

ABTL's Bi-Annual Trial Skills Seminar – Turning a Challenge Into an Opportunity

By Frank Johnson

"The structure of the program was superb, the commentary of the panel of experts created a tremendous learning environment, and the participants did a wonderful job. ABTL should be proud. This program reflected the very best in the organization."

— Judge Joel R. Wohlfeil —

After about nine months of planning and thoughtfulness, ABTL San Diego hosted the all-day Bi-Annual Trial Skills Seminar on March 27, 2021. Despite the challenges posed from running an entirely remote program, the event turned out to be a huge success. This year's focus was on effectively handling remote bench trials, starting at the trial readiness conference. The program also included a 45-minute lunch-hour presentation on mediations and arbitrations in the virtual world – where are we now, and what the future will bring. In prior years, the program was conducted in person and the focus was on effectively conducting a full jury trial, from voir dire through closing arguments. Each phase of the trial would be handled by different lawyers with between two and eight years of experience, with real-time feedback from judges and a panel of four well-known and experienced trial lawyers.

This year, the program took a bit more advanced planning because of the uncertainty surrounding court and office closures. Frank J. Johnson, chair of the Seminar's committee, started planning the program back in June 2020, with a projected date to host the program on January 30, 2021. The hope was to again have the program in person and conduct a mock jury trial. However, as with many things, the pandemic created uncertainty about whether and how the program would be carried out. Each month, the Board of Governors discussed whether the program should be in person, be done remotely, or be held at all. In September 2020, there was some consideration of the possibility that by the time the program was (expected) to occur in January 2021, remote bench trials would be a thing of the past. As we now know, that was not to be. Eventually, with offices still closed and no expectation as to when courts would fully reopen, ABTL San Diego decided to tailor the Seminar to the realities facing litigators today. Not only would we conduct the Seminar

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PRESIDENT'S LETTER:

A Journey Toward What Can Be

By Rebecca J. Fortune

This presidency began January 1, 2021, on *very* uncertain ground. While many had hoped to be rounding the corner nearly a year into the pandemic, increased hospitalizations in late November led to renewed shutdown orders and the sad promise of a virtual winter and spring. With rocky vaccine mobilization and roll-out at the start of the year, no one knew what was to come. And yet, with no guidebook on how to steer a professional networking organization through a generational crisis where public health measures made historical programming formats impossible, 24 committed souls stepped forward and accepted a call to action. A call to not only ensure our Chapter's survival during uncertain times, but to flourish in spite of them. A call to embrace the challenge and push beyond what *was* and toward what *could* be.

As we enter the third quarter of 2021, because of the commitment and enthusiasm of our Committee Chairs, ABTL San Diego hasn't just taken flight—it's truly beginning to soar. Thanks to Membership Chairs *Dan Gunning* and *Corey Garrard*, we find our Chapter nearly 400 strong, a gain of almost 100 members over 2020. And, with the wind of increased membership at our back, Sponsorship Chairs *David Lichtenstein* and *Anne Wilson* have exceeded expectations by not only securing existing sponsors' renewal, but by selling ABTL San Diego's mission to new vendors. In tandem, and despite a totally speculative future for programming opportunities, our Membership and Sponsorship Chairs have put our Chapter in an exceedingly strong financial position ... thereby expanding the possibilities of what can be for the remainder of our 2021 event calendar.

Speaking of programming, while many litigators were resisting the transition from telephonic to video court appearances, how about *creating* materials out of the either, organizing and conducting a day-long *virtual* trial skills seminar? On March 27th, *Frank Johnson* and *Marissa-Janine Page* put on a truly sensational seminar – a full trial, totally virtual, and flawlessly executed. Though the fall promises a return to our annual mock trial competition hosted – in person – at the U.S. District Court, I have little doubt Marissa and Frank will leverage our collective virtual experience to incorporate new surprises for our law school competitors. Mark your calendars for the 2021 ABTL Annual Mock Trial on November 5, 6, and 8, 2021. Trust me, volunteering your time as scoring judges will be well worth it – you may just find your next new associate.

In addition to the technological hurdles we all encountered, the last year also exposed significant disparities faced by female litigators and attorneys of color. From September 30 to October 11, 2020, over 4,200 members of the American Bar Association responded to a survey launched to gauge the pandemic's impact on legal practitioners. Unsurprisingly,



the ABA's findings point toward a disproportionate number of women and people of color either leaving the profession altogether, or being set back decades on the road to advancement. In an effort to confront these realities here in San Diego, our Specialty MCLE Chairs *Rachel Jensen* and *Tess Wynn* organized the truly remarkable panel of Janice Brown, Cyndie Chang, and Carolina Bravo-Karimi, chaired by the Hon. Randa Trapp (Retired). Impacted attorneys, and a considerable number of allies, joined in a discussion about the unfortunate realities, exacerbated by the pandemic, encountered by women and people of color within the legal community and ways in which we can all work to assure equal access to promotion and longevity in the legal profession.

Not only was the conversation on April 29th frank and informative for those who attended, it gave way to our Community Outreach Committee's next mission: the formation of an ABTL mentorship program, open to prospective (high school, college, and law school students) and active lawyers of more diverse backgrounds who may lack access to traditional methods of advancement within the larger legal community. Though in its infancy, chairs *Rachael Kelley* and *Kate Thornton's* concept is already inspiring several judge and attorney volunteers. I personally look forward to supporting Rachael and Kate's efforts in any way I can, and I sincerely encourage interested mentors to reach out and volunteer your expertise.

On a similar note, our Chapter's pledge to promote the civil practice of law remains at the forefront of our day-to-day mission, with Civility co-chairs *Michelle Burton, Alan Mansfield* and the *Hon. Katherine Bacal's* active participation in the Statewide Civility Task force (a collaboration of the State Bar, the California Judges Association, and the California Lawyers Association), chaired by Associate Justice Brian Currey. And, after a years' long hiatus, I am also pleased to announce ABTL San Diego's renewed sponsorship of the Red Boudreau Trial



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Lawyer's Charity Dinner where, on September 18, 2021, Ken Turek (2020) and Heather Rosing (2021) will be honored with the Daniel T. Broderick III Award for civility.

Given the added pressures of billable hours in a remote world, one of the most unexpected challenges of 2021 has been securing our younger members' active participation in the Leadership Development Committee ("LDC"). That said, LDC Chairs *Marissa Marxen* and *Bill Keith* are doing a phenomenal job. And their hard work is paying off. So far this year we've seen our highest ever Brown Bag attendance on March 25, when we all had the opportunity to meet San Diego Superior Court Judge Carolyn Caietti. Thereafter, on May 4, LDC members hosted a judicial roundtable with U.S. District Court Judge Todd Robinson and Magistrate Judges Allison Goddard and Daniel Butcher. And, thanks to additional volunteers, the LDC is *just* getting started. Keep an eye out for our first Nuts & Bolts seminar on June 29, focused on Qualified Immunity and Government Claims Act issues, as well as future Brown Bag events with San Diego Superior Court Judges Katz, Freeland, and Bowman.

