

abtl REPORT

NORTHERN CALIFORNIA

Volume 27 No. 3
Fall 2020

Social Distancing, Plexiglas, and Masks--Oh My! Conducting Jury Trials in a Pandemic



Hon. Evette Pennypacker

Courts across the nation are beginning to reopen their doors to jurors. Varying resources, local COVID case numbers, and community sensitivities are creating different procedures. But, based on lessons learned from

the panel I participated in with Judges Alan Albright, Edward Chen, Anne-Christine Massullo, and Yvonne Gonzalez Rogers during our most recent ABTL panel discussion, it is clear that with careful planning, jury trials can be done safely even before we have a vaccine.

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How to Prepare for and Succeed in Virtual Mediations

Due to the coronavirus pandemic, most mediations are now being conducted virtually. While some resolution centers have begun to re-open (and in some places, only to shut down again as government restrictions resumed), most parties are still only attending virtually. As a result, the days of a full-day meeting around a conference table, catered buffet lunches, and a creative variety of individually portioned snacks have given way to the new reality of virtual mediations, complete with interruptions, reminders to unmute, and a trip to your own kitchen for lunch. While virtual mediations pose some distinct challenges, they can be effective with proper preparation and expectation setting. Indeed, they even provide some unique benefits, such as making it easier for key decision-makers to attend, as well as the elimination of the time and expense associated with travel.



Hon. Elizabeth Laporte (Ret.)



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CAITLYN CHACON
TIMOTHY CRUDO

The Latest Word in Compliance: Data



Caitlyn Chacon



Timothy Crudo

If there is one lesson to be learned from the U.S. Department of Justice’s latest update to its guidance on corporate compliance, it is the importance of data and especially of putting that data to work. The updated Evaluation of Corporate Compliance Programs, released in June, came just over a year after DOJ last revised the guidance, signaling that the government is paying attention to companies’ efforts to structure their compliance programs. Though few, the latest revisions include notable new references to the importance of data to identify and control for company-specific risks. These additions highlight a fundamental theme of the guidance: it is not enough to have a paper program loaded

with policies and employee trainings that do not measure results, seek out problems, and enforce accountability. Accurate, comprehensive data and proactive use of that data are central not only to making a compliance program effective, but also, if the need arises, proving its effectiveness.

Why a Compliance Program Matters: It is Not Just About Complying

In this day and age, a nonexistent or even merely weak compliance program is a material liability. From “Me Too” to cyber threats, data privacy, supply chain management, and the ever-present concerns of fraud and corruption, organizations face compliance challenges that are both numerous and complex. Social media and

the ease with which information can be shared (and stolen) amplify these risks. Compliance functions are necessary to guard against these threats to a company’s reputation and its bottom line.

The upside of a good compliance program is all the more apparent in light of the compelling incentives enforcement agencies offer for having one. A substantial program, even if it does not prevent all wrongdoing, can significantly reduce a corporate penalty and even may convince regulators to forego an enforcement action altogether when something does go wrong. See U.S.S.G. § 8C2.5(f) (directing that three points should be subtracted from the applicable offense level if “the offense occurred even though the organization had in place at the time of the offense an effective compliance and ethics program, as provided in § 8B2.1”).

For example, the DOJ advises that where a company voluntarily self-discloses misconduct, fully cooperates with regulators, and appropriately remediates the problem, prosecutors should presume to decline a corporate charge absent “aggravating circumstances involving the seriousness of the offense or the nature of the offender.” FCPA Corporate Enforcement Policy, U.S. Dep’t of Justice, U.S. Attorneys’ Manual 9-24.120. While issued in the context of investigations and prosecutions of Foreign Corrupt Practices Act violations, DOJ has since announced that this guidance may also apply to other types of criminal conduct. See Rod J. Rosenstein, Deputy Attorney General for the U.S. Dep’t of Justice, Prepared Remarks for the 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017) (announcing that the DOJ’s Criminal Division would use the FCPA Corporate Enforcement Policy as nonbinding guidance in criminal cases outside of the FCPA context). Corporate declination letters consistently cite a company’s compliance program and efforts to enhance that program following the discovery of malfeasance as a reason for declining to prosecute. See, e.g., Letter from Robert Zink to David W. Simon, Re: Quad/Graphics Inc. (Sept. 19, 2019) (confirming DOJ’s decision not to prosecute company based in part on its “prompt, voluntary self-disclosure of the misconduct” and “full remediation, including the steps that [it] took to enhance its compliance

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JOE MAUCH

On TRADEMARKS



Joe Mauch

It is not every day that the Supreme Court of the United States issues a decision affecting trademark law. It is no surprise then that the recent decision in *United States Patent and Trademark Office v. Booking.com B.V.*, 140 S. Ct. 2298 (2020), received significant coverage in the legal and

mainstream media. As reported in those various articles, blogs, and client alerts, the upshot of the decision was that the Supreme Court allowed Booking.com to proceed with its trademark application for BOOKING.COM. I had more than one client reach out to me in the days after the decision to inquire whether they could now file an application for their own trademark plus “.com.” The answer every time was “no.” To understand why requires an explanation of the issue that the Booking.com decision was and was not addressing.

The Trademark Office previously took the position that a trademark application for a generic term plus “.com” was per se generic and had to be rejected. On this ground, it had rejected Booking.com’s application for BOOKING.COM in connection with the company’s online hotel-reservation services. The Supreme Court’s holding was that use of [GENERIC].COM as a brand is a generic name for a class of goods or services—and thus not a trademark—only if the term has that generic meaning to consumers. If consumers understand the [GENERIC].COM brand to be associated only with the brand owner, then the [GENERIC].COM brand could be a trademark (and thus registered by the Trademark Office and enforced by the owner). Since Booking.com had submitted substantial evidence of its use of BOOKING.COM as a trademark and the fact that consumers associate BOOKING.COM with its site, not with travel booking sites generally, the Supreme Court thus determined it should be

allowed to register its trademark.

