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Civil Discovery Sanctions in California Courts — "The 3:10 to Discoveryville"

A Civil Discovery Calendar is like a "psychological western," with a lawman that believes "you have to follow the law," and the outlaws who believed "ya gotta do what ya gotta do, and every man will take whatever he can…"(inspired by "3:10 to Yuma.")

A contested civil discovery motion conjures up visions of the three-way gunfight scene in the cemetery in the classic Spaghetti Western "The Good, the Bad and the Ugly." The parties, attorneys and unfortunately sometimes the judge focus on the gunfight. Overlooked are the real issues giving rise to the discovery contest.

Hon. Socrates P. Manoukian

Of my over 21 years as a Santa Clara County Superior Court Judge, I have supervised civil discovery calendars for almost 6 years. I actually enjoy the civil discovery calendar. But with the good comes the bad, and that requires that the discovery judge must be able to maintain proper order and decorum in the legal profession. I would like to my five top tips to keep in mind

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Judgments and Pre-Judgments: Trying the Case in Court After the Trial by Public Opinion - Part 1

Talking with Allen Ruby about some of his better-known cases is like having a chess Grand Master explain his strategy in his past matches. In the first installment of this interview, Allen reveals some of the "inside story" on the Barry Bonds case and discusses difficult decisions made in defending San Jose Mayor Ron Gonzales on corruption charges. In the second installment, which will appear in the next issue of ABTL Report, Allen will discuss strategy decisions in the Catholic Church child molestation cases and representing the NFL against a well-respected adversary like Al Davis of the Oakland Raiders.

Allen Ruby

MR. ZELDIN: Based on your experience, are there any overall rules that you've developed for lawyers representing clients who are prejudged, either positively or negatively?

MR. RUBY: I wouldn't call them rules, because I wouldn't presume to say that anybody else would pay any attention to this. But I believe, that in the context we're talking about, the opinions or impressions that people have about a star baseball player, or a beloved football franchise, or religious institutions are opinions and impressions that are formed for the most part over a long period of time, and they're often strongly held views.

So for at least this lawyer to think that I can change those views with an hour of voir dire, or 90 minutes of opening statement, or two weeks of testimony, or a closing argument, would be one heroic point of view, and I don't think a good guide to action.

I think the challenge is to recognize or try to develop your best estimate of what those impressions likely are and

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while seeking discovery sanctions.

Number Five: A Failure to Remember That Civil Discovery Is Supposed to Be Civil

Before every civil discovery calendar, I began with the same speech. I remind the litigants that civil discovery is supposed to be civil. Judges have been discussing the breakdown in civility in the legal profession since I graduated from law school in 1977, but if there is such a breakdown it is because the judges let it happen. I inform the litigants that ad hominem attacks in the papers distract the attention of the Judge. Business & Professions Code, § 6068(f) states: "It is the duty of an attorney to do all of the following:… To advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged." "As an officer of the court the lawyer should support the authority of the court and the dignity of the trial courtroom by strict adherence to the rules of decorum and by manifesting an attitude of professional respect toward the judge, opposing counsel, witnesses and jurors." *Hawk v. Superior Court* (1974) 42 Cal.App. 3d 108, 123. I inform the lawyers that I have amassed a collection of vitriolic letters and audio recordings of words that a lawyer probably wishes he or she could take back. "Whenever a judge has personal knowledge that a lawyer has violated any provision of the Rules of Professional Conduct, the judge shall take appropriate corrective action." Canon of Judicial Ethics,3D(2). I end the speech with an observation that "the opposing lawyer on the second biggest case of your career is going to be the trial judge on that biggest case of your career."

When I call a case, I try to know where the attorneys are sitting. If they are sitting next to each other, I am certain that they are getting along. However, many times they are sitting on opposite sides of the courtroom, glaring at each other as they approach the counsel tables.

Number Four: Failure to Comply with Technical Requirements for the Discovery Motion

The Code of Civil Procedure1 and the California Rules of Court are the primary sources of authority to impose sanctions.

Many times, a party seeking discovery sanctions is so preoccupied with the bringing of the motion that it forgets to comply with the technical requirements of the motion. Many motions require a Separate Statement that is compliant with Rule of Court 3.1345, and every discovery motion should start with a review of this Rule to determine whether it applies.

Frequently overlooked is Rule 3.1346, requiring personal service of motions to compel answers to deposition questions or to compel production of documents from nonparty deponents.

Motions to compel a party to further answer deposition questions must be brought within 60 days from the completion of the transcript. Section 2025.480(b). There is a 45 day time limit within which to file and serve motions to compel further responses to interrogatories (Section 2030.300(c)), production of documents (Section 2030.310(c)) and requests for admissions (Section 2033.290(c).) Failure to comply with this jurisdictional requirement will expose the moving party to a request for monetary sanctions from the responding party. It is therefore important for counsel to confirm in writing all agreements extending these time limits (although courts have held that the doctrine of equitable estoppel may apply in the absence of such confirmation; *see Pelton-Shepherd Industries, Inc. v. Delta Packaging Products, Inc.* (2008) 165 Cal.App. 4th 1568, 1585).

Do not leave these matters until the last minute. Leave time for trouble.

Number Three: An Inability To State the Relevance of the Discovery Being Sought

Lawyers occasionally forget the most important questions in generating a discovery plan: "Is the discovery that you are seeking relevant under the applicable standards of your forum? Do you really need the discovery you are seeking in the first place? If you succeed in obtaining all the discovery you seek, what are you going to do with it?" I am no longer startled by the number of times an attorney cannot answer these basic questions.

Bringing a discovery motion to compel the production of otherwise irrelevant evidence can expose the moving party to discovery sanctions because a court will find that the motion was not brought with substantial justification.

Number Two: Failure to Provide Code Compliant Notice of the Motion

The main reason why the vast majority of motions seeking discovery sanctions do not succeed is because of the failure to give proper code compliant notice of the motion. All relief sought by the motion, including whether the moving party requests sanctions, should be stated in the notice of motion (and, if possible, identified in the title of the motion), not just argued in the supporting memorandum. Many judges, this one included, believe that proper notice requires the *amount* of the sanctions sought to also be included in the notice of the motion.

