ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO

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The Honorable Kenneth J. Medel

Adventures in Jury Selection

By Hon. Kenneth J. Medel, Depart 66 Hall of Justice

By far the most difficult jury trial skill is jury selection. All other tasks can be locked in before trial: Opening statements and closing arguments memorized; client's direct examination script pre-screened and rehearsed in good faith with the client; the content of a direct exam script orally previewed with a cooperative witness; leading questions brilliantly organized for cross exam. In short, you can precisely pre-plan all the events of trial but one, and that is jury selection.

In my courtroom this adventure into the unknown involves chatting-up thirty-five nervous strangers to determine which twelve (plus two alternates) can fairly judge your client and witnesses, your case and you. The natural angst of jury selection is compounded by the enormous weight on your shoulders of all that lies ahead, all that must go right for you to win. To alleviate that discomfort, contemplate the following issues that arise regularly during *voir dire* in Department 66, San Diego Superior Court.

First, understand that the guiding principle of jury selection is to ask questions only about a venire person's *qualifications or competence* to sit as a juror. These simple themes should guide your inquiry: "Can you be fair to both sides? Are you *competent* to sit as a juror? Is there something about the case, the parties, the witnesses or the attorneys that gives rise to *bias* or *prejudice?* Is there a factor present in this case that will *distract* or *compromise* you or make you *miserable* given your life experience? Can you *follow the rules* and *apply the legal principles?*" These are the essential topics of jury selection. If your questions touch these core factors directly and with dispatch, you will be fine from a legal standpoint.

Occasionally, however, lawyers veer from these principles during jury selection. The following situations can make this Court uncomfortable:

1. Juror as shill to promote theme. Sometimes attorneys take advantage of a juror as an unwitting shill to promote a theme: To illustrate, the San Diego Inn of Court Trial Pro-

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President's Letter

By Randy Grossman

When was the last time you were inspired by trial advocacy? For me, the answer is approximately two weeks ago during a trial in federal court. I was particularly impressed by the opening statements. Counsel for both parties spoke eloquently about the evidence they expected to introduce. The advocates performed like veteran trial attorneys, but they were law students competing in the 2019 ABTL San Diego Mock Trial Championship. I had the pleasure to serve as a scoring juror and found the trial to be an inspirational way to finish another great year of ABTL programs and initiatives.

The Mock Trial Competition was held at the federal courthouse on November 1st, 2nd, and 4th. Congratulations to the University of San Diego, our 2019 champions! Special thanks to Marisa Janine-Page and Frank Johnson for organizing another great tournament, and to the U.S. District Court for the Southern District of California and U.S. Marshals Service for generously donating their time, space, and resources to make the competition a success.

We enjoyed several other programs since our last newsletter. On October 3rd through 6th, we convened at the La Quinta Resort for an informative and entertaining Annual Seminar. On September 12th, we held our second annual fundraiser at Stone Brewing World Bistro & Gardens, where we raised money for the Mock Trial Competition. On October 28th, we met for our fourth and final board meeting. We elected our 2020 officers – Alan Mansfield (President), Rebecca Fortune (Vice President), Paul Reynolds (Treasurer), and Judge Lorna Alksne (Secretary), and several new board and judicial advisory board members. We followed the meeting with a great dinner program featuring Steven Peiken, the Co-Director of the SEC's Division of Enforcement.

Finally, we made progress on two important initiatives to improve civility and professionalism in San Diego. On September 23rd, we hosted a roundtable discussion on civility at the San Diego County Superior Court's conference room. In addition, the San Diego County District Attorney's Office and San Diego City Attorney's Office recently agreed to provide a limited number of volunteer trial opportunities to ABTL members through our new Trial Attorney Partnership program led by Judge Victor Bianchini and the Trial Attorney Partnership Committee.

Thank you for the special opportunity to serve as the San Diego ABTL president. It was a privilege to work alongside our judicial and attorney members, board of governors, judicial advisory board, officers, and our executive director, Lori McElroy. I look forward to spending more time with you in 2020. Until then, have a nice holiday season.

Randy Grossman

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Adventures in Jury Selection

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gram employs a hypothetical involving a dentist who takes her kids to a mountain resort. Once settled in her room, she walks out to her car in the dark of night choosing a dirt mountain trail instead of the lighted cement walkway. She falls into a fire pit breaking her wrist. She sues the resort for negligence and there is a comparative negligence affirmative defense.

The defense lawyer asks the jury panel: "Does anyone run as exercise?" A juror raises a hand, "Yes". Then the litany of pre-conditioning questions: "Do you take precautions when you run? Do you make every effort to run during the daytime, and avoid the nighttime, to make sure you are safe? Do you make sure you don't go down dark unfamiliar places like dark streets, alleys or trails? Do you carry a flashlight?", etc. and always concluding with the master stroke, "And if you didn't take such precautions and you fell and hurt yourself, wouldn't you take total responsibility for your own injuries?"

Yes, you found the perfect vehicle to promote your comparative negligence defense. But what do these questions have to do with the juror's "qualifications"? The lawyer is not exploring the juror's competence or ability to be fair, not uncovering potential bias or prejudice. The only object of the questions is to precondition *the jury panel* by using this juror as an unwitting, involuntary shill. This is not a proper function of *voir dire*.

Rather, be direct with the juror: "Ms. Robinson, there is no question that Plaintiff fell and injured herself at my client's resort. But will you be open to considering what her own responsibility is, if any, toward these injuries? We will be presenting evidence of precautions that she may have taken; could you keep an open mind and fairly consider the merits of that evidence?"