This leads to perhaps the most exciting news ... so far.
From October 20 – 24th, ABTL San Diego will be hosting this years' Annual Seminar at the Mauna Lani Resort on the Big Island of Hawaii, where I will have the honor of welcoming (retired) Associate Supreme Court Justice Anthony Kennedy as our keynote speaker. Thanks to the efforts of Chairs *Jenny Dixon* and *Jon Brick*, this year's Seminar – "Evolution of Business Litigation: Adapting and Overcoming" – promises to be the most highly attended in at least a decade. Given the spectacular accommodations, addition of a pickle ball tournament (to compliment golf and tennis), and the prospect of mingling with members of the bench and bar from across the state live and in person, mai tai in hand, I am hopeful San Diego will represent well and I encourage everyone to register now as flights are filling up!

Perhaps the most daunting assignment of 2021 was reserved for our Dinner Program Chairs, *Hon. Jill Burkhardt* and *Christian Andreu-von Euw.* In December 2020, I tasked our fearless Chairs with both: (a) locking down *all* of 2021's evening programming by the end of the first quarter, *and* (b) setting dinner events for at least the first and second quarter of 2022 by years' end. With an assist here and there from our outstanding officers and BOG members, Christian and Judge Burkhardt are performing with flying colors. On February 16, we all had the privilege of attending a virtual program (preceded by a networking happy hour thanks to our honorary Chair of ZOOM technology, *Rachael Kelly*) honoring the Legacy of Ruth Bader Ginsburg, moderated by U.S. Circuit Judge Margaret McKeown and attended by RBG's former clerks, California Associate Supreme Court Justice Goodwin Liu and U.S. Circuit Judge John Owens.

Thereafter, Christian and Judge Burkhardt worked with statewide Chapter Chairs to organize the May 12 conversation with newly appointed California Associate Supreme Court Justice Martin Jenkins.

Now, with the expectation all social distancing requirements will be lifted as of June 15, Christian and Judge Burkhardt are ensuring ABTL San Diego's future programming will *not* disappoint. On August 11, we look forward to welcoming all members to our third annual wine/beer tasting event, returning to the "Float" at Coasterra for a charitable mixer benefitting the trial teams for our three local law schools. Then, on September 14, in a collaborative effort, our Dinner Chairs will join forces with LDC Chairs, Judicial Advisory Board Chair *Judge Lorna Alksne*, and Chief U.S. District Court Judge Dana Sabraw to host *the premier event of the year*: our muchanticipated judicial mixer at which LDC members will facilitate an interactive evening of learning some of the more *interesting* tid-bits about members of the San Diego bench.

Finally, on December 7, our Officers will have the privilege of capping off this incredible year back downtown at one of San Diego's finest hotels with our final Board of Governor's meeting of 2021, followed by an evening with former General Counsel to the FBI and former Assistant Special Counsel for the U.S. Department of Justice in the Mueller investigation, Andrew Weissmann. After dinner, Mr. Weissmann will lead a non-partisan discussion about the inherent challenges in the special counsel process, obstacles he encountered, and potential for reform.

As I conclude this letter, I am truly humbled by the effort and achievement of our 2021 Committee Chairs. But, I would be remiss in failing to acknowledge the one person most responsible for assuring that *any* of this is possible. The aspirational goals I set for this year would have been totally unattainable without our Executive Director, *Lori McElroy's* willingness to answer my e-mails at 10 a.m. on a holiday morning, and to devote herself to learning new technologies and processes to ensure the successful execution of our bold programming schedule. With half the year behind us and half still ahead, I thank Lori and our Chairs for their hard work and ask that everyone remain committed to the journey forward. Only together can we assure not just a successful 2021, but a truly exceptional 2022 and beyond.



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BI-ANNUAL TRIAL SKILLS SEMINAR | Continued from cover

remotely, but it would focus on how to effectively and successfully conduct a remote bench trial in the virtual world. The view was that the program would provide benefits not only for remote trials, but for remote hearings and presentation skills in general.

As Frank Johnson explained—in perhaps the understatement of the pandemic—"a great deal of time and effort went into planning

this particular Seminar." Frank and his committee essentially had to gather and organize four separate groups: first, two sitting judges who would agree to preside over the trial in the morning session and the afternoon session; second, eight well-respected and experienced trial attorneys to dedicate four hours on a Saturday to provide feedback; third, 10 less experienced litigators to present a portion of the trial and be critiqued in front of the bar; and fourth, three neutrals to put on a shorter lunch program on mediations. To add to the complications, someone had to figure out how to run a remote trial with close to 75 participants and attendees, and be available throughout the day to deal with drop-offs and technical difficulties. Fortunately, Marisa Janine-Page skillfully prepared for and executed that part of the program with ease.

Finally, on March 27, Frank, Marisa, and Lee Hejmanowski (who co-moderated the program) kicked off ABTL's firstever remote Trial Skills Seminar. At the beginning of the program and before the first witnesses were called, Lee (who has conducted four remote bench trials in the past year) gave the audience an overview of several considerations for conducting effective virtual trials (e.g., using the right software, presenting exhibits, having the right equipment, preparing your witnesses the right way, etc.). Judges Timothy B. Taylor and Joel R. Wohlfeil served as the presiding judges for the trial. The eight panelists included Judge Linda Lopez, Eric Beste, Dave Carothers, Rebecca Fortune, John Gomez, Amy Martel, Marisa Janine-Page, and Kenneth Parker. The neutrals included Judge Suzanne Segal (ret.), Judge Jan Adler (ret.), and Bob Friedenberg. And the stars of the program—the trial lawyers—included Paul Belva, David Gouzoules, Rachael Kelley, Victoria Lazar, Jessica Lujan, Erin Lupfer, Caitlin Macker, Olivia Miner, Keshav Nair, and Ingrid Rainey.

Because it was a remote bench trial, the planning also included incorporating a number of mishaps that many judges and trial lawyers have experienced over the past few months, including the use of distracting backgrounds, the unexpected pet interruption (that seemed to annoy Judge Taylor), a "hot mic" interruption in the middle of opening statement, a witness texting his lawyer for direction during cross-examination, problems with showing exhibits, and having audio/video issues arise during a closing argument.



Including these mishaps in the Seminar provided an opportunity for a robust and healthy discussion with the judges and experienced trial attorneys about

best practices for dealing with the unexpected.

Below are a few observations during the discussion after each phase of the bench trial.

Trial Readiness Conference

Judge Taylor: In a bench trial, the primary directive should be: "Make it easy for the judge to rule in your favor. It's clear which lawyers have thought through that primary directive and those that have not."

Judge Lopez: "It's important that you familiarize yourselves with the platform ahead of time... In Superior Court they may use MS Teams; in Federal Court, we pretty much exclusively use Zoom." "I've had lawyers appear in ripped T-shirts, sitting eating peanuts and tossing the shells while we're in the middle of a mandatory settlement conference. Inappropriate! ... Make sure that each of you is appearing professionally. It is still a court proceeding. Talk to your witnesses so they understand, problems with cell phones, problems with distractions, the camera is focused in the right direction ..."

Mr. Carothers: "The TRC is a great time to get to know the judge and build rapport. It's a good time to be helpful for the court. As the case proceeds after this point, many judges are looking to see which lawyers are going to be helpful. It helps you maintain your credibility."

Mr. Gomez: When confronted with a bench trial (as opposed to jury trial), he recommended specifically asking at the TRC "if it would help the court to have motions in limine, opening statements, closing arguments."