Ordinary civil motions have similar notice requirements: The must give written notice, stating when the motion will be heard, the grounds upon which it will be made, and the papers, if any, upon which it is based. (Sections 1010, 1005.). The court, however, may overlook a defective notice if the supporting papers make clear the grounds for the relief sought. (*Solv-All v. Superior Court* (2005) 131 Cal.App.4th 1003, 1008-1009.) The purpose of the notice requirements is to cause the moving party to "sufficiently define the issues for the information and attention of the adverse party and the court." (*Luri v.*

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Greenwald (2003) 107 Cal.App.4th 1119, 1125.)

Proper notice is essential, however, where discovery sanctions are sought. Section 2023.040 specifies: "A request for a sanction shall, in the notice of motion, identify every person, party, and attorney against whom the sanction is sought, and specify the type of sanction sought. The notice of motion shall be supported by a memorandum of points and authorities, and accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought." Rule 2.30(b) and (c) of the Rules of Court contain similar requirements.

The four types of discovery sanctions are specified in Section 2023.030. These are identified as: monetary sanctions, issue sanctions, evidence sanctions and terminating sanctions. You will be well advised to never use the noun "sanctions" without any or all of the adjectives "monetary" or "issue" or "evidence" or "terminating."

Monetary Sanctions: The purpose of monetary discovery sanctions is to compel a party to pay the costs incurred by other parties if the offending party acts without substantial justification in discovery disputes.

Issue Sanctions: This type of sanction designates that certain facts will be taken as established in accordance with the claim of the party adversely affected by that misuse of the discovery process,

Evidence Sanctions: this type of sanction precludes an offending party from introducing designated matters into evidence.

Terminating Sanctions: the most drastic of discovery sanctions can result in a striking out of pleadings or parts of pleadings, staying proceedings, dismissing the action, entering a judgment by default or by the imposition of a contempt sanction.

The notice of motion must *identify the person, party and attorney against whom the sanction is sought.* A notice of motion stating that the moving party "will seek sanctions," and nothing more, is not code compliant and will lead to the denial of discovery sanctions. The best practice is to state the full name of the offending party. Merely identifying the offending party as "Defendant" does not comply with these notice requirements if there are multiple defendants. Similarly, he notice must specify the type of sanction sought. If it merely seeks "sanctions" without specifying the type, it is not code compliant and the request will be denied.

Number One: Failure to Cite Appropriate Authority for the Sanctions Request

Section 2023.040 requires that the notice of the motion to be *supported by a memorandum of points and authorities and accompanied by a declaration* setting forth facts supporting the amount of any monetary sanction sought.

A common reason for the denial of sanctions is the failure to cite proper authority in support of the request for

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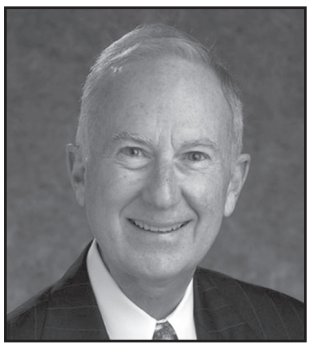
Exercising Your ADR Options

Business lawyers are accustomed to providing for alternative dispute resolution in contracts. Common practice has been to require parties first to go to mediation; and if they do not succeed at mediation, then to submit the dispute to arbitration.

In recent years, lawyers and clients have re-examined this approach. As a result, a new process has been created and an existing, but previously overlooked, process has become more popular. This article reviews the various processes and the considerations with respect to each of them. It begins with commercial arbitration and then turns to judicial reference and binding mediation. It concludes by discussing traditional mediation and the steps that should be taken to satisfy the legitimate expectations of mediating parties.



Michael P. Carbone

Commercial Arbitration

The principal driver of change in the ADR world has been disillusionment with commercial arbitration. There is a feeling that arbitration is longer an efficient, time-saving and inexpensive process. Common complaints are that demands for arbitration have taken on the form of pleadings, that there is excessive motion practice, and that discovery is allowed to get out of control. Arbitrators are reluctant to exclude evidence that is not truly relevant, but that might still be considered "material to the controversy" for fear that it may cause the award to be vacated. (See CCP § 1286.2(a)(5).) For that reason and perhaps others, the hearing can take longer than it should. There are also time and cost concerns related to the arbitrators. The most sought-after neutrals are very busy, which makes it difficult to obtain a prompt hearing. Arbitrators' fees can be high.

Parties may have to go to court to litigate arbitrability, and return to court to enforce an award. Losing parties may seek to vacate an award; one ground for vacating an award is refusal by the arbitrators to hear evidence "material to the controversy." Another ground may be that an arbitrator failed to disclose all potential conflicts. Under CCP § 1281.9(a), "…a proposed neutral arbitrator must disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial.… The statute spells out a number of matters concerning prior relationships with the parties or their lawyers, and also refers to "matters required to be disclosed by the ethics standards for neutral arbitrators adopted by the Judicial Council pursuant to this chapter." (For these standards, see *Appendix*

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to California Rules of Court, Division VI.) If the neutral or the provider organization fails to make a required disclosure, vacatur of the award is mandatory. No showing of prejudice need be made. (See CCP § 1286.2 (a)(6) and *Mt. Holyoke Homes v. Jeffer Mangels Butler & Mitchell* (2nd Dist., 2013) 219 Cal.App. 4th 1299,1311.)

For many parties, the crowning blow is that in almost all cases the arbitrator is not required to follow the law. (*See Moncharsh v. Heily & Blasé* (1992) 3 Cal. 4th 1, 6.) Thus in a complex case, after spending several months or even years, and a great deal of money, the losing party may be faced with an award that is contrary to law and have no further recourse.

These problems do not mean that commercial arbitration should or will disappear. Arbitration providers have improved their rules. Contract drafters have revised their arbitration agreements to limit discovery, to require hearings within a short timeframe, and to limit the number of days for the hearing. There can even be a provision that requires the arbitrators to follow the law. (See *Cable Connection Inc. v. DIRECT TV* (2008) 44 Cal. 4th 1334.) With these improvements, a well-managed arbitration remains a viable option. Nevertheless, some lawyers have come to the conclusion that in California there are better forms of private adjudication available.