2. The Trick Pop Quiz: Some lawyers introduce legal concepts to the panel through a trick "pop quiz". A criminal defense lawyer says, "Ms. Smith the prosecutor has the burden of proving the crime beyond a reasonable doubt before you can find my client guilty. *What do you think the burden of proof is for the defense?"* The juror reflects in good faith and answers: "Well, I would expect that you would put on witnesses or other evidence that shows your client is not guilty". Logical, reasonable. But the lawyer pronounces triumphantly, "Wrong! The defense has no burden of proof. We don't have to call the defendant to the witness stand, call any witnesses, produce any exhibits. We can just attack the prosecutor's evidence as failing to constitute proof beyond a reasonable doubt! Does everyone understand that?"

This is not a clever way to screen this issue with the jury panel. The cost of the trick question is juror embarrassment. You might as well have just screamed to that juror, "You big dummy!"

The legal pop quiz also appears in civil trials: "Mrs. Brown, what do you think the difference is between the "more likely that not" standard and "proof beyond a reasonable doubt?" "How would *you* define 'negligence'?" My experience is that the juror will get it wrong every time, or simply sit in silent confusion. Do yourself the favor of avoiding trick questions and legal pop quizzes. Remember, you are trying to win-over, not alienate your prospective jurors.

Again, be direct with the juror: "Mr. Brown, this is not a case where we have to prove the elements of the cause of action by proof beyond a reasonable doubt, but only must prove an element to be 'more likely true than not true'. Do you see the distinction? You won't hold me to that higher criminal standard, will you?" In short, *you tell* the juror what the legal principles are, and then ask the juror whether he or she is capable of abiding by them. Core principles of juror competence and ability to follow the rules.

3. Wasting time on a blatantly unqualified juror. Some jurors throw down the gauntlet: "I think plaintiff's lawyers are all dishonest and I am telling you right now, plaintiff definitely does not want me on this jury" or "I had a similar accident and was cheated by a conniving defense attorney and a penny-pinching insurance company; there's no way I could ever be fair to the defense." It is nearly impossible to rehabilitate a juror after such a pronouncement of prejudice. The juror will not be around long; a disqualification for cause is inevitable. In the meantime, nothing good or helpful to the jury selection process will come out of this juror's mouth.

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Adventures in Jury Selection

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Consequently, it surprises the Court when an attorney, consciousness of the limited time allotted for jury selection, wastes time by asking questions of that juror. It is not as if the juror is on the fence as to a fairness issue, and you need to inquire to clarify or confirm; if that were the case, fine, ask some questions. But do not do so with someone who has clearly and forcefully declared a disqualifying bias or prejudice. It will only serve to inject more venom into the jury panel blood stream. If you just can't leave that juror alone, then simply use the juror as a springboard to question other jurors without giving the juror the soapbox again: "Earlier Mrs. Johnson expressed her distrust of defense lawyers; does anyone else share those feelings?"

4. The problem of an absent client: Often a party cannot or will not be present for part or most of the trial. There are always panel members who are put-off, even alienated, when they become aware of this. This memorable quote from a medical malpractice case I tried makes the point: Juror: "I just can't understand what's going on in the (defendant) doctor's office that is so much more important than his teenage (plaintiff) patient going blind under his care!"

It can be a difficult problem to address in *voir dire*. Most commonly the attorney inquires, "Ms. Smith, my client will not be here during much of the trial. Is that something you will hold against her?" But, consider the propriety of this question in light of the jury instruction that helps jurors evaluate the credibility of witnesses.

CACI 5003 states that a factor to consider in assessing a witness's credibility is "the *witness's attitude about this case* or about giving testimony." Query whether a party's absence from the trial, either with no justification or with a flimsy excuse ("I would prefer to play golf") reflects on "the witness's attitude about this case" and is therefore a piece of evidence that the jury could consider in assessing the party's credibility. If your judge takes that position, it may be totally *permissible* for a juror to hold absence against the party as reflecting on the *attitude* of that party as a witness. It follows that asking the jury in advance to *not* hold absence against the client, may be asking the jury to prejudge a credibility factor.

I vetted this issue with my distinguished lunch judges. Many believed that the credibility instruction to consider a witnesses' attitude pertains only to the attitude the witness demonstrates on the witness stand. To those Judges, "absence from trial" was not a relevant consideration and it would be acceptable for the lawyer to tell the jury in *voir dire* that the client's absence should not be considered or held against a party. Other colleagues thought it was something a juror could assess in evaluating a party's credibility.

If the Court believes that a party's absence from trial could reflect on a party's attitude as a credibility factor, then likewise, it may not be appropriate for the lawyer to express during *voir dire* precisely *why* the client cannot be present. Arguably, the lawyer would be testifying for his client as to a viable credibility issue and a lawyer's statements are not evidence. If the potential absence of your client is a problem in your case, try to convince him or her to be there and if that is not possible, then be sure to inquire of the Judge about his or her position in addressing this issue on *voir dire*.

But, do not ask the judge to get involved. "Your honor, will you please tell the jury my client can't be here the whole time and explain to them why not?" Remember the Court is the judge of the law and the jury is the judge of the facts, including witness credibility. The Court can neither influence the jury on a credibility issue nor advocate for a party.

Instead return to core principles; "Ladies & gentlemen, my client will not be here for part of the trial. Will all of you keep an *open mind* on this issue until you hear my client testify as to why she can't be here? Will you all be able to treat her *fairly,* despite knowing that she won't be here for parts of the trial? Does this fact alone prevent you from giving my client a *fair* trial or from listening to all of the evidence?"

5. Covering areas already fully addressed in the Court's *voir dire:* I use a PowerPoint presentation for the Court's *voir dire* to cover all judge-appropriate issues as well as case specific issues that the lawyers reveal to me. I preview the PowerPoint with the lawyers before jury selection and modify it to the lawyers' specifications. During the jury selection process, I dig

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Adventures in Jury Selection

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deep when a juror discloses a bias or prejudice against a party or intimates a problem in understanding or following the legal concepts. My inquiry is thorough.

