ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO

abtl

Volume MMXX No. 3 December 2020

Heroes Never Die: How RBG Can Live On

By Rupa G. Singh, Niddrie Addams Fuller Singh LLP

> Ideals are like the stars: we never reach them, but, like the mariners of the sea, we chart our course by them.
>
> – Carl Schurz[i]

As an appellate lawyer and a woman standing on the shoulders of countless pioneers who paved my way, I greatly admire Justice Ruth Bader Ginsburg, or RBG, as she was dubbed.[ii] But I had not studied her writings beyond scholarly summaries in seminars or journals. The two times I heard her speak live were from afar, allowing for no interaction. I also had little occasion to apply the equal rights jurisprudence for which she was best known in my business-focused appellate practice. So, while aware of her ground-breaking work and well-deserved celebrity, I found my daily life unaffected in any palpable way by RBG.

Or so I thought. Her passing affected me so immensely, shaking me to the core, that I felt as if a protective, guiding hand had been lifted from not only my head, but from our country's back, leaving us both adrift. Then I heard Dean Erwin Chemerinsky say during a seminar about the Supreme Court's upcoming October 2020 term that we are grieving that much more for RBG because she was a hero at a time when our profession no longer has that many heroes. It shouldn't have taken someone else saying it, but I realized then that RBG was a true real-life hero, one who represented my aspiration to be a hero myself.

Her superpower was her brain, reflected in her pen. In eighth grade, she wrote an editorial for her school newspaper about the five greatest documents the world had known to date. With clear-eyed brevity, she made the case for why the United Nations Charter should join the Ten Commandments, the Magna

Photos courtesy of nytimes.com and The New Yorker

(continued on page 6)

INSIDE

SAN DIEGO

2021 MEMBERSHIP REGISTRATION NOW OPEN

BENEFITS INCLUDE

- ***Diverse membership -*** plaintiff and defense bars, federal and state judiciary, firms of all sizes and solo practitioners.
- ***Dinner Programs -*** topical, informative events, featuring state and nationally known lawyers, judges and experts. *(Member discount & MCLE credit)*
- ***Annual seminar*** at resort destinations - tentatively scheduled for October, 2021 at the Mauna Lani Resort on Big Island, Hawaii. *(MCLE credit)*
- ***"Meet the Judges" Series -*** Judicial Mixer and other scheduled events throughout the year. *(Complimentary bench bar networking & Brown Bag lunchtime event(s) with MCLE credit)*
- At least four ***"Nuts & Bolts" and "Specialty MCLE"*** luncheons. *(Complimentary events w/MCLE credit)*
- Three to four issues of the ***ABTL Report,*** a professional publication containing articles of interest to business trial lawyers and judges.
- ***And MUCH more...***

PRICING

- Individual Membership - ***$95.00***
- Litigation Dept. Membership - per person *(all attys in office, min. 5)* - ***$85.00***
- Public Sector Attorney - ***$50.00***
- New Lawyer - ***Complimentary***
- Sitting Judge - ***Complimentary***

Go to:

abtl.org/sandiego

to register NOW!


Alan M. Mansfield

President's Message

By Alan M. Mansfield, Whatley Kallas LLP

Well, that was eventful. This year has been a whirlwind in terms of time passing quickly while at the same time seeming to stand still. But throughout this eventful year we have managed to offer our members important updates from our judicial leaders – the Hon. Larry Burns, Chief Judge of the United States District Court for the Southern District of San Diego, and ABTL's incoming vice president, the Hon. Lorna Alksne, Presiding Judge of the San Diego County Superior Court. We thank both of them for taking time out of their incredibly busy schedules to do so.

We were able to continue, and in fact increase, the programming provided to our members as part of their membership – not only here but by coordinating with other chapters to provide access to programming throughout California. We thank all of our participants, and particularly our judicial officers, who generously participated in our dinner programs (yes, we actually held a live event in February and had our annual ABTL fundraiser dinner on November 17th in virtual format); our successful virtual judicial roundtable event (coordinated by Rachael Kelley and Anne Wilson); our brown bag lunch presentations (moderated by Jack Leer and organized by Charlie Berwanger); our nuts and bolts presentations (coordinated by our Leadership Development Committee chairs Tess Wynne and Corey Garrard) and our numerous lunchtime programs on a wide variety of topics (coordinated in part by Jon Brick, David Lichtenstein, Rob Shaughnessy and Leah Christensen). I also would like to recognize the work of our Community Outreach program, lead by co-chairs The Hon. Vic Bianchini, Rachael Kelley and Anne Wilson.

I would like to individually thank and recognize two members of our Board who are stepping down from their active ABTL service. First, the Hon. Randa Trapp, supervising civil judge of the San Diego Superior Court, who has acted as the chair of our Judicial Advisory Board and has worked very hard to ensure the active participation of our judicial members that is the hallmark of ABTL. Second, Rich Segal, who has left his position as Dinner Programs co-chair for a much more worthwhile pursuit – the CEO for Camp Kesem, a non-profit organization that arranges for camp experiences (including virtual events) nationwide for children with parents battling cancer (for more information see www.campkesem.org).