Judicial Reference

Judicial reference under CCP § 638 avoids most of the problems that are associated with commercial arbitration. Because an action at law must be filed, it operates within the judicial system and the law is fully applicable. The process is straightforward. If the parties have agreed in writing, which may be done either pre-dispute or post-dispute, the court will appoint a general referee. The referee decides all issues of fact and law and issues a statement of decision. The parties may also require findings of fact and conclusions of law. A judgment will be entered that may be reviewed on appeal, just as if the case had been decided by the court. (See CCP §§ 644, 645.)

Because referees are subordinate judicial officers, the California Arbitration Act, including the disclosure rules for arbitrators, does not apply. Instead, referees are required to comply with the disclosure obligations that are contained in California Rule of Court 3.904 and with Canon 6 of the Code of Judicial Ethics. Failure on the part of the referee to comply would be considered an irregularity in the proceedings that would provide grounds for a new trial if the rights of a party had been substantially affected. (See CCP § 657.)

The advantages of judicial reference are:

• The parties have the opportunity to choose one or more decision-makers with expertise in the subject matter.

• The hearing will almost always be private.

• The process should be faster and more convenient than going to court.

• Discovery proceeds as if the case were being tried in court, except that it will be under the control of the referee, rather than a law and motion judge.

• The *California Evidence Code* and the *California Code of Civil Procedure*, as well as the applicable rules of court all apply.

• There is a right of appeal from the judgment, and the decision may not be set aside in the way that an arbitral award might be.

Binding Mediation

The term "binding mediation" seems at first to be an oxymoron, but the parties enter into it voluntarily and by mutual agreement. The word "binding" applies only to the result of the process.

Binding mediation was judicially accepted in *Ryan N. Bowers et al. v. Raymond J. Lucia Companies, Inc.* (4th Dist., 2012) 206 Cal. App. 4th 724. In *Bowers*, the court affirmed a judgment that was based on a "Settlement Agreement and Release" that provided for "binding mediation," also referred to as "mediation/binding baseball arbitration." The terms of the settlement were:

• The parties would mediate for one day and if they had not settled, the mediator would be "empowered to set the amount of the judgment."

• Plaintiffs would give the mediator their final demand, which would have to be between $100,000 and $5,000,000, and defendant would give the mediator its final offer, which would have to be within those same parameters.

• The mediator would then determine the final amount (again within the same parameters) which would have to be equal to either the plaintiffs' final number or the defendant's final number.

• This "binding mediator judgment" would then be entered as a legally enforceable judgment in the Superior Court.

The parties went to mediation, but failed to settle. When the mediator asked each side for its final number, plaintiffs demanded $5,000,000 and the defendant offered $100,000. The mediator chose $5,000,000 as the amount of the judgment to be entered.

Plaintiffs petitioned the Superior Court to confirm the mediator's "award." In opposition, defendant argued that the court could not confirm the alleged award because the neutral was not an arbitrator. The court, however, entered the judgment under CCP § 664.6, which provides in part that:

• "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement."

The Superior Court reasoned:

• The parties had agreed in writing that the mediator would decide the amount of the "binding mediator judgment," which would then be entered in court.

• The case involved sophisticated parties and knowledgeable counsel, who could have provided for an arbitration, complete with witnesses and other evidence, if that

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had been what they intended.

• The parties agreed to binding mediation, rather than a two-step mediation and arbitration process.

• There was confusion about the terminology, but defendant admitted that the mediator had the authority to decide the case if the parties did not settle.

• Defendant admitted that the mediator would have the authority to choose between a range of $100,000 and $5,000,000 "after we present our cases to him or her during mediation."

• The use of the term "binding baseball arbitration" was meant to allow the mediator to set the amount of the judgment by choosing one party's number or the other, subject to the parameters that had been agreed upon.

The Court of Appeal affirmed the judgment, holding that (a) the binding mediation provisions in the parties' settlement agreement were not too uncertain to be enforceable; and that (b) binding mediation is neither constitutionally nor statutorily prohibited.

The particular process that was agreed to in *Bowers*, including baseball arbitration with wide parameters, would probably not be suitable in all cases. Subject to that *caveat* however, binding mediation may be an attractive alternative for some cases and with some mediators. It offers speed, economy, and the opportunity to choose a neutral who can first mediate and then, if necessary, decide. It also offers finality because there is no award that could potentially be vacated by a court. However, because the mediator may also be a decision-maker, parties should do a more thorough conflict check than they would perform for the typical mediation.

Traditional Mediation

Although mediation is still the most widely used of form of ADR, anecdotal evidence indicates some degree of dissatisfaction with it. There is a question, at least in the mind of this author, whether parties are using mediation because they believe in it, because it has become a habit, or because they are being ordered to mediate by the courts (or required to do so by contract). There is also a question whether some lawyers really know what to look for in a mediator and how best to choose one.

To understand the problem, it is helpful to look back at two important events that took place in recent years. In 2008 the ABA Dispute Resolution Section's Task Force on Improving Mediation Quality issued a Final Report concerning the expectations of frequent and sophisticated users of mediation. The Report can be found at www.americanbar.org/content/dam/aba/migrated/dispute/ documents/FinalTaskForceMediation.authcheckdam. pdf. Based upon surveys, interviews, and questionnaires the Task Force reported that four elements were found to be necessary to a high quality mediation. They were: (a) preparation by the mediator; (b) customization of the process; (c) analytical assistance from the mediator; and (d) persistence by the mediator.

In the 2009 article "A Perfect Storm is Gathering" (https://imimediation.org/a-perfect-storm-is-gathering) the authors, who are a group of twelve corporate counsel with national public companies, wrote: "What worked for a few mediators and providers in the past in terms of vague and general reputation will not sustain them for the future. In the past, the parties' choice of mediator was based on perception — word of mouth, anecdotal impressions, whether someone they knew thought they were 'good.'… The world has changed. Uncertain and imprecise forms of endorsement will no longer be adequate for discerning General Counsel and their staffs.

"Corporate counsel's growing appetite for transparency and authenticity will drive demand for access to prior user feedback before making a choice of an individual mediator or a provider institution. Those wishing to maintain the status quo, who are unwilling or unable to offer credible independent feedback from prior users up front, risk being selected less often, however well-known or experienced they may be. Transparency, authenticity and trust are three of the eight choreographers of the New Economy."

These statements appeared to point to a failure on the part of some mediators to deliver the high quality that should accompany a high reputation. The authors may well have been mindful of the four elements that were spelled out by the ABA Task Force.