Consequently, it is disconcerting when the lawyer says, "I know the Judge just covered this with you already, but let me ask you anyway . . .", and then asks an identical question, e.g. "any problem with awarding general damages?". The Court recognizes that you wrote that point on your outline, but that should not compel you to ask the question. We want to use our trial time productively. And you should know that in most instances, the jurors sit mute in response to the question, recognizing that the Court just addressed that very point.

6. Making a Juror Promise You Something: Finally, I have never understood how a lawyer believes that he or she is entitled to require a panel member to "make me a promise". "Do you promise me that you will hold the Plaintiff to his burden of proof?" "Do you promise me you will keep an open mind until you hear the evidence we produce?" Isn't that a bit presumptuous? Promises are usually made between close friends and intimates; someone well known to you. But not someone you just met. And what exact authority does a lawyer have to require a promise of a panel member, almost as a quid pro quo to sitting on the jury? I am not sure how a juror feels when a lawyer exacts a promise like that, but it has always made me squirm.

Instead of exacting a promise, why not focus on a juror's ability and willingness to follow the law? "Do you think you can follow the instruction and hold Plaintiff to his burden of proof?" "Would you have any problem in keeping an open mind until you have heard all of the evidence in this case?"

When it comes to trial practice we deal with art, not science. As to the jury selection issues discussed above, I am certain that there are as many judicial perspectives as there are judges in the courthouse. Nevertheless, I sought to give you a glimpse as to certain recurring irregularities that occur in Department 66 as you prepare for your upcoming adventure in jury selection. Good luck!

Conceptualizing San Diego's Civil Department 66

By Angela Hampton, Gordon Rees Scully Mansukhani, LLP

The Honorable Judge Kenneth J. Medel, along with his friendly and highly competent support staff, spent a lunch and learn afternoon discussing Department 66's procedures. Even if you do not find yourself before Judge Medel, being able to conceptualize how the courtroom works can be highly beneficial.

Days of the Week

Consider what day it is when at court. Knowing the court schedule allows for realistic expectations. There are no ex parte motions calendared on Monday, so Monday tends to be light, assuming there is no ongoing trial. Tuesdays through Thursdays start at 8:30 with ex parte hearings, which could be followed by court or jury trial at 9 a.m. Please make sure your ex parte request is necessary and urgent before scheduling it, not merely something on your agenda. The court tends to receive too many ex parte papers that are not appropriate for ex parte hearings. Consider whether the issue can even be decided by Judge Medel at the ex parte hearing. A limited time-frame for a complex issue or set of pertinent facts does not allow for a reasoned, final determination to be made in a rush setting. Plan ahead, put important dispositive hearings or discovery disputes on calendar early to avoid needing an ex parte hearing.

Judge Medel indicated that the only circumstance certain to make him anxious is the threat of running past daily time confinements, such as attorneys arguing motions expansively, repeating concepts, as the noon hour approaches (or any situation where the jury is kept waiting!) With CMC, trial call, TRC, status reviews, and motion practice filling Friday from start to finish, it is by far the busiest day for Department 66 and likely for most courtrooms. Judges cannot, by law, keep court staff past noon. So, the judges expect courteous expedition by the lawyers when the Court, staff and attorneys are struggling against a deadline.

No-Shows and Calls

There are too many no-shows, sometimes as to important hearings such as TRCs and Trial Calls. Please call and cancel if you do not intend to appear. Let one of Department 66's calendar clerks, Cynthia Rein, Kimberly Roberts, and Jenitta Verissimo, know if your case has settled. It will open up time slots for others. Also, avoid calling Department 66's court clerk, Grachelle Mendoza, unless it is necessary. A lot of information can easily be found online. Do not call and ask a question that you can find yourself. For instance, calling to ask for the status of signed papers is usually a drain and takes time away from Ms. Mendoza's ability to process. Rest assured, as soon as she processes the papers, they will be instantaneously updated on the register of actions. Judge Medel signs stipulations throughout the week, but if in trial, that may occur on Friday. It saves time by only using the court where necessary and remember to think of others. So, next time you are in Department 66 be sure to smile at bailiff Vanessa Acevedo. Manners and consideration go a long way.

Necessary Court Intervention

Judge Medel estimates 50-60% of discovery motions and informal discovery conferences could have been resolved if only the parties had just spoken to one other in open cooperative fashion. When a phone call or face to face conference could have brought mutual understanding, it is disappointing when the court expends time and effort for no good reason. With regard to many discovery disputes, the controversy comes down to a balancing of the importance of the information sought versus the cost, work hours and feasibility of finding the information. If the information is important to the case the requesting party will probably get it; however, if the information sought is not critical or is of tenuous value to the issue, then re-consider if a motion to compel is the best use of resources.

Judge Medel is an active listener during the motion calendar. If he hears counsel say something that catches his attention during oral argument that impacts his feeling about the tentative, he may take the matter under submission and the Court could change its mind. Yet, he estimates that he totally reverses his tentative after further deliberation maybe 1 in 30 cases.

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Conceptualizing San Diego's Civil Department 66

