ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO

abtl

Volume MMXX No. 1 *March 2020*

The Honorable Lorna Alksne

Civil Case Status During Emergency Operations

by Alan M. Mansfield Whatley Kallas LLP

During this unsettling time, Judge Lorna Alksne, presiding judge of the San Diego County Superior Court, wants to assure our members the Court has not forgotten our civil practitioners. On March 27, 2020, Judge Alksne participated in a telephone conference with local Bar leaders to share what is going on with the San Diego Superior Court, both presently and in the short term. The following is a summary of the highlights from that discussion *(Note -- none of the statements in the following have been approved by the San Diego Superior Court, and are my summary of that discussion.)*

Judge Alksne hopes that our Bar can be held out State-wide as a shining example of how we promote and follow our civility rules and guidelines. This is not a time for technical timing arguments, particularly since from the date of closure until the date the Court officially reopens, every day is a Sunday for calendaring and court day purposes.

There are also ongoing and unanticipated issues that will arise, and there might be truly emergency matters that may need Court involvement. The Court is reviewing emails raising non-case specific questions to consider whether to take up an emergency matter, or a general issue that is within the jurisdiction of the Superior Court to resolve. Please see the Court's website for further information on how to direct such inquiries.

San Diego Superior Court is currently closed to all non-emergency matters from March 17, 2020, through April 3, 2020. This means there are no court staff and no clerks currently available. There is no reason to leave a message for a court clerk, as no one will be available.

What does this mean for civil practitioners in the short term? As many motions, Case Management Conferences and trials will need to be reset, counsel for the parties need to work cooperatively on resolving discovery disputes, briefing schedules on pending motions and other issues that are not truly emergencies. The one thing we can all do to help our court system recover from this unprecedented situation is to talk meaningfully, address issues informally, be proactive and work in good faith to resolve as many disputes as we reasonably can.

(continued on page 3)

Inside This Issue

Civil Case Status During Emergency Operations

(continued from cover)

The Court will post when e-filing services are available. However, as long as the business office is closed, on line filing will be closed. In addition, it will take some time to process mail. By the time the Court reopens, there will be at least 14,000 pieces of mail that will need to be processed, and likely limited Court staff to do so.

When the Court reopens, the first priority will be handling criminal matters, then exigent family matters, the civil matters. There are close to 4,000 unique civil matters (for example, motions, TRCs, and CMCs) that were set during this time period that will need to be rescheduled. While these matters will take priority, we need to be patient as to how and when such matters will be reset. The specific logistics will be within the discretion of each Independent Calendar Judge, who are in the process of considering various options to process the backlog. Notice will be sent out when matters are reset.

The Court is working on addressing issues that are to be addressed by local Court rule. Practitioners should check the Court's website, or follow the Court on Twitter, as orders that relate to outstanding issues are being posted on a regular basis on the Court's website.

The following is a list of FAQs currently put out by the Court:

Q: What Civil Court services are currently available?

A: Please be advised that between March 17, 2020, through April 3, 2020, the only Civil Court services available during this period are: • Chamber ex parte requests for civil harassment, elder abuse, school violence and workplace violence TROs, and Gun Violence Protective Orders. • Emergency ex parte applications to stay lockout proceedings (UD). • Petitions for writ seeking emergency relief in unlawful detainer matters. • Emergency writs challenging COVID-19 emergency measures. • Writs of habeas corpus challenging medical quarantines.

Q: When will my case be re-scheduled?

A: Previously set hearings, including trials, that do not meet the criteria noted above, will be rescheduled. At this time, continuance dates have not yet been confirmed. Pursuant to the Statewide Order by Hon. Tani G. Cantil-Sakauye, issued March 23, 2020, all scheduled jury trials are hereby suspended and will be continued for a period of at least sixty (60) days. For additional information on jury trial suspensions, please refer to a copy of Hon. Tani G. Cantil-Sakauye's order posted on this Court's website. You will receive a notice regarding your new hearing/trial date once this information becomes available.

Q: Is the Court still accepting paper and e-File documents?

A: The San Diego Superior Court has suspended the acceptance of paper and e-File documents in the Civil Business Office. The exception to this are paper filings related to the hearing types listed above. Filings that were submitted prior to the Court's closure will be honored for the date they were received. Any items received after the closure will be honored for the date the Court reopens.

Finally, as a result of Governor Newsom's executive order issued last Friday "the following statutes are suspended: a) Code of Civil Procedure section 2025.310, subdivision (b), to the extent that subdivision limits a court's authority to provide that a party deponent may appear at a deposition by telephone. b) Code of Civil Procedure section 1010.6, subdivisions (b) through (d), to the extent those subdivisions limit a court's authority to order parties to accept electronic service, or to perform service electronically."

President's Message

By Alan Mansfield

I am honored to be this year's President of the San Diego chapter of the Association of Business Trial Lawyers. I would like to give you all a brief overview why I am excited for our chapter this year.

As Judge Alksne said on the recent call mentioned in my earlier article (see cover), there isn't a chapter in the President's Handbook entitled "How to Lead An Organization Through A Pandemic". So I start out this message with my hope you, your family, your employees and colleagues, and your neighbors are safe, healthy and reasonably sane. As Judge Alknse also said, when we next get together with our other chapters, we hope to hold our chapter out as a shining example of how we can come together as a legal community and help both our clients, our colleagues and our courts weather this storm. To that end, we are starting a dialogue on developing programs that will be of relevance to our members, and how we can work with our local judiciary during these unprecedented times. With Presiding Judge Lorna Alksne as an officer and Presiding Judge Larry Burns on the Board of Governors, we, as an organization, stand (with appropriate social distancing) ready to assist getting our systems back up to full speed, and providing opportunities to meaningfully connect. We would appreciate your feedback on how you all think we can best serve our legal community, and the community at large.

I would like to welcome our incoming Board of Governors members:

Hon Ronald Frazier *(San Diego County Superior Court)*
Hon. John Meyer *(San Diego County Superior Court)*
Hon. Allison Goddard *(U.S. District Court)*
Hon. Andrew Schopler *(U.S. District Court)*
Eric Beste *(Barnes Thornburg)*
Leah Christensen *(McCune Wright)*
Jason Kirby *(Kirby & Kirby)*
Kelly O'Donnell *(Jones Day)*
Thomas Proctor *(Sheppard Mullin)*
Devin Shoecraft *(Shoecraft Burton)*
Anne Wilson *(Duckor Spradling Metzger Wynne)*
Joseph Dunn *(Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.)*
Bob Knaier *(Fitzgerald Knaier)*
Callie Bjurstrom *(Pillsbury)*

As you can see from our new board members, one of the unique aspects of ABTL is our strong judicial participation, headed by the work of Judge Randa Trapp and with the support of both our Secretary, Presiding San Diego Superior Court Judge Lorna Alksne, and Chief Judge of the Southern District of California Larry Burns. Between our Board of Governors and our Judicial Advisory Board we have 57 current and former judicial officers involved in ABTL.

We are also involved in a wide variety of programs for the benefit of our members. For example:

Dinner programs. Our chairs this year are Rich Segal and Jenny Dixon. Our first event was on Monday February 24 at the Westin Emerald, recognizing and honoring our judiciary leaders – Judge Margaret McKeown, Justice Judith McConnell, Judge Alskne, Judge Elizabeth Mann and Magistrate Judge Barbara Major. This was one of our most successful events in the history of our chapter, with over 280 registrants. Thank you for turning out in record numbers!

Civility ABTL Statewide. Headed in our chapter by Randy Grossman and Judge Katherine Bacal. The work that past president Michelle Burton started two years ago has lead in part to this statewide initiative. Recently, we were asked to suggest names of people to serve on a small statewide working group on improving civility, given our organization's focus on improving civility, and our chapter chairs volunteered to assist in this effort.