It appears to this author that as of today the situation with regard to mediation quality has probably not improved and that at best it remains the same. There is usually no customization of the process because the typical mediation is conducted almost entirely in separate caucuses. Lawyers report that some mediators fail to prepare, even to the point of not reading briefs; and that they provide little or no analytical assistance. They simply convey numbers back and forth.

Lawyers today should know what makes a high quality mediation, and they should seek out the mediators who provide it. The transparency and the credible endorsements that the authors of "A Perfect Storm is Coming" called for are readily available. Leads can be obtained by word of mouth or found online.

See www.mediate.com and http://mediationsociety.org/membership.php.

Regardless of the source, leads should always be carefully investigated. The best mediators will have recommendations and endorsements, can provide references, and can also be interviewed.

Clients are making new demands on outside counsel with respect to the use of ADR, but their demands are not impossible to satisfy. It is matter of becoming familiar with the available options and making informed choices. The "Perfect Storm" has arrived, and the new demands are being passed on to the neutrals. Not only must they be transparent, credible, and cost-effective, they must be open to innovation. We are living in a "disruptive" environment, and technology is not the only reason. It is time to adapt.

Michael P. Carbone is a dispute resolution specialist who practices primarily in the San Francisco Bay Area. His website is found at www.mpcdisputeresolution.com.

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the specific sanction being sought. Here, even experienced practitioners come up short because they fail to cite the correct statutory authority for the imposition of sanctions. Section 2023.010 is a nonexclusive list of acts that constitute misuse of the discovery process, and does not itself set forth any provisions regarding the issuance of a monetary sanction. Section 2023.20 covers failure to meet and confer, and authorizes sanctions where a meet and confer obligation was not fulfilled. Note that a meet and confer must be meaningful. In a recent case, an e-mail sent by an attorney to the opposing counsel contained a line to the effect that "I have mistletoe hanging from the seat of my pants." This language at best shows there was no genuine meet and confer, and at worst could lead to a report to the State Bar. Section 2023.030 provides that sanctions may be imposed for misuses of the discovery process "[t]o the extent authorized by the chapter governing any particular discovery method or any other provision of this title." As such, section 2023.030 does not provide an independent basis for an award of sanctions.

Also cited in support of requests for monetary sanctions are (without subsections) Code of Civil Procedure, §§ 2030.300, 2031.310, 2031.320 and 2033.290. But a party filing an unopposed discovery motion may learn that the court cannot impose sanctions under these sections (specifically, §§ 2030.300(d), 2031.310(h), 2031.320(b) and 2033.290(d)) because, since no opposition was filed, the non-moving party did not "…unsuccessfully make[ ] or oppose[ ]…" the motions. The correct authority in this situation is Rule of Court 3.1348(a) which states: "The court may award sanctions under the Discovery Act in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed."

Another common error is the citation of authority for the wrong motion. Quite often the moving party will cite the code sections pertaining to compelling *further* responses when there were no responses at the outset, or will cite the sections pertaining to compelling initial responses when the motion is to compel *further* responses.

A code compliant request for monetary sanctions must also include a declaration setting forth facts supporting the amount of any monetary sanctions sought. This must include an hourly rate and the number of hours used in the preparation of the motion. See *Serrano v. Priest* (1977) 20 Cal.3d 25, at pages 48-49. Many times counsel will put the argument and the memorandum of points and authorities but not under penalty of perjury in the declaration. It is also common that declarations state the hours anticipated to prepare reply papers and appear at hearing, but the courts does not grant speculative monetary sanctions. Sanctions should be awarded only for expenses actually incurred. (See *Tucker v. Pacific Bell Mobile Services* (2010) 186 Cal.App.4th 1548, 1551.) If a party does orally argue before the Court, the moving party may bring up the issue of further sanctions at that time.

Finally, about one in five ex parte applications to specially set discovery motions seek the imposition of sanctions of some type during the hearing on the *ex parte* application. Section 2023.030 states in relevant part, that "[t]he court, after notice to any affected party, person, or attorney, and after opportunity for hearing, may impose [monetary] sanctions." A sanction order issued ex parte is void. *Parker v. Wolters Kluwer United States, Inc.* (2007) 149 Cal.App. 4th 285, 296.

A discovery judge should not be concerned with your own subjective intent of whether you believe "you have to follow the law" or you believe "ya gotta do what ya gotta do. "A judicial proceeding is not to be treated by a party as a game of blindman's buff in which the participants may enter or withdraw at will. It is successor to the duel, in which, after the challenge had been accepted, both parties were obliged to comply with the code duello and to stand on the line until the deadly discharge. Diligence is the watchword and to be on the alert is the constant directive." *Elms v. Elms* (1946) 72 Cal.App. 2d 508, 514.

No one case or one issue should be so important that you unnecessarily jeopardize your client or yourself to discovery sanctions. Remember, the next time you see your opponent in a bitterly contested discovery matter, your first words might be "Good Morning, Your Honor."

Mr. Manoukian is a Judge of the Superior Court of Santa Clara County.

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then see in the best case how those can be deployed on behalf of your client, or at least how the evidence and the law can be presented so you're not bumping head on into views that people have formed over a long period of time.

If there are jurors who are 49er fans, to think that this lawyer at least can somehow transform them to Cowboy fans, or at least make them less enthusiastic about the 49ers, isn't a very good guide to action.

I think the more constructive line of thinking is what's our best guess as to the impression that the jurors bring into the courtroom and how can we avoid a head-on collision between those views or impressions and values and the point of view we're trying to be persuasive about.

MR. ZELDIN: I'd like to talk first about the Barry Bonds criminal trial. What was he accused of?

The ABTL thanks Behmke Reporting & Video Services (415-597-5600; depos@behmke.com) for its help with this transcript and its generous support of ABTL projects.

MR. RUBY: He was accused of multiple counts of making a false statement to a grand jury. It's often referred to as perjury, but it's actually a different statute. But for purposes of our discussion, the elements are the same. And he was accused of one count of obstruction of justice for making

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JAMES YOON

On PATENTS

The passage of the America Invents Act (AIA) in 2011 not only altered the U.S. patent system but also fundamentally changed the dynamics of patent litigation. Specifically, the AIA dramatically altered how patent defendants view and respond to the filing of a patent case. Defendants recognize that the AIA provides a faster and less expensive path to victory in patent cases. For example, the AIA greatly enhances defendants' ability to challenge the validity of patents outside the courtroom in "post grant" proceedings before the U.S. Patent Office such as *inter partes review* (IPR) or review of covered business method patents (CBM). This has empowered defendants — who in the past often felt like hostages of the patent system — to stand up to patent holders when they believe the patent infringement allegations lack merit and/or they believe that the patent holder's royalty demands are excessive.

