the abtl REPORT

Voir Dire in the Real World

By Mark Mazzarella

I just read an article entitled "11 must-dos from a *voir dire* master." My reaction was: "If he is actually able to do one half of those 'must dos,' he must be picking juries in an alternate universe." Examples of such "must-dos" included:

- Jury selection should be a "conversation."
- "Explain the process."
- Ask open-ended questions and "get the jurors talking."
- "Encourage jury participation."
- "Be persistent."

Great advice if you have unlimited time. But the last time I picked a jury, I had 30 minutes to question the first 18 prospective jurors. I have sat jurors whom I never had the time to question whatsoever. Unless the "*voir dire* master" can pause time, if he did everything he suggests, he might get through one juror, maybe two, if he talked really fast.

Academic articles on jury selection are great, and I've written a few over the years. But my objective here is to suggest ways you can select—or, more precisely, deselect—jurors in the real world, where you might get two (2) minutes a juror during *voir dire*.

Create a Voir Dire File: Do not wait until the last minute to start thinking about who you do and do not want on your jury. As soon as a case comes into the office, create a *voir dire* file. As the case progresses you should have lots of ideas about jury selection. If you don't preserve them somewhere, you will forget most of them. I'll write down things like:

- get jurors who believe they have been wrongfully terminated;
- pick jurors with long term marriages;
- stay away from rednecks;
- avoid jurors who have suffered severe injuries; or
- we need smart jurors.

By the time of trial I'll have a long list—half of which will leave me wondering what I was thinking at the time. But the other half will give me a good start on creating my image of: (1) the perfect juror, and (2) the juror from Hell.

The more focused you are when you start jury selection, the more you will be able to accomplish in whatever time you are given. If you have already thought through whether members of the military are likely to be good or bad for your client, you may be able to spend less time questioning a member of the military during jury selection. If you have decided that smart jurors are essential, you may want to shy away from asking the rocket scientist any

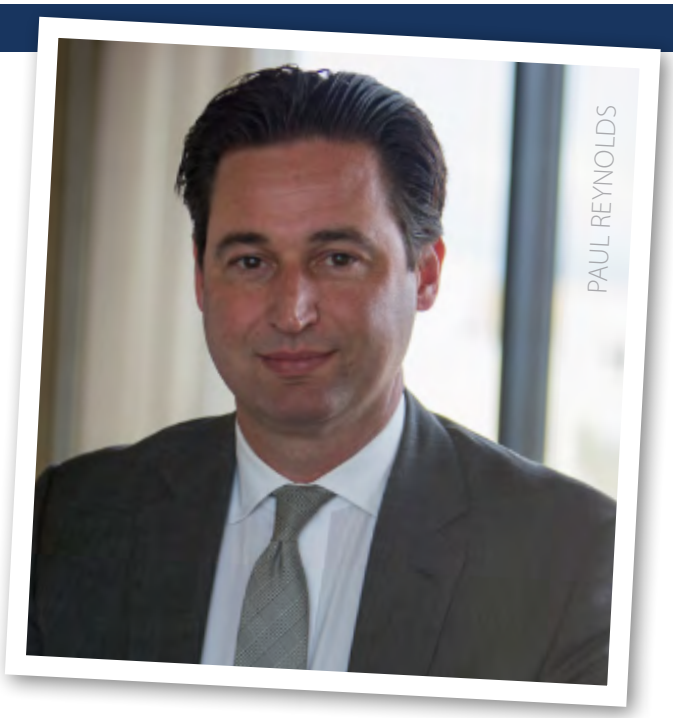
Continued on page 4

Inside

PRESIDENT'S LETTER:

ABTL San Diego, 2023

By Paul Reynolds



We are pleased to present the latest edition of the ABTL Report that you hold in your hand—or, far more likely these days, are reading on your screen. We have a number of interesting articles in this edition and we expect that most of you will find them useful in your practice.

First up is Mark Mazzarella's excellent article on *voir dire*—a topic about which there has long been competing views concerning how it should be best conducted. Mark's article takes what is, in my view, a salutary approach by focusing pragmatically on what you will most likely actually be able to accomplish in *voir dire* given the time limits that will almost certainly be imposed upon you.