This is an important decision, but it is a narrow one that pertains to a limited number of trademark owners or prospective owners. And not to my clients. Why? Because the decision does not change the law that a party cannot register [TRADEMARK].COM as a trademark, unless it actually markets itself as [TRADEMARK].COM. As the Trademark Office states in its Trademark Manual of Examining Procedure:

“A mark composed of a domain name is registrable as a trademark or service mark only if it functions as a source identifier. The mark, as depicted on the specimen, must be presented in a manner that will be perceived by potential purchasers to indicate source and not as merely an informational indication of the domain name address used to access a website.”

In other words, a prospective trademark owner has to actually refer to its goods or services with the “.com” as part of the trademark. This is not something that most companies do. Nike markets itself as NIKE, not NIKE.COM. Booking.com—which markets itself as BOOKING.COM, not BOOKING—is an exception. I could not think of many companies that use “.com” or any other top level domain as part of their trademark (1-800-Flowers.com, the infamous Pets.com of the first Dot Com Bubble), but perhaps you can.

So what can a company that does not use “.com” do to protect its trademarks and its domain names? As is always the case, it can and should register its trademarks and monitor the commercial landscape for infringers. Those trademark rights, particularly if the trademark is registered, will go a long way to protecting the trademark owner from third parties that try to use the trademark or a confusingly similar one in a domain name. Nike may not have trademark rights in NIKE.COM, but its trademark rights in NIKE allow it to stop (in most instances) others from using that trademark in an improper way in a domain name, such as Nikeshoes.com or Nike.net. Stopping the use of infringing trademarks in domain names can be done in a court action, but the most common forum for asserting such rights is an administrative proceeding pursuant to the Uniform Domain Name Dispute Resolution

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DAVID MCGOWAN

On ETHICS



David McGowan

Lawyers make threats on behalf of clients all the time. A recent conviction in a well-publicized case (*United States v. Avenatti*, S.D.N.Y. Cr. No. 1:19-cr-00373-PGG) poses the question of how the law distinguishes permissible from unlawful threats, and what practical risk threats may pose.

The rules of conduct impose few direct restrictions on threats. California Rule of Professional Conduct 3.10 forbids threats to present criminal, administrative, or disciplinary charges to obtain advantage in a civil dispute. (The ABA Model Rule does not contain this restriction—a deliberate omission. See ABA Formal Op. 92-363 (1992).) In cases where a lawyer engages in misconduct, Business & Professions Code 6090.5 and Rule 5.6(b) make the related point that one may not either offer or agree not to report the lawyer's misconduct as part of a settlement. But Rule 3.10 does not apply to threats to file a civil action (cmt [2]), or to the actual reporting of misconduct to a criminal or regulatory authority. Rule 3.1 indirectly constrains threats by forbidding the filing of a civil claim without probable cause and for the purpose of harassing another. This conjunctive requirement is not particularly restrictive. Lastly, Rule 8.4(b) may come into play if a threat qualifies as a criminal act sufficient to call into question a lawyer's fitness to practice. Taken together, the Rules provide only a little clarity. If counsel for an employer responds to the wage demand of an undocumented employee by threatening to report the employee to immigration authorities, for example, that person is subject to discipline.

The Anti-SLAPP provisions of C.C.P. Section 425.16 et seq. include another potentially

relevant source of law. The provisions become relevant if someone on the receiving end of a threat sues the lawyer making it for, by way of example, extortion. The statute is applied via a two-step inquiry, which asks if the complaint aims at protected activity and, if so, whether the plaintiff can show they are likely to prevail. Section 425.16(e)(2) identifies statements made in connection with judicial proceedings as a type of protected activity, and this provision may extend to threats in demand letters. However, *Flatley v. Mauro*, 39 Cal. 4th 299 (2006), holds that demand letters that are themselves unlawful are not protected under Section 425. That ruling makes relevant the elements of expression-based crimes, such as extortion. The Penal Code defines extortion to include a threat under Section 519 of that Code, which makes it a crime to threaten to: accuse a person or a relative or family member of a crime; expose them to disgrace; expose a secret affecting them; or to report actual or suspected immigration status. The *Flatley* Court held an extortionate demand letter fails to qualify for anti-SLAPP protection at step one of the analysis. Cases such as *Oasis W. Realty, LLC v. Goldman*, 51 Cal. 4th 811 (2011), show that constraints on lawyers may be relevant at step two of the analysis as well, as when the expression at issue plausibly violates a duty of confidentiality owed to a former client.

The litigation privilege is also a relevant source of law. Based in Civil Code Section 47(b), the privilege exempts from liability, other than for malicious prosecution, expression that has some connection or logical relation to an action filed or contemplated in good faith and which is made to advance that connection. *Silberg v. Anderson* 50 Cal.3d 205, 212 (1990); see also Restatement (Third) of the Law Governing Lawyers Section 57(1). A threat not made in good faith is not protected by the litigation privilege. *Action Apartment Assn., Inc. v. City of Santa Monica*, 41 Cal. 4th 1232, 1251 (2007). Where a threat does not satisfy each element of a crime, such as extortion, it may both be protected activity for purposes of anti-SLAPP analysis and subject to the litigation privilege. E.g., *Malin v. Singer*, 217 Cal. App. 4th 1283 (2013). Conversely, under *Flatley*, an extortionate communication might

CAROLINE MCINTYRE

On LITIGATION



Caroline McIntyre

The COVID-19 pandemic has caused a seismic shift in the way attorneys litigate cases. Litigators are working remotely from their homes and attending meetings and court appearances by phone and videoconference. As offices and courtrooms begin to slowly open their doors again,

there is a sense that the landscape for litigators may permanently have been altered as companies reassess the way they do business while also considering the possibility of another surge of the virus. Litigators need to be flexible with these changes and learn how to effectively navigate the challenges of remote litigation. This column un.masks best practices for remote civil litigation.