This has caused the popularity of IPRs and CBMs to soar. In September 2012, 25 IPRs and CBMs were filed. In December 2013, just over a year later, more than 110 IPRs and CBMs were filed. The latest statistics indicate the patent office grants IPR and CBM petitions almost 80% of the time. Moreover, the AIA favors litigation stays pending post grant proceedings, and post-AIA courts have stayed litigations pending post grant review more than 50% of the time. The petition grant and stay statistics demonstrate the high likelihood that the issue of patent validity can be resolved without a defendant being subjected to expensive court proceedings on the myriad issues associated with patent cases. In effect, IPRs and CBMs allow many (but certainly not all) defendants to bifurcate patent validity from the other issues of a patent case and allow the bifurcated issue of patent validity to be resolved earlier and with less expense.

Even more striking are the actual *final* results from the patent office. As of the beginning of March 2014, the patent office had reached a final decision on 11 IPRs and 8 CBMs. *In all but three of these* proceedings, the patent office cancelled all the claims at issue. Overall, the patent office cancelled 95.2% of claims for which it instituted a patent office trial, and 82.9% of the patent claims originally challenged by the patent defendant. An almost 83% "kill ratio" is an incredible percentage in patent litigation, where patents are "presumed valid" and where juries are traditionally hesitant to overturn the decision of the U.S. patent office to grant a patent.

The popularity and early success of IPRs and CBMs has transformed how defendants view patent cases and interact with patent holders. The significant possibility that an IPR/CBM petition will be granted and that a district court will stay the case pending patent office review has offered defendants the hope that they can "win" a patent case without the expense of traditional litigation. This has strengthened the resolve of defendants, and reduced the amount of money they are willing pay to settle "nuisance" litigation.

The popularity and early success of IPRs and CBMs have also impacted how patent plaintiffs view cases and the potential upside of litigation. The new procedures increase plaintiffs' costs and can delay any positive outcome in litigation. And until the IPR/CBM process is completed, the defendant may be bullish on the litigation and thus unwilling to pay plaintiffs substantial royalties. As a result, the IPR/CBM process will probably reduce the number of patent cases overtime. On the positive side, this should reduce the number of cases on meritless patents. On the negative side, the IPR/CBM process may discourage smaller companies and individual inventors from enforcing their patents because of the increased expense involved.

James Yoon

It is important to note that IPRs and CBMs are not a panacea for defendants. They carry significant costs and risks. First, while less expensive than patent litigation, IPRs and CBMs are not cheap. The cost can exceed $500,000 through the patent office trial on a single patent. Second, they increase the importance of developing a strong defense to a patent. A defendant whose petition is denied, or who goes through a patent office trial and has the patent office confirm the validity of the plaintiff's patent claims, is in a worse position than the defendant who elected not to file a petition with the patent office due to the estoppel the AIA attaches to IPR and CBM proceedings. In settlement negotiations, the plaintiff will use the failed petition to demand more money. At trial, the plaintiff will attempt to use the failed petition to reinforce the importance of the patent to the jury and, potentially, to argue that the defendant was willfully infringing a patent that the patent office has confirmed is valid and enforceable. Accordingly, it is vitally important that defendants fully evaluate the strength of their invalidity position and alternative strategies with experienced counsel before filing a petition for an IPR or CBM.

James Yoon is a partner with the Palo Alto office of Wilson Sonsini Goodrich & Rosati. jyoon@wsgr.com

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the statements that formed the substantive counts of false statements to a grand jury.

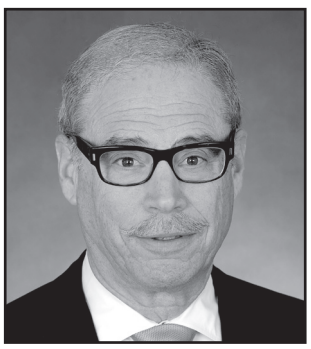
MR. ZELDIN: What did you think were the public's preconceptions that affected the case?

MR. RUBY: As an avid reader of sports pages for a long time, I thought there was a good likelihood the jurors would have formed views of him and his alleged conduct that were largely shaped by the media.

And so to the extent that he had been the target of — and this is putting it mildly — criticism from the media for a variety of things over the years, I thought that might be part of the environment that we needed to deal with.

MR. ZELDIN: Were you more concerned with the allegations of his use of steroids or with the stories about him being abrasive as a personality?

MR. RUBY: We thought that the media environment before the trial started was more complex in terms of the things with which he was charged than it was in terms of attacks on his personality.



Joel Zeldin

Again, as a long time reader of sports journalism and sports media, I thought that the attacks on personality, the attacks on character were not complex and all organized themselves around some repetitive ideas, whereas the reporting of the alleged violations were somewhat more nuanced.

MR. ZELDIN: In what ways were they more nuanced?

MR. RUBY: Once criminal charges were in the offing, and once criminal charges were filed, there were substantial parts of the media that made an effort to present something less than a signed and sealed adjudication of the case. Not everybody, not everywhere; but there was, I thought, a not insubstantial effort.

MR. ZELDIN: Were you concerned about the perceptions that super athletes like Bonds were taking steroids, and if you believed that he was taking steroids, it's not too hard to believe that he testified untruthfully before the grand jury when he said he didn't take them?

MR. RUBY: That was always a concern, that if people had formed the view that he had behaved in a certain way, then the grand jury testimony sort of fell into place with that point of view.

In talking about the public perception, what we were concerned about — I think in the Bonds case more than any others I can think of — was sort of a dividing line, if you will, between the historical coverage, the years and years of articles and various media pronouncements on him, and the more contemporary comments and ideas that were published and spread through, among other things, the Internet.

When you want to talk about it, I'll share some lessons and views that we formed about the reality of representing a high visibility client in a high visibility case in the age of the Internet.

MR. ZELDIN: Why don't you share those views now?

MR. RUBY: The historical archive was, if nothing else, at least fixed; fixed in the sense of it wasn't going to change. The historical reporting was what it was.