Next, Frank Johnson has an article reporting on the Chapter's Bi-Annual Trial Skills Seminar that he and Co-Chair Christian Andreu-von Euw so ably organized and administered, which occurred on March 25. Those of us who were present can attest that the program was extremely successful and that the participants did an amazing job and had obviously put in many hours in preparation. The Trial Skills Seminar is one of our most important programs, in that it directly addresses one of the key components of our *raison d'être*—developing the trial skills of our less experienced members. One of the best parts of the seminar is the feedback given by the panelists—some of ABTL's most experienced members. A number of these pearls were transcribed and are included in the article so that all members can benefit from them.

After that is a very helpful article by David Gouzoules examining the current state of the law, following the pandemic, regarding the extent to which a witness can be compelled to appear in person at their deposition. The article walks through the extant statutory provisions and court rules and—most helpfully—includes citations to judicial opinions coming down on both sides of the issue.

Cornelia Gordon then gives us a helpful summary of Judge Kenneth So's "Nuts and Bolts" presentation on ethics to ABTL this past quarter. Drawing upon his vast judicial experience, Judge So led an engaging and participatory discussion on how to protect our credibility as lawyers when confronted with ethical dilemmas.

Next, Caitlin Macker Marisa Janine-Page continued their review of recent California cases interpreting the Supreme Court's Viking River Cruises case and its impact on arbitration provisions in employment agreements. Now that the California Supreme Court has agreed to wade into the dispute, expect another article from Caitlin and Marisa in our next Report!

Finally, we have an article by PJ Novack discussing the extent to which the federal courts are open to plaintiffs bringing claims arising out of cannabis-related business, given that the substance is currently illegal under the federal Controlled Substance Act. Specifically, he analyzes a recent Ninth Circuit decision, *Shulman v. Caplan,* which held that cannabis-related civil RICO claims are not cognizable in federal court for this reason.

On another note, we hope that you will join us on June 14 for our Q2 dinner event, featuring Daralyn Durie of Morrison & Foerster, one of California's top trial lawyers, discussing her recent California Jury Verdict of the Year as well has her thoughts on trial advocacy generally. The dinner will be held at Venue 808 (at 808 J Street between Eight Avenue and Ninth Avenue). We are very excited about this new venue and expect that you will all enjoy it as a change of pace. We look forward to seeing you there.

Paul Reynolds

Paul Reynolds, President of ABTL San Diego Chapter and partner at Shustak Reynolds & Partners, P.C.

Voir Dire in the Real World | *Continued from cover*

questions, not only because it will save you a couple minutes, you also may avoid giving your opponent a reason to challenge her.

Ask How Your Judge Manages Voir Dire: If you are in Federal Court or in an independent calendar department in Superior Court, you typically know who your judge will be. When you get close to trial ask the clerk, or even the judge, about the jury selection procedure. What are the standard questions they ask? Will they ask questions submitted by counsel? How long will each side have to question the jurors? Will they allow jury questionnaires, and if so, how long can they be?

The last thing you want is a well-prepared four (4) hour *voir dire* and thirty (30) minutes to complete it. There is little utility in a long jury questionnaire if the judge either does not use it, or gives it to the jurors in the morning and you get the completed copies at the lunch break with *voir dire* resuming immediately thereafter. If that is the schedule the judge keeps, you better keep the questionnaire short enough so you can read a couple dozen questionnaires over the lunch hour and actually think about them. If the judge will ask questions submitted by the lawyers, submit as many as possible.

Ask the clerk for the names of a few lawyers who have tried jury cases before the judge recently, and contact them. They may be able to tell you if the Judge is likely to grant challenges for cause, or at least allow further examination of the jurors to whom cause challenges are directed. If so, you may be able to extend your *voir dire* of some of the jurors as part of the challenge for cause process.

Do not be afraid to try to negotiate with the judge for more time. The judge may have a standard amount of time for jury selection. But if you have a case that legitimately calls for more *voir dire* time than the judge usually gives, you may be able to convince him or her to grant more time for your particular case.

Have Someone Watch the Jurors In the Hall: It is not unusual to have a jury panel sent to the court room an hour or more before motions *in limine* and other pre-trial matters are finished. During that hour, they sit and read, chat, make phone calls, listen to music, or just stare at the walls. Unlike when they get seated in the jury box, during this time, they are being themselves. It is a great time to pick up clues about potential jurors that you might never see in the courtroom.

You always want to identify the likely leaders in a jury. See who strikes up conversations with the other jurors. They likely will be candidates for foreperson. Notice what they are they reading: a novel, work papers, a crossword puzzle? Are they playing video games on their phones, watching TV, or making business calls? These activities provide good information, most of which will not be available once the jurors enter the court room when they are all doing essentially the same thing--nothing.