While always valuable, this year our sponsors have been an integral part of our organization being able to remain in good financial position. We would like to thank our Platinum Sponsors JAMS, Judicate West, Legal Arts, Signature Resolution, and Heffler Claims Group; our Gold sponsors ADR Services, Inc., @ptus court reporting and Prosearch and our Silver sponsors ankura, bakertilly, CBIZ and Veritext. Whether live or virtual, they all provide tremendous services to our members, and we appreciate their continued support both for this year and upcoming years. My thanks go out to David Lichtenstein and Boris Zelkind, who have worked hard in gaining and retaining our sponsors to ensure their continued participation and that we are meeting their needs. Please consider using their services in your litigation practices.

One of our biggest disappointments this year was having to postpone the Annual Seminar. However, due to the tireless efforts of our Annual Seminar Committee chair Andrea Myers and event organizer Linda Sampson we were able to postpone the event to next October with the same great location and rates. Jenny Dixon and Jon Brick will be taking over the annual seminar duties for 2021. It will be a welcome event!

(Continued on page 4)

President's Message

(continued from page 3)

We were able to successfully run the first virtual ABTL Mock Trial program. The team from Cal Western School of Law took the honors this year. Thanks to Marisa Janine-Page and Frank Johnson for coordinating and dealing with all the technical challenges of this event.

The task of retaining membership has been challenging this year. Our membership chairs Dan Gunning and Gary Brucker have worked on a variety of ideas to sustain our membership levels. They will be working over the next month to ensure our membership levels return to where they were in 2019, if not increase.

ABTL offers a tremendous value to our members. We appreciate your ongoing support and will continue to strive to increase ABTL's focus on civility, increased diversity and meaningful interactions between the bench and bar. **So please go to abtl.org/sandiego and renew your 2021 membership today!**

It's been my privilege to assist in leading this organization through these unprecedented times. I am pleased to announce our ABTL officers for 2021:

President – Rebecca Fortune
Vice President – The Hon. Lorna Alksne
Treasurer – Paul Reynolds
Secretary – Andrea Myers

It is great to know ABTL is in such good hands going forward. Rebecca has already started implementing plans to get 2021 off to a great start, including an amazing program in February featuring friends, colleagues and clerks of the Hon. Ruth Bader Ginsberg (and thank you Rupa for your wonderful tribute and the lead in to that program!). We will soon be releasing details about this event, which will use our new virtual dinner format.

Here's to turning the page in 2021! Thank you all for your support.

Heroes Never Die: How RBG Can Live On

(continued from cover)

Carta, the British Bill of Rights, and the U.S. Declaration of Independence as documents that benefitted humanity "as a result of their fine ideals and principles."[iii]

Her ability to write and speak persuasively continued to be on full display in her teachings, speeches, and writings as a law professor at Rutgers University and Columbia Law School; a winning appellate advocate at the ACLU; a judge on the D.C. Circuit; an associate justice on the Supreme Court; and a sought-after public speaker and officiant throughout her career. Surprising for someone whose words and work proved so revolutionary, she strategically advocated incremental change, one that invited everyone along instead of dragging them to a desired conclusion about equality under the law in various respects—parental estate administration, dependent benefits for military spouses, social security and tax deductions, access to public education, pay discrimination, voting rights, and reproductive justice, among others.[iv]

Even in her powerful dissents, she tried to persuade instead of berating the majority, using accessible, everyday English to discuss why the other justices' interpretation of complex legislation or jurisprudence was mistaken. In her influential dissent in *Ledbetter v. Goodyear Tire & Rubber Company,* she candidly noted that her male colleagues did "not comprehend or [were] indifferent to the insidious way in which women can be victims of pay discrimination" and put the "ball" in Congress's court "to correct this Court's parsimonious reading of Title VII."[v] Successfully so, with Congress's enactment in 2009 of the Lilly Ledbetter Fair Pay Act. Six years later, in *Shelby County v. Holder,* she explained that invalidating an anti-discrimination mechanism in the Voting Rights Act of 1965 that applied to historically segregated Southern States when "it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."[vi] How RBG's dissenting words will inspire legislators and advocates to reinstate or strengthen voter protection provisions remains to be seen.

Though she refused to use the traditional phrase I "respectfully" dissent, RBG seemed to do so because she genuinely respected the colleagues with whom she disagreed. It seemed hypocritical to her to pretend that she admired the majority's reasoning while systematically explaining why it was fundamentally mistaken or incorrect. Based on unspoken mutual respect, she bravely and candidly disagreed with her colleagues' analysis while trying not to criticize their motives or intelligence. In an era of growing incivility in political, legal, and civic discourse, RBG modeled how to consistently take the moral high ground without being disingenuous or artificial.

Equally heroic was what some sexists might label her ladylike humility or feminine sensibility, but is actually her enduring grace as a person. RBG acknowledged her limitations in the kitchen, and sought advice from her father-in-law on balancing marriage, motherhood, and career. She advocated for a marriage built on intellectual respect and romantic love, believing that the two were inseparable. On many occasions, RBG switched the spotlight from herself to praise and thank her personal heroes, including her mother, her parents-in-law, and her husband, as well as her professional role models, including Professor Vladimir Nabokov at Cornell and ACLU advocates Pauli Murray and Dorothy Kenyon. Instead of taking offense that women's wardrobe choices garner public attention in a way that men's don't, RBG even incorporated her iconic fashion sense and "dissent" collars to amplify her feminist message. She assumed the mantle of her unsolicited celebrity graciously, helping more than one generation reimagine a life in the law as fulfilling and cool all at once.

