of a malpractice claim. In *Bank Brussels Lambert v. Credit Lyonnais (Suisse)*, the Southern District of New York held that a law firm could not assert the privilege over emails between firm attorneys and in-house counsel concerning a potential claim by a current client because doing so would “create an inherent conflict against that client.” 220 F. Supp. 2d 283, 207 (S.D.N.Y. 2002). The District of Massachusetts similarly concluded that because a law firm owed a fiduciary duty to a plaintiff trust beneficiary who was its former client, the firm could not withhold communications concerning an internal investigation of the beneficiary's claim against the firm. *Burns ex rel. Office of Public Guardian v. Hale and Dorr LLP*, 242 F.R.D. 170 (D. Mass. 2007).

Although no California state court directly addressed the issue during the 1990s and 2000s, federal courts in California predicted that California courts would follow *Sunrise*. In *Thelen Reid & Priest LLP v. Marland*, No. C 06-2071 VRW, 2007 WL 578989, at *1 (N.D. Cal. Feb. 21, 2007), for instance, the Northern District of California cited *Sunrise* in holding that a law firm's “fiduciary relationship” with a former client “lift[ed] the lid” on communications between the firm's attorneys and its in-house counsel concerning a potential claim against the firm. *Id.* at *7. The following year, the United States Bankruptcy Court for the Northern District of California similarly held that “a law firm cannot assert the attorney-client privilege against a current outside client when the communications that it seeks to protect arise out of self-representation that creates an impermissible conflicting relationship with that outside client.” *SonicBlue Claims, LLC v. Portside Growth & Opportunity Fund* (In re SonicBlue Inc.), Ch.11 Case No. 03-51775-MM, Adv. No. 07-5082, 2008 WL 170562, at *9 (Bankr. N.D. Cal. Jan. 18, 2008).

Continued on Page 14...

Are Communications with a Law Firm's In-House Counsel Privileged?" ... continued from Page 13

Edwards Wildman: California Rejects the “Fiduciary” and “Current Client” Exceptions

Over the last five years, several courts have refused to follow *Sunrise*; instead, they have held that the attorney-client privilege applies to communications between firm attorneys and their in-house counsel. In 2013, for instance, the Massachusetts Supreme Judicial Court declined to recognize a “fiduciary” or “current client” exception to the attorney-client privilege. It held that “the attorney-client privilege applies to confidential communications between a law firm’s in-house counsel and the law firm’s attorneys, even where the communications are intended to defend the law firm from allegations of malpractice made by a current outside client.” *RFF Family P’Ship, LP v. Burns & Levinson, LLP*, 991 N.E.2d 1066, 1080 (Mass. 2013). The next day, the Georgia Supreme Court reached the same conclusion, holding that “the attorney-client privilege applies to communications between a law firm’s attorneys and its in-house counsel regarding a client’s potential claims against the firm” *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.*, 746 S.E.2d 98, 108 (Ga. 2013).

California courts soon followed suit. In *Edwards Wildman Palmer LLP v. Superior Court*, 231 Cal. App. 4th 1214 (Ct. App. 2014), the California Court of Appeal broke with *Sunrise*—and more specifically, the California federal courts’ interpretation of California law—by holding that such communications were privileged. In *Edwards Wildman*, a client fired his law firm, sued for malpractice, and sought to obtain communications between his former attorneys and the firm’s in-house counsel concerning his allegations of malpractice. *Id.* at 1221-22. Although the firm asserted that those documents were privileged, the trial court ordered the firm to produce them. Relying primarily on *Thelen Reid* and *SonicBlue*, the trial court held that “the client’s right to be informed took precedence over any claim of privilege.” *Id.* at 1223.

The Court of Appeal reversed, holding that the “plain language” of the California Evidence Code rendered the communications privileged. *Id.* at 1227-28. Because the

scope of the attorney-client privilege is defined by statute in California, the court explained, it was not at liberty to recognize a “fiduciary” or “current client” exception to the privilege, even if it were inclined to do so. *Id.* at 1231. Moreover, the court explained, an attorney’s consultation with in-house counsel will not necessarily be adverse to the client’s interests; to the contrary, it emphasized that their interests “are likely to dovetail insofar as the attorney seeks to resolve the dispute to the client’s satisfaction, or determine through consultation with counsel what his or her ethical and professional responsibilities are in order to comply with them.” *Id.* at 1233-34.

