the abtl REPORT

The Wit and Wisdom of Judge Fred Link

By Logan Smith, McNamara Smith LLP

Judge Frederick Link's courtroom sits on the 22nd floor of San Diego's Central Courthouse, literally at the very top of the city with a panoramic view of the bay and downtown. It is a fitting place for this legal giant to hold court. Judge Link has bestrode the San Diego legal community like a Colossus with his larger-than-life personality for decades. For more than 40 years, he has handled some of the most serious, complex, and high-stakes criminal and civil cases in San Diego County. And during this entire time, Judge Link has certainly done so by charting his own unique path.

"Judge Fred Link Day"

San Diego Mayor Todd Gloria declared May 20th to be "Judge Fred Link Day" in remarks given at the courthouse reception honoring an incredible 41-year career, which began in June of 1981 when Governor Jerry Brown appointed Judge Link to the Municipal Court. In 1990, Judge Link was elected as a Superior Court Judge for San Diego County. Mayor Gloria lauded Judge Link as a "true public servant," commending his rare blend of toughness, compassion, and good humor on the bench, and also noting his accomplishments as an active civic leader, who has continually supported charitable causes and served as the face of justice in the San Diego community. In his heartfelt remarks about the bittersweet nature of Judge Link's retirement, Judge Michael Smyth, the Presiding Judge of San Diego Superior Court, said that there would now be a "gaping void" in the courthouse to fill, given Judge Link's years of continually "crushing it" as the Court's consummate trial judge, who has done it all.

Judge Smyth took some solace in the fact that San Diego still had a Judge Link on the bench, which he hoped would be the case for another 40 years. In 2014, then-Governor Jerry Brown appointed attorney Daniel Link, Judge Link's son, to be a San Diego Superior Court judge, making the duo the only father-child judges in the courthouse at the time. (Thirty-three years earlier, the very same Governor Brown had appointed Judge Fred Link). Judge Dan Link served as the emcee for his father's festive retirement ceremony, an event

Continued on page 5

Inside

PRESIDENT'S LETTER:

Simple Life Lessons

By Hon. Lorna Alksne (Ret.)

Last week when I was donating several books to my neighborhood "Little Library", I noticed a book wedged in the corner, "Aesop's Fables." Reading some of the fables brought back a flood of childhood memories, and simple life lessons. Who can forget the fables, "The Hare and The Tortoise" and "The Boy Who Cried Wolf," both famous fables that still resonate today, some 2000 years after it is believed these fables were written. It was another fable however, that caught my attention, as it seemed to be a lesson for every trial lawyer: The Fox and the Stork, also known as The Fox and the Crane.

As the story goes, the Fox invites the Stork for lunch, and decides to serve lunch on a flat platter, so the Fox can lap up the food. The Stork, however, barely manages to eat anything from the plate and goes home hungry. At their next meeting, the Stork invites the Fox to lunch, and remembering how he was treated, the Stork serves minced meat out of long neck jar, that easily accommodates the bill of the Stork but the Fox cannot manage to get a bite. Now it is the Fox's turn to go home hungry! As the fable ends, rather than getting mad at the Stork, the Fox remembers that he was the one that tricked the Stork first, and thus admitted he got back what he deserved.

The stated moral of this fable is "Don't complain when others treat you as you treat them," or, as interpreted by me, "treat others like you would like to be treated." Either way this concept seems to coincide with our ABTL civil guidelines, where we strive for civil, respectful communication and advocacy between counsel. The First Guideline sets forth the principle in a way that makes clear what is expected: "A lawyer must work to advance the lawful and legitimate interests of his or her client. This duty does not include an obligation to act abusively or discourteously. Zealous representation of the client's interests should be carried out in a professional manner." So the next time you want to write an angry email to opposing counsel, or respond to a not-so-nice one, don't be the Fox or the Stork. Instead, lead by example with civility and treat opposing counsel as you would like to be treated. In addition to meeting the ABTL's guidelines and channeling your inner Aesop, you just might change the course of your case and the reactions of your opponent.

In this time of social media and live streaming, I encourage all of you to pick up a copy of Aesop's Fables and enjoy the simple life lessons and illustrations that were written so long ago. The copy I found is a "children's edition" that would be easy reading for your children or (as a new grandparent such as me) for you to read to aloud to someone little. I hope you enjoy some reading time with your family this summer, and to see you all at the Judicial Mixer in July.

Hon. Lorna Alksne

Hon. Lorna Alksne (Ret.), President ABTL San Diego Chapter and Mediator at JAMS

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We congratulate Judge Link on his retirement, after 40 years of distinguished service to the San Diego Superior Court. He presided over hundreds of significant civil jury trials and for the last 10 years has almost exclusively handled civil settlements.

Judge Link's ability to unearth the core issues of a case coupled with his unwavering goal towards resolution has procured him an impressive reputation for settlement. His passion for the law and giving back to the community extends beyond the courtroom. He established Justice 101, a program that teaches students about the judicial system and the consequences of their actions.

Based in San Diego, Judge Link is now available to serve as a mediator, arbitrator, and private judge statewide.

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BACK to Inside this issue

where people filled the jury lounge to pay their respects. Judge Dan Link infused his remarks about his father with his own blend of humor, compassion, and thoughtfulness, confirming that Judge Link's influence on the Court will continue to be felt.

In addition to the Mayor, attendees at the retirement ceremony included Judge Link's family, his wife Roxi, his son Dan, his daughters Suzanne Smith and Stacey Hogan, and his six grandchildren, as well as fellow judges, clerks, bailiffs, and other court staff, members of the District Attorney's Office and Public Defender Office, and numerous other local lawyers, including Chuck Goldberg, Judge Link's long-time law partner before he was elevated to the bench. Judge Dan Link also passed along congratulations from similar giants in their own respective fields: Chicago Bears legend Mike Ditka wrote a personal email congratulating "one of America's toughest judges"; and Judge Link's fellow retiree from this same year, Duke University's basketball coach, Mike Krzyzewski, also congratulated Judge Link.

"Don't drink the stuff in the punch bowl."

Among all of Judge Link's accomplishments, Judge Link is most proud of "Justice 101," a courthouse educational program he created that provides high school students with a unique look at the judicial system and the real-world consequences of poor choices. Students not only get to witness actual court proceedings but also hear first-hand from judges on the consequences of the decisions that they have confronted or will soon confront. The court visit has become a core part of many government classes. This program will surely continue in the future, as Judge Dan Link will be taking over running the program, which has influenced thousands of high school seniors.

The program has worked so well, because Judge Link has been unafraid to talk to students honestly about issues like drug and alcohol use, violence, and pregnancy – and he provides his practical advice with colorful life lessons. For instance: "Don't drink the stuff in the punch bowl." To this day, Judge Link is routinely stopped by adults who tell him the impact of his words in court that day for Justice 101. He even recalls a woman telling him that when she went to a party in college, she saw Judge Link's face in the punch bowl staring back at her saying, "No, No, No." One regularly attending teacher remarked, "The judge's presentation adds a 'scared straight' dimension to the day. He tells it like it is. My government class is not complete without this field trip."

"You just have to say what's on your mind."