And I have to say, as the case went on, we viewed it as part of the environment, but not the one that could be potentially the most lethal.

He had been in the news and in the media an awful lot for a lot of years. And some consumers of that media might have formed views about him. And if that was so, well, we hoped that could be developed in voir dire and the jury questionnaire, but it wasn't fluid.

Social media and the Internet, on the other hand, had the potential to change and adapt and falsify and distort on an on-going basis from the time the actual criminal charges were filed right up through and including trial.

So the whole question of how to protect everyone's right to a fair trial, when an Internet search would instantly present the searcher with unbounded items, some of which could be true, and many of which undoubtedly weren't, was a real challenge from the beginning of the case.

MR. ZELDIN: Did you make any effort to harness the social media for the benefit of your client?

MR. RUBY: We didn't, and that's a great question. In talking to other lawyers and reading about other cases, I know there's a school of thought which believes that if a party has the resources, that is a prudent course of action.

If one believes, for example, that in spite of best efforts, prospective jurors, even trial jurors, are going to search the Internet about Plaintiff X or Defendant Y, then of course there are means of making sure that Internet searches can lead people to at least some favorable points of view.

And I think we are in the infancy of the developing a body of knowledge and rules that will help courts and lawyers know the right path through this world.

In the Bonds case, the judge was very active and assertive in trying to protect everyone's right to a fair trial by talking to the jurors about how this was forbidden. The judge talked to the jurors about this more than once, and in the most serious way.

At least according to what's been publicly discussed by jurors, there's no reason to believe that anybody violated the trust that had been placed in them in this respect or in any other respect.

MR. ZELDIN: There seemed to be a strong minority point of view that this criminal prosecution was not worth the taxpayers' money. Did you try to exploit that point of view at all?

MR. RUBY: It wasn't a point of view that could be expressed in the evidence, certainly. And it's a point of view that I always thought was organic and unique to particular individuals, if it existed at all.

In plain language, I thought for a lawyer to raise that as an issue would arguably have been misconduct because it certainly wasn't linked to any evidence that anybody was going to present and ran the risk of seeming pretty weak or defensive in the context of the case.

During jury selection, both in questionnaires and in voir

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ROGER HELLER

On CLASS ACTIONS

When the Supreme Court decided *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), some commentators quickly categorized it as the next in a series of decisions by the Court constraining class litigation. Were they correct? While it is too early to fully evaluate the impact of *Comcast*, as we approach the first anniversary of the decision there are insights to be gained from reviewing how courts and practitioners have wrestled thus far with applying it.

Following on the heels of *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), *Comcast* reflects the Supreme Court's recent focus on the level of scrutiny required in analyzing Rule 23's elements at the certification stage. *See Comcast*, 133 S. Ct. at 1432 (Rule 23(b)(3) requires courts to "take a 'close look'" at whether common or individual issues predominate) (quoting *Amchem Prods. v. Windsor*, 521 U.S. 591, 615 (1997)); *but see Parra v. Bashas', Inc.*, 291 F.R.D. 360, 367 (D. Ariz. 2013) (noting that "the extent to which courts may probe behind the pleadings [at the certification stage] is still evolving") (citing *Wal-Mart and Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184, 1194-95 (2013)).

As courts have cited *Wal-Mart* for the more general proposition that an analysis of the Rule 23 factors will sometimes overlap with consideration of merits issues, some courts have cited *Comcast* as a basis for taking a closer look at proposed class damages theories at the certification stage. *See, e.g., Parra,* 291 F.R.D. at 392-93; *Thurston v. Bear Naked, Inc.*, 2013 U.S. Dist. LEXIS 151490, *29-30 (S.D. Cal. July 30, 2013). Defendants in class cases have used *Comcast* to oppose certification, with varying degrees of success. *Compare, e.g., Astiana v. Ben & Jerry's Homemade, Inc.*, 2014 U.S. Dist. LEXIS 1640, * 38-40 (N.D. Cal. Jan. 7, 2014) (denying certification where plaintiffs failed to offer a method of measuring class damages), *with Thurston*, 2013 U.S. Dist. LEXIS 151490, *31 (finding plaintiffs offered a "viable theory" of damages, sufficient at the certification stage, by generally describing the data and method they would use to measure damages).

While courts have shown an increased willingness, after *Comcast*, to look more closely at class damages issues at the certification stage, they have been notably conservative in construing *Comcast's* substantive reach, with several courts emphasizing the specific circumstances of *Comcast* — a proposed damages model that indisputably went beyond plaintiffs' theory of liability — as a point of distinction. *See, e.g., Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 800 (7th Cir. 2013) (Posner, J.), *cert. denied*, 2014 U.S. LEXIS 1507 (Feb. 24, 2014) (distinguishing *Comcast* on the basis that, "there is no possibility in this case that damages could be attributed to acts of the defendants that are not challenged on a class-wide basis"); *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 2013 U.S. Dist. LEXIS 160739, *29 (N.D. Cal. Nov. 8, 2013); *In re Nexium Esomeprazole Antitrust Litig.*, 2013 U.S. Dist. LEXIS 173353, *43-45 (D. Mass. Dec. 11, 2013).

Another issue that has received some renewed attention following *Comcast* is whether Rule 23 (b)(3) certification can be appropriate where individual damages calculations are required. Some of the dicta in *Comcast* has led class defendants to argue it cannot be. The Ninth Circuit has taken the opposite view, finding that *Comcast* did not change the law in that respect. *Levya*, 716 F.3d 510, 513-514 (9th Cir. 2013) (finding that, even after *Comcast*, the mere fact that damages calculations would require individualized inquiries does not defeat certification); *accord Butler,* 727 F.3d at 799-800.

Roger Heller

The early returns suggest that *Comcast* probably represents more of a reflection and application of class action law as it already existed, rather than a major shift in the legal landscape. *Comcast*, 133 S. Ct. at 1433 (stating that the decision was based on a "straightforward application of class-certification principles" and was not changing the law). That said, following *Comcast,* class practitioners can likely expect damages issues to increasingly be a focus of proceedings at the certification stage. Class counsel should be thinking, from the very start of an action, about how they intend to measure damages and should tailor their discovery efforts with that issue in mind. Class counsel should also be prepared to explain and/or demonstrate, at the certification stage, the options for measuring monetary relief for the class and any alternative procedural mechanisms (such as bifurcation) that might be appropriate. Defense counsel should be mindful of all of these issues as well, and should look for potential flaws in plaintiffs' damages theories.