How can RBG not live on if we, and hopefully future generations of lawyers, continue to chart our course by her example? That need not mean enduring every personal tragedy with dignity; overcoming overt employment discrimination despite being valedictorian; writing the definitive textbook on sex discrimination; co-founding a path-breaking ACLU project; marrying your staunchest admirer for love and all the right reasons; surviving and nursing others through multiple bouts of cancer; ascending to the male-

(continued on page 7)

Heroes Never Die: How RBG Can Live On

(continued from page 6)

dominated D.C. Circuit Court of Appeals and the United States Supreme Court; and making it hip to be a petite, bespectacled legal nerd. Rather, honoring RBG's legacy could just mean pretending to be slightly deaf to unkind words or criticism, as her mother-in-law advised and as RBG confessed to doing personally and professionally; choosing persuasion over accusation in our speech and writing, as RBG did skillfully from at least the eighth grade; and striving for moderation even in our impassioned efforts to create lasting change in our chosen sphere, as RBG modeled in her thoughtful appellate advocacy and careful judicial dissents.

For me, how I should try to carry on RBG's legacy was brought home yet again by someone else's words, this time, those of my nine-year old daughter. More concerned with perfecting her gymnastics front flips and pulling off a soccer hat trick than reflecting on equality under the law, the youngest member of our family was nevertheless visibly moved by a KPBS film tribute to RBG that our family recently watched. After being quiet through dinner that night, she said decisively, "I wish we could dissent from someone's death. If so, I dissent from RBG's death." It made me smile, cry, and marvel at her elegant ability to simplify how I could transform into meaningful action my unavailing grief for someone I mistakenly thought never touched my life tangibly. Because I now aspire to persuade, oppose, and make tactical decisions as an advocate by asking what my hero, RBG, would do in that situation, I proudly join in my daughter's dissent.

Rupa G. Singh is a certified appellate specialist who handles complex civil appeals and critical motions in state and federal court at Niddrie Addams Fuller Singh LLP, San Diego's only appellate boutique. She is a past president of FBA-San Diego, a former Ninth Circuit staff attorney, and a self-proclaimed RBG groupie. She is married to a telecommunications engineer, and the proud mother of three would-be activists.

ENDNOTES

[i] https://www.inspiringquotes.us/author/6443-carl-schurz; Schurz was a German-American political leader, journalist, orator, and U.S. Senator at the turn of the last century (https://www.britannica.com/biography/Carl-Schurz).

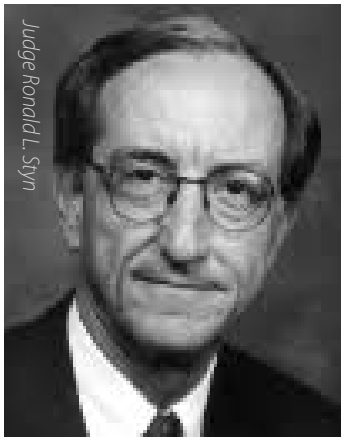
[ii] The name came from an NYU law student's blog titled the Notorious RBG, likening Justice Ginsburg to the rapper Notorious BIG after her powerful dissent in a seminal voting rights case, *Shelby County v. Holder,* 570 U.S. 529 (2013).

[iii] Ruth Bader Ginsburg, Mary Harnett, and Wendy Williams, IN MY OWN WORDS, p. 10 (Simon & Schuster, 2018).

[iv] Reed v. Reed, 404 U.S. 71 (1971) (no automatic preference for males as estate administrators); *Frontiero v. Richardson,* 411 U.S. 677 (1973) (female officer's spouse entitled to same medical benefits as male officer's); *Moritz v. Comm'r of Internal Rev.,* 469 F.2d 466 (1972) (caregiver deduction available to unmarried men, not just women or widowers), review den., 93 S.Ct. 2291 (1973); *Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975) (provision giving widows but not widowers to social security benefits while caring for minor children unlawful); *Craig v. Boren,* 429 U.S. 190 (1976) (statute allowing women to buy beer at 18 and men at 21 discriminates on the basis of sex); *U.S. v. Virginia,* 518 U.S. 515 (1996) (exclusively male public military school violates equal protection).

[v] 550 U.S. 618, 661 (2007), (Ginsburg, J., dissenting), overruled by legislative action (Jan. 29, 2009).

[vi] 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting).


Judge Ronald L. Styn

Judge Styn Lunch and Learn

By Angela M. Hampton

The Honorable Judge Ronald L. Styn has presided in an independent calendar department of the San Diego Superior Court since 2003, having been appointed to the bench in 2000. On October 14, 2020, Judge Styn provided helpful feedback on how best to approach his department as well as allowed an open dialogue of questions and answers during ABTL's judicial lunch and learn program.

True Meet and Confer

With a heavy reliance on email correspondence, the meet and confer process has deteriorated over the years. Too often, Judge Styn reads meet and confer efforts in the form of scathing emails. As a result, he requires attorneys speak with each other. (Although in-person meetings are preferable, due to COVID-19 restrictions he understands if counsel use telephonic or virtual meetings.) Judge Styn's experience is that a genuine meet and confer, in which counsel actually discuss the issues in dispute, is far more productive.