And for forty years, Judge Fred Link has definitely told it like is – not just to students, but also to litigants, to lawyers, to his staff, and even to his fellow judges. As Judge Link recently told CBS News, "My philosophy is to be honest with the parties out here and with the public." As Judge Link told me: "You just have to say what's on your mind." During the past four decades (which have had seven U.S. Presidents and 13 San Diego Mayors), Judge Link has seen nearly everything on the bench, handling some of San Diego's most prominent civil and criminal cases, including more than 250 murder trials. Most recently, he handled a high-profile trial involving the shooting death of San Diego Police Officer Jonathan "J.D." De Guzman and the wounding of his partner Police Officer Wade Irwin, both of whom were sitting in their police car. Twenty-five years ago, Judge Link handled the trial of Ramon Jay Rogers, an aspiring actor who was convicted of murdering three people, including two ex-girlfriends. Judge Link has also handled numerous complicated civil disputes, including the lawsuit over building Petco Park at its current downtown location.

Judge Link has been particularly well suited to handle these types of complex and sensitive cases that hold great weight for the San Diego community, not only because of his vast experience and knowledge of the law, but also because of how he has treated the litigants before him with fairness and decency as human beings. Knut Johnson, who specializes in criminal defense and has tried several cases in front of Judge Link, commented: "Judge Link was always fair and kind to everyone. These were especially difficult murder cases with terrible facts, and he handled them with such professionalism."

While Judge Link's courtroom was regularly filled with his characteristic sense of humor, he still maintained an appreciation for the gravity of weighty issues before the court, recognizing the impact of his role. As he recently told CBS News, "I know it affects a lot of people." San Diego County District Attorney Summer Stephan's admiration for Judge Link grows out of her experiences with him across her 32 years at the District Attorney's Office, including her last four years in charge of the entire office. District Attorney Stephan recalled how professionally Judge Link had handled one of her most important cases earlier in her career, People v. Brandon Taylor, which involved the 1996 murder and rape of Rosa Mae Dixon, an 80 year-old woman. District Attorney Stephan "truly appreciated" how Judge Link never lost sight of how important a case was for "all sides" – understanding both the pain of victims' families as well as the need for each defendant to receive a fair trial.

Continued on page 6

BACK *to Inside this issue*

"The Wit and Wisdom of Judge Fred Link" | *Continued from page 5*

At his retirement ceremony, Judge Link's daughter Stacey Hogan recalled being at a wedding many years ago and meeting a man who asked if Judge Link was her father. When she said yes, he told her, "Your father saved my life," explaining that her father had given him the choice of jail or rehab. He had chosen rehab and turned his life around and was forever grateful. At his retirement ceremony, Judge Link's wife of fifty-three years, Roxi, recalled watching her husband as a judge in court and marveling at how he treated every person who came before him with respect, regardless of the circumstances.

"Step into the arena."

While Judge Link is perhaps best known for how he has handled high-profile trials, Judge Link has also been successful at getting attorneys and litigants to settle those cases that should settle. As Knut Johnson observed, "Boy is he good at settling difficult cases. He has a rare ability to see the big picture of cases from early on and identify the key issues – and then he is able to cut through nonsense and instead steer lawyers to resolve those cases that really shouldn't go to trial." District Attorney Sanders concurs, "Judge Link has a real sense for those cases that really need to be put through the jury trial system," and he has the ability to differentiate between those types of cases and the ones that should be settled for any number of reasons.

This talent is a result of his personal belief that it was always important for him as a judge to "get involved" in the cases. He felt that he always should "step into the arena" himself, because that's why he became a judge. While he appreciated and respected that some judges might prefer to avoid involvement in pretrial settlement negotiations, that was just not his way. He believed that he could add value for both sides by rolling up his sleeves and getting directly engaged, because he knew the cases as well as anyone, he understood the key facts and legal issues, and he was in a position to focus the parties' attention on the weak spots on both sides to be able to honestly assess their cases. Judge Link said that he was never afraid that his participation in settlement discussions to help the parties resolve disputes early could affect how he would subsequently rule in cases. He was always able to separate the two and retain his impartiality.

As for potential criticism, Judge Link said that he has approached his decisions as a judge based on what he viewed to be the right thing to do – without fear of being criticized later, whether by lawyers, the press, or appellate judges. At trials, he made the best calls he could from the bench, and when attorneys would say things like, "Judge, that's wrong. That's appealable error," the essence of Judge Link's response was: "Here's the number for the Court of Appeals." Attorney Mary Ellen Attridge, who is now in private practice after spending 27 years in the San Diego County Public Defender Office, has had scores of trials in front of Judge Link since the early 1990s. She said that a key attribute of Judge Link's ability to make decisions without looking back was that he was sufficiently self-assured and confident in his rulings, based not only on an intimate familiarity with the law but also his understanding of each case's facts. District Attorney Stephan said the she felt a "sense of finality" when a case was assigned to Judge Link, because she knew that his rulings would be "grounded in the law" and thus less likely to be subject to appeals.

When asked what advice Judge Link would give to attorneys, Judge Link emphasized being reasonable above all else. He urged all attorneys to "judge their cases up and down" and then be prepared to have "reasonable conversations" with their clients about the true value of the cases and the risks of proceeding. He cautioned against attorneys overpromising their clients and said that in his experience, that often led to attorneys underdelivering in the end. His other piece of related advice for attorneys was to try to have experience on both sides of the v., whether you are a civil or criminal practitioner. "That way you know what the other side is thinking." He said that his own experiences before becoming a judge, first as a Deputy District Attorney and then as a defense attorney, have surely been beneficial to him when evaluating cases, because knows how he would have handled the same situation on both sides.

"Judge Link took me under his wing and always made me feel confident and valued."

Judge Link has also had a profound influence on those who have worked closest with him. His current courtroom clerk, Cassandra Perez, and his current bailiff, Frank Cortez, are bonded to the judge for life and appreciative of the positive impact that he has had on their careers and their lives. They

Continued on page 7

BACK *to Inside this issue*

both had front-row seats on a daily basis to the best judicial show in town for most of the past decade. In reflecting on her time with Judge Link, Ms. Perez was grateful that Judge Link selected her to be his clerk and had always empowered and supported her. "Judge Link took me under his wing and always made me feel confident and valued." She recalled that while Judge Link had many high-profile cases before him, she also remembered how much attention he paid to the smallest of cases when no one was watching.

When noting Judge Link's no-nonsense approach with attorneys practicing before him, Bailiff Cortez also remembered the underlying compassion and commitment to educating attorneys that Judge Link displayed. As a vivid example shared at Judge Link's retirement ceremony, Bailiff Cortez said that what many people never saw was that one of his regular tasks as Judge Link's bailiff was to chase down disappointed lawyers after they had left the courtroom to bring them back into chambers, where Judge Link talked with the attorneys in private about what they did wrong and what they could have done differently.

Despite his many accomplishments, when Judge Link spoke at his retirement ceremony, he graciously preferred to put the emphasis on others in his life, including his wife Roxi, his family, and his courtroom staff. He even called up beside him at the podium all of his former courtroom clerks, specifically describing what each one had meant to him over the years.

"Everyone has a Judge Link story."

Ms. Perez correctly observed that without fail, every clerk, every litigant, and every lawyer has his or her very own Judge Link story. Mary Ellen Attridge described Judge Link as having an incredible measure of "bombastic enthusiasm" for any person, let alone for a judge. Reflecting back on her many cases with Judge Link, Ms. Attridge said simply: "I love Judge Link." She noted his ability to handle the most complex of cases and said "you could always rely upon the fact that he knew what was going on." Ms. Attridge said that she appreciated that "he knew the stress of being on the other side of the bench" and did several little things to support the attorneys in front of him, such as the time he had the Court take a day off when he saw that she was coming down with bronchitis during a trial.