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Motion Matters

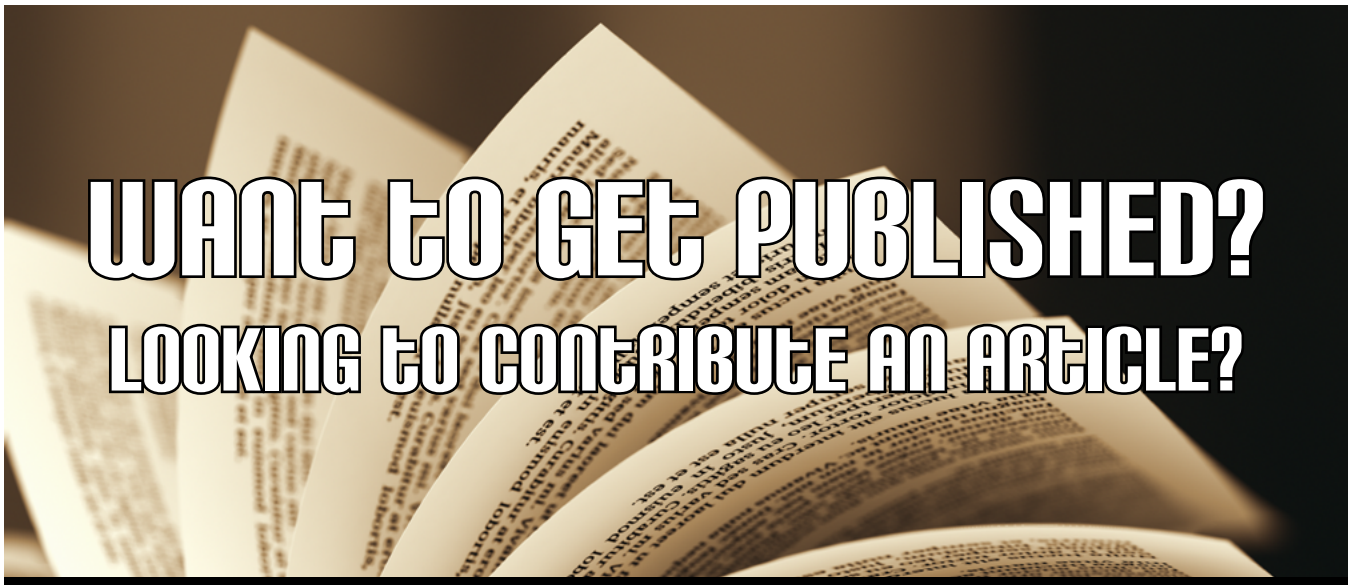
All the points and authorities head straight to Ken Jensen, a Research Attorney with 25 years of experience. Mr. Jensen gets first crack at reviewing the papers. Do your best to make it easy for him to find your exhibit, declaration or whichever particular support your papers reference. Cite directly as much as possible but when you need to send a reader elsewhere, direct them precisely where you want them to go. It can be a struggle finding things. Labeling on the register of actions, or any electronic portal, is crucial. Avoid vague labels such as "opposition". Use common sense labels that clearly identify the document's purpose. A long label is better than a vague one. Consider filing a notice of lodgment and filing each exhibit with the court. This makes it much simpler for the court.

After reading the papers, Mr. Jensen will draft a memorandum laying out the issues and comments in an objective manner with a proposed ruling. Judge Medel will always read the memorandum from Mr. Jensen first and will then review the papers, if needed. While Judge Medel appreciates complete papers, avoid adding two pages worth of citations explaining the legal standard of a demurrer or summary judgement. Judge Medel already knows. So, simplify it and drop it down to two sentences. At the end of the day, their overall goal is about getting it right and being committed to following the law.

Thank You Department 66

A warm and grateful thank you to all of Department 66 for putting on a tremendous lunch and learn overview. As a new attorney, this information is extremely helpful. We legal newbies occasionally experience the deer in headlights syndrome when walking into a new courtroom. But it certainly should not happen in Department 66 moving forward!

Angela Hampton is an associate at the San Diego Office of Gordon Rees Scully Mansukhani, LLP.



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Flow State Depositions

By Conor Hulburt, The McClellan Law Firm PC

The right question comes to you as if dropped into your head by a mysterious force. You ask it and then you are laser focused on the answer. Back and forth you volley with the witness. Everything else fades away. There is no hesitation or effort. Time expands. Or dissolves. It doesn't matter. What matters is that you are flowing and you want to stay there as long as you can.

What is flow? It is a state of total present awareness that all top performers - from athletes, to artists, to soldiers - search for. It is Steph Curry dribbling past three defenders and then stepping back and shooting behind the arc. It is Alex Hannold soloing El Capitan two thousand feet above the ground. It is Kelly Slater stalling into the tube and then rocketing out in a spray of sea foam. It is the state you experience when you are totally immersed in the task at hand.

Learning how to find flow can take your deposition game to the next level. Here are three tips (and challenges) to do just that.

Tip 1: Burn Your Outline

The deposition outline is both a great helper and great hindrance in achieving flow. It is a great helper in the sense that it is the foundation of the deposition preparation. There is no question that time spent preparing an outline leads to a better examination. However, the outline is a great hindrance if you attempt to conform the testimony to your outline. When you closely follow an outline, the deposition proceeds in a predictable pattern - question, pause, answer, pause. Your attention oscillates between the witness and the outline. The intermittent pauses afford the witness too much time to stick to his own strategy. The outline can also cause you to resist moving into topics that arise out of the order of your outline. The witness could say something relevant, but because your outline doesn't get into that topic until later, you pass over the testimony.

The object of flow is to be so present in the moment that you pull the witness into the present with you. By maintaining undivided attention, eye contact, and following up without pause, you don't give the witness time to consider where the question is headed or how best to answer. Your own spontaneity requires spontaneity from the witness, which is exactly where you want him. A spontaneous witness testifies impulsively without premeditation. He is much more likely to simply tell the truth.

I recently deposed an engineer for a large automobile manufacturer in a product defect case. He had been thoroughly prepared by a team of attorneys. He knew exactly what our PMQ categories were, and he had a preconstructed answer for everything. He was Mr. Anti-Flow. I can't tell you how many times he said: "We designed and tested the part to be robust against separation." It was his answer to everything. I had spent days preparing a detailed outline, but I knew that the only way to break up his robotic script was to bring him into the present with me.

I launched into a line of questioning he hadn't anticipated, and it was requiring him to answer more impulsively. He said something that was toward the end of my outline, but I decided to dive in. I pulled an automotive safety device out of my briefcase and handed it to him. I started on a line of questions about whether the device could have contained the separated part in our case, which ripped through the fuel lines, brake lines, and floorboard, and set my client on fire. Then, as I watched him holding the device, arguing that he couldn't say whether it could have prevented the ensuing damage, I asked him to demonstrate. It wasn't a question I had planned, but I realized in that moment that physically handling the device would limit his arguments. I asked him to pretend his left arm was the separated part and place it inside the safety device. Then I asked him to "separate the part" and attempt to move it into the surrounding area. His arm was clearly restrained by the device, and the answer to my earlier question became obvious. The defense engineer physically demonstrated on video how the safety device could have prevented the damage in the case. If I had been referring to my outline and not fully engaged with the witness, the opportunity for this valuable testimony would have passed me by.