Judge Styn is starting to require informal ex parte appearances to discuss potential discovery motions generally, wherein the court provides a preview of how it may rule. Unless it is a technical issue or involves a nuanced issue of law, in which case a noticed motion may be necessary, the informal conferences often obviate the need for a formal motion hearing, consequently saving time and expense for the parties and court. It also forces parties to speak with each other respectfully and reasonably, with a judge present.

Helpful Tips for Pleadings

Avoid placing footnotes in your motion or other pleading. Judge Styn does not read them. It is not proper and may violate the page limit. If you want to say something, say it in the pleading's body.

Please proof read. Judge Styn has read papers with egregious errors, sometimes even in the captions. *"Why should I read your papers, if you have not"* is not an attitude you want a judge to have while reviewing your motion.

The pleading caption should tell the reader what the document is. Make sure your pleading caption is clear and not misleading. Too often captions are overly wordy burying the nature of pleading and the responsible party in a word avalanche. Also, if a pleading serves multiple purposes ensure that is clear in the caption. For example, use parenthetical numbers to identify those purposes.

Lastly, avoid multiple exhibits with the same number. It is not uncommon for Judge Styn to have three exhibits numbered one for the same motion, for example. Please number exhibits consecutively.

Trial in Dept. 74

Be professional in all aspects. Please do not address individuals by their first names. Do not get personal. Judge Styn does not want to hear any personal information or remarks to the jury during trial. Dressing professionally lets the court know this is important to you.

When writing the statement of the case, be specific. Do not simply say, "plaintiff suffered an injury." Instead say, "plaintiff injured his back." Even better would be, "plaintiff suffered a back

(Continued on page 9)

Judge Ronald Styn

(continued from page 8)

injury to his L-1 and L-3". Talk about the things that will come up. Identify anything that is a hot button issue so that voir dire is meaningful.

Judges do not like surprises. If there are any notable issues, raise them before trial starts.

Most attorneys talk too much in motions and in openings. Ministers do sermons in twenty minutes. Get to the point. Do not say you are willing to stipulate unless you do in fact have an agreed upon stipulation in place.

Before the case goes to the jury, review exhibits with opposing counsel and make sure that only admitted exhibits go to the jury. During one trial the parties did not realize that an expert damage calculation which had been ruled inadmissible was sent back to the jury, resulting in the damages award being based on the excluded evidence.

From a Jurors' Perspective

During trial, jurors have nothing to look at except the judge and attorneys. The hours can crawl by, especially if attorneys are fumbling through papers looking for exhibits. Worse is a witness searching through a large binder with exhibits not intended for them. Have the exhibits ready for each witness. Think ahead, be organized, and make the process seamless. If you do, the jury will like you more.

Use technology to help remind jurors of the evidence. During closing argument when counsel said, "you recall the testimony of Dr. Smith…" counsel simultaneously displayed a photograph of Dr. Smith so the jurors could actually recall. This was done for each witness. It was very helpful. Yet, that was the singular time Judge Styn saw this approach. This would be especially helpful in longer cases.

The number one criticism from jurors is that lawyers do not speak up. If you have something to say, make sure they can hear you.

Trials in the Time of COVID

There remains a massive backlog of criminal cases. It is likely there will not be a civil jury trial in SDSC for the remainder of 2020. The ability to conduct trials in general also depends upon the status of the pandemic, a vaccine, and of course the jury pool numbers. When civil jury trials begin again, they will undoubtedly take longer due to social distancing.

Virtual bench trials are available if both sides stipulate. SDSC's first live bench trial started the third week of October. It had previously been a jury trial in progress stopped in March due to COVID. The parties agreed to finish it as a bench trial.

SDSC is working to make Microsoft Teams an additional option available not only for trials but for motions too.

COVID Impact on Cases

Please remember that COVID has affected judicial caseloads. Caseloads have increased since the pandemic began. The average SDSC independent calendar judge has over 1,200 cases. Also, it appears lawyers have increased filing motions as a result of COVID. Think brevity. Do not repeat yourself.

Know Your Judge

Judges are very different. Whomever you appear in front of try to find out something about their judging style. Find someone who knows the judge. Judges react very differently. So, it is helpful to know what the judge likes and does not like.

It is for this reason ABTL's judicial lunch and learn program was created. Knowing our judges helps us work smarter and more efficiently. It also saves judicial resources, which is needed now more than ever. A special thank you to Judge Styn for his time and remarks. And as always, stay classy San Diego.

Angela M. Hampton is an associate at Gordon Rees Scully Mansukhani LLP

Legal Arts®
Experience Visual Persuasion

Every litigation practice area

call 619.239.1101 / 888.305.1101
write jgripp@legalarts.com
visit www.legalarts.com

Established 1979

- Graphics Consulting
- Graphic Design
- Advanced PowerPoint
- Technical / Biomedical Illustration
- 2D-3D Animation
- Interactive Multimedia
- Photography / Video
- Technology Tutorials

"I have worked with Jim Gripp for almost thirty years and he just keeps getting better! Jim is masterful at conveying themes, storylines, and perspectives on how one should view the evidence through the graphics he creates. Jim is particularly gifted with intellectual property matters where he reduces technical concepts into easy-to-understand graphics that jurors quickly embrace. Jim is tireless and he produces valuable work product time and time again. I highly recommend Jim."