(Continued on page 5)

President's Message

(continued from page 4)

Specialty MCLE, coordinated by Jon Brick. Our goal is to provide our members the ability to obtain more difficult MCLE credits to arrange. We will announce at least one, if not two, programs to fulfill these requirements throughout the year.

The 45th Annual Seminar. Andrea Myers and Doug Lytle are the Co-chairs for the ABTL annual seminar. We are currently discussing whether to postpone or change the location of the annual seminar. It is a difficult and complicated decision. I will provide updated information to you all as soon as decisions have been reached with the other chapters.

Leadership Development Committee, chaired by Tess Wynne and Corey Garrard. The LDC will be helping with specific projects in addition to the Nuts and Bolts events and the Judicial Mixer they currently organize. For example, they will assist in editing the ABTL Report, which is one of our great member benefits, as we will be aiming for each issue of the report to be 24 pages or more.

Community Outreach, chaired by Rachael Kelley and Anne Wilson. Both Rachael and Anne attended the State Bar swearing in ceremony in December, and will be working with the LDC with developing law school outreach programs and other community events. We will have our law school trial skills program in November (headed by Marisa Janine Page and Frank Johnson) and our Trial Attorney Program (coordinated by Judge Vic Bianchini and Randy Grossman), which has already resulted in two attorneys working in the program. The San Diego County Bar Association set up a meeting last year with the various Bar associations – there are 61 separate legal organizations in San Diego County. They will be our representatives to work with the SDCBA to coordinate the efforts of these associations.

Membership. We do this for you! This year the membership committee is chaired by Dan Gunning and Gary Brucker. Last year we had just under 500 members. Our goal is to increase membership by at least 10% as well as diversity our membership, focusing on groups such as public sector attorneys and younger attorneys. Please assist in this effort to identify new members and explain how ABTL can benefit all members of our legal community.

Inland Empire, chaired by Rob Shaughnessy and Leah Christensen. This is a project that has been in the works for a couple of years and that we hope to get off the ground this year. The goal is to also expand our membership by helping develop a subchapter of judges and attorneys in Riverside and San Bernardino Counties. We met last October with the past, present and incoming presiding judges in San Bernardino County, and have also met with the assistant presiding judge of Riverside County. They are interested in participating in this project. We will have more to report on this project later this year.

Financial Position. Due to the great work of Randy and Michelle over the past two years, we are in an excellent position financially. Paul Reynolds is our incoming Treasurer, and with the hard work of our Vice President Rebecca Fortune, our Executive Director Lori McElroy and our accountant Carl Griswold of Bayside Consulting, we have streamlined our accounting so that we have a much better sense of our expenses and financial position in real time.

Sponsors. As a result of the great work by Boris Zelkind and David Lichtenstein, our ABTL chapter has a total of 13 sponsors this year:

PLATINUM

Signature Resolution
Judicate West
JAMS
Legal Arts
Heffler Consulting Group

GOLD

Aptus Court Reporting
ProSearch
ADR Services

SILVER

Sullivan Group
CBIZ – formerly Brinig Taylor Zimmer
Veritext
Bakertilly
CalPrivate Bank
Ankura

(Continued on page 6)

President's Message

(continued from page 5)

We encourage you to consider reaching out to them and utilizing their services. Their contact information is on our updated website. Speaking of which…

Website Improvements. Lead by the San Francisco chapter, we have revamped the ABTL website statewide, which will allow us to directly update the website and use that as our primary source for communication. Relatedly, we have posted our 2020 calendar, which we have been working on to have ABTL events spaced out to ensure members can get the maximum participation and benefits of their membership.

I would like to end this message by thanking our Outgoing President. Randy Grossman has continued the excellent work of Michelle Burton and accelerated our efforts to be on a more secure financial footing with a coordinated sponsorship program. He also worked on implementing the civility guidelines, laying the groundwork for our Inland Empire project, and worked closely with Judge Bianchini to start two attorneys on our Trial Attorney Program with the District Attorney and City Attorneys office, and is working to expand this program. Thank you, Randy, for all you do for this organization.

Preventing Violence in the Workplace

By Hon. Richard S. Whitney, San Diego Superior Court

The Honorable Richard Whitney

Let's start with the following workplace scenario: Dwight is upset with his latest performance review. He meets fellow employees in the breakroom and complains about his poor performance review issued by his Manager, Michael. Dwight tells his co-workers in the breakroom he intends to go to the gun range to break in his newly purchased semi-automatic handgun. He laughs and says, "maybe I'll put the face of Michael on the paper target and unload my magazine." The two fellow employees leave concerned about the comments.

This type of scenario unfortunately plays out all over the United States on a daily basis with different forms of threats/statements that could be construed by co-workers as creating a hostile or, at the very least, potentially scary work environment. Was Dwight exercising lawful free speech in the breakroom or creating a basis for a workplace violence restraining order, as provided for under California Code of Civil Procedure Section 527.8? This is one of the most important issues you may deal with in counseling business clients. It is certainly one piece of legal advice you need to carefully weigh and consider.

OSHA reports that violence is increasingly having a major impact on the workplace, accounting for about 9% of all workplace fatalities in 2015, according to the U.S. Bureau of Labor Statistics. The National Safety Council reported that in 2016, 17% of workplace deaths were due to workplace violence.

It is difficult to open a paper or listen to any media outlet without hearing of a shooting at work, place of worship or just some random public location. Both Mom and Pop stores and Fortune 500 businesses are subject to the same potential threat.

As a lawyer, how do you ever advise your business clients on whether the possible threat/comments by Dwight (above) are putting fellow employees in real danger, as opposed to Dwight simply blowing off steam after a poor performance review?

This question confronts attorneys and judges in California almost daily. With the rise of work-related violence, the issue of granting or denying a request for a workplace violence TRO becomes an important legal balancing act.

I think we can all agree that if Dwight had stated, "I'm coming back with my pistol and unloading my magazine on Michael," then this becomes an easy call by dialing 911 for law enforcement and immediately seeking a workplace TRO under CCP 527.8.

CCP 527.8(a) provides TRO/Permanent Injunction protection when:

(a) Any employer, whose employee has suffered unlawful violence or a credible threat of violence from any individual, that can reasonably be construed to be carried out or to have been carried out at the workplace, may seek a temporary restraining order and an order after hearing on behalf of the employee and, at the discretion of the court, any number of other employees at the workplace, and, if appropriate, other employees at other workplaces of the employer.

CCP 527.8(b)(2) defines a threat of violence as:

"Credible threat of violence" is a knowing and willful statement or course of conduct that would place a reasonable person in fear for his or her safety, or the safety of his or her immediate family, and that serves no legitimate purpose.

(Continued on page 8)

Preventing Violence in the Workplace

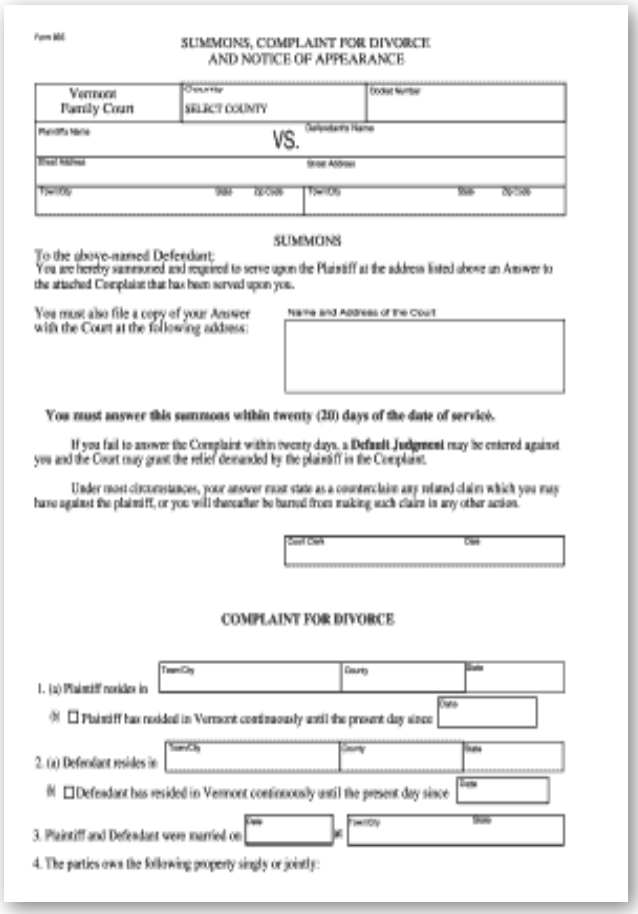
(continued from page 7)

The difficulty arises when the threats are more obtuse or vague and subject to different individual interpretations concerning the foreseeability of violence occurring from speech or actions. There is a tremendous amount of "he said/she said" allegations in workplace violence allegations. The court in recognizing this issue, does allow for a relaxed evidentiary standard on hearsay (*Kaiser Foundation Hospitals v. Wilson* (2011) 201 Cal.App.4th 550).