She too recalled his "immense popularity" with jurors. Judge Smyth similarly noted Judge Link's rare gift for connecting with and managing jurors, saying that courthouse surveys of jurors routinely revealed that Judge Link always had jurors "eating out of the palm of his hand." Part of the jurors' enjoyment surely came from the fact that Judge Link approached his judicial career the same way he approaches life: "All I know is that I had to have a good time." Jurors were able to catch a glimpse of this larger-than-life personality, with his life-size cut out of Mike Ditka in his chambers, and his comfort with making off-the-cuff but on-the-record quips like the time in 1991 that he offered San Diego defense attorney Alex Landon two hundred dollars "to cut his pony tail." As reported by the San Diego Reader in its March 1991 edition, "Link wanted the four or five inches to hang on his wall," but as Landon made clear in the article, "The remark was not intended cruelly. We've been friends for a long time."

Attorney Attridge delighted in recalling how much laughter she had shared with Judge Link over the years. She remembered the time Judge Link had received a juror's note, which indicated that Ms. Attridge had a run in her black stockings. Because she was in the middle of trial, she had ordered a pair of pantyhose from Nordstroms that were delivered directly to the bailiff in Judge Link's courtroom. This resulted in Judge Link's courtroom regularly receiving the Nordstrom's catalogue for women's hosiery in the mail, which Judge Link would promptly forward to Ms. Attridge with humorous notes attached.

While Judge Link's popularity with jurors was in part based on his quick wit, it went well beyond that, as District Attorney Stephan observed: "Judge Link never forgot that jurors were taking away time from their businesses, their work, and their families. It always stood out how cognizant Judge Link was of the value of jurors' time." She noted that Judge Link put a tremendous amount of energy and thought into resolving as many issues as possible through pretrial decisions and preliminary hearings. That way, jurors were left with an "efficient, lean and mean jury trial that put out only the relevant facts and law." "Judge Link made sure we weren't wasting a minute of jurors' time, with packed days." He had a "real talent" to handle "so many moving parts."

Thank You, Judge Link

Speaking on behalf of the attorneys of San Diego, we are forever grateful for Judge Link's many contributions to the San Diego legal community from the bench – for his wit, his wisdom, his dedication, and (on occasion) his tough love. Speaking personally, I feel fortunate to have had the opportunity to practice before him for the last few years and was lucky enough to have participated in his final court hearing. Judge Link kept me on my toes, and he regularly forced me to abandon flowery legal prose, to speak simply, and to communicate in the clearest of terms what I wanted and needed for my client.

Continued on page 8

BACK to Inside this issue

"The Wit and Wisdom of Judge Fred Link" | *Continued from page 7*

While Judge Link will no doubt be missed on the bench, the good news is that he is staying in the law and will be working as a mediator at Judicate West. He also mentioned that he might even take on a case or two in private practice if the subject matter interests him. Given his very particular set of skills – skills he has acquired over a very long career spanning every facet of the law – I am certain that Judge Link will quickly become a forceful go-to mediator at Judicate West. It is simply in his DNA to get to the heart of issues and solve problems – and to do so in his own inimitable way. If you need Judge Link's legal assistance in the future, please remember that he is no longer a public servant. As he recently told me, he's getting out his sign that reads: "No Bread, No Fred."

Logan Smith, a partner in McNamara Smith LLP, is a member of the Board of ABTL and was named as a 2021 Top White Collar Lawyer by the Daily Journal, California's largest legal publication.

BACK *to Inside this issue*

Tips for Civil Litigators Practicing in Probate Court

By Mark Mazzarella, Mazzarella & Mazzarella LLP

In the last issue of the *ABTL Report,* I promised to follow up my discussion about some of the traps for the unwary civil litigator in the Probate Court with practical "tips" from those familiar with that terrain. Here are "tips" well worth noting before you venture into the Probate Court.

David Greco, whose firm, **RMO, LLP,** only handles trust and estate litigation, financial elder abuse, and conservatorships, told me the following were on the top of his list of what general civil trial lawyers should know about the Probate Court:

No. 1: "I cannot tell you how many times I have seen civil litigators walk into Probate Court not knowing what "Probate Examiner's Notes" are, let alone that lawyers must respond to them. That is not surprising, since there is nothing similar in the typical independent calendar department. But Probate Examiner's Notes are a critical aspect of litigation in the Probate Court."

The San Diego Superior Court website describes Probate examiner notes as: ". . . summaries prepared by the probate examiner after reviewing a petition for probate. The notes are presented to the probate judge to help them make a decision during petition review. More specifically, probate notes identify the parties involved in the matter and the relief they seek. The job of the probate examiner is to identify problems, questions, errors or other deficiencies in the paperwork to allow them to be corrected before a scheduled hearing."

The Court's website continues: "A petition with deficiencies will show up on your notes as a question or a statement preceded by the word NEED under a category entitled DEFECTS. If there are defects in your Probate Notes, please respond to that question or statement before the matter is heard by the court by filing the appropriate document(s). Parties can respond to defects by drafting a supplement, amendment, or filling out and completing the Response to Probate Notes (SDSC Form #PR-177PDF). Certain defects may also require the filing of an amended petition. See Cal. Rule of Court, rule 7.3 for definitions of these terms and to determine what document is appropriate. All filings must be made at least 5 court days prior to your hearing to be considered."

California Rules of Professional Conduct, Rule 3.5 (c), prohibits *ex parte* contacts by attorneys with "law clerks, research attorneys, or other court personnel who participate in the decision-making process" unless permitted to do so by statute, rule or court order. It would be unthinkable for an attorney to ask to meet with an independent calendar judge's research attorney prior to a hearing to find out how they could modify their pleading to get a better result. As a consequence, general civil trial lawyers would not anticipate that the Probate Court rules not only allow such *ex parte* communications, they encourage them. Lawyers who understand and use the Probate Examiner's Notes, and seek the Examiner's direction, can move their cases along quickly. Those who fail to address the "NEEDs" identified by the Examiner's Notes prior to a hearing could well add six months to their client's case at every hearing.

No. 2: Experts can be used more sparingly in Probate Court than in a general civil courtroom. There are no juries, so the "trier of fact" is the judge. Probate judges deal with a relatively limited universe of issues compared to an independent calendar judge. Therefore, they are very familiar with most of the subject matters that might require expert testimony elsewhere. For example, a probate judge does not require a private fiduciary to explain that a trustee needs to invest wisely or has a fiduciary duty. They know that. Generally, they also know what investments are recognized as appropriate and which are not. If there is some question about the appropriateness of a particular investment, the volatility of which may not be known to the judge, that is where an expert might be needed. When capacity is an issue, my experience is probate judges rely more on treating physicians than hired guns, assuming the treating physicians are experts in the medical sub-specialties at issue, such as geriatric care and dementia. If the treating physicians support your theory of the case, you probably are wasting money if you hire an expert. However, if they don't, you need to look for an expert whom the judge will find more knowledgeable than the treating expert. Just another doctor with the same pedigree as a treating physician probably won't get you very far."