While the issue remains unsettled in many jurisdictions, several courts have followed *Edwards Wildman* in treating communications between firm attorneys and their in-house counsel as privileged. See, e.g., *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 326 P.2d 1181 (Or. 2014); *Garvy v. Seyfarth Shaw, LLP*, 966 N.E.2d 523 (Ill. App. Ct. 2012); *Stock v. Schnader Harrison Segal & Lewis LLP*, 35 N.Y.S.3d 31 (N.Y. App. Div. 2016).

Conclusion

The trend towards treating these communications as privileged is a welcome development. Lawyers are frequently faced with complex legal issues and risk sanctions, disqualification, or even personal liability. Instead of encouraging a lawyer to obtain legal guidance about how to navigate these risks, the fiduciary exception penalizes her for seeking advice from her firm’s in-house counsel. That penalty is not only unfair to the lawyer, but may be adverse to the client’s interests insofar as it discourages lawyers from obtaining valuable guidance that may resolve difficult ethical issues.

Hopefully, the tide has turned for good on the fiduciary exception.

Kirsten Hicks Spira is a partner, and *Alex Smith* is an associate, in the Los Angeles office of Jenner & Block LLP.

UNANSWERED QUESTIONS – THE ARBITRABILITY OF PUBLIC INJUNCTIVE RELIEF



Kelsey Leeker

In April 2017, the California Supreme Court handed down a decision that many thought would clarify whether claimants in arbitration may seek public injunctive relief under California’s Unfair Competition Law (“UCL”), False Advertising Law (“FAL”) and Consumer Legal Remedies Act (“CLRA”), despite the common law *Broughton-Cruz* rule. But the decision—*McGill v. Citibank, N.A.*, 2 Cal. 5th 945 (2017)—left the question mostly unanswered, possibly inviting U.S. Supreme Court review in the future.

1. *Broughton-Cruz*

California’s *Broughton-Cruz* rule—named after *Broughton v. Cigna Healthplans of California*, 21 Cal. 4th 1066 (1999) and *Cruz v. PacifiCare Health Systems, Inc.*, 30 Cal. 4th 303 (2003)—is that agreements to arbitrate claims for public injunctive relief under the UCL, FAL, or CLRA are not enforceable. The rationale behind this rule is that arbitration, which is meant to expeditiously and efficiently resolve private disputes, is not the appropriate forum in which to remedy a public wrong. However, since the 2011 United States Supreme Court decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), the Ninth Circuit, the Central District of California, and multiple state courts have all held that the Federal Arbitration Act (“FAA”) preempts the *Broughton-Cruz* rule. See *Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928, 937 (9th Cir. 2013); *Nelsen v. Legacy Partners Residential, Inc.*, 207 Cal. App. 4th 1115, 1136 (2012); *Martinez v. Leslie’s Poolmart, Inc.*, No. 8:14-CV-01481-CAS, 2014 WL 5604974, at *6 (C.D. Cal. Nov. 3, 2014); *Valdez v. Terminix Int’l Co. Ltd. P’ship*, No. CV 14-09748 DDP

(EX), 2015 WL 4342867, at *7 (C.D. Cal. July 14, 2015).

In *Concepcion*, the U.S. Supreme Court held that the FAA preempts state laws that prohibit arbitration of a particular type of claim. 563 U.S. at 341 (holding that the FAA preempted a California judicial rule classifying most class action waivers in consumer contracts as unconscionable). *Concepcion* reasoned that “[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.” *Id.* After this decision, there was a lingering question in California (and courts disagreed) as to whether claimants could seek public injunctive relief under the UCL, FAL, and CLRA in arbitration.

2. *McGill v. Citibank*

In *McGill v. Citibank*, plaintiff Sharon McGill opened a credit card account with defendant Citibank and purchased credit protection for the account. Under that plan, Citibank agreed to defer or credit certain amounts where there were extenuating circumstances, such as the loss of a job. The plan included an arbitration provision containing a class action waiver. *McGill* lost her job, but did not receive the benefits advertised under the credit protection plan. She filed a class action based on Citibank’s marketing of the plan, alleging claims under the UCL, FAL, and CLRA. She sought both damages and an injunction against the allegedly illegal marketing.

Citibank filed a petition to compel arbitration. The trial court granted the petition as to all claims other than those for public injunctive relief, following *Broughton-Cruz*. The Court of Appeal reversed and ordered the trial court to order all of McGill’s claims to arbitration, holding that *Concepcion* effectively overruled *Broughton-Cruz*.