Any TRO issued by the court is fully vetted and entitled to a hearing under the law where all the evidence on both sides can be produced and flushed out during the court hearing.

The legislature in 1994, in creating a legal standard for Workplace Violence Safety, attempted to address those very concerns of rising workplace violence in California.

For an employer to obtain a workplace violence TRO, the Petitioner starts the proceeding by completing the TRO packet or form WV-100 Petition for Workplace Violence Restraining Order:



SUMMONS, COMPLAINT FOR DIVORCE
AND NOTICE OF APPEARANCE

Vermont
Family Court

SELECT COUNTY

VS.

SUMMONS

To the above-named Defendant:
You are hereby summoned and required to serve upon the Plaintiff at the address listed above an Answer to the attached Complaint that has been served upon you.

You must also file a copy of your Answer with the Court at the following address:

Name and Address of the Court

You must answer this summons within twenty (20) days of the date of service.

If you fail to answer the Complaint within twenty days, a **Default Judgment** may be entered against you and the Court may grant the relief demanded by the plaintiff in the Complaint.

Under most circumstances, your answer must state as a counterclaim any related claim which you may have against the plaintiff, or you will thereafter be barred from making such claim in any other action.

COMPLAINT FOR DIVORCE

1. (a) Plaintiff resides in
(b) ☐ Plaintiff has resided in Vermont continuously until the present day since
2. (a) Defendant resides in
(b) ☐ Defendant has resided in Vermont continuously until the present day since
3. Plaintiff and Defendant were married on
4. The parties own the following property singly or jointly:

The request for a TRO will be filed on an ex parte basis with the court ruling on the TRO application the same day. A temporary restraining order granted under this section shall remain in effect, at the court's discretion, for a period not to exceed 21 days, or if the court extends the time for hearing under subdivision (h), not to exceed 25 days, unless otherwise modified or terminated by the court.

Within 21 days, or if good cause appears to the court, 25 days from the date that a petition for a temporary order is granted or denied, a hearing shall be held on the petition. If no request for temporary orders is made, the hearing shall be held within 21 days, or, if good cause appears to the court, 25 days from the date that the petition is filed.

Once the TRO goes into effect, the Respondent must surrender under California law all firearms which gives the TRO some significant teeth with law enforcement. A good practice is to provide the court with as many articulable and relevant facts of the violent threat as possible in the form WV-100 TRO.

At the permanent injunction hearing, the court will take evidence from both sides and has the option to issue up to a 3-year permanent order which typically calls for no contact by employee with employer and 100 yards or more of distance from the employer's location(s). Protected employees to be included can also be added to the request.

The petition must be proved by a clear and convincing standard of proof. Once a TRO/permanent order is issued by the court, it becomes a CLETS order. **CLETS** is an acronym standing for California Law Enforcement Telecommunication System. CLETS is a high-speed message switching system which became operational in 1970. Broadcast messages can be transmitted intrastate to participating agencies in the Group Bulletin Network and to regions nationwide. This allows nationwide enforcement of the CLETS order.

Investigation into the employee's work history, complaints, threats or disruptive behavior in the past could all be relevant evidence for the court to consider in determining whether to make the TRO permanent.

(Continued on page 9)

Preventing Violence in the Workplace

(continued from page 8)

It is helpful to the court to ascertain the likelihood of future violence by the current or former employee and the exact detailed nature of the threat communicated to fellow employees.

The courts have recognized that by relaxing evidentiary standards on hearsay, it does enable the court to hear from employee witnesses on the nature of the threat and how the threat was perceived by those in close proximity of the threat.A team approach to assessing the threat is best when evaluating whether to seek a TRO against the employee. Meeting with Human Resources, management, in house mental health personnel, executives, and security personnel would all be helpful to determine and attempt to evaluate the possibility of future harm by the employee.

Some companies have also sought the intervention of mental health professionals to counsel the subject employee as a means of diverting the necessity of a workplace TRO and/or obtaining a professional mental health assessment on the legitimacy of the threat.

The more information available to your company to properly evaluate the exact nature of the threat, the safer your company's work environment will be. No one wants to deal with active violence in the workplace. It is certainly better to be safe than sorry, and this workplace TRO could provide a good stop gap measure to permit a "cooling off period". This allows the employer/company to keep the subject employee off the premises for a statutory time period to allow a calm and collective determination of the future course of action.

It is a good idea for companies to consider a periodic risk assessment to prevent or forecast the potential for violence in the workplace. Assessments to threats should be taken seriously and investigations done immediately to prevent the issue of languishing or becoming aggravated by inaction.

Keep your client's workplace safe by constantly assessing and reassessing threats in the workplace so everyone can enjoy a safe and comfortable work environment.

Judge Richard S. Whitney is currently assigned to a Civil Independent Calendar at the San Diego Superior Court Hall of Justice, but has had considerable past experience presiding over workplace violence restraining order requests.

JUDICATE WEST
THE GOLD STANDARD
IN COMMERCIAL DISPUTE RESOLUTION

Commercial disputes demand resolutions that get all parties back to their business, and our experienced neutrals know how to deliver. Our arbitrators take a firm, fair, and expeditious approach guided by our unique Commercial Arbitration and Appellate Rules. Our mediators are renowned for adding value to settlement negotiations by helping the parties craft effective, durable, and innovative solutions.


Hon. Jan M. Adler (Ret.)


N. Denise Asher, Esq.


Hon. Victor E. Bianchini (Ret.)


Jonathan A. Brenner, Esq.


Hon. Steven R. Denton (Ret.)


Hon. Christine K. Goldsmith (Ret.)


Hon. Herbert B. Hoffman (Ret.)


Richard A. Huver, Esq.


Jeffrey Joseph, Esq.


Robert J. Kaplan, Esq.


Hon. Joan M. Lewis (Ret.)


Hon. William McCurine, Jr. (Ret.)


Hon. Thomas P. Nugent (Ret.)


Hon. Leo S. Papas (Ret.)


Gregory A. Post, Esq.


Hon. Ronald S. Prager (Ret.)


Hon. Joel M. Pressman (Ret.)


Hon. Linda Quinn (Ret.)


Thomas E. Sharkey, Esq.

WWW.JUDICATEWEST.COM
(619) 814-1966

JUDICATE WEST
Alternative Dispute Resolution

Results Beyond Dispute℠

DOWNTOWN LOS ANGELES | SACRAMENTO | SAN DIEGO | SAN FRANCISCO | SANTA ANA | WEST LOS ANGELES

To Disqualify or Not to Disqualify

By Jason Kirby, Kirby & Kirby LLP

Chances are pretty good that just before the holidays many of you read the news about a lawyer out of Culver City, named Christopher Hook, who peppered opposing counsel, Sheppard Mullin, with a barrage of profanity-laced emails and threats in a bad faith insurance case. The particular profanity selected and escalating settlement demands for hundreds of millions of dollars was so bizarre that Mr. Hook's emails went viral shortly after being attached to a pleading. The fervor of the distribution was not confined to the legal profession. Even widely distributed newspapers like the Los Angeles Times and the Washington Post ended up reporting on the simple fact of what one attorney said to another attorney over email. Genius seldom goes viral in the wake of stupidity's reign.