One consequence of all of this is that the costs of litigating class actions — for both sides — are likely to increase, as there is greater and earlier emphasis on expert damages analysis and counter-analysis. Another consequence is that, where class certification is granted, both sides are likely to have more developed and refined positions on damages issues well in advance of trial. In the meantime, class practitioners on both sides should pay close attention as the case law interpreting and applying *Comcast* continues to evolve, and its legacy and import — large or small — continue to come into focus.

Mr. Heller is a partner in the San Francisco office of Lieff Cabraser, Heimann & Bernstein.
Rheller@lchb.com

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dire, there were a small but non-trivial number of jurors who expressed that point of view. They were all duly excused for cause. So it didn't seem to be a major element in the trial itself.

MR. ZELDIN: You had at least one witness and one non-witness who seemed to have personal agendas. You had the former mistress who seemed to want to get even, and you had had the former personal trainer who didn't want to testify. How did you address those?

MR. RUBY: Well, as to the non-testifying witness or potential witness, we didn't address it at all; that wasn't our issue. That was someone who had his own counsel, his own representation. He had advice from his own lawyer and the course that he chose to follow was his, and we had nothing to do with that. Not only did we have no control, but we had no input.

As to testifying witnesses, it was of course an entirely different matter. Cris Arguedas' cross-examination of a very important government witness, you've referred to as the former girlfriend, was a remarkable cross-examination. You had to be there.

The intensity — that's the word I always think of in connection with that cross-examination. The intensity of the cross-examination and the intensity of cross-examiner were remarkable.

Rarely have I seen a witness who was so intense and determined to bring about a certain outcome encountering an attorney who was no less intense and determined to bring about a different outcome.

It was a remarkable cross-examination, all within the boundaries of the rules. I don't claim to be objective about this, but I thought it was a fair cross-examination. I don't think that the witness was confronted with anything that was or should have been out of bounds. But the use that was made of prior statements of motive was compelling. And I'm not sure that anybody in the courtroom, once that cross-examination was over, was prepared to think that this witness would be decisive on anything.

MR. ZELDIN: Was the assignment of this witness to Cris Arguedas designed so that you as a larger male would not appear to be bullying this female witness with a similar approach in cross-examination?

MR. RUBY: I wish I could say that we were analytical about it. There were two witnesses who were going to testify based on what they said was years and years of close personal contact with the accused. And indeed both of them had had very long relationships that they could draw on to illustrate or even provide a rationale for their testimony. Cris and I decided to divide them up. And I forget how it turned out that which one of us did each one.

MR. ZELDIN: Was there any character testimony introduced during that trial?

MR. RUBY: Almost all the testimony was character testimony of one kind or another. Was there any that was explicitly labeled character evidence or limited just to character evidence? I don't remember any.

But there were witnesses whose testimony was clearly founded on their hostility toward the accused. And there were other witnesses whose testimony reflected a fondness or affection for the accused.

So I thought that as the trial unfolded the quasi-character evidence canceled itself out.

MR. ZELDIN: Do you think pure character testimony in a case like this is ever effective for the defense?

MR. RUBY: "Ever" is a broad idea. I think when the defendant doesn't testify, then there are significant risks to offering character evidence. It would be a human reaction to think if the defendant is such an exemplary person, why hasn't she been up here telling us about it herself. So character evidence can always be risky. But especially when the defendant doesn't testify, I think there's an even greater need for caution.

MR. ZELDIN: What was the outcome of the Barry Bonds case?

MR. RUBY: It was a hung jury on everything except the obstruction count, and he was convicted of the obstruction count.

MR. ZELDIN: I'd like to turn to the case of Ron Gonzales, the former mayor of San Jose. What was that case about?

MR. RUBY: He was accused of using his office improperly. He was accused of bribery, although there was never any evidence that he personally profited from anything. There was a conspiracy count. And there were some alleged violations of government code sections. But the core of the case was a corruption allegation — that he had been bribed to take certain action in respect to a waste disposal contract.

MR. ZELDIN: How was the case resolved?

MR. RUBY: A motion to dismiss under Penal Code Section 995 was granted. The court agreed that there was insufficient evidence presented to the grand jury to establish probable cause for the charges.

MR. ZELDIN: What was your perception of the public's perception of the mayor and the charges?

MR. RUBY: With significant exceptions, I thought that the public environment was at worst hostile and at best disapproving of the mayor.

He had been the target of very critical attention from the local media for some period of time. Some of that attention and criticism appeared to be directed at his conduct in office and some of it was plainly directed at his personal life. So he was not in an environment where he could count on friendship from many quarters.

MR. ZELDIN: Did that effect your strategy?

MR. RUBY: It affected a number of important decisions that had to be made in the case. One of the threshold decisions was whether or not he would step aside, take a leave, or resign while criminal charges were pending. And he needed to recognize that if he decided to continue in office, against this chorus that was urging him otherwise, there was a risk that the public clamor would become even louder and more hostile.

MR. ZELDIN: As I recall, he did not resign?

MR. RUBY: He did not.

MR. ZELDIN: What was your analysis?

MR. RUBY: Of course it was his decision. He believed,

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HOWARD M. ULLMAN

On ANTITRUST

Undoubtedly you've seen television commercials by a well-known insurance company where one character turns to another and says: "you can save 15% or more in 15 minutes." The other character then replies: "everyone knows that, but did you know.… In antitrust, everyone *knows* that horizontal price-fixing agreements are per se illegal, while oligopolistic pricing is not. But did you know that there is an argument against this dichotomy? In a recent and thought-provoking book entitled *Competition Policy and Price Fixing* (Princeton University Press 2013), Harvard professor Louis Kaplow argues that the rule makes little or no sense, and instead urges that the core inquiry of antitrust enforcement be jettisoned in favor of the application of economic tests. Swimming somewhat against ABTL Report precedent, this column is a brief review of Professor Kaplow's book.