Randall E. Kay, Esq., Jones Day


Judge Timothy Casserly

Judge Timothy Casserly Provides Insight about His Department, From the Pleading Stage Through Trial

Leslie A. Horwitz,Gordon Rees Scully Mansukhani LLP

On August 13, 2020, the Honorable Timothy Casserly, Department N-31, Independent Calendar Judge in the Vista Courthouse, provided insight on judicial discussions and preparations for the reopening of the San Diego court as well as his perspective on how cases in his department should be handled from the pleading stage through trial, during a remote ABTL brown bag lunch. Judge Casserly, who began his career in criminal law but now focuses on civil law, and having been appointed to the San Diego Superior Court in 1996, brings an experienced trial lawyer and judge's view to Department N-31.

A Date for Civil Jury Trials to Resume is Uncertain

Judge Casserly reported there is no plan for jury trials to begin and it is unlikely that any civil jury trial will be held this year as the Court is not currently summoning jurors. There are, however, ongoing discussions about resuming bench trials, but again there is no target date when they may begin.

General Principles When Dealing With the Court

The first principle is to be honest and straightforward with everyone that you deal with. The second is to be respectful to everyone, particularly opposing counsel, no matter how "stupid" or "evil." Third is see yourself as problem solver and recognize that litigation is one tool to solve a dispute and is not a war. A reminder: most wars should not have been fought.

Cases Management from Pleadings Through Trial

Excessively long complaints, with hundreds of pages and upwards of twenty causes of action, are typically unnecessary. Instead, it is best to ensure that each cause of action is simple, clear, and necessary. The responding party should seriously consider if a demurrer or motion to strike is really necessary and cost effective. The moving party will necessarily spend a lot of money educating opposing party on pleading deficiencies with the foreseeable result leave to amend will be granted. Of course, there are situations where a demurrer or motion to strike is appropriate, such as when it would change the scope of discovery, makes a case seem more valuable, or will assist with settlement.

At the Case Management Conference the key points for the statement are what the case is about; is everyone in the case; what is the time estimate for case; is there a jury demand; and what form alternative dispute resolution would be most useful.

As for ex partes, Judge Casserly understands they are a necessary part of good case management and if the issue cannot be settled at the ex parte it will be set for a noticed motion.

While not required, it is highly recommended that, prior to bringing a discovery motion, the parties contact the clerk to set an informal discovery conference. If the conference is unsuccessful, the motion can be specially set

(Continued on page 13)

Judge Timothy Casserly

(continued from page 12)

earlier than had the parties simply gone through the reservation system.

The most time consuming motions are Anti-SLAPP motions, CEQA motions, and motions for summary judgment. Similar to demurrers and motions to strike, a party should seriously consider whether the expense and effort to bring a motion for summary judgment is prudent. Motions for summary judgement are rule oriented, expensive, and time consuming. Furthermore, Judge Casserly notes that he often denies motions for summary judgment because of the strict standards required to succeed on a motion for summary judgment, even when he believes the case has no chance of success. Furthermore, in failing to succeed on the summary judgement motion, the moving party has shown its defense to the action.

It is important to address cases that are not in your favor, preferably by distinguishing them. Do not ignore them. Furthermore, all papers filed with the court should be professional. Personal attacks on opposing counsel should be avoided. Let the facts lead the Court to the conclusion the other side is being dishonest. Do not call them a "liar". Once a tentative ruling is posted very rarely will oral argument change the tentative ruling because the facts and law do not change. Thus, oral argument is most effective when the tentative ruling indicates that the Court does not understand an important fact or point of law. During oral argument it is vital to directly answer the Court's questions, and when the Court tells an attorney to stop, the attorney should sit down. Either the Court agrees with the attorney's argument, or nothing the attorney is going to say will change the Court's ruling.

The Trial Readiness Conference – which is typically held four weeks prior to trial – is critically important and must be attended by trial counsel. The purpose of the Conference is to ensure that the case is actually ready for trial. Any documents or witnesses not identified in your Trial Readiness Brief may be excluded, so spend the time needed to prepare a thorough brief. If the parties have made no efforts to settle the case prior to trial, it is likely Judge Casserly will order the parties to attend a mandatory settlement conference.

At trial call a joint trial notebook with completed jury instructions and jury verdicts is required. It is rare that special instructions will be necessary and when they are they should be formatted similar to the CACI instructions. Citing appellate case law in the instructions should be avoided. There will be no jury called until all of the trial documents have been reviewed and finalized.

Settlement Conference

Judge Casserly does a lot of settlement conferences. He "loves doing them" and has ample availability because he is currently unable to try cases. The virtual settlement conferences have been working well with the biggest hindrance to settlement being the lack of a firm trial date.

At least five days prior to the settlement conference, the parties are required to submit a brief, but the earlier the brief is submitted the better. At the settlement conference, Judge Casserly typically will meet with both sides and explain that settlement is better than trial. Once the parties are separated he will actively negotiate settlement, will empower the attorney, and encourage clients to listen to their attorney.

Judge Casserly's Final Thoughts

It is important during trial to "relax and have fun." In Judge Casserly's view attorneys should refrain from getting angry about their cases and he is most impressed with attorneys who act nonplussed when a ruling goes against them. After all, Judges are simply trying to make the best rulings they can with the limited information they have been given. Getting upset will not change the ruling, and may even lead the Court to disregard your subsequent arguments.