Home work space

By now, everyone has carved out some type of remote work area at home. Preferably, this is a dedicated space for work that has a strong Internet connection and good lighting with a door that can be closed for confidential calls and videoconferences. Get whatever equipment you need to work efficiently including a monitor, keyboard, printer, mouse, and headphones, as well as necessary software. Keep the work area stocked with supplies such as printer paper and toner. Consider maintaining defined work hours at home similar to the hours you kept in the office – this will help with the transition back to the office.

Technology

Make sure your computer and other devices have a working camera, microphone, and speaker, as well as appropriate encryption to secure confidentiality. Are your phone lines clear and your Internet connection dependable with sufficient bandwidth? If not, contact your provider to see if improvements are possible. Coordinate closely with any IT specialist

your firm has. It is best to use hardwired Internet to ensure the connection will not be dropped. Make sure the videoconference platform used is as secure as possible, including using passwords to join the videoconference.

Local Rules

Courts are taking different approaches regarding COVID-19 issues. Check the local rules for courts where you have cases to ensure you have the latest guidance regarding how that particular court handles emergency hearings, remote depositions, conferences, law and motion, and trials. Most courts are permitting in-person emergency hearings with appropriate safeguards. Many courts are encouraging remote depositions, and are conducting status conferences and hearing motions via telephone or videoconference. Local rules may provide guidance on technical requirements for joining conferences remotely.

Taking Depositions

As COVID-19 issues continue to impact in-person meetings, remote depositions may be the new normal at least for now. The notice of deposition should indicate that the deposition is being taken remotely. If a video recording of the deposition is desired, the notice should also state that the deposition will be videotaped. Advance planning is key, including selecting a secure platform for the deposition and becoming familiar with that platform. Also, counsel should coordinate with opposing counsel regarding handling exhibits, including deciding whether to send hard copies of exhibits to the court reporter to upload during the deposition (provided the court reporting service used offers this service), or to send hard copies to the court reporter and counsel in advance of the deposition with passwords or a sealed envelope which is only to be unsealed during the deposition. If remote depositions are new to you, consider having a practice session before the deposition to get comfortable with the technology.

Defending Depositions

Make sure the witness has appropriate equipment to participate in the deposition, including a computer and webcam, and clear instructions to access the platform. Remind the witness that the

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Social Distancing, Plexiglas, and Masks--Oh My!

Unlike my fellow panelists who are conducting and planning civil bench and jury trials, the trials I conducted, which created the protocols for COVID jury trials in Santa Clara County Superior Court, were all criminal trials. But a trial is a trial—something I learned in real time when given a criminal assignment as a new judge after litigating intellectual property and complex business cases for nearly two decades. Whether state or federal, civil or criminal, courts and counsel face the same issues when conducting trials during COVID. Summarized below are some tips for making it work.

First, you need to create the right mindset for a COVID jury trial:

Juror safety and comfort is critical. Jurors must see that court and counsel take their safety seriously. This means making sure your actions cater to those most sensitive to the virus by routinely using your hand sanitizer, wiping down surfaces, and wearing a mask that covers your mouth and nose. Jurors are watching; if you share pens or microphones or touch the water jug at counsel table without wiping them off, they will notice.

Communication is key. The pre-trial conference is more critical than ever; maintaining safety requires considering every detail of the trial process. Counsel need to know protocols for exhibits, remote testimony, impeachment, how to question jurors, where to stand to maintain social distancing, whether witnesses will wear masks, and so on.

Cooperation regarding safety is not optional. Obviously this is a trial, and lawyers on each side want to win. But when the issue is safety protocols during a pandemic, the fight should be set aside. Work with the court and your opponent to agree to, and then follow through with, procedures to protect everyone's

health.

Be patient. Everything takes longer. We have to bring in smaller groups for voir dire, fewer people can be on an elevator, surfaces and objects need to be cleaned between uses, there are technical problems, and communication is more challenging. Build in this extra time, prepare your witnesses and clients for this pace, and breathe.

Now for the mechanics:

The courtroom: In Santa Clara County, we use average-sized courtrooms for jury selection rather than an assembly hall or auditorium, for example, to maintain control over sanitization and to create processes that can be used as long as the pandemic lasts. Seats are taped off to permit only a small socially distanced number of people to sit in the courtroom. Markers on the floor show where people can safely stand, and Plexiglas is placed as a physical barrier at counsel table, around the courtroom clerk and court reporter, and at the witness stand. Hand sanitizer is everywhere, including in the jury box, and sanitizing wipes are freely available. Counsel and client are separated by Plexiglas at counsel table, and the “jury box” is the entire side of the courtroom. Some courts are providing monitors facing the audience to permit the observing public to see virtual testimony and exhibits. Other courts have a public access telephone line to call into to listen to all court proceedings.

Counsel conferences: The days of the entire legal team sitting at counsel table with their client are gone. For remote trials, everyone may be in a different building. For in court trials, parties cannot lean in close and whisper. Chat functions, breaks for conferences, permitting texting in the courtroom, and other measures need to be worked out in advance.

Side-bars: Similarly, how will the court and counsel confer outside the presence of the jury in a remote trial—chat, telephone, a virtual break out room? In my live jury trials, I have counsel step quickly into chambers. Surprisingly, these conferences are faster and

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more productive because we can talk and move freely while completely outside the presence of the jury's keen ears and watchful eyes.

Hardships: San Francisco County conducts hardships online using Survey Monkey. Other counties conduct hardships outside under tents, use other online services, or have kiosks in the courthouse. In Santa Clara County, groups of 20 at a time come to the courtroom, receive information from the judge, then fill out either a hardship form or a case questionnaire. Pens are either given to the jurors or sanitized with pen cleaners and divided into "used" and "clean". All jurors, counsel, and courtroom staff wear masks throughout the process.