A few years ago I had "hall duty" for a case that involved a claim of mold in an apartment building that allegedly caused the tenants to suffer personal injuries. While I was in the hallway watching the jurors, a modestly dressed middle-aged woman sat down. She pulled a novel from her oversized purse and began reading. She seemed like a good defense juror. Then she pulled out a water bottle and a small box of tissue. She carefully wiped the top of the bottle before opening it, and again before she drank. The last thing we wanted was a germaphobe on the jury when we were defending a mold case. She probably would have been seated if I had not been watching the jurors.

Identify One or Two Questions That Will Provide the Most Information and Take the Least Time: This is not easy to do. The objective is to have a question or two that you can ask to the group, with follow up as appropriate. An example is a question I've asked a couple times when my client was in an accident after drinking: "When you have guests over for dinner, and they have a couple glasses of wine, do you feel that makes you responsible if they get into an accident on the way home?" I want to know which jurors make a clear distinction between drinking and driving and driving drunk. I want to know who holds the most extreme attitudes on the issue, one way or another. I could ask about their drinking habits. They probably won't give me an honest answer. And even if they did, it would not tell me what I want to know. Another example is, when trying to determine who the leaders/probable forepersons are, I'll ask: "On a scale of one (1) to ten (10), how much do you like a good lively debate with friends or family about politics or similar topics, one (1) being you really don't like it and ten (10) being you thrive on it?" The jurors with the low numbers are more likely to be among the sheep, not the foreperson.

Do Not Waste Time Talking to Jurors About Whom You Have Already Made Up Your Mind: It makes sense that you do not want to waste your limited time questioning jurors when you know you are going to challenge them. But there are other jurors you also may not need to question. For example, there may well be jurors you know your opponent will challenge. The prosecutor is going to challenge anyone convicted of drunk driving who claims he was innocent. Why waste time talking to them? There may be juror about whom you have a very good

Continued on page 5

BACK to Inside this issue

Voir Dire in the Real World | *Continued from page 4*

feeling already. Any further questioning may trigger a challenge by your opponent, as well as use up your valuable time.

Do Not Waste Your Time Trying to Indoctrinate the Jurors: I remember when I was first starting out, it was all the rage to use jury selection to indoctrinate jurors. I would find a juror who shared my client's views and ask as many questions as possible to get those views before the other jurors. For example, when defending car manufacturers, I loved to find an engineer and ask all about the extensive testing and analysis that is done before a product is released for production, and the additional quality control performed during and after production. I would then contrast that to the limited testing and analysis performed by the typical plaintiff's expert. The fact is, judges hate that practice. And, jurors generally are not impressed. All it does is take up a lot of time that you should devote to determining which of the prospective jurors will vote against you no matter what the evidence may be.

Use Online Investigation If Your Judge Allows It: With the advent of the internet and social media lawyers now have the ability to find out a lot about many of their prospective jurors before they say a word. The benefits are obvious and will not be discussed here. However, I have a couple words of caution. First, make sure your judge does not prohibit the use of online investigation. Next, make sure that you do not access juror information in a way which alerts the juror to the fact that you are investigating them. Not only will this tend to upset your jurors, but it may also constitute an impermissible communication with jurors. I invite you to read the ABA Standing Committee on Ethics and Professional Responsibility's Formal Opinion 466, which concludes: "unless prohibited by law or court order," a lawyer may research a juror's internet presence. You should be aware also that the failure to use online investigative tools has been alleged to be malpractice. Clearly, this is an area in which the law is evolving. For now, I recommend you use online investigation, but use it with great restraint.

Use Focus Groups and Jury Research If Your Client Can Afford It: There are excellent jury consultants available to conduct jury research through online surveys, telephone interviews and other means. Focus groups can provide invaluable information regarding the characteristics of jurors who will love or hate your client or your legal theory, as well as which themes and witnesses "sell" well and which do not. But this can be quite expensive. A focus group could range from $25,000 to well over $100,000. Surveys of prospective jurors' attitudes are priced based upon the number of participants in the survey and the methods used. Ultimately, your consultant will be able to give you a list of traits which suggest a good juror for your client and another list of traits that suggest the opposite within an acceptable degree of certainty. When you do not have the time to probe your prospective jurors' attitudes, resorting to this type of stereotyping may be your only recourse.