Kaplow begins by outlining various criticisms of the inquiry into price agreements — some of which are familiar. Agreements can be inchoate and hard to detect (even with access to relevant documents). Industry participants can develop means of communicating even if certain statements or techniques are off-limits. Outside observers, including courts and regulators, "are at a disadvantage in determining what is actually happening if parties attempt to be clever and subtle." Lower courts sometimes infer agreements from communications and certain "plus" or facilitating factors, even where there is no explicit agreement and even though there is no uniformly agreed-upon list of plus factors. And even stating with precision what we mean by the term "agreement" is fraught with definitional, linguistic, and perhaps logical problems.

These problems alone might not justify overturning antitrust law's somewhat single-minded focus on ferreting out price agreements, but Kaplow thinks that, when combined with another problem, they militate strongly in favor of a different approach. That problem is the "paradox of proof," which he acknowledges has been noted in the literature but says has never been systematically explored. While in some settings greater ease of coordinated oligopolistic behavior and its resulting harmful effects make liability more likely, in others — where the danger is most serious — liability may become less likely.

> The basic reason for the latter result is that, if successful interdependence is sufficiently easy (think about… two [competing] gasoline stations [that can see each other's prices]), then firms may find it unnecessary to rely on communications [to agree on prices]…so that any inference that they in fact did so is less plausible. As a result, evidence that a market is less conducive to successful coordinated oligopolistic pricing may make the inference that firms' actions included at least some falling within [the rule against price-fixing] more plausible.

(Chapter 6, p. 126.) In other words — price communication (and price agreements) are more likely or at least more plausible in markets that are less susceptible to price agreements having any actual impact. That is the paradox of communications in the context of interdependent or oligopolistic pricing.

If we follow Kaplow's prescription to eschew focusing on whether competitors entered into a price agreement, what test or tests should we instead apply? The answer, Kaplow says, is to look to economic evidence to distinguish between types of interdependent oligopolistic behavior. Economic theory has no corresponding term to the law's use of the word "agreement," but successful oligopolistic interdependence may be a good proxy for what the law is attempting to define. In this view, communications are not the holy grail of liability, but when they occur, they may suggest that competitors expect that communications will be helpful. They also may help to enforce coordinated oligopolistic pricing. The central question becomes "whether the communications at issue…are more likely to promote or suppress competition, and modern oligopoly theory offers the best set of tools for undertaking that inquiry.…"

Howard M. Ullman

To detect coordinated oligopolistic price elevation, then, one would look to market-based evidence, not to the existence of agreements *per se*. This evidence would consist of pricing patterns, including evidence of price elevations and nonresponsiveness to changes in market conditions. Additionally, regulators or private plaintiffs would look to the existence of facilitating practices — including price communications, advance price announcements, product standardization, cross-ownership of firms, the existence of side payments or most-favored-customer clauses, etc. Also relevant would be the overall conduciveness of the market to coordinated pricing (market structure, concentration, firms' capacities, price transparency, product heterogeneity, etc.).

Professor Kaplow's book raises some cogent criticisms of antitrust law's current approach to price-fixing. While he does address the issue of administrability, I tend to think he overlooks how difficult it might be in practice to fully implement his proposals. Moving regulators and courts to an economic-based analysis is one thing; moving companies and their inside and outside counsel is another. It is difficult enough as it is to counsel companies on antitrust compliance. Repealing the per se prohibition on horizontal price agreements and mandating that counsel explain to their clients *ex ante* that interfirm price communications and agreements might sometimes be unlawful, but sometimes might not, depending upon a complex stew of economic concepts and measurements, may just be a bridge too far."

Mr. Ullman is of counsel with Orrick, Herrington & Sutcliffe LLP. hullman@orrick.com

Letter from the President

The ABTL Annual Seminar is always a wonderful event, and a chance to meet and learn from great lawyers all over the state. But the last Annual Seminar included a special treat: a gathering of the Past Presidents from all the *ABTL* chapters. And for me, the most memorable part of that memorable evening was listening to Marshall Grossman talk about the founding of the *ABTL*, a subject about which it turned out that I knew little. As Marshall tells it (and he was there at the beginning), the *ABTL* was born in Los Angeles in the 1970s, at a time when there was a considerable schism between the Downtown and West Side firms. Many downtown clubs still did not admit Jewish members. (I am inferring that women and other minorities likely fared no better.) The founders of the *ABTL* — representing a cross-section of the legal community —wanted to create an organization where lawyers from these firms could come together and that would welcome everyone — wasps, Jews, women, minorities, defense lawyers, plaintiff lawyers — and aim to bridge gaps, not to reinforce them. Listening to Marshall describe the roots of the *ABTL*, I could not be more proud to be assuming the Presidency of the Northern California chapter. Today, much of the overt discrimination that Marshall described is, thankfully, a thing of the past. But the need for an organization that welcomes and brings together lawyers from across the aisle is just as great. The *ABTL* today is a place where courtroom adversaries can break bread, share stories, and remember that what unites us — the career we have chosen and the justice system that we serve — is much more important than the side of the courtroom on which we usually sit. I feel fortunate to be part of the diverse and inclusive community that is the *ABTL*.

Daralyn J. Durie

Daralyn J. Durie is a principal with Durie Tangri LLP in San Francisco.

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and he said this more than once, he had been elected to do a job, and he intended to fulfill the commitment that he'd made to the voters to stay in office and do the job.

And I have to say, it was my perception that once that issue was settled, that is once he said he would not resign, a lot of the furor died down. He made a decision. Some people liked the decision. Some people didn't like the decision. But it was made. And he was the mayor. He continued to render services to the public. And as I said, the clamor largely dissipated.

MR. ZELDIN: Did you learn any more general lessons from Mayor Gonzales' decision not to resign?

MR. RUBY: Every case is different. But generally, I have come to believe that a defendant in a criminal case who resigns his or her office, whether it's in the private sector, or a public office, or in a nonprofit, whatever position they hold, if they step aside because an accusation has been made, there's a very high risk that many, many people will believe that the accusation must be true.

There can be excellent reasons for someone to step aside. Defending against a criminal case is very time consuming, it's draining. Many times people don't want to introduce controversy into their workplace. So there could be excellent reasons for somebody to say that they want to step aside temporarily or permanently, and those reasons need to be respected.

I formed the view rightly or wrongly that there is a significant risk that they will incriminate themselves by what in most cases is a very statesmanlike decision.

Allen Ruby is a litigation partner in the Palo Alto office of Skadden, Arps, Slate, Meagher & Flom LLP. Joel Zeldin is a litigation partner at Shartsis Friese LLP.