Robin Pennell, a contract lawyer, echoed Mr. Greco's thoughts, stating succinctly, "Read the Probate Notes!! Best deal in town!!

Teresa Moore, of the Law Office of Teresa Moore notes: "In a recent MCLE program entitled 'Collision Between Civil and Probate' presented by Judge Kelety, Cynthia Chihak, and Craig Gross, the big takeaway for civil litigators was to be aware of CCP Section 366.2, the one-year limitations for claims against a decedent. This statute of limitations supersedes the other limitation periods for claims. You have one year from the date of death to get a creditor's claim on file against the decedent

Continued on page 10

BACK *to Inside this issue*

Tips for Civil Litigators Practicing in Probate Court | *Continued from page 9*

to toll the statute of limitations, full stop. It doesn't matter that the other statutes of limitations give longer periods; once you have a decedent as a defendant, you have one year from the date of death. That may mean a rush by a creditor to file a petition for probate to timely file a creditor's claim. This can be more confusing because the form "Notice to Creditors" seems to indicate that a creditor may have four months from the date notice letters are issued to a general personal representative, or 60 days after the notice of administration is mailed or personally delivered to the creditor. However, those time periods do not extend the one-year statute of limitations, despite the fact that the Judicial Council forms seem to indicate otherwise.

If you're a civil attorney, and you have a claim against a decedent, associate in or consult an experienced probate attorney to make sure you aren't barred by the statute of limitations."

A civil litigator with over 40 years of experience, who will remain anonymous, noted: "At least one of the Probate Judges has acknowledged in open court that they are not familiar with many of the general rules of court and civil procedure that should apply in the Probate Court. As a result, even if you comply with the applicable rules for a particular motion, if the Judge doesn't want to hear it, the clerk just won't set a date." His advice is: "If, after consulting with a probate attorney, you can file the case or the motion in the general civil court – do so!"

Uzzell Branson, of Branson & Branson LLP, who teaches Trusts and Estates at the University of San Diego School of Law, had a few "tips" for the rest of us. Not surprisingly, Professor Branson first cautioned that lawyers who appear in Probate Court need to have a clear understanding of the role of a trustee vs. the trust itself if they are to navigate Probate Court unscathed. Trusts are not an entity, contrary to what many lawyers think. They are simply a way of holding property. (Presta V. Tepper (2009) 179 Cal.App.4th 909.) Title is vested in the trustee, not the trust, and an individual trustee holds title as trustee of a trust. So the trustee is the proper party, either as a petitioner or respondent.

Mr. Branson suggests anyone venturing into the Probate Court approach it much as they would the Bankruptcy Court. Trust and Estate law is very, very code driven. There are many traps for the unwary, some of which can be fatal to your client's case. Consequently, lawyers who think they know everything they need to know about probate and estate litigation because they have mastered other areas of the law will have a rude awakening. "Do your homework!!!"

On the other hand, much like the Bankruptcy Court, equity plays a prominent role in Probate and Estate litigation. For one thing, the trial court has wide discretion when considering petitions for accountings and can reach outside the trust assets if the circumstances call for it. (Evangelho v. Presoto (1998) 67 Cal.App.4th 615) For another, bench trials mean that the judge can fashion relief in the way most appropriate to the situation. This can even lead to the court approving settlements over the objection of interested individuals. (Breslin v. Breslin (2021) 62 Cal.App.5th 801) Technical arguments that lead to an unfair result may not be as well-received in Probate Court as other courts.

Finally, Mr. Branson cautions: Don't compare us to Family Law or Divorce Court. Probate and Estate litigators hate that, and so do the Probate Judges.

Jim Bush, of Keystone Law Group, probate attorneys, has drafted his own "Tips for Civil Litigators Practicing in Probate Court" which includes fourteen (14) separate tips beginning with the filing of a Petition, and ending with appeals. Due to space limitations, I have included just the first and last of Jim's "tips." The entire list can be found here: Tips for Civil Litigators Practicing in Probate Court (648218) (ID 648218).pdf

1. In probate court, all petitions (the equivalent of a civil complaint) and objections or responses (the equivalent of a civil answer) MUST be verified. This also means that an answer (formally an objection or response) cannot use the "general denial" method available in civil court for an answer to an unverified complaint

14. The rules on what the probate court can do once an appeal has been filed also are different. Although Probate Code § 1310 states that an appeal often stays the operation of the order being appealed, an appeal does not deprive the probate court of jurisdiction over other aspects of a matter not subject to the appealed order. Also, § 1310 sets out exceptions to the usual stay. If a case has been appealed, or is being considered for appeal, it is important to understand the intricacies of §§ 1310 and 1311.

Continued on page 11

Tips for Civil Litigators Practicing in Probate Court | *Continued from page 10*

I'll offer one final "tip" of my own. In the Probate Departments, there are no jury trials, or long trials. Cases are tried to the judge, usually in one afternoon or less, maybe a couple of afternoons. Since Probate cases lend themselves to separate trials on separate issues, one or two afternoons are usually sufficient. If your case is going to take more than a day to try, you probably will be "put on the wheel" and sent to an independent calendar department for trial. However, the Probate Judge may want to keep your case and limit your trial time. My suggestion is that you let the Probate judge know as early as possible that you will be asking for the case to be sent out on the wheel because you will need more time than the Probate Court can accommodate. Whether the Judge agrees or not, the sooner you know, the better.

Good luck!!!

Mark C. Mazzarella is Owner/Founder of Mazzarella & Mazzarella LLP. Over the past 42 years, he has tried over 90 cases from San Diego to Washington D.C., mostly before juries, but also before judges and arbitrators

BACK to Inside this issue

BACK to Inside this issue

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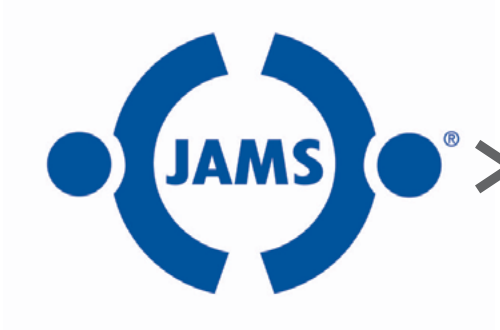

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BACK to Inside this issue

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BACK to Inside this issue

What Business Lawyers Need to Know About the Evolving Landscape of PAGA

A four-part series by Caitlin Macker and Marisa Janine-Page, Caldarelli Hejmanowski Page & Leer LLP

The California Private Attorney General Act of 2004, or PAGA, allows aggrieved employees to bring representative actions against their employers to recover civil penalties for violations of certain California Labor Code provisions. These civil penalties are hefty, ranging from $50 to $500 depending on the violation. They are levied for each violation, for each employee, and for each pay period, so the penalties add up exponentially and can be financially devastating for employers. Even an employer's technical or harmless violations of the Labor Code can result in millions of dollars of liability, not to mention the additional cost of paying the employee's statutory attorneys' fees. As such, it is critical for business lawyers to understand PAGA and stay informed about recent developments impacting this quickly evolving area of law for their employer clients.[1]

The staggering proliferation of PAGA cases in the past five years may not be all attributable to a rise in Labor Code violations, given that PAGA notice filings increased to an average of 125 per week immediately after Covid-19 shuttered businesses throughout the state. Those numbers have continued to climb post-pandemic. Comparing 2015's case numbers with last year's numbers puts this in perspective. In 2015, 2,169 PAGA cases were filed; in 2021, it is estimated that more than 7,500 PAGA cases were filed. Further, more than 20,000 PAGA claims were resolved out of court.