Final Thoughts: Who your jurors are really matters. In the Gore/Bush debates in 2000, 95% of the Republican viewers thought Bush won, whereas 95% of the Democratic viewers thought Gore won. How we view one another, factual situations, and the law depends upon the color of the spectacles through which we see the world. You cannot just throw up your hands and say: "What difference does it make. I'll just take the first 12 seated in the box." You need to work as hard as you can to get the best jury you can. There is an old saying, with which I agree wholeheartedly: "Whether you win or lose a trial is based 1/3rd on your trial preparation, 1/3rd on your trial presentation, and 1/3rd on your jury selection." You need to make the most of your thirty (30) minute *voir dire*. Hopefully, my thoughts on how to do that will be of some help.

Mark Mazzarella of Mazzarella Law APC, is a 42 year trial lawyer. He is a past president of ABTL.

BACK to Inside this issue

abtl SD

2023 Membership

JOIN NOW!

Click here: **abtl.org/sandiego**

Benefits Include

- **Diverse Membership -** plaintiff and defense bars, federal and state judiciary, firms of all sizes and solo practitioners.
- **Dinner Networking Programs -** topical, informative events, featuring state and nationally known lawyers, judges and experts. (Members discounts & MCLE credit)
- **Annual seminar** at resort destinations - currently scheduled for September 22-25, 2022 at the Rancho Bernardo Inn, San Diego. (MCLE credit)
- **"Nuts & Bolts" & "Specialty MCLE" luncheons.** (Complimentary w/MCLE credit)
- **"Meet the Judges" Series -** Judicial Mixer and Judicial Brown Bag events throughout the year. (Members only complimentary bench bar networking event(s) with MCLE credit)
- **Bi-Annual Trial Skills Seminar & Annual Local Law School Mock Trial.** Trial Skills programs for young lawyers and law students to hone their skills while Judges and seasoned trial attorneys evaluate and provide valuable feedback.
- **The ABTL Report**, the quarterly journal of the Association, with articles of interest to business trial lawyers and judges.
- **And MUCH more...**

Pricing

BEST VALUE

- **Individual Membership -** $125.00
- **Litigation Deptartment (100% club) -** (all attys in office, min. 2) - $100.00 ea
- **Public Sector Attorney -** $75.00
- **Retired Judge -** $75.00
- **Sitting Judge -** Complimentary
- **New Lawyer -** Complimentary
- **Law Student -** Complimentary

* Board of Governor's firms will be invoiced for membership.
(100% Club recommended | Large firms - min 10 | Medium firms - min 5 | Boutique firms - # of litigators in SD office)

* Go to ABTL.ORG/SANDIEGO - to view our 2023 calendar of events *(dates subject to change)*

BACK to Inside this issue

ABTL's Bi-Annual Trial Skills Seminar

By Frank Johnson

"The Bi-Annual Trial Skills Seminar is one of ABTL's most important programs. In the age of the diminishing trials, less experienced lawyers need every opportunity to develop their trial skills. This program provides trial practice with outstanding feedback." - *Judge William Hayes*

ABTL San Diego held its all-day Bi-Annual Trial Skills Seminar on March 25, 2023. Two years ago, the Chapter hosted a virtual Seminar over Zoom and focused on how to handle remote bench trials. Now that in-person trials are back, this year's Seminar also returned to an in-person experience.

The Seminar was designed to effectively conduct a full jury trial, from voir dire through closing arguments. Each phase of the trial was handled by a new pair of lawyers, one representing the plaintiff and the other representing the defendant. The trial lawyers had between two and eight years of experience and received real-time feedback from a presiding judge and two separate panels of four experienced trial lawyers—one panel in the morning, and a second panel in the afternoon. Over the lunch hour participants heard from renowned jury consultants who discussed their craft in general, and the particular issues in jury selection and presentation presented by this year's fact pattern.

Judges John Meyer and William Hayes served as the presiding judges for the morning and afternoon sessions. The eight panelists included William Caldarelli, Dave Carothers, John Gomez, Amy Martel, Marisa Janine-Page, Heather Rosing, Debra Wyman, and Andrew Young. The stars of the program—the trial lawyers—included Paul Belva, Benjamin Cooper, Nick Dahl, Kevin Ganley, Caitlin Macker, Alyssa Moscrop, PJ Novack, Haylee Saathoff, Ivana Torres, Katharine Tremblay-Beck, Allyson Werner, and Amanda Zemel. Notably, Mr. Cooper stepped up to give the plaintiff's closing argument when the lawyer who had planned to perform that skill was unable to participate in the Seminar at the last minute. With little time to prepare, Mr. Cooper did an outstanding job and experienced the true excitement and stress that often accompanies a real trial.