The California Supreme Court granted review in order to consider the continued viability of *Broughton-Cruz*, but ultimately decided that *Broughton-Cruz* was not at issue. The court instead ruled for McGill based on her argument that the arbitration provision precluded her from seeking public injunctive relief in any forum. The

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Arbitrability of Public Injunctive Relief ... continued from Page 15

California Supreme Court stated that, whereas the *Broughton-Cruz* rule applies only where the parties agreed to arbitrate requests for such relief, the parties here stipulated that the arbitration clause prevented McGill from seeking public injunctive relief in arbitration. The court held that “the waiver in a predispute arbitration agreement of the right to seek public injunctive relief under these statutes would seriously compromise the public purposes the statutes were intended to serve. Thus, insofar as the arbitration provision here purports to waive McGill’s right to request in any forum such public injunctive relief, it is invalid and unenforceable under California law.” *McGill*, 2 Cal. 5th at 961.

Citibank understandably argued that a California rule precluding enforcement of a class action waiver was preempted by the FAA. The court rejected that argument as well, squaring its decision with *Concepcion* by reasoning that arbitration agreements, like other contracts, may be invalidated by generally applicable contract defenses, but not by defenses that apply only to arbitration. The court concluded that McGill presented a generally applicable contract defense—that a law established for a public reason cannot be contravened by a private agreement—which therefore was not preempted by the FAA.

3. Going Forward

What does this mean in practice? First, *McGill* does not bar all class action waivers, just waivers that preclude seeking public injunctive relief in any forum. Thus, a broad arbitration clause mandating that parties arbitrate all claims would be unenforceable as applied to UCL, FAL, and CLRA claims seeking public injunctive relief because such a clause would prevent plaintiffs from seeking such relief in any forum due to the *Broughton-Cruz* rule’s bar on arbitrating such claims because they seek relief that primarily benefits the public. Accordingly, future arbitral class action waivers should be as limited in scope as possible by doing no

more than barring class litigation or class arbitration.

Many questions remain unanswered after *McGill*. Can the injured consumer choose to seek public injunctive relief in arbitration if she wishes? Or must the wronged party seek public injunctive relief in court while arbitrating all other claims? And will the U.S. Supreme Court allow California courts to continue down the path of resisting mandatory arbitration provisions, despite the clear arbitration-friendly trend of the high court’s cases in recent years? The *McGill* decision effectively leaves the *Broughton-Cruz* rule to live another day, meaning that the U.S. Supreme Court will likely have to weigh in on the issue. In fact, the U.S. Supreme Court has granted certiorari and will hear argument in October 2017 in three consolidated cases addressing whether employers can enforce mandatory arbitration clauses with class action waivers in employment contracts. See *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 85 U.S.L.W. 3343 (U.S. Jan. 13, 2017) (No. 16-285); *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), *cert. granted*, 85 U.S.L.W. 3343 (U.S. Jan. 13, 2017) (No. 16-300); and *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, 85 U.S.L.W. 3343 (U.S. Jan. 13, 2017) (No. 16-307).

Your move, SCOTUS!

Kelsey Leeker is an associate in the Los Angeles office of Skadden, Arps, Slate, Meagher & Flom LLP.

YLD UPDATE



Jeffrey A. Atteberry



Jen Cardelus

As with the rest of the ABTL, the summer has been a time of transition for the YLD. For the 2017 term, Jeffrey Atteberry will serve as chair of the YLD, with support from Jen Cardelus as vice-chair. The YLD has an exciting year planned with a number of events focused on providing opportunities for young lawyers to interact with the judiciary, engage with other young lawyers in the community, and strengthen our ties with the larger legal community. As a first step, the YLD will be led

by an Advisory Committee of YLD members who will organize brown-bag lunches, judicial mixers, practical panels, community service events, and other social functions. YLD members who are interested in taking a more active role in organizing these events are encouraged to contact Jeff and Jen.

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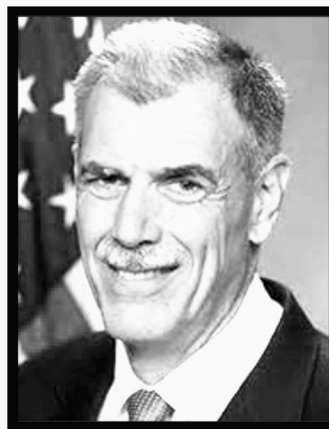
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