Voir dire: Some courts question one juror at a time virtually. Others use an assembly hall or their largest courtroom to bring in larger groups. In Santa Clara, a questionnaire is used for all cases to speed up selection. Counsel meet and confer regarding cause challenges after reviewing the questionnaires. Jurors excused for cause are contacted by phone or email and excused without returning to court. Jurors not excused for cause are contacted and told to return directly to either the courtroom or a spill-over room. Jurors in the spill-over room are able to listen to voir dire through a virtual platform. Attorneys stand at a podium in the well and question all the prospective jurors that can safely fit in the room. Everyone wears masks. So that the court reporter can hear, jurors questioned individually stand at a podium equipped with Plexiglas and a microphone they do not have to touch.

Seating jurors: As jurors are excused, some courts have jurors stay in their seats until a break. This can be challenging from a record keeping perspective. Other courts replace excused jurors immediately, giving jurors coming into the box the option to remain standing or to take a sanitizing wipe and wipe

down the chair before sitting down.

In court testimony: Some courts require witnesses to wear masks during testimony. Others equip the witness stand with Plexiglas in a U-shape with or without a top, and permit the witness to testify without a mask. After the witness testifies, the witness stand, microphone, and Plexiglas must be wiped down with sanitizing wipes. Some courts have the resources to have janitorial service do this, others ask the witness to replace their mask, wipe down the area, and then throw the sanitizing wipe in a trash can next to the witness stand on their way out.

Remote testimony: The ABTL Template for Virtual Bench Trials is a handy outline of the issues that must be considered for remote witnesses, including ensuring the witness has the correct equipment, an adequate internet connection, an appropriate background, and is not being coached; what to do when the technology fails (which you know will happen at least once); and protocols for using documents. When I permitted a witness to testify virtually in my first trial, even after addressing these issues and the Sixth Amendment issues that would not arise in civil cases, several concerns remained.

Would the witness treat the oath seriously testifying from home? A way to address this is for the court to administer the oath and confirm with the witness that there is no one else in the room, the witness is not using notes or other documents, and no chat or other communication program is on or being used during testimony.

What would the jury see other than the witness? The jury would see all witnesses who appear in person in the same setting—the generic witness stand next to the bench. Remote witnesses necessarily testify in a different setting. A fake background cannot be used because it could conceal another person or items in the room that might assist or influence testimony. Thus, juries inevitably receive more information about remote witnesses based on the witness's

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surroundings. This cannot be entirely avoided, but it can be addressed by conducting a test run outside the jury's presence so that any objections or/and adjustments can be made before the witness testifies.

Would the witness be viewed as more or less credible based on setting? Poor lighting, informal dress, an unattractive camera angle, not looking at the camera—these are all visuals that can influence the way a jury perceives a witness's testimony. We have all seen these issues in Zoom meetings and in bench trials. In civil cases, you can meet with your witnesses and work all of this out in advance, which will presumably become a new part of all witness prep and trial strategy.

Would the witness bear objections and stop speaking? This can be an issue when using telephones or where the connection is not robust. We have all been on conference calls where a participant using a speaker phone cannot hear anyone else speaking and never pauses. This is a serious problem during a hearing or trial where objections are made and a witness continues speaking, filling the record with material the court may later have to strike. An equipment test before testimony is given will identify if this is an issue.

Deliberations: Some courts have sufficiently large rooms to allow jurors to deliberate there in person. In one Alameda County trial, the jury foreperson was at court to bring questions to the judge while the rest of the jurors deliberated remotely using notebooks provided by counsel. In Santa Clara, the juries deliberate in the courtroom so that they can continue social distancing and benefit from the high ceilings.

Shortening trial time: Given the extra time and the backlog that pandemic-era trials create for both bench and jury trials, courts and counsel are devising ways to shorten the

trial. In bench trials, some courts are taking direct testimony through written statements and having lawyers conduct cross examination live based on the written statement. Preparing and sending exhibits to the court and opposing counsel well in advance is also a time saver. Some courts are using an 8:30-1:30 trial schedule, which avoids the jurors looking for something to do over a long lunch hour and allows them to handle child care and work issues in the afternoon.

Public access: Courts are public forums. But the proceedings cannot be recorded without a prior court order. Permitting access over the telephone or other virtual means exposes court proceedings to mischief. Where sensitive information is at issue, the parties should discuss technical and other protections to avoid court proceedings being improperly recorded and published.

As you can see, there is a lot more to think about and plan in COVID-era trials of all types. The good news is that jurors are showing up for service and staying to hear, deliberate, and decide cases. Once jurors understand the steps court and counsel have taken to protect juror safety, most are ready to serve even during a pandemic, which is a very nice piece of news during these strange and stressful times.

Judge Evette D. Pennypacker serves on the Board of Governors of the ABTL Northern California Chapter and is Assistant Criminal Supervising Judge of the Family Violence Unit on the Santa Clara County Superior Court. Before her appointment by Governor Brown in 2018, Judge Pennypacker was a Partner at Quinn Emanuel Urquhart & Sullivan, LLP where she practiced intellectual property and complex business litigation.



How to Prepare for and Succeed in Virtual Mediations

How It Works

Virtual mediations are conducted via a videoconferencing platform such as Zoom. Much like in an in-person mediation, the parties will spend most of their time in breakout rooms. At the beginning of the mediation, the mediator or moderator will assign each party to a breakout room, where counsel can communicate privately with his or her clients. The mediator will go back and forth between the breakout rooms and discuss issues with each party separately. To avoid surprise, most mediators will text before entering or ask to be texted when a party is ready for the mediator to re-enter the break-out room. Within a breakout room, a party can share its screen to display exhibits, PowerPoints, photographs, or other relevant information.

The mediator will usually also set up a separate breakout room where opposing counsel can talk directly to each other outside the presence of their clients, or an attorney and the mediator can talk one-on-one. Many mediators make it a practice to ask counsel what accommodations would be most helpful in a given mediation, but counsel should not be shy about raising the issue themselves if they do not.