Ms. Fortune: "As lawyers you may end up with a judge who has not done [a virtual trial] either. The more preparation you have, the more forethought you have, the better prepared you look, the better your presentation will be." "Think about all of the obstacles there may be, and there will be many." "Have your mute on when you're not speaking. We've all had the experience of having someone walk in when they don't realize we're in court." She also recommended using a separate microphone, a light, and a simple plastic backdrop so as to not have a distracting background.



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Opening Statements

In defense counsel's opening statement there was a "hot mic" issue when someone off camera blurted out "oh c'mon, the evidence is not going to show that!" Judge Taylor interrupted and asked who made those comments. There was silence. At the break, there was a healthy discussion on how one might handle that situation. Judge Taylor was very helpful in leading the analysis of whether a lawyer should consider requesting a mistrial if the comment was so prejudicial that it tainted the process. If the judge denied the motion, it would preserve the record for appeal. However, one must consider the risks if the judge granted the motion. Would the judge recuse himself for the next trial? How long would the delay be before a new trial could be set? How much more in costs would the client incur? Would your client be better served to simply ask the judge to strike the comment from the record? If the comment was not heard well for the reporter, should you make a record of what was said and then ask that it be stricken? If it were in front of a jury, should you ask the court to tell the jury to not to consider the comment and/or ask the jurors if anyone thought that they could not disregard the comment? Should you find out who made the comment, whether it was a party, whether it was a witness who will be testifying at trial? There were a few theories as to who made the unseemly hot mic comments, but to this day, no one ever found out who it really was (although Frank mentioned something about pleading the Fifth).

Judge Taylor: "I rarely allow for side bars." "I do not permit the use of given names, unless when referring to a child. It's Mr. or Ms. You should ask about that at the TRC."

"Referring to the plaintiff (who was 17) as the 'Plaintiff' is an exceptional way to de-personalize the plaintiff." "It's very important to identify exhibit numbers when referring to them in opening statements." And using "you will see" or "the evidence will show" are helpful ways to avoid drawing an objection.

Judge Lopez: "Rather than personally attacking the plaintiff, referring to him as 'the plaintiff' while referring to your own client by its common name was a great idea."

Mr. Carothers: "In a breach of contract case, saying 'promises made, dreams deferred' was a great theme." "It's important to talk to the jury rather than memorize your opening. You want the jury to think 'this person believes in their case, I should believe in their case too."

Ms. Fortune: "In the virtual world, the audience gets bored. So the use of exhibits is important to keep audience's attention." "I don't like to pre-annotate exhibits. Have the audience watch you annotate, it's easier to engage your audience. But be careful that it's not argument." "Also over video, remember that all of your facial expressions and body movements are magnified for everyone to see. So be careful."

Mr. Gomez: "Always consider what's in your background and whether it's distracting." "Make sure your name as it appears on the screen over Zoom is your name and how you want it to be seen."

Ms. Fortune: "Consider putting 'Plaintiff's Counsel' after your name" as it appears on the screen.

Mr. Carothers: "Many lawyers pull it back too much over Zoom. The Judge wants to hear a good story too. It's incumbent on lawyers to do that."

And both Ms. Fortune and Mr. Gomez said they make use of a standing desk for remote presentations to be able to move as necessary.

Direct and Cross-Examination of Plaintiff's Witness

Mr. Beste: "You really only need to ask two questions to lay foundation: 'What is that?' and 'How do you know that?'"

Ms. Martel: "Some of your direct questions, you could have just said 'why?' ... The how, what, when, where, and why questions are really important for direct."

Mr. Parker: "Consider angles and lighting. You're better to be looking straight on, rather than having the camera looking down at you." "With your witness, you should try to have a high impact start and a high impact ending. On direct, I like to start with something like 'why are you here' to give your client a chance to create a high impact start."

Ms. Janine-Page: "It's important to get out any weaknesses that you have [for your witness] and present every fact or evidence that you have to shut those [weaknesses] down." "Use your witness as an expert" if he is knowledgeable on the subject to educate the trier of fact.

Judge Wohfeil: During the examination of the plaintiff, the plaintiff conceded that he was sending and receiving text messages to and from his own lawyer. Defense counsel requested a sidebar and asked to see the text messages. Plaintiff's counsel objected on the ground of attorney client



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privilege. "I'm generally receptive to having a side bar to hear the lawyers' arguments without influencing the witness or the jury (if there were one). The attorney client privilege objection would be overruled in a heartbeat. There is nothing privileged about a witness looking at his phone while on the witness stand," particularly during a remote trial. If it were in person, Judge Wohfeil said he would not allow witnesses to use or have access to their phones while on the witness stand.

Direct and Cross-Examination of Defendant's Witness

Mr. Parker: "On direct, you should be prepared to take out the sting or inoculate any bad testimony you know your witness has. Otherwise, a good cross-examiner will crush your witness. It's important to do a mock trial so that you can see how it will go." "When you get a witness saying 'Yes but...' rather than move to strike, it might be better to say 'I heard you answer my question Yes.' If you move to strike, you might get it overruled."

Ms. Martel: "When the answer is non-responsive you could say 'That's great, now can you answer my question?'" "If you're going to take the time to admit an exhibit and publish it, make a point with it."

Mr. Beste: "When publishing exhibits, don't overlook some things that can help you in the document." "Don't forget to make a record about what page you're referring to when referencing a document. You'll be glad you did when reading transcript." When one of the lawyers had technical difficulties presenting an exhibit and asked opposing counsel, who was using Trial Director, to display the exhibit: "Good job on showing the exhibit; it shows you're a professional, the judge appreciates it, the jury sees you as a professional, that you play fair, and the jury will like you because you are kind. If the jury likes you as a person, they are more inclined to agree with your arguments."

Ms. Janine-Page: Consider the visibility of exhibits over remote proceedings. "The document was so tiny that it had to be blown up so we can't see it. I know it may be awkward but you have to ask your opposing counsel to blow it up."

Closing Arguments

Ms. Martel: "When you're talking about damages you have to lay those out, say exactly what you want, why you want them, and build up the emotional side of your client's case.... Build compassion toward your client."

Mr. Parker: "Theme, story, and then the law. The same is true for bench trials. Most judges want to hear the compelling moral story as to why one party should win."

Ms. Beste: "I've seen virtual trials in which the advocates are able to walk around a little bit. Consider if you want to have a camera angle to allow you to do that." "People make decisions on the story they believe.... You should start off your closing and your opening with why your client should prevail."

Ms. Janine-Page: "When we are nervous, and a little on the shy side, we have to become actors and actresses in the courtroom; you have to become dynamic... I recognized that I am shy and my fix is to take a moment before going into the courtroom; I take 5-10 minutes by myself to become an actress and that's how I do it.... Especially in closing argument, you have to deliver it with passion as an advocate for your client." "Consider spending \$100 to \$150 to buy a camera that tracks you while you are walking for effective closing argument."

Judge Wohlfeil: "You've heard outstanding comments from excellent lawyers I know well. Take every single suggestion, whether directed to you or other participants, take note of them, reflect on them and if you can take one, two, or even three things away from what you've experienced today to make you a better lawyer, this seminar has been a smashing success."