As in prior years, the Seminar provided an opportunity for a robust and healthy discussion with the judges and experienced trial attorneys about best practices for dealing with each phase of the trial. Both participants and attendees learned a great deal from the Seminar. "This was a great opportunity to get stand up experience in a courtroom setting without the added pressure of a high-stakes client conflict," said Ms. Moscrop who cross-examined a defense witness. And Micheal L. Wright, who graduated law school last year and participated in the audience said it was "an amazing event! Hearing the real-time feedback and advice from some of San Diego's most experienced trial lawyers was invaluable. I wish this was an annual event!"

"It was great to see ABTL's new lawyers so engaged, but my veteran colleagues who skipped this program really missed out. One attorney with more than 100 trials under his belt commented to me afterwards that even he learned new tricks and take-aways that he's going to integrate in his courtroom!" Ms. Janine-Page.

Below are a few highlights of the observations and feedback given during the discussion after each phase of the trial.

Voir Dire

Judge Meyer: "Don't refer to 'you guys' or 'my client.' I heard one lawyer say 'it's your guys's job to decide the facts.' Try to personalize your clients and treat the jury with respect. … When I say it's important to pick the right jury for your case, find out from the jurors whether they have experienced anything like the facts of your case. Ask questions so that you can determine if this person is going to be fair and impartial. If you can precondition and get away with it, do it. But you might draw an objection."

Mr. Caldarelli: "Be careful about how your questions might make your client look to the jurors."

Ms. Rosing: "Know where the line is with your judge, and back off. You don't want the jury to see the judge upset with you."

Mr. Young: "This is the first chance the jury has to meet you. So your credibility is important. Know that many of the jurors don't want to be there and may not like you. Be yourself. Have goals and know what you want to get from the prospective jurors. You don't want 12 leaders. But you should figure out who the leaders are."

Ms. Wyman: "Make sure you simplify terms in complex cases. When you have a complicated case, be sure to follow up to be sure they understand."

Opening Statement

Judge Meyer: "Be careful when making argument in opening statement; an objection in a civil case will get sustained in a heartbeat."

Ms. Wyman: "Be sure to listen to the other side's opening statement carefully so that you can respond to points raised."

Mr. Young: "It's always better to be in the well without notes if you can do it. Technology will fail. Always have a backup. I don't

Continued on page 8

BACK to Inside this issue

ABTL's Bi-Annual Trial Skills Seminar | Continued from page 7

use PowerPoint. If you put something up on PowerPoint, the jury is going to read it and stop listening to you. And if you lose the PowerPoint, you need to be ready."

Ms. Rosing: "You don't need to say 'the evidence will show' over and over. But don't say anything that you can't back up with evidence, because any good attorney will skewer you in closing if the evidence doesn't come in as you promised. As you're doing voir dire, opening, and questioning witnesses, you have to keep going back to the jury instructions. Your questions and statements should be aligned with what you have to prove."

Mr. Caldarelli: "In a complicated case like this involving alleged trade secret theft with respect to a medication, you might want to consider asking for pre-instructions. Also, consider your word choices. Consider the impact of saying 'drug' vs 'medicine' or a 'generic' vs a 'copycat' depending on which side you are representing."

Witness Examinations

Judge Meyer: "When you get an answer, you don't need to say 'right' or 'ok' over and over; it's annoying. Avoid referring to the other parties by their first name. Most judges don't like it. On exhibits, always remember that if they're not introduced during the trial, they're not in. If you want it in evidence, make sure to move it in during the trial. And if an exhibit is in evidence, you don't have to ask witness describe it."

Mr. Young: "The direct examination is a conversation. If you write your question, you might not hear the witness said. If it's a good answer, you may want to repeat the good part in your next question so the jury hears it twice. On cross-examination, every question should be leading and you should know the answer to every question before you ask it. Never ever, ever let a witness read their own deposition testimony when you are impeaching them."

Judge Meyer: "In cross, some lawyers think they have to cross examine, when a good trial lawyer might say no Qs. Think about whether you want to do a full cross-examination if you are in damage control."