The following are recent, real-world examples that exemplify how this new PAGA landscape can inflict thorns in employers' sides:

1) Six different clients receive nearly identical PAGA claim letters in the same week, inviting pre-litigation settlement from the same plaintiff's firm;

2) Three different mediators tell our clients that the entrance fee for a PAGA mediation has risen from approximately $30,000 to $150,000 almost overnight;

3) An employer reaches a pre-litigation settlement of a PAGA claim with one employee, only to be sued for a PAGA claim by the same law firm representing another employee the following week;

4) Plaintiff's attorneys ignoring existing pending PAGA litigation and filing a second and even third concurrent PAGA action in different venues to run up the employers' defense costs and coerce a higher nuisance settlement; and

5) "Promoted" social media posts targeting California businesses by name and enticing employees with "DID YOU WORK AT [NAME OF EMPLOYER]?" "Contact us today … YOU MAY BE ENTITLED TO COMPENSATION." (emphasis in original.)

That is not to suggest that all PAGA claims are bad. After all, the purpose of the law was to discover and correct Labor Code violations and promote employers proactivity in their employment decisions and processes. You can help your clients avoid PAGA. Auditing your client's employment practices (and their payroll provider's practices) on a regular basis and staying knowledgeable about changes in the law can be instrumental in diminishing your client's likelihood of being the next PAGA target.

PAGA Is Here to Stay … At Least Until 2024

PAGA made recent headlines because of a proposed ballot initiative titled "The California Fair Pay and Employer Accountability Act." The FPEAA effectively seeks to repeal PAGA by taking away an "aggrieved" employee's ability to bring a representative action and to put Labor Code violation enforcement back into the hands of a government agency. But proponents of the initiative recently announced that they have stopped efforts to qualify for the November 2022 ballot and are instead working towards qualifying this initiative for the 2024 ballot.

What this means for employers is that PAGA's fate will not be in the hands of California voters in the upcoming election and the risk of PAGA litigation and expensive settlements will remain for the foreseeable future.

One New Solution for Addressing Multiple Concurrent PAGA Actions

Employers facing multiple PAGA actions filed in different venues may now have a new line of defense: a motion to stay. A recent case in Contra Costa County explored the interplay between PAGA claims and the rule of exclusive concurrent jurisdiction. The doctrine of exclusive concurrent jurisdiction provides that when more than one court has subject matter jurisdiction over a dispute, the court that first claimed jurisdiction would exclusively assume such jurisdiction.

Continued on page 17

BACK to Inside this issue

...PAGA | Continued from page 16

In *Shaw et al. v. Superior Court of Contra Costa County,* former employees filed a PAGA action on behalf of aggrieved employees who worked for Beverages & More!, Inc. ("BevMo"). More than a year after the petitioners initiated the Contra Costa action, a different employee filed a second PAGA representative action against BevMo in Los Angeles Superior Court alleging claims that overlapped with those at issue in the Contra Costa action.

BevMo asked the Los Angeles trial court to stay the second PAGA action under the doctrine of exclusive concurrent jurisdiction. The trial court granted the employer's motion to stay, rejected the employees' motion to lift the stay, and exercised its discretion to apply the rule of exclusive concurrent jurisdiction. The Court of Appeal for the First District affirmed the Los Angeles trial court, finding that the trial court did not commit legal error when it applied the exclusive concurrent jurisdiction rule and noting that the legislative enactment of PAGA did not abolish the judicial doctrine of exclusive concurrent jurisdiction. Thus, an employer can now seek to stay a subsequently filed PAGA action on the grounds that a different court has exclusive concurrent jurisdiction.

The Court Is Still Out on Whether PAGA Claims Will Be Arbitrable

Since the California Supreme Court's decision in *Iskanian v. CLS Transportation Los Angeles LLC* in 2014, California law has held that PAGA claims are not subject to arbitration agreements and representative action waivers are not enforceable under California law. As a result, California employers could not use arbitration agreements to minimize their PAGA risks.

However, as this edition of the ABTL Report was going to press, the U.S. Supreme Court held in *Viking River Cruises, Inc. v. Moriana* that a California court decision preventing arbitration of PAGA claims is superseded, in part, by the Federal Arbitration Act (FAA). In subsequent article for the next ABTL Report, we will explain how *Moriana* permits employers to compel arbitration of employees' PAGA claims on an individual basis, potentially limiting the number of representative claims that may be brought in the future.

Stay tuned...

ENDNOTES

[1] Estimates from publicly available data from the California Department of Industrial Relations, Private Attorneys General Act (PAGA) Case Search, https://cadir.secure.force.com/PagaSearch/ (last visited June 1, 2022).

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Judicial Brown Bag

"The Path To Becoming A Judge" with Judge Jinsook Ohta & Judge Linda Lopez

By Brittany Salamin, the Watkins Firm, APC

Two of the most recent additions to the federal bench in San Diego took time out of their busy schedules to speak with ABTL about their respective paths to the judiciary. Given their varied experiences in our federal and state courts, Judges Linda Lopez and Jinsook Ohta were particularly appropriate speakers for this topic.

Notwithstanding their different paths, both judges had a common observation: being honest with yourself is the first step towards becoming a successful judicial candidate at any level. If you decide that you want to pursue the path, go into it with your eyes wide open. While becoming a state or federal judge can be extremely rewarding, it also comes with new challenges. For example, many attorneys are able to specialize around one (or a few) legal practice areas, and continually work to become an expert in their specialized fields. But judges do not have the luxury of picking and choosing the cases in front of them, and are instead tasked with deciding a wide variety of both procedural and substantive disputes, requiring constant learning and growth.

State Superior Court Judgeship

To apply for an appointment to become a California State Superior Court Judge, candidates are required to have practiced law for at least 10 years. California has a rolling application process, and while some applicants are able to move through the process in several months, others wait for years to be appointed.

For an applicant under consideration by the governor's office, the first step is vetting by , the local committee. The candidates who proceed with the selection process are then sent to the Commission on Judicial Nominees Evaluation (JNE Commission). The JNE Commission sends out comment cards to everyone identified in the application. Specifically, the applicant is required to include their most important cases and provide a list of all opposing counsels, colleagues, and co-counsel for those cases. The applicant must also submit 75 names of attorneys in the community who can speak to their credentials and character. As a final step in obtaining feedback, the JNE Commission sends a feedback solicitation email to a randomly selected cross section of the legal community. All of this feedback is then compiled and the JNE Commission begins the interview process.

The JNE Commission interview revolves around the applicants' overall background, legal experience, judicial philosophy, and community involvement. If any negative feedback was received from the community, the applicant is provided general information about the content of such feedback prior to the interview and an opportunity to speak to those critical comments during the interview.

The final phase of interviews is conducted through the Governor's Office. After completing the interview process, the applicant may still have to wait for many months to learn if he or she has been selected for an appointment.