After the program was over and everyone was back to the grind by Monday, Mr. Gomez expressed his gratitude for being involved in the seminar

"I consider ABTL's Trial Skills Seminar to be one of the very best trial advocacy trainings available to San Diego trial lawyers. In a single day, we get to observe an entire trial with commentary by esteemed, sitting judges and some of San Diego's pre-eminent practitioners."

— John Gomez —



Frank Johnson is one of the founding partners of Johnson Fistel and has more than twenty-five years of experience as a trial attorney focusing on complex civil litigation.

Why Covid-19 Is Not a Force Majeure Event Under Lease Agreements

By Rebecca J. Fortune

Before getting into the present situation, let's rewind a bit ... to ancient Rome, when essentially two doctrines applied to the enforcement of agreements. First, *pacta sunt servanda*, contracts are to be kept. Next, *rebus sic stantibus*, things standing thus. Taken together, these two doctrines are commonly interpreted to mean, if circumstances contemplated at the time of contract remain the same, the terms of the contract must be honored. Now, fast forward to the 1800s when the French took these early Roman doctrines and integrated them into the Napoleonic Code – if a party to a contract is prevented from completing what it promised to do, it is not guilty of breach if performance was prevented by consequence of a *superior force*, i.e., *force majeure*.

Before landing in the United States, the concept made its debut in the United Kingdom in 1863 in Taylor v. Caldwell. Caldwell owned a music hall. Taylor was an event promotor. Taylor and Caldwell entered into a contract wherein Taylor would lease the hall from Caldwell for a four-concert series, paying rent on the day of each event. Unfortunately, the hall burnt to the ground a week before the first concert. But that didn't stop Taylor from suing Caldwell for failing to rent him the music hall. Though the contract did not have a specific force majeure provision, it did end with the phrase "God's will permitting." Ultimately, the Queen's Court ruled the purpose of the contract was for Taylor to use that specific concert hall for its concert series. So, no concert hall, no contract. Both parties' performance obligations were excused because the specific set of circumstances contemplated in the contract could not be performed.

The United States Supreme Court first discussed the application of *force majeure* in an 1883 case commonly referred to as *The Tornado*, aka *Ellis & Others v. Atlantic Mutual Insurance Company* (1883) 108 US 342. The Tornado was a cargo ship contracted to take cotton to England. Before it could set sail, the ship's cargo hold caught fire. In an effort to extinguish the blaze, the crew pumped water into the hold, ultimately causing the ship to sink next to the wharf. Again, the contract did not contain an express *force majeure* provision, but it did specify the cotton was to be transported on the Tornado and that the ship be seaworthy. Because the Tornado, resting at the bottom of the Mississippi River, was clearly not seaworthy due to an unforeseeable fire, both parties' performance was excused.

Since 1883, multiple events occurred to help shape the interpretation and enforcement of contracts in the United States. Some include Prohibition, WWI, the Spanish Flu, the Great Depression, WWII, hurricanes, floods, actual tornados, the LA Riots, September 11, 2001 ... and pretty much all of 2020. Generally speaking, U.S. Courts still apply the rule of *Tornado*, but with various jurisdictional modifications.

In California, the originally French doctrine of *force majeure* has been codified in Civil Code Section 1511 and can be summarized (roughly) as the excuse of performance by operation of law [§1511 (1)] or by irresistible or superhuman causes [§1511(2)]. However, the two subdivisions of CC § 1511 exist with one *major* difference. Under §1511(1), if performance is prevented or delayed by operation of law, it is still excused even if a contract states otherwise. Meaning, competent landlord counsel could have foreseen the possibility of a worldwide pandemic, specifically required a tenant's payment of rent despite occurrence of the *force majeure* event, and still the tenant's payment obligation is excused ... if prevented *by operation of law*.

The outcome of an enforcement action on a commercial lease agreement is dependent on an extraordinarily fact-specific analysis under CC §1511 as well as the common law defenses of impossibility and frustration of purpose.

To start, we look to the language of the *force majeure* provision within the contract. For the purpose of this discussion, "Any prevention, delay or stoppage due to strikes, lockouts... acts of God...governmental restrictions, governmental regulations, governmental controls, judicial orders...and other causes (except financial) beyond the reasonable control of the party obligated to perform, shall excuse performances by that party for a period equal to the prevention, delay or stoppage, except the obligations imposed with regard to Minimum Rent, Percentage Rent and any other payments required to be made by Tenant to Landlord pursuant to this Lease..." Pretty clear, right? Tenant remains contractually obligated to pay rent even on occurrence of an act of God. Not so fast.

In our example of a commercial lease in California, during the COVID-19 pandemic, what event prevented or delayed a tenant's ability to pay rent? The SARS-CoV-2 virus and resulting respiratory disease? Or, Governor Newsom's stay-at-home



COVID-19 — FORCE MAJEURE | Continued from page 8

orders, related business closures and public health orders prohibiting indoor gatherings of more than 10 people? Did the bug keep tenants from opening for business (think spring break in Florida), or were tenants prevented from opening their doors *by operation of law?* The answer is key to how the Court will – or should – analyze the case.

Covid-19 is not a *force majeure* event. The virus did not prevent restaurants, gyms, or hair salons from welcoming customers between March 2020 and April 2021. Rather, "governmental restrictions, governmental regulations, [and] governmental controls" prevented businesses from operating. But, given our very well-drafted force majeure provision, the landlord is still entitled to enforce the tenant's payment obligation. Right? After all, the contract specifically requires the tenant's payment of rent, even on occurrence of the various governmental restrictions. But remember the language of Civil Code §1511(1): "The want of performance of an obligation...is excused by the following causes, to the extent to which they operate: (1) When such performance or offer is prevented or delayed ... by the operation of law, even though there may have been a stipulation that this shall not be an excuse." So, even if the contract states otherwise, even if sophisticated parties negotiated this precise set of circumstances and the tenant accepted allocation of the risk, the landlord is still out of luck. Or, is it?

Let's look again at precisely what was the *force majeure* event purportedly preventing performance—that is, Gov. Newsom's Executive Orders. Using a gym as our example, what did the Orders prevent? Did they prevent or even delay a tenant's obligation to pay rent? Or, did the Orders make impossible a tenant's obligation to operate a gym in a specific location? Indeed, the Orders specifically state, nothing in the Order relieved "a tenant of the obligation to pay rent, nor restrict a landlord's ability to recover rent due." Bingo! Newsom's Orders did not prevent any tenant from the act of paying rent. They simply made the act more difficult, e.g., fewer (or no) customers meant less business revenue. However, nothing stopped business from utilizing other funds – perhaps PPP loan funds – to continue meeting their payment obligations.

Ok, so the Orders didn't make payment impossible. Even so, they certainly acted to frustrate the tenant's performance. I mean, if a gym cannot open for business and collect membership dues from its customers, its ability to pay rent is certainly frustrated. Right? Nope. Luckily, our counsel's attention to detail when drafting the *force majeure* provision wasn't for naught. "It is settled that if parties have contracted with reference to the frustrating event or have contemplated the risks arising from it, they may not invoke the doctrine of frustra-

tion to escape their obligations." *Glen R. Sewell Sheet Metal, Inc. v. Loverde* (1969) 70 Cal. 2d 666, 676. Because our solicitor specifically identified governmental restrictions, governmental regulations, and governmental controls as events wherein a tenant's obligation to pay rent was not excused, our gym may not use the Orders in a frustration defense.