Rather than respond directly to Mr. Hook's bizarre communications, Sheppard Mullin instead assembled the emails as an exhibit to an *ex parte* application seeking, among other things, to dismiss the action and to disqualify Mr. Hook as plaintiffs' counsel. In response, the United States District Court for the Central District of California set a hearing and ordered plaintiffs to personally appear to show cause why the relief should not be granted.

Like many of my colleagues, I started receiving text messages and emails almost immediately after the news broke in the legal community. At that time, the Court's OSC hearing was still a week away. I was intrigued enough by the whole debacle to set a calendar appointment for the day of the hearing to remind myself to look for news coverage. The news did not disappoint. The plaintiffs personally appeared as ordered, but through new counsel, David P. Schack and Matthew O'Hanlon of Barnes & Thornburg in Los Angeles. The plaintiffs represented to the Court that they were wholly unaware of Mr. Hook's conduct, and that they had terminated Mr. Hook immediately upon learning of his emails. Like me, the plaintiffs learned of Mr. Hook's emails as a result of their wide distribution over the Internet.

While the record is not exactly clear, Mr. Hook was either a few minutes late to the hearing or trying to keep a low profile in the gallery. I have my suspicions, but either way, shortly after the Judge called the matter and expressed his disbelief that Mr. Hook was not present, Mr. Hook suddenly appeared. The Judge first questioned Mr. Hook about how long he had been in his courtroom before ultimately requesting his resignation from the profession of law. Mr. Hook declined.

The Court's final Order denied Sheppard Mullins' request to dismiss the case because plaintiffs had already terminated Mr. Hook and they were unaware of his conduct. The motion to disqualify Mr. Hook was rendered moot by his termination. Mr. Hook agreed to pay reasonable costs and fees associated with the *ex parte* application. The last line of the Order states, "the Court will be reporting Hook's misconduct to the California State Bar and will recommend disciplinary action."

A review of Mr. Hook's emails or even the news coverage leaves little room for a deep lesson in civility. His communications traveled far beyond the realm of civil discourse with opposing counsel. Even Mr. Hook's opposition declaration to the *ex parte* relief conceded, "perhaps some of the language 'crossed the line' of civility and was offensive and inappropriate." This, unfortunately, was as close as Mr. Hook came to falling on his sword. The spirit of his opposition papers was in fact unrepentant, as evidenced by his request for Rule 11 sanctions against Sheppard Mullin. Safe to say, that request was dead on arrival.

Another take-away for me, that dives deeper than the news coverage did, is a lesson I learned from my father: "Be careful what you wish for." Its application is useful in life and litigation. Just because you have the grounds to disqualify opposing counsel, even good grounds, the real question is different: Do you really want to force the opposing party to select new counsel?

(Continued on page 12)

To Disqualify or Not to Disqualify

(Continued from page 11)

Before I go any further, one of Mr. Hook's emails to a lawyer at Sheppard Mullin stated that he knew where he lived and referenced his wife's name. I want to be clear that I am not suggesting, in any way, that Sheppard Mullin's decision to move to disqualify Mr. Hook was not absolutely necessary or done without thorough consideration. Rather, my point is simply that there seems to be at least one easily predictable consequence to forcing your opponent to select new counsel. Namely, opposing counsel will likely be replaced by better lawyers or, at least, lawyers more suited to the remaining tasks. In my experience, seldom does a successful motion to disqualify result in a downgrade of counsel. This predictable consequence may have something to do with the fact that most often the departing lawyers are highly motivated to see that their former clients find the best possible representation going forward.

Here, I read the pleadings filed by Mr. Hook and the pleadings filed by successor counsel. Even setting aside Mr. Hook's emails—which is not easy to do—I found the judgment displayed by successor counsel to be a substantial upgrade over plaintiffs' former counsel. As I tend to appreciate good judgment in evaluating other lawyers, I am of the opinion that plaintiffs hired better lawyers. My opinion was also based, in part, on publicly available information about each attorney and particularly the substantial experience successor counsel has in handling insurance coverage cases. I did not get the same sense of experience from the materials I read from Mr. Hook.

For me, litigation is similar to chess. A knee-jerk reaction can turn out to be a good move or a bad move. Only time will tell. But before you make a move, it is always worth taking the extra time to think about what your move will likely force your opponent to do. As in chess, sometimes your best moves are the pieces you end up leaving in place.

Your analysis should also take into account where you are in your case. Moving to disqualify opposing counsel at the start of a case presents far less risk than making the motion late in a case. As you get further along in the litigation, you learn your opponent's basic strategy in pursuing or defending the case. You have a sense from the depositions, motions, and communications with opposing counsel how they intend to present their case. The knowledge and insight you gain working with opposing counsel may ultimately help you beat them because you know what to expect and how best to deal with it. When you move to disqualify opposing counsel, you are signing up for the unknown. A new lawyer may take an entirely different approach to the case that actually improves your opponent's case. Likewise, when a new lawyer goes after witnesses at trial, you may have to deal with issues that were never anticipated based on the depositions by former counsel. When the discovery process is aimed at removing surprises at trial, you do not necessarily want to sign up for those surprises by removing your opponent's counsel after the case is well underway.

Another major factor in contemplating a motion to disqualify opposing counsel should be the cost to the client and the potential for delay. A motion for disqualification rarely affects the underlying merits of your client's case. Opposing counsel may have earned the right to be disqualified, but that hardly makes it your client's cost to bear. I was involved in parallel litigation that dragged me into *McDermott Will & Emery LLP v. Superior Court* (2017) 10 Cal. App.5th 1083. After more than a year and half effort to disqualify defense counsel, a divided Court of Appeal finally affirmed the trial court's order granting the motion to disqualify. It was not until after the California Supreme Court denied review that the procedural fight found its end. Meanwhile, the actual parties had to sit and wait it out. In the end, one dragon law firm was replaced by another dragon.

Here, Mr. Hook was clearly an impediment to settlement. One could make a compelling argument that removing him would finally permit a rational settlement discussion. That too would be a valid consideration. The particular circumstances of every case are going to present unique considerations beyond whether the motion is warranted based on opposing counsel's conduct alone.

(Continued on page 13)

To Disqualify or Not to Disqualify

(Continued from page 12)

I have had the grounds to bring a motion to disqualify opposing counsel in several different cases, but I have yet to file a motion and I have no regrets about never having brought one. There is something to be said for a bird in hand. Likewise, I have been involved in numerous cases where other attorneys filed a motion, but I have yet to see a real benefit to their clients. In the end, I think it is important to take the time to consider whether bringing a motion to disqualify is really in your client's best interests or whether you may be doing the other side a favor by forcing them to find better lawyers.

Jason Kirby is a founder at KIRBY & KIRBY LLP. Kirby serves on ABTL'S Board of Governors.

The Importance of Knowing Your Own Biases

By Nicole Baldwin, Klinedinst

ABTL›s first dinner program of 2020 was a hit!

The event featured a panel of highly esteemed judicial officers, who discussed, among other topics, the importance of being aware of one›s own biases.


Hon. M. Margaret McKeown


Hon. Lorna A. Alksne


Hon. Barbara L. Major


Hon. Margaret M. Mann


Hon. Judith D. McConnell

Hon. M. Margaret McKeown, of the United States Circuit Judge of the United States Court of Appeals for the Ninth Circuit, graciously moderated the panel, which included:

Hon. Lorna A. Alksne, Presiding Judge of the Superior Court of California, County of San Diego;

Chief Magistrate Judge Barbara L. Major, United States District Court (S.D.Cal.);

Chief Judge Margaret M. Mann, United States Bankruptcy Court (S.D.Cal.); and

Hon. Judith D. McConnell, Administrative Presiding Justice, Fourth District Court of Appeal, Division One.