Counsel should be sure to prepare their clients for the possibility that the mediation starts in a communal room that includes opposing counsel and their clients. A mediator will sometimes join all the parties together initially so that they can introduce themselves before going to their breakout rooms. However, parties can be admitted to separate breakout rooms at the outset before a joint meeting, if any, is held. Some mediators discuss with counsel in pre-mediation calls whether to start in joint session or instead start

with separate sessions, and if so, which party the mediator should meet with first. If a client is concerned about seeing an opposing party, his or her counsel should notify the mediator in advance of the mediation so that alternative arrangements can be made.

Safety and Security

Most alternative dispute resolution (ADR) providers such as JAMS have gone to extensive lengths to make virtual mediations secure. For example, JAMS uses the Zoom HIPAA-compliant platform for all scheduled virtual proceedings, including mediations and arbitrations. This Zoom platform incorporates the necessary security features to satisfy the requirements of the Health Insurance Portability and Accountability Act (HIPAA). Virtual mediations are password protected, with the password given only to those who have been invited to participate. Moreover, the mediator or a staff moderator who assists in setting up the breakout rooms at JAMS is responsible for assigning each person to a breakout room. Anyone not on the list will not be admitted.

Some clients have concerns about a mediator or others listening in to a conversation in the breakout room. Such concerns are almost certainly unfounded with reputable mediation services. JAMS ensures that the recording function of the videoconferencing platform will be disabled and requires parties to sign agreements stating that they will not record the mediation and that they will maintain the confidentiality of the proceedings (and can help set up DocuSign for this purpose, as well as for settlement agreements reached at the mediation). Nonetheless, having a separate email, text chain, or dial-in number available to clients where sensitive conversations can be held outside of the breakout room often eases these concerns. But be sure to mute your audio on the videoconferencing platform during any confidential side-calls with your client.

How to Prepare for and Succeed in Virtual Mediations

Succeeding Requires Preparation on Logistics, Not Just Substance

The most successful lawyers in virtual mediations consider the logistical details as well as the substance of the case. The following tips can help ensure the mediation runs smoothly:

Do a test run: Counsel should arrange a test run with their clients shortly before the mediation, if the mediator has not already done so, to ensure everyone is comfortable with the videoconferencing platform. Some mediators will arrange for this as well. Prior to the mediation, all participants should know how to mute and unmute their audio and turn their video on and off, as well as how to frame themselves in front of the camera. Some clients may be technologically challenged. If so, counsel can explore alternatives such as having them appear in counsel's office. At least one member of each party should be able to virtually share documents in cases where the need may arise.

Mediation services are generally happy to provide counsel with login information to do a test run in advance on the actual platform that will be used for the mediation. For example, JAMS can provide assistance during practice sessions.

It is ideal to do this test run around the time when there will be the greatest strains on an internet connection. An internet connection that is fast in the evening might be much slower in the middle of the day when other members of the household are using it. Counsel should encourage their clients to ensure the best internet connection possible.

Have a backup plan: Technological difficulties can sidetrack a mediation. Some clients, for example, have retreated to second homes in more remote areas with a less reliable

internet connection. Counsel should provide their clients with a dial-in number before the mediation to call in if necessary. Cell phone and, if needed, landline telephone numbers should be shared with each other and at least for lead counsel with the mediator. While not ideal solutions, these backup measures are vital in case anyone on the team faces technological difficulties.

Think about the optics: In some ways, a virtual mediation offers a more intimate experience than one conducted in person because it provides a glimpse into people's homes and their lives. Counsel should plan for where each person attending the mediation will be to ensure the optics of a person's location are professional and appropriate. Counsel should be conscious of the message that might be conveyed by the background behind each participant. Mediators will be looking for clues that allow them to connect with participants because they likely will not be able to see body language below the shoulders.

But optics go beyond the background. Details such as lighting, sound, and privacy should be considered prior to the mediation.

Take breaks, but do not log off: One thing that has not changed about virtual mediations is the amount of downtime. Counsel should prepare their clients for long stretches of waiting while the mediator is with another party. Stepping away from the computer is often helpful and necessary, but counsel should make sure their clients know not to log off from the mediation during a break. If they do, the mediator will be forced to re-admit them into the room before communications can continue. Instead, counsel should encourage clients to mute their audio and turn off their video if they need to step away momentarily.

Embracing the New Normal

Many lawyers and clients may be reluctant, at least initially, to participate in a virtual mediation. However, most mediators, including

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How to Prepare for and Succeed in Virtual Mediations

Judge Laporte, say their success rates have not been significantly affected, and their techniques are improving every day. Regardless, even in-person mediations in the future are likely to feel much different. A mediation with attendees wearing masks and trying to maintain a distance of at least six feet will affect the ability to read facial expressions and to establish as close of a personal connection. And even with those precautions, those at higher risk from the virus will likely choose to participate remotely even if others do not, at least until there is a vaccine and/or a reliable treatment.

In short, counsel should prepare their clients that in this new normal, virtual mediations are inevitable. Waiting for the “good old days” to resume can waste precious time to resolve cases that may drag on indefinitely due to the widespread postponement of civil jury trials, while bleeding resources in discovery and other pretrial preparation. With proper preparation, a little flexibility, and a willingness to embrace the new normal, virtual mediations can be productive and lead to successful resolutions of even the most complex matters.

Hon. Elizabeth D. Laporte (Ret.) is an arbitrator, mediator, special master/referee and neutral evaluator at JAMS in San Francisco. She handles matters involving antitrust, business/commercial, civil rights, employment, environmental law, insurance and intellectual property. She can be reached at elaporte@jamsadr.com.

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program”) (Sept. 19, 2019); Letter from Sandra Moser to Caz Hashemi, Re: Polycom, Inc. (Dec. 20, 2018) (confirming DOJ’s decision not to prosecute company, citing its “prompt, voluntary self-disclosure, and the “thorough and comprehensive investigation, that it “took to enhance its compliance program”).