All of this said, remember, this analysis is tremendously fact dependent. In this hypothetical, what would have happened if the word "pandemic" were included in the contractual force majeure provision. Would our tenant have escaped its obligation to pay? Clearly still no. Civil Code §1511(1) would still provide no relief as it was the Governor's health Orders that made performance more difficult, not the virus.

But, what if litigation counsel on either side acquiesced to the legal conclusion that it was COVID-19, and not Governor Newsom's Orders, impacting performance? What then? Section 1511(1) would have no application because the *force majeure* event preventing performance is no longer the operation of law. The event is now an irresistible or superhuman cause, taking us within the bounds of §1511(2), i.e. the "want of performance of an obligation...is excused by the following causes, to the extent to which they operate:...(2) When it is prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of this state or of the United States, unless the parties have expressly agreed to the contrary." Because the contract specifically identified the possibility of a pandemic and excepted the payment of rent from excused performance obligations, our gym is still stuck.

So, under what circumstances could a California commercial tenant be relieved from its payment obligations during the Covid-19 pandemic? For the most part (depending on the facts of any particular case as well as the sensibilities of the person wearing the black robe), either: (a) if it tendered back possession, thereby returning all benefits conferred by the landlord, thereby tipping the equities in favor of the tenant, or (b) if landlord's transactional counsel failed to include a force majeure provision within the lease. That said, as the above example makes clear, inclusion of a boilerplate *force majeure* provision isn't enough. The specific language used by transactional ... and trial ... counsel can make *all* the difference.



Rebecca J. Fortune, ABTL President, Partner at Kimball, Tirey & St. John LLP Business & Real Estate Group



Interviews with Federal Judges Todd Robinson, Allison Goddard, and Daniel Butcher

By Ashley Morales and Carson Baucher

During ABTL's Judicial Roundtable on May 4, 2021, we had the distinct honor of sitting down with three new members to the bench of the United States District Court for the Southern District of California: District Judge Todd Robinson and Magistrate Judges Allison Goddard and Daniel Butcher.

In advance of the Roundtable, we were fortunate to have the opportunity to speak with each panelist privately about their background, interests, and preferred practices. Below is our summary of each judge's responses to our questions.

Ashley's Interview With District Judge Robinson

Please tell us about your professional background and legal practice prior to becoming a judge.

I had a fairly traditional path to the bench. After graduating from law school, I began working as a prosecutor for the United States Department of Justice Criminal Division's Narcotics and Dangerous Drug Section. I prosecuted cases all over the country. In 1995, I was sent to San Diego to handle investigations related to narcotics. In 1997, I became an Assistant United States Attorney (AUSA), where I worked until I took the bench, with a short detour with the CIA. In 2020, I was nominated to serve as a District Judge for the Southern District of California.

Being an AUSA helped prepare me to be a judge. As an AUSA, I gained an appreciation of how courts handle different situations. The judges worked hard to ensure a fair hearing and process. It was a reminder of how important the process is, not just the outcome in court. People would leave court feeling that they had a fair day in court, even if the outcome was not what they wanted.

What are some preferred practices that we wouldn't find in your chambers rules or in the local rules?

My chambers rules, particularly the civil rules, are still a work in progress. I looked to the chambers rules for my colleagues while drafting my current rules. Some of these rules will likely change. However, one thing that will not change is my preference for oral argument for dispositive motions. The default for my chambers is generally to hear oral arguments on civil motions. I find that these hearings are a good way for parties to have their voice heard, and for attorneys to get professional experience.

One way that attorneys stand out in a positive way is when they are prepared to discuss both the substantive law and facts of the case.

Are you involved in settlement at all?

I am not involved. I leave settlement to our magistrate judges, who do a really good job at facilitating settlement.

How does your chambers go about evaluating written motions?

I read all papers submitted to the court. While the order may vary between cases, generally, I like to start with my clerks' work product. After I read the briefs of the parties, I re-read the clerks' brief. I like to be prepared with all of the facts before a hearing so that I can ask pointed questions, rather than recap the case. I also read every case that is cited in a brief, especially those in civil cases. Due to COVID, my focus lately has been on my civil docket.

Who are your favorite authors, whether fiction, non-fiction, or legal writers?

I do not have as much time these days to read for fun, but my son and I do read together. We've been reading books in the Dog Man series, and The Diary of A Wimpy Kid series.

What do you like to do in your free time? Have you developed any COVID hobbies, skills, or interests during the pandemic?

My son and I like to do a lot of outdoor activities. We go boogie boarding, and I got him into scuba diving. He is doing online schooling by zoom, so we have been doing science projects like figuring out the best way to craft a paper airplane. We also go to the beach, and go biking, and I like to do open water swimming.



INTERVIEWS WITH FEDERAL JUDGES Continued from page 10

Ashley's Interview With Magistrate Judge Goddard

Please tell us about your professional background and legal practice prior to becoming a judge.

I had a bit of an unusual path to the bench. I started off my career as a litigation attorney at Cooley LLP. In 2003, I had my first child, and in 2004, when my child was 9 months old, I had the opportunity to start my own law firm, Jaczko Goddard, with Chris Jaczko. I took on cases similar to those I worked on while at Cooley, but having my own firm gave me more flexibility as a working parent. In 2010, due to various circumstances, I decided to start working with a law school friend in the representation of plaintiffs in class actions. Working on the plaintiffs' side gave me the opportunity to take cases as far as I wanted to take them, with less concern about client budgets. I tried several class action and intellectual property cases over a six-year period, and argued several appeals before the California Supreme Court, Ninth Circuit Court of Appeals, and California Court of Appeal. I eventually decided I was ready for a change of pace, and applied to become a judge. The first time I applied, I made it to the first round of interviews, but was not selected. The second time I applied, I was selected to be a magistrate judge. I learned from this experience that if you want to be a judge, and you are not selected the first time, you should not be discouraged from applying again.

What are some preferred practices that we wouldn't find in your chambers rules or in the local rules?

My chambers rules are pretty extensive. I based many of my rules and procedures from rules and procedures in the Northern and Central Districts of California, where I had many cases as a lawyer.

A pet peeve of mine is when an attorney states that a case says something that it doesn't, or that an order from the judge says something that it doesn't. We read those cases and it's obvious when it happens. If an attorney does this, I will scrutinize his or her work more closely going forward.

I do not prefer citations in footnotes; I want case citations to be in line with the text of the brief.

Tell us about your general practice for early neutral evaluations.

Virtual meetings via Zoom has been great for early neutral evaluations. I usually start with all parties in the main session to go over the procedures, then move the parties to their own breakout rooms. Zoom provides a good way for everyone to see each other without the feeling of it being "forced." Zoom has also allowed for me to get a better sense of whether the parties are getting along,

or if they are in a grudge match. I have found Zoom to be more convenient for the parties overall, and have found participants to still attentive. The "distraction factor" is not as great as I had expected.

My experience as an attorney really helped prepare me for these early neutral evaluations. Since I have been on both sides of the table, I understand these cases from both sides, which helps build credibility.