Federal Magistrate Judgeship

Unlike the rolling application process for State Court Judges, a candidate for Magistrate Judge has to wait until a vacancy opens up. The application becomes available and must be submitted by a specific deadline in order for an individual to be considered. From the typical applicant pool, 10 finalists are chosen for first round in-person interviews with the Merit Selection Committee. Those applicants are typically interviewed on the same day, with interviews lasting from 30 to 60 minutes. The applicants then wait for weeks before learning whether they will advance to a final round of interviews (allowing ample time for applicants to stress about their candidacy).

Making it through that first interview gets you a second interview with a panel of all of the District Court Judges. The interviews are typically held on the same day, and applicants are ordinarily notified later that same day if they have been selected to fill the open Magistrate Judge seat. However, the

Continued on page 19

BACK *to Inside this issue*

BROWN BAG - Judge Ohta and Judge Lopez | *Continued from page 18*

process is not quite over. After you are selected for a seat as a Magistrate Judge, the FBI background check begins, which can take anywhere from 8 to 12 weeks, and includes detailed and comprehensive inquiries into the last 7 years of the designee's personal and professional life.

Federal District Court Judgeship

Although experience as a Magistrate Judge or Superior Court Judge can provide an excellent foundation for later service as a Federal District Court Judge, other Judges have made the transition directly from practicing law. Becoming a District Court Judge requires an application to the California Senators, who typically designate committees in the various judicial districts to assist with vetting candidates.

When a District Court Judge takes senior status (or indicates a desire to retire or resign), applications from qualified candidates are sought out by the Senators and their committees. The first step after the application is submitted is review by the local committees, which may also interview a number of candidates.

For a candidate that advances in the process, an interview with the statewide head of the committee will often follow. If the White House decides to consider a candidate for nomination, the FBI background check as well as other vetting occurs. Only after the conclusion of this due diligence may a candidate actually receive a nomination from the President.

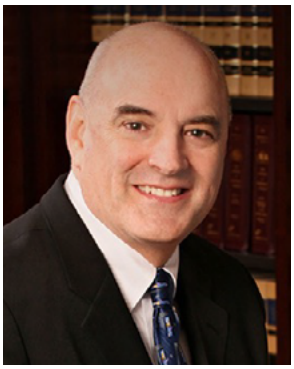
Once nominated, the confirmation process begins with the Senate Judiciary Committee (SJC), which includes a questionnaire and interviews. The questions asked by the SJC during the hearing will differ for each candidate depending on their background and public statements. After the Senate Judiciary Committee hearing, the candidate must pass a Senate Judiciary Committee vote, and then a Senate-wide confirmation vote. Once the applicant is confirmed by the Senate and receives a commission from the President, he or she may be sworn in as a new District Court Judge.

Brittany Salamin is an associate at the Watkins Firm focusing on contract litigation, construction defect, real estate law and transactions, finance law, employment law, property law, civil litigation, and business law.

Judicial Brown Bag

Interview with Judge James A. Mangione

By Ashley Morales, Knobbe Martens Olson & Bear and Ivana Torres, Burton Kelley, LLP



During ABTL's Judicial Brown Bag Event on April 5, 2022, we had the distinct honor of sitting down with Judge James A. Mangione, from the San Diego Superior Court. Prior to the event, we were fortunate to have the opportunity to speak with Judge Mangione. He discussed his experience as a Judge in the Family Law Department, and in particular the positive impact of technology in Family Law matters through the height of the pandemic and into his current role in Department 75.

Judge Mangione's admiration and devotion to the law was evident throughout our discussion. Outside of the courtroom, you might find him at California Western School of Law, where he teaches mock trial. He is proud to have the opportunity to offer mentorship and guidance to his students and shape the next generation of lawyers within our community. Though Judge Mangione is the first to acknowledge his busy schedule, he always manages to put his family first.

Q: Can you tell us about your professional background and legal career prior to your appointment to the bench?

I graduated from the University of San Diego School of Law in 1981. I then practiced criminal law for then next 12-13 years, where I tried cases with John Mitchell, a notable criminal defense lawyer. During this time, I also maintained my own practice where I predominantly handled tort cases.

In 1994, John Mitchell retired, and I began working for Golden Eagle Insurance Company. There, I defended third-party and first-party insurance cases. Golden Eagle Insurance Company was eventually taken over by the Insurance Commissioner and eventually, Liberty Mutual. After, I was hired as the personal lawyer for John C. Mabee and assisted him with multiple business ventures. My next position was as a partner at the private firm of Wingert, Grebing, Brubaker & Juskie, LLP. As a partner, I practiced mostly defense work, which was almost exclusively tort practice. In 2015, I was appointed to the bench by former Governor Jerry Brown.

Among these great experiences, I really enjoyed representing plaintiffs in tort cases. I enjoyed any case where I had the opportunity to represent individuals. Although, I will say, I had a lot of incredibly interesting insurance defense cases.

Q: What are some preferred practices that we would not find within your Department Rules?

Be prepared…because I will be. I also expect basic human decency such as not interrupting opposing counsel and waiting to be called upon by the Judge. For example, if I need to hear from counsel, I will request a response. During a hearing, I am very formal. I want to hear counsel speaking to one another through the bench, not to each other.

Q: What are your thoughts regarding remote appearances? Do you find there are certain advantages and/or disadvantages?

I am probably the right person to respond to this question because my judicial career included five years in family court. There are no jury trials in family court, so as a Judge, I was the trier of fact. Thank goodness for technology! In 2020, when the civil and criminal departments were paralyzed due to the pandemic, the family law department had the ability to continue working on numerous matters by use of technology. The department had the ability to adjudicate and resolve so many vital issues which impacted real families. Without technology, we would not have been able to resolve those matters for the families involved and I am thankful for that. I understand there are some judges who do not like technology in the courtroom. However, I believe it is likely because those judges are not used to it.

As for lawyers, I will defer to them as to their preference to appear in person or remotely. I am "all in" on technology. While I would love to have everyone in my courtroom, I have also been in numerous situations where I have handled remote third-party witnesses and appearances, and it works! However, in terms of trial, the "old school" way is great. For shorter appearances, technology is the way to go. The younger generation may be more familiar with technology because they grew up with it. In my opinion, we get results by using technology.

Q: With the increased use of remote technology for depositions, meetings, and hearings, what are some common disputes you have come across?

Zero! Again, with the caveat that I was also a family law Judge for five years. I have not had any controversies yet regarding technology, law and motions, or trials. I am sure problems may come up in the future. However, in any scenario, technology keeps getting better and people are learning how to use

Continued on page 21

BACK *to Inside this issue*

BROWN BAG - Judge James A. Mangione | *Continued from page 20*

technology. For example, on Friday mornings, when I am handling 50 matters and 40 of those matters are on Microsoft Teams, I do not have any problems as far as technology goes, even with pro per litigants. I will say, I have heard stories with depositions and questioning, though I have not dealt with these issues yet. Personally, so far, so good! Again, with the caveat that I have not experienced any of these problems.

Q: What are common mistakes you find on motions, applications, or other pleadings?