If “aggravating circumstances” make declination unavailable, a robust compliance program can make the outcome more palatable. A company with a good program is eligible for a 50% reduction from the low end of the U.S. Sentencing Guidelines’ fine range as long as it is not a recidivist. Even if a company does not voluntarily self-report misconduct, it remains eligible for up to a 25% reduction from the bottom of the range if it cooperates with the DOJ and timely remediates the problem. In a time when it is not unusual to see corporate penalties in the hundreds of millions of dollars—in December 2019, Ericsson agreed to pay over \$1 billion to resolve an FCPA matter—these reductions can translate into a significant benefit.

And enforcement actions show no signs of slowing down. The Fraud Section resolved 15 corporate cases, involving more than \$2.9 billion in fines and penalties, in FY 2019. U.S. Dep’t of Justice, Fraud Section: Year in Review, 2019. In the same year, the DOJ opened 35 new FCPA enforcement actions, and the SEC opened an additional 19—and that’s just FCPA matters. All of this activity signals that companies should evaluate their compliance programs, not just to identify and deter internal misconduct, but also to optimize the potential benefits of self-reporting and remediation if the need arises.

Contrasting 2018 resolutions provide a good example. In 2018, Barclays voluntarily reported to the DOJ that some of its employees had engaged in a multimillion dollar front-running scheme involving foreign exchange transactions. The bank cooperated with DOJ, took steps to strengthen its compliance program, and agreed

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to pay \$12.9 million in combined restitution and disgorgement, leading DOJ to decline to prosecute the company. See Letter from Benjamin D. Singer, Chief of the Securities and Financial Fraud Unit of the Fraud Section for the U.S. Dep't. of Justice Criminal Division, to Alexander J. Willscher & Joel S. Green, Counsel for Barclays PLC (Feb. 28, 2018). After the resolution was announced, DOJ officials contrasted the Barclays resolution with the outcome in a similar front-running investigation, concluded around the same time, involving HSBC Holdings PLC. Whereas Barclays paid under \$13 million to U.S. regulators, HSBC paid over \$100 million in penalties and disgorgement to resolve a matter involving similar conduct. See U.S. Dep't of Justice, "HSBC Holdings Plc Agrees to Pay More Than \$100 Million to Resolve Fraud Charges" (Jan. 18, 2018). In making this comparison, DOJ officials specifically called out HSBC's failure to self-report and its disappointing initial cooperation with DOJ.

What We Can Learn From the Updated Guidance: Data, Data, and More Data

So if a good compliance program makes a difference, what makes a program good enough? As with prior versions, the updated DOJ guidance emphasizes that there is no "rigid formula" for evaluating compliance programs. After all, companies and the risks they face differ and change over time. A compliance program needs to address all risks a company faces, the foreseeable and the unforeseen: government corruption, fraud, health and safety, privacy, antitrust, sexual harassment, product quality, social responsibility, environmental risks, and the list goes on. New refinements to the guidance underscore that because numerous factors can distinguish one organization from another, prosecutors must "make a reasonable, individualized determination in each case that considers various factors including, but not limited to, the company's size, industry, geographic footprint, regulatory landscape, and other factors, both internal and external to the company's operations, that might

impact its compliance program." (Revisions italicized). By recognizing that compliance programs must be evaluated on an individualized basis, DOJ is signaling that the guidance should not be viewed as a simple checklist. One size does not fit all.

That said, the guidance does reflect that prosecutors expect companies across the board to have increasingly more sophisticated compliance functions that are integral parts of the organization's strategic risk management and business planning. In particular, DOJ expects more and better use of data.

The guidance has added a new "Data Resources and Access" section that advises prosecutors to consider whether compliance personnel have sufficient access to relevant data sources to enable "timely and effective monitoring and/or testing of policies, controls, and transactions." If there are impediments limiting a compliance program's access to data sources, the company should be prepared to explain what it is doing to address them. Another update notes that a company's risk assessments should not be "limited to a 'snapshot' in time," but instead must be based on "continuous access to operational data and information across functions." As these additions make clear, data is a crucial resource, and compliance teams need to press for broad access to a company's data and information systems in order to analyze and identify risk.

This concern about data access is not an academic one. The Wells Fargo Board's 2017 Independent Directors' Report summarizing the investigative findings of the alleged sales practices problem that has roiled the bank in recent years found that the bank's information systems and processes were fractured and lacked coordination, resulting in missed opportunities to draw connections between issues in a way that might have more quickly revealed the extent of the problem. Independent Directors of the Board of Wells Fargo & Company, Sales Practices Investigation Report at 13 (Apr. 10, 2017). The report noted that although the bank had a great deal of information in its systems, there was no coordinated effort among the bank's various functions to track, analyze, or report on sales practice issues.

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More recently, on September 29, 2020, JPMorgan agreed to enter into a deferred prosecution agreement and pay \$920 million to resolve two felony wire fraud counts based on misconduct tied to the manipulation of the precious metals and U.S. Treasuries markets. See U.S. Dep't of Justice, "JPMorgan Chase & Co. Agrees to Pay \$920 Million in Connection with Schemes to Defraud Precious Metals and U.S. Treasuries Market" (Sept. 29, 2020). The deferred prosecution agreement features over six pages devoted to DOJ's expectations for the bank's corporate compliance program. This section of the agreement echoes much of the updated Guidance and notably directs the bank to "ensure that compliance and control personnel have sufficient direct or indirect access to relevant sources of data to allow for timely and effective monitoring and/or testing." *United States v. JPMorgan Chase & Co.*, No. 3:20-cr-00175-RNC, Dkt. No. 2, at C-6 (Sept. 29, 2020). The bank is required to use "such review and testing and its analysis of any prior misconduct" to "conduct a thoughtful root cause analysis and timely and appropriately remediate to address the root causes." *Id.*

These examples highlight the importance of giving an organization's compliance program broad access to data so that it can connect the dots and mitigate problems quickly. Companies that make data unavailable to the compliance functions or whose compliance functions do not seek out and use company data proactively to develop metrics as part of program monitoring risk coming out on the wrong side of a prosecutor's "is this program good enough?" analysis.