Leslie A. Horwitz, is an associate at Gordon Rees Scully Mansukhani LLP.

When Businesses Are Exposed To Federal Sex Trafficking Liability

Article reprinted with approval – The Monitor 2020, a quarterly publication2020 by Johnson Fistel, LLP.

Until recently, sex trafficking was an underground crime and social ill. Now, however, it seems federal sex trafficking – and the laws aimed at stopping it – are more than ever in the news, and in the courts. While the allegations giving rise to Jeffrey Epstein's arrest last year, and to Ghislaine Maxwell's arrest just this July, are more obvious criminal sex trafficking cases, the law governing federal sex trafficking is much broader. Not only do victims have a right to bring a civil lawsuit against the sex traffickers, but – depending on the facts – victims may also bring claims against any person or entity who benefitted in any way from the sex trafficking. As such, hotels, transportation companies, and rental companies utilized by the perpetrators of sex trafficking are also exposed to liability

Federal Sex Trafficking Laws

The Trafficking Victims Protection Act ("TVPA") is a federal law criminalizing the use of fraud, force, or coercion in order to recruit, entice, and solicit a person to engage in a commercial sex act. 18 U.S.C. § 1591(a)(1). A "a commercial sex act" is any act whereby anything of value is exchanged or received by any person for a sexual act. 18 U.S.C. § 1591(e)(3). The TVPA also criminalizes knowingly benefitting from participation in a venture that engages in sex trafficking. 18 U.S.C. § 1591(a)(2). To more fully combat sex trafficking, Congress went further by expressly permitting sex trafficking lawsuits. The TVPA grants sex trafficking victims the right to bring a civil lawsuit against the perpetrator and/or anyone who benefits from participation in the venture if that person knew or should have known that sex trafficking was occurring. 18 U.S.C. § 1595(a). The victims, if successful, are entitled to compensatory damages, punitive damages, and their attorney fees.

"Section 1595 opened the door for liability against facilitators, who did not directly traffic the victim, but benefitted from what the facilitator should have known was a trafficking venture." A.B. v. Marriott Int'l, Inc., No. 19-5770, 2020 WL 1939678, at 7 (E.D. PA Apr. 22, 2020) ("Marriott"). The phrase "knew or should have known" echoes a negligence standard. M.A. v. Wyndham Hotels & Resorts, Inc., No. 19-849, 2019 WL 4929297 (S.D. Ohio Oct. 7, 2019) ("M.A. v. Wyndham"). Courts have labeled these claims against facilitators as proceeding under the "beneficiary theory."

Suing Businesses for Sex Trafficking

So, under this "beneficiary theory," when is a business exposed to federal sex trafficking liability? While this area of law is very much still developing, most federal courts agree that a plaintiff must show the defendant: (1) knowingly benefitted financially; (2) from participation in a venture; (3) it knew or should have known was engaged in sex trafficking. Marriott at 7.

1. The Business Must Knowingly Benefit

This element merely requires that the defendant knowingly receive a financial benefit, such as payment for rental of a hotel room. B.M. v. Wyndham Hotels & Resorts, Inc., No. 20-CV-00656-BLF, 2020 WL 4368214, at 4 (N.D. Cal. July 30, 2020) ("B.M. v. Wyndham") [rejecting defendants' argument that "'benefit must derive directly from, and be knowingly received in exchange for, participating in a sex-trafficking venture"]. Similarly, the United States District Court for the Southern District of New York found the plaintiff adequately plead the Weinstein companies "knowingly benefited" from Harvey Weinstein's alleged sex trafficking because the companies affirmatively enabled and concealed Mr. Weinstein's predations, leading to a symbiotic relationship with mutual financial benefit. Canosa v. Ziff, No. 18-4115, 2019 WL 498865, at *24 (S.D.N.Y. Jan. 28, 2019).

2. The Business Must (Somehow) Participate in the Venture

In civil cases, district courts have differed in defining the phrase "participation in the ven-

(Continued on page 15)

When Businesses Are Exposed To Federal Sex Trafficking Liability

(continued from page 14)

ture." While Section 1591 defines "participation in a venture" to mean "knowingly assisting, supporting, or facilitating a violation" in the criminal context, the term is not defined for the purposes of a Section 1595 sex trafficking lawsuit.

Some courts have borrowed the criminal definition in Section 1591, requiring a civil defendant knowingly participate in the sex trafficking aspect of the venture, such as participating in victim recruitment. See Noble v. Weinstein, 335 F. Supp. 3d 504 (S.D.N.Y. 2018); Doe 1 v. Red Roof Inns, Inc., No. 19-3840, 2020 WL 1872335 (N.D. Ga. Apr. 13, 2020). Other courts have roundly refused to require a knowing participation, finding that such a requirement would void the "should have known" / "negligence language in the civil remedy," improperly borrow the definition from the criminal section, and violate rules of statutory construction. Marriott at 10-13; M.A. v. Wyndham at 7; J.C. v. Choice Hotels Int'l, Inc., No. 20-CV00155-WHO, 2020 WL 3035794, at 1, n. 1 (N.D. Cal. June 5, 2020). In Marriott and M.A. v. Wyndham, the courts found allegations that the hotel defendants repeatedly rented rooms to traffickers as sufficient participation to state a claim. Given the Congressional language in Section 1595, more courts are likely to follow Marriott's approach, i.e., the plaintiff does not need to show a knowing participation.