The panelists noted that we, as legal professionals, must first become aware of our own biases, before we can effectively address the biases of others.

In particular, the panelists suggested that our legal community partake in assessments designed to test one›s own biases. Such an assessment can be found here: https://implicit.harvard.edu/implicit/takeatest.html Interestingly, it was noted that individuals who claim to hold no biases, are actually *more* likely to be biased against others.

Other discussion topics ranged from the importance of sexual harassment prevention policies, to the difficulty of reporting workplace complaints, despite the existence of outside hotlines.

Lastly, the panelists provided the following tips for those seeking to pursue a judicial role: (1) «know your stuff», i.e. excel in your current practice areas, (2) volunteer and give back to your community, and (3) remember to remain courteous to opposing counsel, as their opinions of you matter during the judicial evaluation process.

In putting some of these suggestions into practice, the Ninth Circuit offers a pro bono program, which provides law students and new attorneys with valuable hands-on experience to enhance the Court›s ability to process pro se appeals equitably and efficiently. https://www.ca9.uscourts.gov/probono/

OTHER RESOURCES REGARDING COGNITIVE BIAS:

https://www.ted.com/talks?topics%5B%5D=law&sort=relevance&q=bias+in+the+law

http://apertur.co/apertur.pdf

Nicole Baldwin is an attorney at Klinedinst.

Lawyer Well-Being: Is Anyone Doing Anything?

By Janet E. Sobel, Counseling at Law

Here is the question for all licensed lawyers: "How much do you care that a career in the law has become risky business?" Does it bother you to know that at any given time, 30% of lawyers would qualify for an intervention for addictions or mental illness? How about that suicide is the third leading cause of death for lawyers, behind cancer and heart disease? Twenty years ago, new lawyers faced a one-in-five chance of a destroyed career due to an inability to deal with the stress and anxiety of the profession; now, according to two large studies of law students and practicing lawyers, new lawyers face a one-in-three chance of failing as a lawyer by the tenth year of practice.

There is no reasonable dispute that the organizations that have assumed responsibility for preparing lawyers to be good at their craft have done a commendable job. Any lawyer who desires to become good at some particular area of practice has the tools to do so, thanks to the excellent performance of legal industry organizations like ABOTA and the American Inns of Court, along with state and local bar associations that offer career-enhancing training and CLE courses designed to elevate the competence of the practicing lawyer.

But no one can reasonably suggest that the myriad of professional associations that serve the legal community are tackling the personal problems that grow from the heavy demands that lead lawyers to become addicted to substances and to deal with a mismanaged mental illness. Things have not gone from bad to worse – an undisputed fact – except that the organizations that serve the legal profession are inadequately attending to the misery that is endemic to our profession.

No one suggests our hard-working organizations are responsible for the problems that accompany practicing law, but we can't reasonably deny they aren't capable of solving them. After all, the knowledge of how to overcome addictions, manage mental illness, and prevent suicide is outside the expertise and qualifications of the legal community. As lawyers, we are trained to marshal experts in fields beyond our own experience, and the health and wellness industries are the experts to address the existential impact of the damage that comes with a career in the law. Bottom line, many lawyers (especially the newest ones) are suffering in ways that injure the quality of justice in this country – and we are falling way short of doing anything about it.

The statistics are unequivocal. The recent studies tell us that although many of the law students and lawyers who are losing their footing are acutely aware they are in trouble – nonetheless, they will not reach out to the legal community for help. We all know why, of course. When a career in the law is as expensive as it is, in terms of time, effort, and money, no one who desires to be a good lawyer is willing to be identified as a person who's not in control of their life and their job. No state bar is seen as the friend of the practicing lawyer in that state. The undisputed evidence is that licensed lawyers are reluctant, to put it mildly, to seek rehab assistance from the organizations that operate in tandem with the disciplinary arm of their licensing authority.

California previously called its MCLE on this subject "the prevention, detection, and treatment of substance abuse and mental illness," and mandated one hour every three years. Experienced lawyers in top-notch law firms have privately acknowledged matter-of-factly to me that the 1.0 mandatory unit, every three years, is the sum total of their consideration of those issues throughout their careers. Interestingly, California changed the title of that MCLE to "Competency," although I can't find the stated reason for that change. True, using substances or having a mental illness does not tell us that a lawyer's competency is impaired. Obviously, if using substances or dealing with a psychological or mental disorder is wreaking havoc in a lawyer's life, then steps must be taken. Clients are probably being injured when that happens, and it becomes a matter of ethics.

If the use of alcohol or drugs is being adequately managed so that work performance doesn't suffer, then a state bar is not going to be involved in that lawyer's professional life. But

(continued on page 18)

Lawyer Well Being...

(Continued from page 17)

when a state bar becomes involved, then – and pretty much only then – professional wellness help is offered. Given the expected lack of public funding to support state bar programs designed to help individuals (lawyer or judges) to overcome addictions and mental illness, those programs are generally reserved for the lawyers and judges who are facing discipline of some kind and need help to reform their lives, and the state steps in to help. Most states offer organizations, like 12-Step AA, that provide confidential help – if the lawyer is unafraid to reach out for it. Stigma is the force against that help. An open conversation is the starting point.

However, when it comes to providing information and resources to rank-and-file lawyers who are adopting unhealthy strategies of coping with the stress and anxiety of practicing law, there is no program in place. Except for the happenstance of belonging to a fee-based association that might offer some information that leads to recovery, lawyers are on their own. And if the addictions and mental issues make it hard for the lawyer to find effective help while in the middle of a black hole, then the situation will continue to slide until the state bar becomes involved.

Consider this. In California, the bar dues for 2020 is a base of $544.00. If I want to practice law, that is what I have to pay. I have no choice. When a lawyer pays that fee, the online site shows where that $544.00 goes. The bulk, of course, goes to run the bar itself. But listen to this: $25.00 goes to "Discipline" and $40.00 goes to the Client Security Fund. The "Discipline" is meant to fund the arm of the bar that investigates and prosecutes errant lawyers. The Client Security Fund provides money to reimburse clients where the lawyer has stolen their money. Of course, clients who have suffered a loss due merely to malpractice are left to seek recourse elsewhere, possibly courts or claims to carriers.

Thus, sixty-five dollars of my $544, or about 12% of my dues, goes to dealing with the lawyers who have gone off the deep end and to giving compensation to the victims of the worst of those lawyers. Guess how much goes to the California State Bar Lawyers Assistance Program ("LAP"), which the State Bar claims "Protects the Public by Helping the Lawyers Who Serve Them"? Take a guess. I'll give you a hint. It is not zero. But how much is it? How much is the State Bar of California spending out of each lawyer's dues to "help lawyers" who are serving the public?

One dollar. One dollar out of 544 dollars supposedly goes "To protect the public by helping the lawyers who serve them." What do you think about that? Anything less and it would be nothing. It's outrageous; that's what it is. But, are we outraged? Or do we just send our thoughts and prayers to the families of the lawyers who commit suicide because life as a lawyer seems hopeless. Or do we say, "Good luck, kid," to the lawyer who can't cut the mustard because we know that practicing law isn't all that society – and law schools – crack it up to be. Right now, sitting in some law school, is a third year law student who is being educated to pass some state bar. That third year law student is completely clueless as to how unhappy he or she is expected to be within ten years of practicing law. And the law schools are busy fancying themselves capable of preparing their graduates for what lies ahead.

The law schools are not capable of explaining something that is outside their experience. Almost no one running or teaching in law schools knows what the practicing lawyer is feeling. The typical professor pretty much escaped to academia a few short years after taking a law job, and has little personal understanding about the problems their alumni will face. The Deans in law schools are unable to understand the problems our profession creates for new lawyers in the real world. If there was something law schools could do to help their alumni deal with the rigors of the legal profession, one would think they would have done it already; surely they haven't knowingly withheld the answer from their alumni. But the fact they have shown themselves powerless does not seem to catch their attention.