How does your chambers go about evaluating written motions?

It depends on the case. I generally read everything before the law clerks so that I can provide them with a tentative decision. I usually start with the moving party's brief first, although many requests are made via joint motions. (My chambers rules require that administrative requests be made by joint motion.) Ex parte applications are disfavored, and I encourage the parties to work together where possible, rather than be disagreeable.

For discovery disputes in which a party is seeking a telephonic conference, I require the moving party to send an email including a neutral statement of the dispute, and one sentence describing each party's position. This is a practice I learned from Judge Karen Stevenson of the Central District of California, and it helps resolve many issues without motion practice.

Who are your favorite authors, whether fiction, non-fiction, or legal writers?

I like to read Amy Tan. I just finished Long Walk to Freedom by Nelson Mandela, and I've been reading Hilary Mantel's Wolf Hall Trilogy. I'm currently reading a book by my sister-in-law called Real, which she wrote with Carol Cujec, inspired by her experience as a nonverbal autistic student.

What do you like to do in your free time? Have you developed any COVID hobbies, skills, or interests during the pandemic?

My COVID hobby has actually been not planning. I have two sons, and have used this time to spend extra time with them. My older son is into surfing, so we have made special trips for him to go surfing. My younger son has gotten into hiking, so we have explored lots of local trails, particularly in Cuyamaca Rancho State Park.



the *abtl* REPORT



INTERVIEWS WITH FEDERAL JUDGES Continued from page 11

Carson's Interview With Magistrate Judge Butcher

Please tell us about your professional background and legal practice prior to becoming a judge.

I grew up in Cincinnati, Ohio and moved to San Diego in high school. Fun fact: I attended the high school that inspired the movie Fast Times at Ridgemont High and "Mr. Hand" (as he was called in the movie) was my history teacher.

I began my legal career as a law clerk for U.S. District Judge Rudi M. Brewster of the Southern District of California. I then worked at Latham & Watkins for five years, where I specialized in environmental insurance and general business litigation.

From there, I joined the U.S. Attorney's Office for the Southern District of California. I spent my first 17 years at the USAO in its criminal division, most of that time in the Major Frauds Section, with a particular focus on healthcare fraud. I also served as a trial team leader, responsible for supervising a team of 10-12 trial lawyers, and then spent three years in the Appellate Section. My final six years in the USAO was spent in the Civil Division, where I defended the United States and its agents and employees in civil lawsuits.

What are some preferred practices that we wouldn't find in your chambers rules or in the local rules?

I recognize that the practice of law can be stressful, so my practices and chambers rules are designed to avoid adding to the stress. Our goal is to be a user-friendly chambers that serves the legal community with a high level of competence and professionalism. My chambers are open to procedural questions, but my staff cannot give substantive legal advice or engage in ex parte communications. Therefore, any communications that might potentially tread on the substance of the case should include counsel for all parties.

Tell us about your general practice for early neutral evaluations (ENEs).

In general, I hold an initial group session in which I advise the parties of my ENE procedures, the rules on confidentiality, and explain my role in the case. During this initial session, I generally ask counsel for each side to make a brief initial presentation. Then, I divide the participants into individual breakout rooms and go back and forth between the different sides attempting to bridge the gaps.

I enjoy settling cases and regard it as one of the most important parts of my job. If there is something I can do to keep the dialogue going, such as an attorneys-only call or a follow-up session with all attorneys and parties, I am happy to do so. I am willing to hold a settlement conference at any stage of the litigation - whenever there's a prospect for settlement.

How does your chambers go about evaluating written motions?

My practice for evaluating motions depends on the nature of the parties' dispute and the complexity of the issues involved.

For discovery motions, my chambers rules require counsel to first jointly contact the law clerk responsible for the case to explain the dispute. My law clerk and I then discuss the issue and how to proceed. I will often have an informal discovery conference with counsel to discuss the issue and try to amicably resolve it to save the parties the time and expense of briefing a motion. At the conclusion of the call, if the parties are not able to resolve the dispute, I will set a schedule for the parties to prepare and file a joint motion.

My chambers has no set procedure for non-discovery motions. After reading the briefs, my staff and I will collaborate to discuss whether a hearing is necessary.

Who are your favorite authors, whether fiction, non-fiction, or legal writers?

I find Malcom Gladwell to be a fascinating thinker and an interesting writer.

What do you like to do in your free time? Have you developed any COVID hobbies, skills, or interests during the pandemic?

I enjoy playing tennis and golf. Since social distancing is built into both sports, I've been able to continue these activities throughout the pandemic. I am looking forward to traveling once it is safe to do so.



Ashley Morales is a member of ABTL's Leadership Development Committee. Ashley is an Associate at Knobbe Martens Olson & Bear.



Carson Baucher is a member of ABTL's Leadership Development Committee. Carson is a Senior Associate at For Purpose Law Group, LLP.



Justice Martin J. Jenkins' Path to the California Supreme Court

By Angela M. Hampton

On May 12, 2021, ABTL held its first state-wide virtual event for all 5 ABTL chapters: An Evening with the Honorable Martin J. Jenkins, California's Newest Supreme Court Justice, moderated by Los Angeles Superior Court's Presiding Judge Kevin C. Brazile.

Though he always knew he wanted to go to law school, Justice Jenkins never wanted to be a judge. As an attorney, he believed that "[judges] make my life difficult." Yet, here he is sitting on the highest bench of the world's fifth largest economy. His path to the California Supreme Court is unlike any other.

Justice Jenkins was born and raised in San Francisco. His athletic skill allowed him to play defensive back on the Santa Clara University football team, and ultimately earned him a position on the NFL's Seattle Seahawks. But his sharp intellect also allowed him to succeed in college, and led him to study at the University of San Francisco's School of Law. Aside from his academic prowess and exceptional work ethic, Justice Jenkins' gumption set him apart.

During his third year of law school, his law professor suggested he watch U.S. District Court Judge Thelton Henderson on the bench. Then law student Jenkins observed a humble and respectful man. Afterward, he called Judge Henderson's department and asked for a meeting. Judge Henderson's secretary inquired, "Do you know the judge? Do you have a case with him?" Jenkins responded "No, but I want him to be my mentor. I need career advice." She came back five minutes later with a meeting date. Judge Henderson graciously cleared his afternoon and gave him three hours, and thereafter, became his mentor. When asked why he gave him so much time, Judge Henderson replied, "That's the price for those who receive success, to pay it back." Seventeen years later, Jenkins was fortunate enough to take the chambers next door to Judge Henderson.

Justice Jenkins belief that "The law should not be divorced from sense" stems from his pivotal experiences as a prosecutor. In 1980, he became a Deputy District Attorney for Alameda County, quickly becoming a stellar trial attorney. And after serving three years in the DA's office, he secured a position as a Trial Attorney in U.S. Department of Justice's Civil Rights Criminal Division. His new position required extensive travel, including to Southern States, where he learned that reality does not necessarily match one's preconceived assumptions. It

made him more rooted in the facts and skeptical of those assumptions.

Determined to obtain

civil experience, Justice Jenkins moved to an in-house corporate counsel position with Pacific Bell. He worked on a wide array of cases, expanding his legal knowledge.