Mr. Caldarelli: "When it's your witness on direct examination, you want the jury to focus on your witness testifying. So if you ask a leading question, all the jury hears is yes. You want the jury to hear the testimony from your witness. In contrast, on cross-examination, you want the jury to focus on the question."

The Afternoon Panel – Witness Examinations

Mr. Gomez: "I want to direct my client's attention to the jury. Get them to look at and speak to the jury. I like to do introductions and three chapter headings or road maps at the beginning of my examination with my witness. 'I'm going to cover the following three items…'"

Judge Hayes: "After John got to his second 'roadmap' I probably would have cut him off and said 'get to your questions counsel!'"

Ms. Martel: "Starting all of your questions with 'and' can be distracting. Try to leave those filler words out. You need to listen to what witnesses say and follow up with them; try not to just follow what's on your list of questions. Keep your voice up; don't let your questions trail off at the end. You need to command the courtroom when you're standing up. Make sure to follow up when witnesses say mm hmm. You need to protect your record for appeal."

Mr. Carothers: "Having the witnesses look at the jury may backfire. I like to tell the witnesses to do what they feel comfortable doing. Some witnesses may freak out if they are looking at a jury. The lawyer can look at the jury to make a punctuation point. All the lawyer brings to the courtroom is credibility. When you lose it, it's gone. So do everything to maintain your credibility."

Ms. Janine-Page: "Know what you need from your witness, on direct and cross. For every examination you should consider having at the top of your page the points you need to get from this witness. Humanize your witness."

Judge Hayes: "All of the examination in my courtroom is at the podium. There is a mic but keep your voice high enough to be heard well. It's rare to approach the witness. Everything is digital. There's a monitor at the witness stand, counsel's table, and in front of the jury. I don't like the counsel getting close to the witness. You want to be aware of what you look like in the courtroom. I've seen counsel leaning back in their chair like they're at a sports bar without a care in the world looking at their phone. It's not a good look for the jury or the judge. You should know what the rules are for the particular court; some require you to give opening and closing at the podium. If you don't know already, you should learn these details at the pre-trial conference."

Closing Arguments

Mr. Gomez: "There's a new rule in state court that you cannot say 'ladies and gentlemen of the jury,' you now have to say 'members of the jury.' I keep everything on an iPad. I like to put the verdict form on an overhead projector so the jury can watch me check the boxes. I think there's something that helps the jury watch you fill out the form."

Continued on page 9

ABTL's Bi-Annual Trial Skills Seminar | Continued from page 8

Ms. Martel: "You always have to be prepared for the technology not working. Using the jury instruction and incorporating the facts that came into evidence is very important. Closing affords you an opportunity to knock down the other side and point out how they did not prove their case. Work on not reading during closing if you can. I type out the entire closing but then rely on about five words that tell me where I need to go. I never look at the closing again. I just look at those 5 words."

Mr. Carothers: "With respect to technology, I've changed my view. I used to say 'if you don't know your story by the time you get to trial, you don't know your case so forget the technology crutches' I'm changing. Now, jurors are not surprised to see a lawyer with an iPad in court. Nowadays one of the common complaints I hear from jurors is the lack of technology in the courtroom. Taking the jury through the verdict form and tailoring your argument to specific instructions is always a good idea in closing."

Ms. Janine-Page: "When you're talking to the jury, avoid turning your back when looking at screen while you continue to talk. Make sure you're always looking at the jury. I need to have notes in closing; I have to read. I put my main points in a document on an iPad in dark bold black. I try to put the iPad on a stand attached to the podium and just scroll up with a swipe of my finger.

Judge Hayes: "Using jury instructions and verdict form in your closing is a good idea. Many lawyers don't do that. The most enjoyable part being a lawyer was trying cases and I can't even think of what the second would be. I remember being in trial and thinking 'I hope the answer comes to me as I walk over to sidebar, because I have no idea what I'm going to say right now.' Trying cases is exhilarating."

A special thanks to Mr. Gomez who graciously allowed ABTL to use his courtroom at his new location on Front Street and to Ms. Janine-Page who previously authored the fact pattern and created the evidence a few years ago for use in the ABTL sponsored mock trial competition with the local law schools.

Frank Johnson is Co-Founding and Managing Partner of Johnson Fistel. He is on the ABTL Board of Governors and chair of ABTL's Bi-Annual Trial Skills Seminar.

BACK to Inside this issue

Depositions in Sweatpants in 2023?