3. The Business Must Know or Should Have Known

There is no "knowledge" state of mind requirement under the "beneficiary theory." Congress specifically allows a sex trafficking lawsuit against defendants who should have known about the sex trafficking venture. Marriott at 14. Whether a particular defendant should have known is a fact-specific, case-bycase analysis.

For example, in M.A. v. Wyndham, the Court found sufficient allegations that the hotel defendants knew or should have known because the sex traffickers asked for rooms near exits, rooms contained sex paraphernalia, the sex traffickers paid for rooms in cash, the victim appeared physically deteriorated, and the victim made no eye contact with hotel staff

California is a Sex Trafficking Hub

According to the United States Department of State, the top three states with the most human trafficking activity are California, New York, and Texas. In fact, 3 of the 10 worst child sex trafficking areas in the United States are in California: San Francisco, Los Angeles, and San Diego – due to the large immigrant population and easy access to the Mexico border.

With the exception of several Harvey Weinstein cases (where plaintiffs argue the Weinstein business enterprise benefitted from his conduct), the law surrounding sex trafficking lawsuits is developing around cases against hotels - essentially, plaintiffs allege that the hotels should have known they were renting to sex traffickers and, thus, benefitting from their venture. However, any business that turns a blind eye to the problem may be liable, including, for example, rideshare businesses, transportation entities, and vacation rental applications.

Lawyers at Johnson Fistel have experience handling cases involving sex trafficking. Indeed, John J. O'Brien recently obtained a verdict of approximately $13,000,000 in damages for 22 plaintiffs, all of whom were young women who were misled in order to induce them into filming commercial sex acts. The verdict followed a lengthy 99-day trial against the individual perpetrators and an online pornography enterprise. The Court also voided the purported release agreements and copyrights, and issued a mandatory injunction prohibiting the defendants' unfair business practices. In fact, during trial, the United States Department of Justice indicted the defendants and their employees for violating the TVPA.

(Continued on page 12)

$50 Million – It Pays to be a Whistleblower

Article reprinted with approval – The Monitor 2020, a quarterly publication2020 by Johnson Fistel, LLP.

The Securities and Exchange Commission (the "SEC") recently announced a nearly $50 million whistleblower award that it says it paid "to an individual who provided detailed, firsthand observations of misconduct by a company, which resulted in a successful enforcement action that returned a significant amount of money to harmed investors."

"This award marks several milestones for the whistleblower program," said Jane Norberg, Chief of the SEC's Office of the Whistleblower. "This award is the largest individual whistleblower award announced by the SEC since the inception of the program, and brings the total awarded to whistleblowers by the SEC to over $500 million, including over $100 million in this fiscal year alone. Whistleblowers have proven to be a critical tool in the enforcement arsenal to combat fraud and protect investors." Not far behind this award, the SEC paid $50 million to two individuals in 2018 and another $39 million to one individual in 2018.

The Dodd-Frank Wall Street Reform and Consumer Protection Act gives the SEC authority to reward individuals who come forward with high-quality original information that leads to a SEC enforcement action in which over $1,000,000 in sanctions is ordered. The range for awards is between 10% and 30% of the money collected. The Act allows the SEC to minimize the harm to investors, better preserve the integrity of the United States' capital markets, and more swiftly hold accountable those responsible for unlawful conduct.

California Case Summaries: Monthly™

November 2020

By Monty A. McIntyre,
Mediator, Arbitrator & Referee at ADR Services, Inc.

CALIFORNIA COURTS OF APPEAL

Arbitration

Brown v. TGS Management Co., LLC (2020) _ Cal.App.5th _ , 2020 WL 6040053: The Court of Appeal reversed and remanded the trial court's order confirming an arbitration award in favor of defendant in an employment contract dispute with defendant's former employee, plaintiff. The arbitrator ordered plaintiff to pay defendant $652,243 for the refund of a deferred 2014 bonus, plus interest from December 24, 2016 through the date of the award in the amount of $134,031. It also awarded defendant $2,462,721 for its attorney fees and $172,682 for its costs, and interest on the entire award from the date of the award until paid. The Court of Appeal concluded the arbitrator's decision was inconsistent with plaintiff's right to work in his chosen profession as protected by Business & Professions Code, section 16600 (section 16600). The confidentiality provisions in section 4 of the employment agreement severely restricted plaintiff's right to work in clear contravention of section 16600. Despite the facial invalidity of these provisions, the arbitrator did not declare them void and unenforceable. Instead, the arbitration award allowed the provisions to stand as a perpetual restriction on plaintiff's right to compete with defendant. Because the arbitration award was inconsistent with the protection of plaintiff's rights under section 16600, the award exceeded the arbitrator's powers, and the trial court erred in denying the petition to vacate the arbitration award and in entering judgment on the award. The arbitrator also erred in finding that plaintiff forfeited the deferred bonus. (C.A. 4th, filed October 13, 2020, published November 12, 2020.)