One of Justice Jenkins' colleagues at the DA's office, Carol Corrigan, was one of the few women trying homicides cases in California at that time. Corrigan later became a judge on the Superior Court, then a justice on the Court of Appeals, and ultimately a justice on the California Supreme Court. Justice Corrigan became another important mentor and colleague to Justice Jenkins, convincing and inspiring him to become a judge.

In 1989, Jenkins was appointed to the Alameda County Municipal Court, followed by an appointment to the Alameda County Superior Court, where he served until 1997. That year he was confirmed by the Senate to be a United States District Judge for the Northern District of California. In 2008, he left the federal bench to accept an appointment as an associate justice on the California Court of Appeal, First District.

After Judge Jenkins retired from the Court of Appeal, Governor Newsom sought him out to be California's Judicial Appointments Secretary. He initially declined, but Governor Newsom persisted because Justice Jenkins had a lot to offer. After all, twenty-seven years in state and federal courts provided him with substantial knowledge of what it takes to be a good jurist. After accepting the position, he not only helped Governor Newsom populate the state courts, but also made significant changes to the judicial committee process.

During his time as Judicial Appointments Secretary, Justice Jenkins was taken by Governor Newsom's intelligence and his caring for the people of California. They talked a great deal about the Commission on Judicial Nominee Evaluation, which consisted of between 27-38 members of the public who were never publicly disclosed. As a son of a janitor, Justice Jenkins pondered how similarly situated candidates fare with such a "secret committee" system. In his view, judicial candidates should know and appreciate who is vetting them. Governor Newsom and Justice Jenkins decided to no longer keep the





JUSTICE JENKINS | Continued from page 14

Commission membership a secret. This change provided transparency for the first time. Now applicants know who is responsible for making such important decisions on behalf of the People of the State of California. This is one of the many steps Justice Jenkins advanced to de-mystify the judicial selection process.

Governor Newsom and Justice Jenkins knew they needed to commit to appointing a bench reflective of our communities. The fact is, non-Caucasian candidates do not apply to judicial positions to the same degree as Caucasian candidates. Instead, they seem to be opting out. Diversification is essential to our justice system. The U.S. Constitution requires a fair and impartial trial. To Justice Jenkins, populating the legal profession with one segment of society does not make sense: "Law is a construct of our lived experiences. If our lived experiences differ, than our different experiences must come to bear. That discussion is enriched when different voices come together to reach a conclusion or resolve a legal issue. The law is improved through discussion of different voices."

The work to diversify the bench continues. In collaboration with Presiding Judge Brazile, the Superior Court for the County of Los Angeles announced its Judicial Mentorship Program. The court established a committee of diverse judges to identify, encourage, and recruit a diverse bench, an experience closely mirroring Justice Jenkins' own. Justice Corrigan and Judge Henderson's unwavering support and encouragement was vital to Justice Jenkins' judicial careers. The mentorship program will help lawyers craft a judicial application, and ultimately increase the diversity of judicial applicants. In Justice Jenkins' words, this Mentorship Program "is going to be huge."

On December 4, 2020, Justice Jenkins was sworn-in as Associate Justice of the California Supreme Court. He has been struck by his fellow Justices' collegiality and warmth in his brief time on the State's highest court. As to writing opinions, "I listen mightily to the views of my colleagues. Law is this process where we can land on a continuum and each party can be right where they land. Listen without any ego to take in fully what is being suggested."

Justice Jenkins' career has been and continues to be rich and varied. He was a prosecutor, civil rights advocate, corporate counsel to one of the world's largest telecommunications companies, a municipal court judge, a superior court judge, a federal judge, a California Court of Appeal Justice, and now a California Supreme Court Justice. The fallacy that we must

travel the exact path taken by those coming before us often stymies our profession. No longer. Justice Jenkins' path has reset the standard. In parting, Justice Jenkins' concluded with advice to all: "Go make your mark."

Justice Jenkins should inspire us all to seek and attain excellence, whether as an advocate or a member of the judiciary. I hope our young readers and attorneys considering a career on the bench will do just that. I certainly intend to. Thank you Justice Jenkins.



Angela M. Hampton is an Associate in the San Diego office of Gordon Rees Scully Mansukhani, LLP. Ms. Hampton's practice focuses primarily on toxic tort and products liability litigation to include representing clients in the defense of asbestos claims before state and federal courts.





California Case Summaries: Monthly

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

CALIFORNIA SUPREME COURT Landlord - Tenant

Stancil v. Super. Ct. (2021) _ Cal.5th _ , 2021 WL 1727612: The California Supreme Court affirmed the Court of Appeal ruling denying defendant writ relief from the trial court's order denying defendant's motion to quash service of summons under Code of Civil Procedure section 418.10 in an unlawful detainer case. The California Supreme Court held that no defendant may use a motion to quash service of summons as a means of disputing the merits of the unlawful detainer complaint's allegations or to argue the plaintiff failed to comply with the pleading requirements specific to unlawful detainer actions set out in Code of Civil Procedure section 1166. (May 3, 2021.)

CALIFORNIA COURTS OF APPEAL Arbitration

Banister v. Marinidence Opco, LLC (2021) _ Cal.App.5th _ , 2021 WL 2036529: The Court of Appeal affirmed the trial court's order denying defendant's petition to compel arbitration in plaintiff's lawsuit alleging discrimination, retaliation, defamation, and other claims as a result of her termination as an employee. Defendant attached to the petition a copy of the arbitration agreement purporting to bear plaintiff's signature. However, because plaintiff challenged the validity of the signature, defendant was required to establish by a preponderance of the evidence that the signature was authentic. The Court of Appeal ruled that substantial evidence supported the trial court's conclusion that defendant failed to prove that plaintiff electronically signed the arbitration agreement. (C.A. 1st, filed May 30, 2021, published May 21, 2021.)

Civil Code

Smart Corner Owners Assn. v. CJUF Smart Corner LLC (2021) _ Cal. App.5th _ , 2021 WL 2010152: The Court of Appeal reversed the trial court's order granting defendant's motion for summary judgment in a construction defect case on the basis that plaintiff association failed to obtain the consent of more than 50 percent of its condominium owner members before filing the action as required by the governing declaration of covenants, conditions, and restrictions. After plaintiff filed its notice of appeal, the Legislature enacted Civil Code section 5986, effective January 1, 2020, rendering prelitigation member vote requirements null and void. The newly enacted statute abrogated the defense that noncompliance with such conditions defeats a construction defect claim. The Legislature also



expressly provided the statute would apply retroactively "to claims initiated before the effective date of this section, except if those claims have been resolved through an executed settlement, a final arbitration decision, or a final judicial decision on the merits." (Section 5986(d), italics added.) The Court of Appeal concluded that a "final judicial decision on the merits" within the meaning of section 5986 (d) does not encompass a judgment that was not final on appeal as of the statute's effective date. Section 5986 therefore applied retroactively to plaintiff's claims requiring reversal of the judgment entered against plaintiff. The Court of Appeal also held, as an independent ground for reversal, that the prelitigation vote requirement at issue in this case violated fundamental state public policy by making it more difficult for the plaintiff hold defendant developers accountable for construction defects. The Court of Appeal also found the requirement to be unreasonable, unconscionable and violative of the fundamental state policy against unreasonable servitudes insofar as it required strict compliance as a precondition to suit and prohibited members from providing their consent later through a vote ratifying a board decision to file suit. The trial court was directed to enter a new order denying defendant's motion for summary judgment. (C.A. 4th, May 20, 2021.)