By David Gouzoules

You are three months away from trial call, and you're preparing deposition notices and subpoenas to the key witnesses. You've gathered the hot documents and are excited to get admissions on crucial issues, catch the witness in a few lies, and assess her credibility so you can see how she'll do in front of the jury. You make sure your office's best conference room is available, and send out the notice.

The witness' counsel, however, says that the witness would prefer to do the deposition remotely via videoconference. She has health concerns, she no longer lives in the city due to her job being remote, the lawyers are in different cities, and her counsel suggests a Zoom deposition might even be more convenient due to drop box exhibit sharing.

As anyone who has taken or defended a deposition both before and during 2020-2022 knows, remote videoconference depositions and in-person depositions are markedly different. There are pros and cons of each, but for a key witness whose testimony you intend to videotape and whose credibility could make or break the case, as the trial lawyer, you probably want the deposition to be in-person.[1] You may also have concerns that the witness could have a chat box open with a co-conspirator feeding them answers, or a cheat sheet of notes pulled up on her computer that you can't see. You dutifully meet and confer, and then file a motion to compel.

So, how likely are you to succeed on your motion to compel? California Code of Civil Procedure section 2025.310 allows for certain remote deposition procedures, but is silent as to whether the deponent must be physically present with the examining attorney. California Rule of Court 3.1010 provides that any party, "other than the deponent," may appear at a deposition by telephone or videoconference, but states that the "deponent must appear as required by statute or as agreed to by the parties and deponent." CRC 3.1010(c).

Given the foregoing, it is no surprise that case law is all over the map. Some courts have noted the importance of an in-person deposition and compelled the same, with certain precautions to be taken to accommodate health concerns or logistical issues. *See, e.g., Rubio,* 2022 WL 193072, at *2 (compelling in-person deposition and advising counsel to abide by applicable vaccination, masking, and quarantine requirements); *Hernandez v. Aisin Holdings of America, Inc.,* No. RG21102984, 2022 WL 18278565, at *2-3 (Cal. Super. Ct. Jan. 26, 2022) (denying motion for protective order seeking remote deposition and noting that defendant had made no specific factual showing of a health or safety risk); *Pruco Life Insurance Co. v. California Energy Development Inc.,* No. 3:18-cv-02280-DMS-AHG, 2021 WL 5043289, at *4 (S.D. Cal. Oct. 29, 2021) (denying request for remote deposition for "key witness [] whose credibility is at issue…")

Other courts have granted motions for remote depositions or denied motions to compel in-person depositions, typically on the rationale that remote depositions are commonplace following COVID-19. *See, e.g., Schoonover v. Iovate Health Sciences U.S.A. Inc.,* No. 20-cv-01487, 2020 WL 7094061, at *2-3 (C.D. Cal. Nov. 9, 2020) (rejecting concern that witness could receive text messages or answers during examination and granting protective order for remote deposition); *Y.M. v. Beaumont Unified School Dist.,* No. 19-cv-1048, 2020 WL 8611032, at *4 (E.D. Cal. Dec. 11, 2020) (denying motion to compel in person deposition where counsel for requesting party "indicated he has regularly conducted depositions via Zoom" and "thus should be prepared to take Milton's deposition remotely," but allowing an additional hour of deposition to account for logistical issues).

On balance, there appears to be slightly more authority in favor of in-person depositions from the 2022-2023 time period, which corresponds with the relative decline in severity of the COVID-19 pandemic after 2021. Nonetheless, there are a few things that practitioners can do to increase their likelihood of successfully convincing a witness to attend a deposition in-person or moving to compel an in-person deposition:

1. Note the significance of the witness' testimony or other reasons why a remote deposition would be inadequate, and don't brag to opposing counsel or the court about how many Zoom depositions you've taken.

2. If the witness makes generalized health or safety concerns, ask for specific information.

3. Make reasonable accommodations on logistics if travel is an issue – offer to go to where the witness is located, instead of making him or her come to your office.

It is likely that, as COVID-19 concerns continue to fade, remote depositions will become less common, and in-person depositions will predominate again. So, although we may not be able to take remote depositions while wearing sweatpants and slippers for much longer, at least we should be able to elicit better deposition testimony for trial.

ENDNOTES: [1] See Rubio v. City of Visalia, No. 21-cv-00286, 2022 WL 193072, at *2 (E.D. Cal. Jan. 21, 2022) ("In-person depositions are crucial to assessing a witness's potential presentation at trial, veracity, and credibility").