ABOTA lawyers know full well that the legal industry is all about money. The clients that make it possible for the partners in the BigLaw firms to make over one million each year, even as much as three-five million in many, are di-

(Continued on page 19)

Lawyer Well Being...

(Continued from page 18)

rectly responsible for the way in which the lawyers in those firms are abused without concern for their welfare. Those large, wealthy law firms are happy with the status quo, which allows them to move on quite quickly when one of their associates walks away from the practice of law. The statistics tell us that 57% of lawyers who leave a firm leave the practice of law altogether.

The elements that drive our industry are too accepting of the casualties of forsaken careers. Many large firms are Signatories to the ABA Pledge for Lawyer Well-Being, but what does that mean? Is being a Signatory just an easy way to look concerned, or does it mean something else? Are you a partner in a firm that is a Signatory? What's your firm doing to make a difference?

It costs a big law firm something like $400,000 to replace an associate that has lost their life-balance, but don't ask law firms for a donation – because law firms don't make donations unless it's to nonprofits that make for good PR publicity. They know the need, but see no reason to help solve the problems that large firms definitely have helped to create. Are we okay with that? Even if it makes economic sense to support getting help to lawyers before they crash and burn?

What is the legal community doing to ease the pain and misery of practicing law? What more can it do? The answers must come from outside the paradigms of state bars, LAPs, bar associations, and law schools, if we are to allow all law students the same opportunity for success that some find in the actual practice of law. If you would like to know what more you can do, send me an email. jsobel@counselingatlaw.com.

Janet E. Sobel is an attorney at Counseling at Law.

Jurors Remain Top of Mind in Department 64

By Ramesses S. Surban, Associate, Gordon Rees Scully Mansukhani

The Honorable Judge John S. Meyer addressed a crowded gallery of attendees in his courtroom during ABTL's bench/bar brown bag MCLE luncheon held on November 12, 2019. Judge Meyer made clear throughout his remarks that thoughtful consideration of the needs of jurors underlies many of his courtroom preferences. To that end, he endeavors to minimize juror inconvenience and provide a satisfying jury experience. Practitioners would thus do well to keep the following guidance in mind during the conduct of trial in Department 64.

Trial Readiness Conference

Jurors expect the court to respect and value their time. As such, Judge Meyer requires counsel to provide informed responses when asked regarding the expected length of trial and the number of causes of action that will reach the jury. He will not take or send cases to the wheel unless parties have agreed on a verdict form and have conveyed a sufficient understanding of what trial will entail.

Parties must bring a joint trial binder to include the aforementioned verdict form, as well as an agreed statement of the case, jury instructions, and motions in limine. Verdict forms do not generally receive bench review, so ensure these are accurate and appropriate. Judge Meyer disfavors special jury instructions unless stipulated to or appropriate CACI instructions are unavailable. To ensure consistency, one attorney will be tasked with ultimately drafting jury instructions. Motions in limine ought to be presented in numerical sequence, with the motion followed immediately after by its opposition and a courtesy copy. Counsel is to provide Judge Meyer with this trial binder at trial call in order to allow His Honor to review these materials during the weekend prior to Monday's trial.

Juror Pre-Screening/Voir Dire

Judge Meyer usually begins with a panel of between 35 to 40 potential jurors who will typically arrive at the Department by 10:30 a.m. Motions in limine are heard prior to their arrival and will normally end before 11:00 a.m. Mini-openings are not regularly permitted unless counsel have previously demonstrated trial competence before Judge Meyer, in which case they are limited to three minutes. No hard limit is imposed as to the time taken during voir dire, but counsel are expected to remain within the scope of what is reasonable and relevant by making use of focused, targeted questions. When asked, Judge Meyer offered that the hallmarks of a good voir dire reveal those experiences which panelists have had with the relevant facts. Lastly, counsel may not enter the area between plaintiff's table and the jury box; this area is reserved for the jury.

Trial

Trial begins in Department 64 at 9 a.m. and ends at 4:30 p.m., with a break for lunch from noon to 1:30 p.m. Again out of consideration for jurors' time, proceedings do not extend past noon, nor do they run past 4:30 p.m. It is of great importance to Judge Meyer that jurors are able to rely on the predictably of this schedule; no juror should have to arrive at 9 a.m. only to have trial begin at a later time. To that end, if counsel must conference with Judge Meyer, do so prior to the jury's arrival or after their departure. Similarly, counsel ought to expect that Department 64 moves at a more rapid pace than some other departments. This will require counsel to keep a close eye on witness availability and promptly inform the Court of the anticipated unavailability of witnesses so as to allow jurors to arrive at the appropriate time.

Judge Meyer implores counsel to respect the jury by watching the use of language at trial. He specifically advised against counsel's use of:

> "You guys" to refer to the jury;
>
> "To be perfectly honest with you;"
>
> "Pissed off" (say "angry" instead);
>
> First names when referring to parties, especially clients.

With regard to motions for non-suit, Judge Meyer advises that counsel file and serve the appropriate papers; however, out of respect for the jury's time, doing so will not result in trial

(continued on page 21)

Jurors Remain Top of Mind in Department 64

(continued from page 20)

interruption or delay. In the same vein, counsel should expect only rare opportunities to sidebar as these also make for disjointed proceedings and are generally disliked by jurors.

Hearings

At motion hearings, Judge Meyer finds it most effective when counsel refrain from simply reading the argument already presented in moving papers. Instead, he advises counsel to focus on matters discussed in the tentative ruling, if available. Should counsel's argument rely on a seminal case, or other critical authority, Judge Meyer encourages counsel to file a copy of this authority with the relevant portions highlighted. Lastly, expect the Court to summarily disregard anything raised in reply that was not raised previously.

Guidance from Court Staff

Linda Chevarin, clerk of Department 64, advises exhibit binders must contain numbered exhibits preceded by an index describing each. Exhibits are to be marked on the original exhibit binder using brown exhibit tags on the first page of each exhibit. Voluminous exhibits are to be designated as [Exhibit Number] [Bates Number].

Deputy John Pedrosa, Department 64's bailiff, advised counsel to speak with him after trial call as well as on Monday prior to trial for any last minute updates.

Closing Thoughts

Judge Meyer may wear the robes of our esteemed judiciary, but, like the rest of us, he is only human as well. On the bench, he enjoys the work-life balance that was so elusive during his civil practice. Offering valuable insight to the end, he finished the event by recounting a time when he made an error during his reading of jury instructions in an eight-figure case. An esteemed local plaintiff's counsel, listening carefully along, requested that he correct himself, which he promptly did. The lesson? Pay attention at all times and control what you can regarding the jury.

Ramesses Surban is principal attorney at Surban Law Corporation.

California Case Summaries FREE™ February 2020

By Monty A. McIntyre, ADR Services, Inc.

CALIFORNIA SUPREME COURT

Civil Code

Scholes v. Lambirth Trucking Co. (2020) _ Cal.5th _ , 2020 WL 827863: The California Supreme Court affirmed the Court of Appeal decision finding plaintiff's action for damage to his trees from a fire that started on defendant's property was untimely filed under the applicable three-year statute of limitations for trespass. The five-year statute of limitations and heightened damages provisions of section Civil Code 3346 are inapplicable to damages to timber, trees, or underwood from negligently escaping fires. (February 20, 2020.)

Employment

Frlekin v. Apple Inc. (2020) _ Cal.5th _ , 2020 WL 727813: Responding to a request of the United States Court of Appeals for the Ninth Circuit to decide a question of California law, the California Supreme Court ruled that time spent on the employer's premises waiting for, and undergoing, required exit searches of packages, bags, or personal technology devices voluntarily brought to work purely for personal convenience by employees is compensable as "hours worked" within the meaning of Industrial Welfare Commission wage order No. 7-2001. (February 13, 2020.)