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Flow State Depostions

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Challenge 1:

Before your next deposition, prepare a thorough outline. Then, before the deposition, simply write down your outline topic headings on the first page of your notepad. Fold up your outline, put it in your briefcase, and don't pull it out until a break to make sure you've covered everything. Enjoy the freedom, spontaneity, and flow of parting ways with your outline. If you want to take it a step further, try not taking any notes, or only taking minimal notes. Notice how note taking pulls your attention away from the witness and interrupts the flow of the conversation.

Tip 2: Take the Witness by Surprise

A great way to pull the witness into the present is to catch him by surprise. When the witness doesn't expect something, he is forced to respond in the present. Once you get him there, you can keep him there by following up with questions before he has time to regain his footing. The trick is that the only way to keep him there is to stay there yourself. As soon as you pause to refer to your notes, write something down, or contemplate your next question, the flow is broken.

In another recent case, I was deposing the general contractor's superintendent on a job site where a structure fell on a subcontractor's worker and killed him. I represented the family of the deceased worker. When the deposition started, I decided to try and catch the witness off balance. Rather than ask him to state his name, or tell me if he doesn't understand a question, I asked him whether he accepted any responsibility for what happened? It was the very first question. Video was rolling.

His face was utterly shocked. Everyone in the room sat straight up. He had been expecting admonitions and background questions, and easing into things. And now here we were, right in the heart of the case. The next fifteen minutes were some of the most dynamic testimony I'd ever been a part of. The superintendent felt responsible for the accident. He was racked with guilt, and he was torn between accepting responsibility and protecting his employer (and his job). Being asked a question out of order forced the witness into the present. And by keeping him there with follow-up questions, eye contact, and focused attention, I was able to distance him from any strategy he had going in.

Challenge 2:

Decide on one way to catch the witness by surprise at your next deposition. This could be by taking a topic out of order, exploring a topic that is seemingly unrelated, or asking the witness to agree to principles or beliefs that are analogous to principles at issue in your case. The key is to be creative. Once you catch the witness by surprise, lean in to the examination. Notice how everyone in the room perks up at the unexpected direction of the conversation. They want to know where it is headed. Now that you have everyone's attention, take them where you'd like to go.

Tip 3: Experiment

Early in my career, I started giving myself 15 minutes of "free time" during depositions to experiment. I'd put it at the end, or the beginning, or right in the middle. I'd pick a key topic, and I'd see where the conversation took us. I found these times to be scary, fun, and challenging. I still had the security of my outline, and I was comforted by the fact that I could return to it after exploring the unknown for a few minutes. The more I did this, the more I became aware of the shift in my attention from the witness back to my outline. Over time, I gave myself more and more free time, until one day, I just sat down and had a conversation with a witness from start to finish.

I recently attended the deposition of a client's sister who cared for her brother for months while he was in the burn unit, and for some time afterwards. She knew better than anyone the depths of his struggle. Yet, in response to the defense attorney's examination, she was practically whispering. She was so self-conscious about the deposition process that she was hardly present in the room.

When the examination was finished, her testimony felt flat, like she had never really gotten off the ground. I don't often ask a damages witness questions after the defense examination, but I was curious to see if I could bring her into the present with me, and what that would look like.

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Flow State Depostions

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I knew there was a risk I'd make things worse, but I also believed there was another side to her testimony. I asked her some questions about her brother before the fire. Who was he? What did he love? Then I took her to her first memory of seeing him in the burn unit. What was that like? What did she see, hear, and smell? What was she feeling? Gradually, by giving her my undivided attention and following up on her responses without pause, she started to flow. Her voice gained strength. You could almost see the burn unit appear around her. She was like a dancer who stopped counting her steps. When she described how she felt, you couldn't help but feel it too. As we moved on, she shared her story in a way that touched everyone in the room. Our conversation took 15 minutes. It was an experiment, and it paid off with the most impactful testimony of the day.

Challenge 3:

Choose one topic that is at the heart of your case and is fitting for the witness. Give yourself 15 minutes of "free time" during the deposition to freestyle, experiment, and have some fun. Imagine you are in trial, the jury is watching, and the judge has only given you 15 minutes for the examination. Don't reference your outline or take any notes during this time. Go all in. Be real. Be you.

The techniques I've described all apply equally whether you are representing plaintiffs or defendants. I've used flow to elicit admissions as a defense lawyer, just as I use it as a plaintiff's lawyer. Flow works in business disputes, SEC proceedings, and personal injury cases. It works in depositions, trials, arbitrations, and any other setting where you need to elicit a witness' testimony.

In conclusion, I wish you all more flow in your coming depositions. I hope tucking your outline into your briefcase, taking the witness by surprise, and giving yourself freedom to experiment helps you to find it.

Conor Hulburt is an associate at The McClellan Law Firm PC. Conor serves on ABTL's Board of Governors.

California Supreme Court Paves Way to Challenge Out-of-State Choice-of-Law Provisions in Insurance Policies

By Ryan Caplan, Procopio, Cory, Hargreaves and Savitch LLP

Overview

In August 2019, the California Supreme Court pronounced California's "notice-prejudice" rule to be fundamental public policy of the state, allowing California policyholders to argue it precludes enforcement of choice-of-law provisions that would otherwise impose strict notice requirements on insureds. (*Pitzer College v. Indian Harbor Ins. Co.* (2019) 8 Cal.5th 93, 110.) The Court further held the notice-prejudice rule also applies to "consent" provisions in first-party coverage policies, but not to third-party coverage. (*Ibid.*)

The "notice-prejudice" rule precludes an insurer from denying coverage where an insured gives notice of a claim that is technically untimely under the terms of an occurrence-based insurance policy. Under this rule, an insured will be excused from strict compliance with a notice requirement unless the insurer can prove it suffered actual prejudice as a result of receiving the "untimely" notice from its insured. Similarly, consent provisions require insureds to obtain preapproval from their insurers before incurring any costs for which they will be seeking coverage.