Another update to the guidance instructs prosecutors to consider the extent to which a company evaluates whether employee training has an impact on employee behavior or company operations. This kind of evaluation necessarily entails analyzing data that reflects the behaviors or operations the organization is interested, or should be interested, in measuring. This revision further underscores the importance of data to the compliance function. It also indicates more

broadly that prosecutors expect companies to understand what is working and what is not, modify as necessary, and be prepared to show their homework if regulators ask.

These updates reflect how the role of compliance has evolved, particularly with the advent of big data. It is not enough for compliance executives to design programs and controls, wait for problems to come to them through tip lines or otherwise, and then respond. Prosecutors now expect compliance programs to use data and other tools to hunt for problems and find them first.

The Costs of Compliance

As DOJ and other regulators elevate their standards around what makes an effective compliance program, companies will need to evaluate their programs and, if necessary, raise their game. Doing so comes at a cost, of course, but reluctance to do so runs the risk of bad outcomes not only with government watchdogs, but also with customers, investors, and the public.

Despite what should be lessons learned from well publicized corporate failures going back decades, studies continue to show that corporate misconduct remains rampant. According to a recent report by the Association of Certified Fraud Examiners, fraud cases are often never reported publicly, and a typical organization loses 5% of its annual revenue to employee-committed fraud every year. Association of Certified Fraud Examiners, *Report to the Nations: 2020 Global Study on Occupational Fraud and Abuse*, at 4 – 5, 8 (2020). Of the approximately 2,500 fraud cases analyzed in ACFE's 2020 study, the average loss per case exceeded \$1.5 million. And of the nearly 2,600 executives interviewed for EY's 2018 Global Fraud Survey, more than 10% were aware of a significant fraud occurring in their company in the prior two years. Ernst & Young, *Integrity in the Spotlight: The Future of Compliance, 15th Global Fraud Survey*, at 8 (2018). EY's survey also found that the propensity of those respondents who would justify fraud to meet their financial targets has increased on a global level since 2016. Corporate malfeasance remains a serious problem.

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It is also worth noting for those at the top who set the tone and allocate the resources that these programs protect not only the company, but its directors as well—a point that may help ensure that a compliance program gets the resources and attention that regulators think it deserves. A board’s alleged failure to oversee a company’s compliance controls is generally evaluated under the generous standard set out in *In re Caremark International Inc. Derivative Litigation*, a standard touted as “possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment.” 698 A.2d 959, 967 (Del. Ch. 1996). But a string of recent Delaware cases may—may—suggest that a board’s conduct in the future will draw closer judicial scrutiny. Four times in the last year, Delaware courts have permitted Caremark claims to proceed against directors who allegedly made no efforts to ensure they were “informed of a compliance issue intrinsically critical to the company’s business operation.” *Marchand v. Barnhill*, 212 A.3d 805, 822 (Del. 2019); see also *In re Clovis Oncology, Inc. Derivative Litig.*, C.A. No. 2017-0222-JRS, 2019 WL 4850188 (Del. Ch. Oct. 1, 2019); *Inter-Mktg. Grp. USA, Inc. v. Armstrong*, C.A. No. 2017-0030-TMR, 2020 WL 756965 (Del. Ch. Jan. 31, 2020); *Hughes v. Hu*, C.A. No. 2019-0112-JTL, 2020 WL 1987029 (Del. Ch. Apr. 27, 2020). Whether these decisions bode a trend in director liability is an article for another day, but they should further emphasize, if only as a point of director self-preservation, that attention to compliance matters.

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On Trademarks

Policy (UDRP). UDRP proceedings—which require, among other things, a showing that the domain name owner does not have any legitimate interest in the trademark and is using the trademark in the domain name in bad faith—are a fast and effective mechanism to protect trademarks and domain names that your client should know about, especially if they are in the retail goods space.

So the Booking.com decision will in all likelihood not allow your clients to register their [TRADEMARK].COM trademarks, but it does present an important opportunity for you to talk to your clients about their trademarks and the way they are using their trademarks in domain names.

Joe Mauch is a Partner at Shartsis Friese LLP, and has extensive experience in a number of areas of business litigation, with a particular focus on intellectual property.



On Ethics

fall within the privilege but not be protected for purposes of step one of the anti-SLAPP analysis. 39 Cal. 4th at 320-325.

Some doctrines may be implicated by a threat, depending on the accompanying demand. A threat to expose misconduct unless hired to do an internal investigation could implicate Rule 5.6(a)(2)’s prohibition on agreements restricting a lawyer’s right to practice, for example, because the lawyer’s agreement to represent the threatened party would turn that party into a client, to whom the lawyer would owe a duty of confidentiality (among others), which in turn would restrict the lawyer from bringing cases based on the misconduct in the future. Such proposals create conflicts by

On Ethics

giving lawyers a personal stake in a settlement, and they create disciplinary risk whether offered or demanded. And in some circumstances, basic contract law doctrine may provide a defense to a settlement achieved by a threat. The threat would have to qualify as improper under the standards of Restatement (Second) of Contracts Section 176, and be one that left the threat recipient no reasonable alternative but to acquiesce. *Id.* Section 175. Defending the threatened claim would typically count as a reasonable alternative, but not always.

More practically, in an age when it is hard to shock people, an overt threat to bring a claim may sound worse than the substance of the claim itself. Civil litigators may become inured to threats, but not everyone has the same reaction. Many judges, and most jurors, will not be so inured. Particularly if, in the heat of a moment, a threat slips outside the rules discussed above, such reactions are the final practical, if informal, constraint.