Attorney Fees

Cruz v. Fusion Buffet, Inc. (2020) _ Cal.App.5th _ , 2020 WL 6559229: The Court of Appeal affirmed the trial court's order awarding plaintiff $47,132.50 in attorney fees and $4,583.35 in costs, and denying the defendants any attorney fees or costs in an action by plaintiff alleging wage and hour violations by her employer, defendant. At the end of a three-day bench trial, the trial court found in plaintiff's favor on seven out of the ten alleged causes of action, including her claims for nonpayment of wages, failure to pay overtime, and failure to pay meal and rest break compensation. It found for defendants on the remaining causes of action. Only the attorney fee and cost award was appealed. The Court of Appeal held the trial court did not abuse its discretion in declining to apportion attorney fees between the claims for which attorney fees are available and those for which they are not. The trial court's attorney fee award for plaintiff was supported by substantial evidence, and the trial court did not abuse its discretion in granting plaintiff's motion to strike defendants' costs. The Court of Appeal ruled that, in line with *Earley v. Superior Court* (2000) 79 Cal.App.4th 1420 and *Ling v. P.F. Chang's China Bistro, Inc.* (2016) 245 Cal.App.4th 1242, where Labor Code section 1194 applies, it displaces any application of Code of Civil Procedure section 1032(b), thereby rendering Code of Civil Procedure section 998 also inapplicable. (C.A. 4th, filed October 15, 2020, published November 9, 2020.)

Business and Professions Code

Quidel Corporation v. Super. Ct. (2019) 39 Cal. App.5th 530: The Court of Appeal granted a writ petition directing the trial court to vacate the summary judgment it granted in favor of defendant. The Court of Appeal ruled that Business & Professions Code 16600 does not invalidate all contractual noncompete provisions outside the employment context. The Court of Appeal issued its original opinion in 2019. After that opinion was issued, a petition for review with the Supreme Court was filed, which the court granted and deferred pending consideration of *Ixchel Pharma, LLC v. Biogen, Inc.* (2020) 9 Cal.5th 1130 *(Ixchel). Ixchel* held "a rule of reason applies to determine the validity of a contractual provision by which a business is restrained from engaging in a lawful trade or business with another business." (Id. at p. 1162.) After the Supreme Court issued its decision in Ixchel, it transferred this matter back to the Court of Appeal. The Court of Appeal reconsidered the case and again determined that the trial court improperly extended, beyond the employment context, the holding from *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937 to a provision in a business agreement between two companies. (C.A. 4th, November 6, 2020.)

(continued on page 21)

(continued from page 20)

Civil Code

Brennon B. v. Super. Ct. (2020) _ Cal.App.5th _ , 2020 WL 6689639: The Court of Appeal denied a petition for writ of mandate seeking to overturn the trial court's order sustaining a demurrer, without leave to amend, to petitioner/plaintiff's cause of action alleging violation of the Unruh Civil Rights Act (Unruh Act; Civil Code, section 51). Ruling on issues of first impression, the Court of Appeal concluded that public school districts are not business establishments subject to the provisions of the Unruh Act. The Unruh Act's statutory language makes explicit that any violation of the Americans With Disabilities Act (ADA; 42 U.S.C. section 12101 et seq.) by a business establishment is also a violation of the Unruh Act. Because public school districts are not business establishments, they are not liable under the Unruh Act for discriminatory conduct actionable under the ADA. (C.A. 1st, November 13, 2020.)

Employment

Semprini v. Wedbush Securities, Inc. (2020) _ Cal. App.5th _ , 2020 WL 6557549: The Court of Appeal reversed the trial court's judgment for defendant, following a bench trial, in a wage and hour class action where plaintiffs alleged defendant did not properly pay its financial advisor employees overtime for all hours worked. The trial court concluded that defendant's compensation plan based solely on commissions, with recoverable advances on future commissions, qualified as a "salary" for purposes of the administrative capacity exemption from wage and hour requirements that applies when employees perform certain duties and are paid a monthly salary equivalent to at least twice the state minimum wage for full-time employment. The Court of Appeal disagreed, ruling that a compensation plan based solely on commissions, with recoverable advances on future commissions, does not qualify as a "salary" for purposes of the administrative capacity exemption. (C.A. 4th, November 9, 2020.)

ENDNOTES

[1] Plaintiff had requested $107,118.75 in attorney fees (including a 1.25 multiplier).

Monty A. McIntyre is the publisher of California Case Summaries™ (https://cacasesummaries.com/) where he offers monthly, quarterly and annual civil case summaries. California Case Summaries: Monthly™ has short summaries, organized by legal topic, of every new civil and family law decision published each month for $50 per month per person. California Case Summaries: Quarterly™ has succinct summaries of every new civil and family law decision published each quarter, with the official case citations, for $200 per person per quarter. California Case Summaries: Annual™ has short summaries of every new civil and family law decision published each year, with the official case citations, for $900 per person per year. Monty A. McIntyre, Esq. is also Mediator, Arbitrator & Referee at ADR Services, Inc. For ADR Services, Inc. scheduling, contact his case manager Haward Cho Phone: (619) 233-1323. Email: haward@adrservices.com

Association of Business Trial Lawyers – San Diego

2020 Officers and Board Members

OFFICERS

President –
Alan M. 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
Robert Knaier
Hon. Christopher Latham
David H. Lichtenstein
Hon. Linda Lopez
Douglas M. Lytle
Robert G. Marasco
Deborah Martin
Kimbery A. McDonnell
Hon. Kenneth J. Medel
Hon. John Meyer
Andrea N. Myers
Kelly O'Donnell
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
Boris Zelkind

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
Hon. Randa Trapp

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
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
Anne 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