Okay, so here I have a few complaints. I worked with my legal research attorney, and we came up with a list. We ask attorneys cease and desist as to the following:

1. Use of Bold and Italics: These are very overused. It is better to pick one and make it consistent throughout your papers.
2. Repeating the Same Arguments: When I see the same argument repeated within the points and authorities, it is clear to me that counsel has not proofread their pleading or does not fully understand the issues presented.
3. Always Introduce the Relief Sought: At the beginning of your motion, opposition, or any pleading…please tell me what you want. For example, at the onset of a moving party's motion for summary judgment, you should tell me why there are no triable issues of facts. You should also be prepared to tell me the exact relief sought by way of your motion. These points should always be on the front page of the moving papers or any pleading filed in my Department.
4. Recognize the Relevant Facts: Please, recognize the type of pleading you are submitting to the Court and the relevant facts. For example, if you are filing a demurrer, I do not want to read about all the evidentiary facts to be shown at the time of trial. If you are filing motion for summary judgment, consider providing me admissible evidence in support of your motion.
5. Citing Unpublished Case Law.

It is all lawyering 101. From a substantive viewpoint, all of these are helpful for me. With that being said, I also have a few procedural tips. First, consider what needs to be included in the pleadings. For example, if an attorney is requesting sanctions, they should consider whether the amount sought should be included in the notice of motion. For summary judgment motions, the attorney should consider the most effective way to present their separate statement of the undisputed facts, including formatting. Frequently—and more times than it should be the case—I often see issues regarding proper notice and service, both of which are very basic. Lawyers need to slow down and take the time to prepare their checklist before filing any pleading. If they did these things, they would already be ten steps ahead.

Q: Well, it appears you were busy during COVID. In the small amount of down time you had, did you develop any hobbies, skills, or interests?

My "downtime" was mid-March up to the end of May. During that time, I probably did more puzzles than I have in the last 40 years. I also watched more black and white movies on Turner Classic Movies, which I have not been able to do in a long time. In the event any one is interested, I would recommend any attorney reading this article to watch *Witness for the Prosecution,* starring Marlene Dietrich. It is a really great movie. If I had more downtime, I would have liked to golf more. Golfing is something I really enjoy and do not have the chance to do very often. It would have been nice to hone my skills a bit more if I had more time.

Q: Who are your favorite authors, whether fiction or non-fiction?

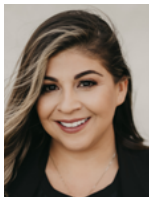
I do not follow authors and do not gravitate towards books with specific authors. However, I love non-fiction books involving History, specifically American History. There are a few books I would recommend:

The American Story: Conversations with Master Historians, by David M. Rubenstein. It is a fantastic book where the author interviews famous biographers of various people throughout American History, including the biographer for John F. Kennedy. He will ask them questions to elicit a response that you probably would not find anywhere else.

Accidental Presidents: Eight Men Who Changed America, by Jared Cohen. This book is very interesting and examines the people who became president very suddenly. It essentially reviews how they reacted and adjusted (or failed to adjust) into the role.

Walt Disney: The Triumph of the American Immigration, by Neal Gabler. This book was particularly interesting, as I knew nothing about Walt Disney. I learned more about him and the obstacles he overcame to start Disney and become arguably, the most famous person in the world.

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



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BACK *to Inside this issue*

Helping Clients Victimized by Business Email Compromise Schemes

By Andrew J. Galvin, Barnes & Thornburg LLP

One of the most devastating cyber crimes affecting U.S. companies today is a scam many executives have never heard of – business email compromise ("BEC") schemes. The trend toward decentralized work environments, along with the dramatic increase in remote working during the COVID-19 pandemic, has made these schemes more prevalent and more damaging. According to the FBI, BEC schemes resulted in nearly $2.4 billion in losses in 2021, far exceeding the combined losses from identify theft, credit card fraud, and ransomware attacks.[1] Given the prevalence and huge potential losses associated with this crime, every lawyer should know what a BEC scheme is, how to help clients avoid it, and how to recover a client's money should they fall victim to a BEC scheme.

In a BEC scheme, criminals trick companies into sending payments to bank accounts controlled by the criminals running the scheme. Typically, the criminals will send an email that appears to come from a trusted source, such as a vendor or a high-level employee from within the company. The email invariably asks the recipient to make a wire transfer for an apparently legitimate purpose. To make the email appear authentic, criminals often spoof a domain name, use a domain that can be easily confused, or gain access to email accounts through malware or other intrusion techniques.[2]

BEC schemes have evolved over the years as scammers have become more sophisticated. In early versions of the schemes, criminals would spoof or hack into the email accounts of executives and instruct company employees to send wire transfers to bank accounts controlled by the criminals. For example, in 2015, a finance executive from Mattel sent $3 million to a bank account in Wenzhou, China after she received an email purportedly authorizing the payment from cyber thieves pretending to be Mattel's CEO.[3] Another common version of the scheme involved criminals posing as lawyers. In the 2021 Internet Crime Report, the FBI noted that criminals recently have taken advantage of virtual meeting platforms to impersonate company executives and convince employees to send fraudulent wire transfers.[4]

Although the form of BEC schemes may vary, the following "red flags" are common indicators of a scheme. First, the wire transfer request is framed as time sensitive and contains high-pressure language. For example, the request may claim that not sending the transfer immediately will result in a failed transaction or the breach of an agreement. Second, the wire transfer request invokes the need to keep the transfer confidential from other company employees. Third, the wire transfer request contains grammatical errors or unusual phrasing for the organization. Finally, those requesting the wire transfer claim that they will be unavailable or out of contact after making the request. Educating your clients about these warning signs, and helping train their employees to be wary of any email request containing one or more of these characteristics, is the first and best line of defense against becoming a BEC scheme victim.

Even if a company falls prey to a BEC scheme, all hope is not lost. If the funds were sent overseas, the Financial Fraud Kill Chain ("FFKC") is a powerful tool used by regulatory and law enforcement agencies to potentially recover such fraudulent international wire transfers. The FFKC is a process for recovering funds that relies on the Egmont Group – an international, intelligence-sharing organization made up of financial intelligence units from 167 countries.[5] The Financial Crimes Enforcement Network (FinCEN) is a bureau in the U.S. Department of the Treasury, and a member of the Egmont Group that can be called upon to enlist the help of other countries to recover lost funds. To use the FFKC, the fraudulent transfer must meet the following criteria:

- the wire transfer is at least $50,000;
- the wire transfer is international;
- a SWIFT recall notice has been issued; and
- the wire transfer occurred within the previous 72 hours.

If an FFKC request is successful, then law enforcement officials from the country that received the fraudulent wire transfer are generally able to freeze and return the victim's funds.

Depending on the circumstances, fraudulent domestic wire transfers may also be recovered with the assistance of federal law enforcement. In February 2018, the FBI established the Internet Crime Complaint Center's Recovery Asset Team ("RAT") to streamline communications with domestic financial institutions and to help FBI field offices freeze funds for companies that made domestic wire transfers as the result of fraud. According to the FBI, RAT recovered over $328 million in 2021.[6]

The FBI recommends that companies victimized by BEC schemes take the following steps, regardless of whether the wire transfer was sent domestically or internationally.

Continued on page 23

BACK *to Inside this issue*

Helping Clients Victimized... | *Continued from page 22*

First, companies should immediately contact their financial institution to request a reversal of the transfer. If the company does not have a dedicated account specialist who can immediately respond to this request, the next step should be to the institution's fraud prevention unit. Next, companies should contact their local FBI field office to report the crime. The local field office will need the originating bank account number, the beneficiary's bank account number, the date of the transfer, and the amount of the transfer so that they can start the process to use the FFKC or RAT. Finally, companies should also file a complaint with the FBI's Internet Crime Complaint Center.