In *Pitzer College*, *supra*, the insurance company obtained summary judgment on the grounds that its insured did not give timely notice of its claim and did not obtain timely consent before incurring indemnifiable costs. By virtue of a choice-of-law provision, the policy was governed by New York law, which required strict compliance of notice provisions for policies issued out of the state. On appeal, the Ninth Circuit sought certification from the California Supreme Court on how to address the choice-of-law issues.

Case Summary

Pitzer College, as part of the Claremont Colleges, procured an insurance policy from Indian Harbor Insurance Company covering legal and remediation expenses resulting from pollution discovered during the policy periods. The policy had a choice of law provision designating New York law and imposed strict notice and consent obligations on the insured. While New York law recognizes a notice-prejudice rule for policies issued within its state, the rule does not apply to policies issued outside the state.

In January 2011, Pitzer discovered ground contamination at the site of a new dormitory it was building on campus. Upon determining remediation would be required, and with pressure to complete its dormitory prior to the 2012-2013 academic year, Pitzer determined to undertake the remediation as soon as possible. After environmental consultation, Pitzer commenced remediation in March 2011, which was completed a month later at a cost of approximately $2 million. Thereafter, in July 2011, Pitzer gave notice of the contamination and remediation to Indian Harbor. Indian Harbor denied coverage on the grounds that Pitzer (a) failed to give notice as required under the policy's notice provision, and (b) failed to obtain Indian Harbor's consent before incurring remediation expenses.

Pitzer filed a coverage suit, which Indian Harbor removed to federal court. There, Indian Harbor moved for summary judgment, contending it was not required to indemnify Pitzer for the reasons stated in its denial of coverage. The district court granted Indian Harbor's motion, finding New York law governed and that, applying New York law, Pitzer's untimely notice excused Indian Harbor's obligations. The district court separately found Pitzer had not complied with the policy's consent provision when it incurred the remediation expenses, rejecting Pitzer's argument that the expenses were incurred on an emergency basis.

Pitzer appealed to the Ninth Circuit, which certified the following two questions to the California Supreme Court: (1) Is California's notice-prejudice rule a "fundamental" public policy for purposes of a choice-of-law analysis? (2) If so, does the notice-prejudice rule apply to the policy's consent provision?

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California Supreme Court Paves Way...

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Under California's notice-prejudice rule, an insurer must prove that an insured's late notice of a claim has substantially prejudiced its ability to investigate and negotiate payment for the insured's claim. It is not enough that notice be late—the insurer must show actual and substantial prejudice. This means the insurer must prove "a substantial likelihood that, with timely notice, and notwithstanding any denial of coverage or reservation of rights, it would have settled the claim for less or taken steps that would have reduced or eliminated the insured's liability."

In finding the notice-prejudice rule to be fundamental public policy of the state, the Court cited the inability to waive the rule by contract under California law, the rule's purpose to protect insureds against the "inherently unbalanced" and "adhesive" bargaining power possessed by insurers, and the protections of the public interest by not shifting costs of harm intended to be covered by insurance policies. As recognized by the Court, "the essential part of the contract is insurance coverage, not the procedure for determining liability, and that 'the notice requirement serves to protect insurers from prejudice, … not … to shield them from their contractual obligations' through 'a technical escape-hatch."

Although the Court held the notice-prejudice rule reflects fundamental California public policy, it did not resolve the issue of whether it applied in the underlying dispute. The Court left it to the Ninth Circuit to determine whether the remainder of the choice-of-law analysis compelled applying the notice-prejudice rule over the policy's governing law provision.

Turning to the issue of whether this newly-anointed fundamental public policy should apply to the consent provision, the Court determined it should apply for first-party coverage, but not third-party coverage.

Guiding this decision was the recognition that, "in the first party context, … the insured must not ignore the damage once it is discovered, or otherwise prejudice the insurer's ability to investigate and cover the loss." Conversely, "in the third party context, 'the insurer is vested with complete control and direction of the defense'" such that "the decision to pay any remediation costs outside the civil action context raises a judgment call left solely to the insurer." In the latter context, these provisions (otherwise known as "no voluntary payment" provisions) prohibit an insured from unilaterally settling a claim before the establishment of the claim or any denial of coverage by the insurer. Recognizing the insurer's right to control the defense and settlement as paramount in the context of third-party coverage, the Court declined to apply the notice-prejudice rule to consent provisions in third-party policies.

Ultimately, the Court declined to resolve whether the notice-prejudice rule applied to the consent provision in the underlying dispute because the parties vigorously disagreed as to whether the policy in question constitutes first-party or third-party coverage. The Court left that matter to be decided by the Ninth Circuit as well.

Takeaways

Following *Pitzer College*, there are two major takeaways of which insurance practitioners should be mindful:

Insureds have a strong basis to challenge choice-of-law provisions that would otherwise deprive them of California's notice-prejudice protections for tendering claims to their insurers; and

For first-party coverage, insureds can rely on California's notice-prejudice rule if they have incurred insurable expenses prior to obtaining approval from their insurers. Conversely, for third-party coverage, insureds will be expected to obtain prior approval before incurring any such expenses if they hope to recover them from their insurers, absent establishing that such expenses were incurred on an emergency basis.

Regardless, the case emphasizes the importance of tendering claims promptly to avoid or minimize the risks otherwise protected by the notice-prejudice rule.