CALIFORNIA COURTS OF APPEAL

Arbitration

Aldea Dos Vientos v. CalAtlantic Group, Inc. (2020) _ Cal.App.5th _ , 2020 WL 581464: The Court of Appeal overruled the trial court's order confirming the arbitrator's dismissal of an arbitration due to the homeowner association's failure to vote in favor of pursuing arbitration before the arbitration was commenced as required by section 7.01B of the covenants, conditions, and restrictions. The Court of Appeal found the arbitrator exceeded his power because section 7.01B contravened state statutory housing policy by giving the developer the unilateral power to bar actions for construction defects. The Court of Appeal declined to follow *Branches Neighborhood Corp. v. CalAtlantic Group, Inc.* (2018) 26 Cal.App.5th 743, and ruled that section 7.01B violated the state policy against unreasonable servitudes set forth in the Davis-Stirling Act, which prohibits the enforcement of unreasonable provisions in the CC&R's (Civil Code, section 5975(a)). (C.A. 2nd., February 6, 2020.)

Attorney Fees

George v. Shams-Shirazi (2020) _ Cal.App.5th _ , 2020 WL 632431: The Court of Appeal affirmed the trial court's order awarding wife attorney fees of $13,000 under Family Code section 271 for having to defend husband's repeated attempts to modify a custody order. Husband's sole argument on appeal was that wife's request was untimely because it was filed later than 60 days after the final judgment as required by Rules of Court, Rule 3.1702(b). The Court of Appeal held that Rule 3.1702(b) does not apply to postjudgment claims for attorney fees awarded under Family Code section 271. (C.A. 1st, February 11, 2020.)

Civil Procedure

Gulf Offshore Logistics, LLC v. Super. Ct. (2020) _ Cal.App.5th _ , 2020 WL 772610: The Court of Appeal granted a petition for writ of mandate and directed the superior court to vacate its order denying petitioner's motion for summary judgment in a class action alleging California wage and hour violations by non-California residents and former crew members of a vessel that provided maintenance services to oil platforms located in the Pacific Ocean off the California coast. The trial court erred because Louisiana law, rather than California law, applied. Louisiana's interest in the application of its laws was stronger than California's. The employment relationships here were formed in Louisiana, between Louisiana-based employers and non-resident employees who traveled to that state to apply for, and accept employment. They received training and orientation in Louisiana and the administrative aspects of their employment were performed in that state.

(continued on page 23)

California Civil Case Summaries

(continued from page 22)

California's interests were weaker because, although the crew members performed some of their work in California, neither the employees nor the employers were residents or taxpayers of California. (C.A. 2nd, February 18, 2020.)

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

California Case Summaries: Monthly™: Short summaries, organized by legal topic, of every new civil and family law decision published each month for $24.99 per person.

California Case Summaries: Quarterly™: Our summaries of every new civil and family law decision published each quarter, with the official case citations, for $99.99 per person.

California Case Summaries: Annual™: Our summaries of every new civil and family law decision published each year, with the official case citations, for $499.99 per person.

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

Trial Courts: The Best Place for a Second and Last Chance on Appeal

By Rupa G. Singh, Niddrie Addams Fuller Singh LLP

In his sprawling acceptance speech for the best actor Oscar as the title character in the psychological thriller, *Joker,* Joaquin Phoenix began by mentioning artistic humility, gratitude, and fellow nominees.[1] Gracious and graceful, but hardly earth-shattering. But then he turned to how animal cruelty, racism, queer rights, gender inequality, and climate change, among other issues, are not different causes that we need to champion separately, but a common fight against injustice in all its forms that should and does unify us.

Inspiring, thought-provoking, and unusual, right? Yet what resonated most with me was his heartfelt admission that he had been a difficult person, a "scoundrel," as he put it, who had made many mistakes, but had been blessed with forgiveness and second chances, including by many in the audience. Wow. I may have teared up a little. But not for the reason a sensitive, high-EQ person would. Appellate geek through and through, I was saddened by the realization that second chances are harder to come by in the legal world than the real world.

An appeal is the closest thing a litigant has to a second chance in the law. And because most litigants cannot pursue or do not secure Supreme Court review, that second chance is pretty well their last chance. One of the judges for whom I clerked used to say that the best place to win your appeal is in the trial court. In furtherance of that excellent advice, I share three common mistakes in the trial court that lose many litigants their second—and essentially last—chance on appeal.

First, sometimes attorneys fail to keep a copy of lodged exhibits submitted in support of a motion or during trial to transmit to the Court of Appeal. But whether a party designates a Clerk's Transcript or an Appendix on appeal, it remains the parties' responsibility to ensure that original exhibits admitted in evidence, refused, or lodged, and not copied in the clerk's transcript or in the appendix, are transmitted to the Court of Appeal per the procedure in the Rules of Court.[2] As a hot shot junior associate at an Am Law 100 litigation firm two decades ago, I recall getting a call from the superior court clerk's office that trial exhibits would be destroyed if not picked up by a certain deadline. My inclination was to let them be recycled; one less thing to do and climate responsible. Luckily, I consulted with all associates' go-to expert, the legal secretary, and heeded her advice to have the exhibits picked up and stored. Talk about getting a second chance to keep my job.

Second, attorneys frequently fail to ask the trial court first for relief to be sought *with* their appeal. For example, appellants may need a stay of the order on appeal if it is not automatically stayed by the filing of the appeal[3] or need a reduced bond to stay a judgment that requires an undertaking. Now, it is understandable not to want to seek this relief in the trial court; after all, following a last appearance in trial court, it may seem procedurally and logistically difficult to seek further relief. It also may seem futile to ask the judge who just ruled against your client to stay the order so you can appeal it as erroneous and get a reversal. Further, there is the perception that trial courts lack the ability to grant relief pending an appeal; not so.[4] Any failure to ask the trial court first for the relief at issue is fatal to securing that relief in the Court of Appeal. As one of the Justices recently put it at an Appellate Inn of Court event, it is the Achilles heel of even a request to the Court of Appeal supported by the strongest showing of good cause.

Third, some attorneys misunderstand the nature of the duty to serve a document titled "notice of entry of order or judgment" to trigger the deadline to file an appeal.[5] For example, serving a "notice of ruling" is not sufficient; the document must be titled "notice of entry" of the order or judgment at issue in order to satisfy the statute.[6] As courts have acknowledged, it may seem "hypertechnical" to distinguish between "'a notice of ruling' and 'a notice of entry,'" but "[s]ince the time within which an appeal must

(continued on page 25)

Trial Courts: The Best Place...

(continued from page 24)

be filed is jurisdictional, rules that measure that time must stand by themselves without embroidery."[7]

So litigants and trial attorneys beware—this may be the one time that seeking permission first, not forgiveness later, is the better strategy. But all is not "Denied" and "Dismissed" in the appellate world, and mercy comes in unanimous opinions. As the Supreme Court recently held, a notice of appeal filed by a plaintiff from an order imposing sanctions on plaintiff's attorney must be liberally construed to include the omitted attorney when it was reasonably clear that the attorney intended to join in the appeal and the respondent was not misled or prejudiced by the omission of the attorney's name as a party to the appeal.[8]

Moved perhaps by his portrayal of the villainous, misunderstood, and unforgiven Joker, Joaquin Phoenix ended his Oscar remarks by noting that humanity is at its best when we help each other to grow, when we educate each other, and when we guide each other towards redemption. Amen brother!

And P.S.–your path as trial lawyer towards growth, second chances, and even redemption may run through the office of an appellate lawyer to be consulted before and during dispositive pre-trial, trial, and post-trial stages. Just saying.

Rupa G. Singh handles complex civil appeals and critical motions in state and federal court at Niddrie Addams Fuller Singh LLP, an 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.