Civil Procedure

Nunn v. JPMorgan Chase Bank (2021) _ Cal.App.5th _ , 2021 WL 1975316: The Court of Appeal reversed the trial court's order dismissing the case, under Code of Civil Procedure section 583.320, for failing to bring the case to trial within three years after a remittitur was filed in trial court following an appeal. The Court of Appeal also granted a writ petition directing the trial court to vacate its order granting defendant's motion to expunge a lis pendens, directing it to reconsider the motion in light of this decision. Ruling on an issue of first impression, the Court of Appeal held that the oral agreement prong of Code of Civil Procedure section 583.330 is consistent with its written stipulation counterpart in authorizing parties to extend the statutory trial deadline by agreeing to postpone trial to a specific date beyond the statutory period. The settled statement for a hearing on May 16, 2019 provided: "Plaintiffs' counsel, Ronald Freshman, and defendants' counsel, David Harford, appeared by telephone. The plaintiffs were in the courtroom. [¶] The court confirmed with both attorneys that the matter was ready for trial. The court suggested November 2019, but Mr. Harford indicated November would be too early because defendants intended to file a summary judgment motion and needed to take the plaintiffs'



CA CASE SUMMARIES | Continued from page 14

depositions before filing that motion. [¶] The court then proposed a trial for January 13, 2020. The lawyers both indicated to the court that they had no objection to the trial being set on January 13, 2020. Plaintiffs told the court that date was alright with them. [¶] The court set dates for a settlement conference and for a trial management conference. The proceedings then concluded." The Court of Appeal concluded that this interchange constituted an oral agreement within the meaning of section 583.330. The judge proposed a trial date beyond the statutory deadline to accommodate defendants, who requested additional time to conduct discovery and bring a summary judgment motion. The parties expressed their agreement to extend the trial deadline to this date when counsel for both sides "indicated" on the record that they had "no objection" to a January 13, 2020 trial date. Plaintiffs, who were present in court, also verbally agreed to the proposed date. On appeal, defendants did not dispute these factual circumstances, which the Court of Appeal found to be dispositive. By explicitly agreeing to the January trial date, the parties implicitly agreed to extend the statutory period to January 13, 2020. (C.A. 1st, May 18, 2021.)

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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

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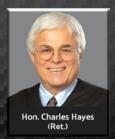


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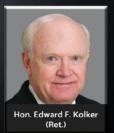














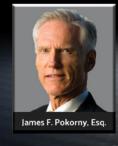




















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Lawyering in the Age of COVID

By Rachel Jensen

Mentorship is key. This was just one of the valuable lessons to emerge from "Lawyering in the Age of COVID: A Survival Guide for Women Attorneys and Attorneys of Color," an insightful panel discussion sponsored by ABTL San Diego on April 29, 2021. In Zoom format, the Honorable Randa M. Trapp (Ret.) of JAMS San Diego moderated a distinguished panel of prominent Southern California attorneys: Janice Brown, a principal in Meyers Nave's Labor and Employment, Workplace Investigations Practice, and Commercial Litigation Practice; Carolina Bravo-Karimi, a partner at Wilson Turner Kosmo; and Cyndie Chang, managing partner of Duane Morris Los Angeles.

The panel discussion focused on the obstacles and opportunities presented by COVID-19, particularly for women attorneys and attorneys of color. In March 2020, many attorneys - particularly women - found their precarious tightrope walk of balancing endless client and parenting demands upended as they were now suddenly called upon to be not only fulltime attorneys, but also full-time teachers, full-time playmates, and full-time caretakers. Reflecting the physical impossibility of the task presented, the legal profession has seen an exodus of women since the pandemic hit.¹ Of course, this phenomenon is not limited to the legal profession; it is a devastating reality across all sectors of the economy. A year into the pandemic, the data shows that women – particularly women of color - have many lost more jobs than men, in fact, a million jobs more. The disparity is so pronounced that some commentators have dubbed the economic fallout of the pandemic a "shecession."² And some have gone so far as to predict that the disproportionate impact of COVID-19 will delay equality efforts in the workplace for decades due to the number of women who have dropped out of the workforce.3

The panelists were quick to stress that COVID-19 did not cause the disparities in the legal profession as to women attorneys and attorneys of color but has aggravated them. Women attorneys already bore a disproportionate amount of caretaking and household responsibilities, and those burdens and the attendant exhaustion have only increased during the pandemic. Attorneys of color already faced implicit (and explicit) bias and isolation, and those dynamics have intensified during the pandemic as hallways have emptied and work has gone remote.

Fortunately, law firms and other legal employers can mitigate against these problems of inequality in the legal profession as we seek to emerge from and transcend the challenges of this past year. For example, law firms and other legal employers need to adopt flex-time policies, mentorship programs, and other "best practices" to not only attract but also to *retain* and *advance* women attorneys and attorneys of color in the legal industry.

Judge Trapp and our distinguished panelists also had words of wisdom for women attorneys and attorneys of color to consider in the coming weeks: once your office reopens, make sure you get back in there. If you need to take flex time to make life sane, do it temporarily so you don't leave the legal profession altogether, and then come back as soon as you can. "You want to be in the room where it happens, not the Zoom where it happens," Janice Brown quipped. As the panelists observed, it is an unspoken understanding that, when managing attorneys are out of the office, they must be doing something important for the practice, but when other attorneys are out of the office, people assume they aren't working. To combat this perception, women and attorneys of color should try to be in the office as much as possible. Facetime may seem like nothing more than an app on your phone, but it continues to be extremely important for professionals seeking to advance to partnership and beyond.

These insights conferred on participants by a wise jurist and seasoned attorneys drive home the point that mentorships are critical to helping women attorneys and attorneys not only survive but thrive in the legal profession. Because we all must play a role to combat inequality and bias in the legal profession (and in society in general), ABTL San Diego is planning to launch a mentoring program for young lawyers. If you are willing to be a mentor – or need a mentor – or know someone else who is willing or needs one, please contact us at abtlsd@ abtl.org



Rachel Jensen is a partner at Robbins Geller Rudman & Dowd LLP, with a 20-year track record helping individuals, businesses, and government entities injured by unlawful business practices, fraudulent schemes, and hazardous products.



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Further resources and reading materials include:

ABA, Day of Conversation (Dialogue about race, ethnicity, and gender in the legal profession. https://www.americanbar.org/groups/diversity/women/initiatives_awards/women_of_color_research_initiative/guided-conversations-project/day-of-conversation/

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ENDNOTES

- 1 See https://www.natlawreview.com/article/how-law-firms-are-supporting-women-lawyers-pandemic#google_vignette.
- 2 See https://www.americanprogress.org/issues/women/reports/2021/02/01/495209/women-lose-jobs-essential-actions-gender-equitable-recovery/.
- 3 See https://abcnews.go.com/GMA/News/women-men-worse-off-finan-cially-year-pandemic-poll/story?id=77347971



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