The most important factor in recovering lost funds is how quickly the victim reports the fraudulent wire transfer to the proper parties. Even a few hours could make the difference between recovery and loss. Ensuring that companies have established compliance policies for promptly detecting, reporting, and responding to BEC attacks is the best way to increase the chances of recovering lost funds. By understanding how BEC schemes work and the process for deploying the powerful tools available to law enforcement, you can put your client in the best position for a full recovery.

[1] Federal Bureau of Investigation, Internet Crime Report, p. 23 (2021)

[2] "Spoofing" a domain means deliberately falsifying a domain to make it appear to be from a legitimate source.

[3] Erika Kinetz, Mattel fought elusive cyber-thieves to get $3M out of China, AP News, Mar. 29, 2016, https://apnews.com/article/f50ded283c41465d-9bdfe0f393732ce1.

[4] Internet Crime Report at p. 9.

[5] About the Egmont Group, https://egmontgroup.org/about/.

[6] Internet Crime Report at pp. 10-11.

Andrew Galvin is a partner in the San Diego and Salt Lake City offices of Barnes & Thornburg LLP where he represents companies and individuals facing government investigations and complex civil litigation. He also provides compliance training and guidance for companies seeking to reduce their risk profile. Andrew previously prosecuted white collar fraud cases for nearly a decade at the U.S. Attorney's Office in San Diego and worked in the Los Angeles office of Skadden, Arps, Slate, Meagher & Flom LLP.

BACK to Inside this issue

The Joint Civility Task Force – What's On the Horizon?

By Alan M. Mansfield, Whatley Kallas LLP

"It is vital to the integrity of our adversary legal process that attorneys strive to maintain the highest standards of ethics, civility, and professionalism in the practice of law."

People v. Chong (1999) 76 Cal.App.4th 232, 243; In Re S.C. (2006) 138 Cal.App.4th 396, 412

We all know this to be true, and strive to regularly practice it. But who among us, for whatever reason, has not witnessed (or even been a party to) incivility as part of a discovery dispute, uncivil communications outside (or even inside) court, lack of professional courtesies resulting in unnecessary motion practice, not conducting meaningful meet and confers as required by law, not working together to prepare trial documents, or using sanctions requests as an intimidation factor?

With this background in mind, several years ago when Michelle Burton was the president of the San Diego chapter of ABTL, at an ABTL Joint Board Retreat at the Rancho Bernardo Inn she began a dialogue and frank discussion on the growing level of incivility in our practice. The discussion centered around what an organization of the bench and bar such as ABTL could do to address it. This initial conversation led to a more formal presentation and discussion within ABTL the following year, led by the Hon. Brian Currey of the California Court of Appeal.

The outgrowth of those discussions led to various civility initiatives throughout the State, including the creation of the California Civility Task Force, led by Justice Currey and our own Heather Rosing. A group of over 40 judges and lawyers throughout the State met for over a year to research problem incivility issues and what could (and could not) be done about them.

This tremendous effort led to the creation of "Beyond the Oath: Recommendations for Improving Civility," the initial Report of the California Civility Task Force. This Report was formally issued as a joint project of the California Lawyers Association ("CLA") and the California Judges Association ("CJA") in September 2021 (to review the report, please go to CalJudges.org/Civility).

The Report contained four main recommendations:

1. Mandate one hour of attorney MCLE devoted to civility training, to be included in the total number of MCLE hours currently required. Approved civility MCLE programs should highlight the link between bias and incivility and urge lawyers to eliminate bias-driven incivility, as that appeared to be the source of individual civility issue.
2. Provide optional training to judges on the need to model civility and curtail attorney incivility, both inside and outside the courtroom, explaining the tools available to them to do so.
3. Require all lawyers, not just those who took the oath after the 2014 rule change, to affirm or reaffirm during the annual license renewal process that: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity."
4. Enact meaningful changes to State Bar disciplinary rules, prohibiting repeated incivility and clarifying that civility is not inconsistent with zealous representation.

The positive news is that over the past several months the recommendations in this Report have gained traction. And, as the Chapter that initiated this discussion, we are proud to announce that CJA has endorsed all of these recommendations, and CLA has endorsed three of the four, with the recommendation to further study the proposals on the Rules of Professional Conduct. Numerous other bar organizations across the State have also issued their support and endorsement of the Report.

Moreover, the State Bar Board of Trustees has formally put in place an internal workplan to study and make further recommendations regarding the first, second, and fourth recommendations. Specifically, the State Bar's Committee on Professional Responsibility and Conduct (COPRAC) is reviewing and studying the suggestions for the Rules changes, as well as the definition of incivility. It is also anticipated that the Task Force and the State Bar will continue to study mechanisms for enforcement, including the potential for diversion programs, mentoring programs, and peer-guided programs, short of discipline.

While the specifics of how to do so are in the works, it is hoped that the MCLE requirement will into effect starting in 2024, and the expansion of the oath requirement will go into effect in 2023. The Task Force leadership and the CJA will have separate discussions within the judiciary about the development of training programs and the encouragement of judges to participate.

In the interim, the Task Force continues on with its important work, seeking endorsements of the Report, giving CLEs on its work and progress, and collaborating with stakeholders across the State to develop meaningful methods to put the recommendations of this Report into practice.

Continued on page 25

BACK *to Inside this issue*

The Joint Civility Task Force... | *Continued from page 24*

Finally, judges are taking notice. While several courts have issued opinions addressing incivility issues, a recent Court of Appeal decision provides at least some tacit guidance practitioners and courts can refer to. In *Karton v. Ari Design & Construction* (2021) 61 Cal. App. 5th 734, the Court of Appeal affirmed a trial court's decision reducing a fee application from $270,000 to $90,000, primarily referencing the trial court's conclusion that the lack of the proponent's civility and compliance with court orders lead to an increase in the lodestar. In so holding, the Court noted: "Attorney skill is a traditional touchstone for deciding whether to adjust a lodestar. . .Civility is an aspect of skill. Excellent lawyers deserve higher fees, and excellent lawyers are civil." (Id. at 747.)

In language we would all hope we do not to need to employ, the Court concluded with these wise words:

"Civility is an ethical component of professionalism. Civility is desirable in litigation, not only because it is ethically required for its own sake, but also because it is socially advantageous: it lowers the costs of dispute resolution. The American legal profession exists to help people resolve disputes cheaply, swiftly, fairly, and justly. Incivility between counsel is sand in the gears. Incivility can rankle relations and thereby increase the friction, extent, and cost of litigation. Calling opposing counsel a liar, for instance, can invite destructive reciprocity and generate needless controversies. Seasoning a disagreement with avoidable irritants can turn a minor conflict into a costly and protracted war. All those human hours, which could have been put to socially productive uses, instead are devoted to the unnecessary war and are lost forever. All sides lose, as does the justice system, which must supervise the hostilities. By contrast, civility in litigation tends to be efficient by allowing disputants to focus on core disagreements and to minimize tangential distractions. It is a salutary incentive for counsel in fee-shifting cases to know their own low blows may return to hit them in the pocketbook." (Id., emphasis added).

Thank you, Michelle, for getting the ball rolling!

Mr. Mansfield is a member of the California Civility Task Force along with Michelle Burton, Heather Rosing and the Hon. Katherine Bacal from ABTL San Diego.

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BACK to Inside this issue