FOOTNOTES

1. Text of full speech is at https://www.theguardian.com/film/2020/feb/10/joaquin-phoenixs-oscars-speech-in-full.
2. (Cal. Rules of Ct., rule 8.224(a)(1) and (a)(3) [party who wants the appellate court to consider original exhibits must, within 10 days after the last respondent's brief is or could have been filed must serve and file *in the superior court* a notice designating such exhibits for transmittal to the appellate court, and serve a copy of the notice on the appellate court].)
3. *(See, e.g.,* Code Civ. Proc. § 916 [appeal stays proceedings on judgment or order on appeal or matters "embraced" therein]; *id.,* §§ 917.1–917.9 [exceptions to automatic stay on order or judgment appealed].
4. (But *see, e.g.,* Code Civ. Proc. § 918 [trial courts can stay enforcement of any order or judgment, including those requiring an undertaking for stay].)
5. To trigger the 60-day deadline to file an appeal, the superior court clerk or a party must serve "a document entitled 'Notice of Entry of judgment or a filed-endorsed copy of the judgment." (Cal. Rules of Court, rule 8.104 (a)(1)(A) and (B).) As used in the rule, "'judgment' includes an appealable order if the appeal is from an appealable order." (Id., rule 8.104(e).)
6. *(Sunset Millennium Assocs., LLC v. Le Songe,* LLC (2006) 138 Cal.App.4th 256, 260–61 [minute order not entitled notice of entry, but including those words in later pages, did not trigger 60-day statutory deadline to file appeal; later clerk's notice of entry of judgment did].)
7. *(20th Century Ins. Co. v. Superior Ct. (Arana)* (1994) 28 Cal.App.4th 666, 672.)
8. *(K.J. v. L.A. Unified Sch. Dist.,* 8 Cal.5th 875, 884–86.)

THANK YOU TO OUR SPONSORS

Platinum

Heffler Claims Group

JAMS

JUDICATE WEST
Alternative Dispute Resolution
*Results Beyond Dispute*SM

LEGAL ARTS
EST. 1979

SIGNATURE RESOLUTION

Gold

aptus COURT REPORTING

ADR SERVICES, INC.

PROSEARCH strategies

Silver

CalPrivate BANK
Relationships. Solutions. Trust.

SG THE SULLIVAN GROUP OF COURT REPORTERS
SULLIVANCOURTREPORTERS.COM

CBIZ

bakertilly

VERITEXT LEGAL SOLUTIONS

ankura

Association of Business Trial Lawyers – San Diego

2020 Officers and Board Members

OFFICERS

President –
Alan Mansfield
Vice President –
Rebecca J. Fortune
Treasurer –
Paul Reynolds
Secretary –
Hon. Lorna Alksne

BOARD OF GOVERNORS

Christian Andreu-von Euw
Karen L. Alexander
Hon. Katherine A. Bacal
Hon. Anthony Battaglia
Hon. Wendy Behan
Hon. Roger Benitez
Hon. Michael Berg
Eric Beste
Hon. Victor Bianchini (Ret.)
Callie Bjurstrom
Jon S. Brick
Gary Brucker
Hon. Jill Burkhardt
Hon. Larry A. Burns
Michelle L. Burton
Ryan C. Caplan
Leah Christensen
Hon. Gonzalo Curiel
Hon. Robert P. Dahlquist
Hon. William S. Dato
Hon. Mitchell D. Dembin
Jenny L. Dixon
Joseph Dunn
K Elizabeth Dunn
Hon Ronald Frazier
Elizabeth A. French
Dave Fox
Hon. Allison Goddard
Hon. Irma E. Gonzalez (Ret.)
Daniel C. Gunning
Jillian Hayes
Valentine S. Hoy
Conor Hulburt
Rachel Jensen
Frank J. Johnson
Randy K. Jones
Noah A. Katsell
William P. Keith
Jason Kirby
Bob Knaier
Hon. Christopher Latham
David H. Lichtenstein
Hon. Linda Lopez
Luis E. Lorenzana
Douglas M. Lytle
Robert G. Marasco
Deborah Martin
Kimbery A. McDonnell
Hon. Kenneth J. Medel
Hon. John Meyer
Andrea N. Myers
Kelly O'Donnell
Hollis Peterson
Adam Powell
Thomas Proctor
Hon. Linda Quinn (Ret.)
Marty B. Ready
Paul A. Reynolds
Mary Robberson
Rob Shaughnessy
Devin Shoecraft
Hon. Andrew Schopler
Richard M. Segal
Andrew B. Serwin
Logan D. Smith
Hon. Michael T. Smyth
David R. Stickney
Hon. Ed Sturgeon
Hon. Timothy B. Taylor
Hon. Randa Trapp
Colin L. Ward
Anne Wilson
Hon. Joel R. Wohlfeil
Summer J. Wynn

JUDICIAL ADVISORY BOARD

Hon. Cynthia Aaron
Hon. Jeffrey Barton
Hon. Cynthia Bashant
Hon. Cathy Bencivengo
Hon. Timothy Casserly
Hon. Karen Crawford
Hon. Patricia Cowett (Ret.)
Hon. David Danielsen (Ret.)
Hon. Peter Deddeh
Hon. Steven Denton (Ret.)
Hon. Kevin Enright
Hon. Charles Hayes (Ret.)
Hon. William Hayes
Hon. Judith Hayes (Ret.)
Hon. Herbert Hoffman (Ret.)
Hon. Marilyn Huff
Hon. Richard Huffman
Hon. Joan K. Irion
Hon. Joan Lewis (Ret.)
Hon. Barbara Major
Hon. Margaret Mann
Hon. Barry Moskowitz
Hon. Thomas Nugent (Ret.)
Hon. Leo Papas (Ret.)
Hon. Laura Parsky
Hon. Gregory Pollack
Hon. Ronald Prager (Ret.)
Hon. Joel Pressman (Ret.)
Hon. Janis Sammartino
Hon. Nita Stormes

PAST PRESIDENTS

Hon. Jan M. Adler
Peter H. Benzian
Charles V. Berwanger
Michelle Burton
Michael L. Duckor
Brian A. Foster
Edward M. Gergosian
Richard D. Gluck
Randy Grossman
Hon. J. Richard Haden (Ret.)
Hon. Maureen F. Hallahan
Marisa Janine-Page
Frederick W. Kosmo
Jack Leer
Mark C. Mazzarella
Hon. M. Margaret McKeown
Anna F. Roppo
Alan Schulman
Hon. Ronald L. Styn
Howard F. Susman
Hon. Randa Trapp
Paul A. Tyrell
Claudette G. Wilson
Robin A. Wofford
Meryl L. Young
Mark C. Zebrowski

ANNUAL SEMINAR CO-CHAIRS

Andrea Myers
Doug Lytle

CIVILITY CO-CHAIRS

Hon. Katherine Bacal
Randy Grossman

COMMUNITY OUT-REACH CO-CHAIRS

Hon. Victor Bianchini
Ann Wilson
Rachael Kelly

DINNER PROGRAM CO-CHAIRS

Jenny Dixon
Rich Segal

INLAND EMPIRE OUTREACH CO-CHAIRS

Leah Christensen
Rob Shaughnessy

JUDICIAL ADVISORY BOARD CHAIR

Hon. Randa Trapp

LEADERSHIP DEVELOPMENT CO-CHAIRS

Corey Garrard
Tess Wynn

MEMBERSHIP CO-CHAIRS

Gary Brucker
Dan Gunning

MINI ANNUAL SEMINAR CHAIR

Frank Johnson

MOCK TRIAL CHAIR

Marisa Janine-Page

SPECIALTY LUNCHES CHAIR

Jon Brick

SPONSOR RELATIONS CO-CHAIRS

David Lichtenstein
Boris Zelkind

ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO
abtl

8030 La Mesa Blvd., #127
La Mesa, CA 91942

PRSRT STD
U.S. POSTAGE
PAID
PERMIT 751
SAN DIEGO, CA