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On Litigation

room the witness uses for the remote deposition should be quiet and free from outside noise and distractions (such as ringing phones and wandering pets). Discuss with the witness in advance how best to present and engage through the videoconference and consider a practice session with the witness. Remind the witness that even though the deposition is remote, it maintains the same formality as an in-person deposition. Advise the witness how you will have secure and confidential communications during the breaks, either through the platform or a separate call.

Hearings

Many courts are permitting hearings to take place telephonically or through videoconference. Counsel should follow the same decorum for these remote hearings as they would if they were physically present in court. This includes professional dress for hearings and etiquette. Backgrounds for videoconference hearings should be professional. If in doubt, use a plain background. For the videoconference, attorneys should select an area in the remote location that is quiet with no outside noise or distractions. Counsel should keep the microphone on mute when they are not speaking and remember to remove the mute function when they are speaking.

Mediations

Mediations can effectively take place through videoconference with the mediator using virtual breakout rooms to communicate with the parties and their counsel. Documents can also be shared during the mediation with most platforms. Advance coordination is important, including discussing with clients how private communications will be relayed during the mediation. A remote mediation can be more efficient than in-person mediation, as travel time is eliminated, and scheduling may be easier for the participants.

On Litigation

Trials

While civil jury trials will be slower to return in light of the unique issues with social distancing jurors, some courts are permitting remote bench trials through videoconference subject to the rules and protocol posted on the courts' websites. Remote bench trials present special challenges so advance planning and coordination is key. Make sure witnesses have the requisite information to access the trial remotely and be admitted by the Court through a virtual waiting room. Exhibits will still be exchanged in advance consistent with the Court's standing order. Court approved exhibits can be shown to counsel and the parties through screen sharing. Counsel should meet and confer in advance and discuss with the Court how any tangible exhibits will be shown. It will be more difficult to assess credibility remotely, so attorneys should have sufficient practice sessions with their witnesses to ensure they are presenting well through videoconference. Examining attorneys should speak slowly and deliberately, taking care not to interrupt the witness. It also will be more difficult to control a witness remotely on cross-examination so it is critical to have short, pointed questions seeking key admissions. Virtual breakout rooms will be available when the Court deems appropriate, including for side-bars and certain private communications.

Final thoughts

While the COVID-19 pandemic continues, attorneys will need to become proficient in remote civil litigation. Even after the pandemic subsides and there is a vaccine, remote litigation may be a viable option to more efficiently handle certain aspects of civil litigation. Learning best practices for remote litigation now will help attorneys represent their clients effectively for years to come.

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Letter from the President

Members:

Although we have been unable to break bread together since March, the work of our chapter goes on.

Membership: We have slightly above 1,800 members. While this represents a decline of roughly 10% off of last year—which was the highest in many years—this year's total still compares favorably with most recent years and reflects the loyalty of our members, and member firms. We are thankful for your commitment this year and hope that it will continue next year.



Bruce Ericson

Dinner Programs: We have held four programs this year (two in-person and two virtual) and will have a fifth on December 8. First up, on February 4, was "Impeachment in the Shadow of War: Constitutional and Policy Implications of Trying a President Amidst National Security Concerns," a lively discussion of holding an impeachment trial when the possibility of war with Iran was on everyone's minds. How long ago that seems! Next up, on March 3 was "Gender Bias in the Courtroom: Overcoming Challenges Facing Women Lawyers," a panel discussion featuring five women judges and trial lawyers. Our April 7 program fell victim to COVID-19, but on June 3, our first virtual program, "In-House, Sheltering From the Storm," featured four in-house counsel discussing how their workloads have grown and their relations with outside law firms have changed during the pandemic. On September 15, five judges who have presided over trials during the pandemic joined us virtually to discuss "The Medium is the Message? Trying Your Case During The Pandemic." While we are not ready to unveil the topic for our final program of the year, I can guarantee that it will be well worth your while. Attendance will remain free for members, and as an added benefit of the virtual format, you need not eat chicken if you would prefer something else. Time will tell when we can return to in-person meetings, but until then we promise to keep informative, lively and topical programs coming your way. I can say this with assurance because I know we already have several great programs in the works for 2021.

Annual Seminar: The bad news is that this

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Letter from the President

year's seminar had to be cancelled. The good news is that ABTL has secured the Mauna Lani, on the Big Island of Hawaii, for next year's annual seminar. Vaccines willing, it will be held October 19-24, 2021.

ABTL Reports: This represents our third issue of the year, all upholding our tradition of bringing useful information to trial lawyers in an entertaining fashion. The shift to an all-electronic format has spurred us to work toward improvements in the functionality and look of the publication, which we hope to unveil in the very near future.

Our Chapter's Response to the Pandemic: Shortly after the pandemic closed the courts, our chapter—at the suggestion of Board member Hon. Brian Walsh (Santa Clara Superior Court)—formed a “Bay Area Complex Courts Working Group” to consider measures to help the complex civil case departments reopen. The Working Group (of 20 judges and lawyers) drafted an outline for moving complex cases forward in a social distancing environment. Most Bay Area superior courts, or their complex case departments, issued rules or standing orders based on the outline.

The Working Group next turned to developing a template for conducting virtual bench trials. The Working Group concluded that absolute uniformity was neither desirable nor practical, as no one order would suit every case, every court or every judge. The finished product reflects input from the judges and lawyers in the Working Group. It is offered as a starting point for discussions among counsel and with courts, to be adapted as appropriate to fit the needs of particular cases. Already it has been used in a number of cases around the Bay Area and several orders reflecting it have been entered. You may find it at <https://abtl.org/northerncalifornia/>

While I have missed seeing all of you in person, I am grateful for the camaraderie and support I have received all year from the officers, the committee co-chairs and the Board. They, and you, make ABTL what it is—the best bar for people who do what we do, together.

Stay safe. Hope to see you soon.

Bruce Ericson



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