Ryan Caplan is a litigation attorney with Procopio, Cory, Hargreaves and Savitch LLP, focusing primarily on insurance coverage and unfair competition disputes. Ryan serves on ABTL's Board of Governors.

California Case Summaries FREE™ November 2019

By Monty A. McIntyre, ADR Services, Inc.

CALIFORNIA COURTS OF APPEAL

Attorneys

Sprengel v. Zbylut (2019) _ Cal.App.5th _ , 2019 WL 4927194: The Court of Appeal affirmed the trial court's order granting defendants' motion for summary judgment against plaintiff's complaint alleging legal malpractice in representing a limited liability company that plaintiff owned a 50% interest in. Plaintiff lacked standing because her claims were derivative not direct. Shareholders do not have a direct ownership interest in company assets, so the use of company funds to pay legal fees could not cause plaintiff a direct injury. Moreover, the representation of the limited liability company did not create an attorney-client relationship with plaintiff. (C.A. 2nd, filed September 10, 2019, published October 7, 2019.)

Civil Procedure

Litinsky v. Kaplan (2019) _ Cal.App.5th _ , 2019 WL 4894225: The Court of Appeal affirmed the trial court's order granting an anti-SLAPP motion to plaintiff's complaint alleging malicious prosecution and intentional infliction of emotional distress. Plaintiff was a defendant in an earlier action brought by defendant on behalf of her client. After the dismissal of that case, plaintiff filed this action. Because the claims in this action arose from the earlier lawsuit, they arose from protected activity. Plaintiff failed to show a probability of prevailing on her claims. The claim for intentional infliction of emotional distress was precluded by the litigation privilege (Civil Code, section 47). The claim for malicious prosecution could not succeed because defendant had probable cause, based upon the statements of her client, to prosecute the earlier lawsuit against plaintiff. While the evidence from defendant's client was contradicted by testimony from the opposing party and some third parties, it was not indisputably false. Faced with the choice of accepting the version of events presented by her client or the version described by the opposing party, defendant appropriately opted to continue advocating for her client. (C.A. 2nd, October 4, 2019.)

Evidence

Berroteran v. Superior Court (2019) _ Cal. App.5th _ , 2019 WL 5558830: The Court of Appeal granted a petition for writ of mandate directing the trial court to enter a new order denying real party in interest Ford Motor Company's motion in limine excluding the videotaped deposition testimony of nine of Ford's employees and former employees, and also directing the trial court to reconsider the admissibility of documentary evidence that the trial court may have excluded because it found the depositions inadmissible. Plaintiff's first amended complaint alleged causes of action for multiple counts of fraud, negligent misrepresentation, violation of the Consumers Legal Remedies Act (Civil Code, section 1750 et seq.), and violation of the Song-Beverly Consumer Warranty Act (id., section 1790 et seq.). The Court of Appeal disagreed with Wahlgren v. Coleco Industries, Inc. (1984) 151 Cal.App.3d 543 to the extent it espoused a blanket proposition that a party has a different motive in examining a witness at a deposition than at trial. The Court of Appeal ruled that the testimony of the nine witnesses was admissible because, in the earlier actions, Ford had the right and opportunity to cross-examine its employees and former employees with a similar motive and interest as it would have in the instant case. Each case, including the present one, concerns Ford's model 6.0-liter diesel engine, the engine's alleged deficiencies, Ford's alleged knowledge of those deficiencies, and Ford's strategy regarding repairing the engines. While a party's motive and interest to cross-examine may potentially differ when the prior questioning occurs in a pre-trial deposition, Ford failed to demonstrate any such different motive or interest here. (C.A. 2nd, October 29, 2019.)

Insurance

Miller Marital Deduction Trust v. Zurich American Ins. Co. (2019) _ Cal.App.5th _ , 2019 WL 5304862: The Court of Appeal affirmed the trial court's order denying an anti-SLAPP motion to strike (Code of Civil Procedure, section 425.16) a state court complaint alleging breach of contract and bad faith as a result of defendant's refusal to appoint Cumis counsel to defend additionally named insureds in a counterclaim filed in a separate federal action regarding environmental contamination that originated from a dry cleaning business. The Court of Appeal disagreed with the trial court's finding that the action arose out of protected activity. Not all attorney conduct in connection with litigation is protected by section 425.16. What gave rise to liability was not the fact of counsels' communications, but that defendant

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California Civil Case Summaries

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allegedly denied plaintiffs the benefit of panel counsel's independent professional judgment in rendering legal services to them. The Court of Appeal ruled that the anti-SLAPP statute did not apply to the cause of action for breach of implied covenant of good faith and fair dealing. (C.A. 1st, October 21, 2019.)

Torts

Dobbs v. City of Los Angeles (2019) _ Cal.App.5th _ , 2019 WL 5206043: The Court of Appeal affirmed the trial court's order granting defendant's motion for summary judgment in a case where plaintiff alleged she was injured by a dangerous condition after she walked into a round concrete pillar (a bollard) that was 17.5 inches wide and 17.5 inches tall and used to protect the Los Angeles Convention Center from car bombs. The trial court properly granted summary judgment on the basis of design immunity. Discretionary approval need not be established with testimony of the people who approved the project. Testimony about the entity's discretionary approval custom and practice can be proper even though the witness was not personally involved in the approval process. The trial court properly found the exercise of approval authority was reasonable. (C.A. 2nd, October 16, 2019.)

Monty A. McIntyre is the publisher of California Case Summaries™ (https://californiacasesummaries.mykajabi.com/) including:

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Monty A. McIntyre, Esq. is also Mediator, Arbitrator & Referee at ADR Services, Inc. For ADR Services, Inc. scheduling, contact my case manager Christopher Schuster Phone: (619) 233-1323.

Email: christopher@adrservices.com

Holiday Tips From & A Tip of the Hat to The Rutter Guide on Civil Appeals

By Rupa G. Singh, Niddrie Addams Fuller Singh LLP

> *"If there's a book that you want to read, but it hasn't been written yet, then you must write it."*
>
> *— Toni Morrison*

Jon Eisenberg, primary author of the Rutter Guide on *California Civil Appeals and Writs,* took Toni Morrison's advice to heart, and is credited with leading the effort to draft this missing treatise on appellate practice. As a head start to fun holiday reading, and after witnessing Eisenberg's recent induction into the Appellate Hall of Fame, I treated myself to reviewing our firm's copy of this Holy Grail of California appeals, from aqua hardbound front cover to worn blue end cover. All 2,000-plus pages, organized into 16 chapters in two volumes, down to the "practice pointer" notes and "but see" cautions.

As a result, for the first time in 20 years of practice, I have a satisfyingly full picture of the appellate process, from nuts-and-bolts appellate considerations during pre-trial motion practice to the basis for seeking review in the California Supreme Court, and even the United States Supreme Court. But every silver lining has a cloud. So I now also have a newfound dread of the many missteps for the unwary trial or appellate lawyer along the way.

Before these kernels of wisdom are replaced in my mind by more pressing things, such as what to buy when it's our turn to provide snacks for our daughter's soccer team or when to schedule the family holiday card photoshoot, I share key do's and don'ts.

- Appellate jurisdiction is conferred on the courts by Article 6, Section 11 of the California constitution, but all litigants' right to appeal is statutory, per Code of Civil Procedure 904.1. That means parties cannot confer or extinguish appellate jurisdiction by consent or stipulation. Nor can they change the appealability of orders or judgments or the deadlines to appeal them. So mark your calendars, and then file early to avoid last-minute mishap.
- The Notice of Appeal can be submitted to the wrong court, without the required filing fee or fee waiver application, and in pink ink for it to be valid. But the Notice of Appeal must be filed timely, state the order or judgment being appealed, and be signed by appellant or appellant's counsel. So don't push the limits of liberal construction.
- Though evidentiary objections need not be ruled upon to be preserved for appeal, they must be made on a timely basis, on the correct grounds, and on the record. So object early and correctly, but not often or without a basis for the objection.
- Trial exhibits must be moved into evidence, sidebar colloquies must be recorded, and chambers' discussions must be reported so they can be made part of the record on appeal. If it's not in the record, it didn't happen. Lesson? It's the record, stupid.
- A timely motion for new trial must be filed to preserve certain issues on appeal, including jury misconduct, insufficiency of the evidence, and excessive or inadequate damages. And the grant of a new trial motion must be accompanied with reasons to be defensible on appeal. So worry about waiver by omission.
- Orders denying motions to compel arbitration are immediately appealable, but granting such motions are not. Orders granting sanctions of over $5,000 are immediately appealable, but order denying sanctions in any amount are not. Both the denial and the grant of anti-SLAPP motions are immediately appealable. So beware of tricky appealability issues as to the same order.
- The exceptions to the automatic stay on appeal under Code of Civil Procedure 916 swallow the rule even more so than the exceptions to hearsay under Evidence Code 1200. So start with the assumption that the order or judgment on appeal is not stayed absent court order or posting a security, and let yourself be pleasantly surprised in the limited circumstances that it is.

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Holiday Tips From & A Tip of the Hat to...

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- Failure to obey trial court rulings or other conduct showing contempt towards the legal process could lead to dismissal of the appeal under the "disentitlement doctrine." But accepting the benefits of the order on appeal could mean losing standing to appeal. So comply with the order on appeal and interim rulings, don't pull a Roman Polansky and flee the jurisdiction to evade the judgment you want to appeal, and don't cash the opposing party's check while appealing the monetary award.
- A settlement pending appeal with a stipulating to reverse the underlying judgment is ***not*** automatically effective. Rather, under Code of Civil Procedure 128(a)(8), the parties must convince the appellate court that the reversal will not harm the interests of nonparties or the public and that their reasons for requesting reversal outweigh the erosion of public trust from the nullification of the judgment.
- Stipulated or consent judgments are generally not appealable, unless the record is clear that consent was given to facilitate an appeal or the parties have no intention of relitigating the issue after appeal (such as agreeing to dismissal with prejudice, not without prejudice). So be clear as to the reasons for the consent.
- While a trial court can always change any interlocutory ruling, even as to summary judgment, until entry of final judgment, the appellate court's opinion constitutes law of the case. Even denial of a writ may constitute law of the case ***if*** the appellate court issues a written opinion and provides reasons. So evaluate carefully when to seek writ review from interim rulings.
- There are 11 statutory writs with specific deadlines; the rest are "common law" writs that should be filed within 60 or so days of the order at issue. Eight statutory writs are the exclusive way to review that ruling in question, three are non-exclusive. Some statutory writ deadlines may be extended by the trial court, others not. Some statutory writ deadlines are based on the date of entry of the order, others by service of the order, depending on the method of service. Lesson? Consult an appellate lawyer.

At his induction, Eisenberg shared that, other than drafting the Rutter Guide treatise, his top career highlights were to sing Bob Marley tunes with a wrongfully detained client in a cramped Guantanamo Bay cell and joining forces with appellate trailblazer Ellis Horvitz of Horvitz & Levy fame to revolutionize California appellate practice.

As a tip of the hat to Eisenberg, unless you envision singing in a federal penitentiary or reinventing your practice area, consider reviewing the Rutter Guide treatise for yourself this holiday season for even more tips, with your favorite pumpkin-spiced, ginger-infused, or mulled-cider beverage. Me? I will be moving on to the Twentieth edition of the Bluebook.

Rupa G. Singh handles complex civil appeals and critical motions at Niddrie Addams Fuller Singh LLP, San Diego's only appellate boutique. She is founding president of the San Diego Appellate Inn of Court, former chair of the County Bar's Appellate Practice Section, and a self-proclaimed appellate nerd.

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