David Gouzoules is a senior associate at Procopio specializing in corporate and commercial litigation. He is a member of ABTL's Leadership Development Committee.

BACK to Inside this issue

Nuts & Bolts | The Honorable Kenneth J. So

By Cornelia Gordon

The Honorable Kenneth K. So retired in late March 2023, but before he did, he was kind enough to present a Nuts & Bolts seminar on Ethics for ABTL's members. The program was enriching and enlightening, in no small part because of Judge So's wealth of experience handling ethical issues. He served nearly 25 years on the San Diego Superior Court bench, along with another nearly four years as a municipal judge. During that time, he served as the court's presiding judge, supervising criminal judge, presiding judge of the appellate division, and on its executive committee. He also served on several Judicial Council committees, including the Supreme Court Committee on Judicial Ethics Opinions, the Executive and Planning Committee, the Enterprise-Wide Infrastructure Governance Committee, the Trial Court Budget and Presiding Judge/Court Executive Officer working groups, and as chair of the Policy Coordination and Liaison Committee prior to retiring.

Judge So was able to draw on his varied experiences to provide seminar attendees with his unique perspective on ethics. He posed hypotheticals throughout the program, challenging attendees to work through a number of difficult ethical quandaries. He gave examples of situations that new or young attorneys might have to confront—for example, a directive from a difficult client to "bury" the other parties by filing a torrent of motions, some of which might be frivolous—as well as situations that more senior attorneys might encounter when supervising a junior attorney under the same circumstances.

After posing these hypotheticals, Judge So then asked audience members to identify what ethical issues would be involved. He shepherded discussions among the group and, in doing so, examined the difficulties that attorneys face when clients propose they take actions that are either unethical or walk the line. In the hypothetical above, for example, the client's direction could be interpreted as an instruction to the attorney to "use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense," in violation of California Rule of Professional Conduct 3.2. If the younger attorney were to follow the client's wishes to the letter, he or she could be in danger of running afoul of the Rules.

But Judge So was also quick to point out that under these circumstances, the responsibility would not rest on the junior attorney's shoulders alone. He cited to California Rule of Professional Conduct 5.1, Responsibilities of Managerial and Supervisory Lawyers, when emphasizing the need for more senior attorneys to take accountability for the actions and decision-making of more junior attorneys who they supervise. As Judge So noted, under the right circumstances, a managing or supervising attorney can even be found responsible for a supervised attorney's violation of the rules and the State Bar Act.

Given his judicial vantage point, Judge So also focused on California Rule of Professional Conduct 3.3, which governs candor toward the tribunal. Judge So explained that while a single request from an individual client to engage in ethically questionable litigation tactics might not seem momentous, a lawyer's good reputation, though hard won, can be easily lost. And not just among one's peers—in Judge So's words, "judges talk," and attorneys should expect that judicial impressions of their conduct in one courtroom will likely follow them to the next.

Above all, Judge So emphasized that a lawyer should consider his or her reputation sacrosanct. He made it clear that no single client is worth compromising one's reputation, even though—especially as a junior attorney—saying "no" might seem like it could have career-ending consequences. At the end of the day, an attorney's reputation for candor, fairness, and civility is far more important in the context of a lifelong career and practice than any individual case or client.

Since retiring from the bench, Judge So has joined Signature Resolution as a mediator. ABTL thanks Judge So for his many years of service, as well as the insights he was able to provide on an attorney's ethical obligations from a judge's perspective. We wish him well in all his future endeavors.

Cornelia Gordon is an attorney at McNamara Smith LLP. Her practice focuses on regulatory compliance, government and internal investigations, and complex civil litigation. She is a member of ABTL's leadership development committee.

Beware of The "Poison Pill" – It Will Render Your Arbitration Agreement Invalid

By Caitlin Macker, Review and revisions by Marisa Janine-Page

Last June, the Supreme Court of the United States upended California law with its decision in *Viking River Cruises, Inc. v. Moriana*. For those of us who need a refresher course, *Viking River Cruises* held that the Federal Arbitration Act (FAA) preempted California's Private Attorney General Act (PAGA) to the extent that state law precluded arbitration agreements from dividing PAGA actions into individual PAGA and non-individual PAGA claims. In other words, this decision gave employers a window to compel a plaintiff in a PAGA action to arbitrate their individual claims. Since this decision, employers have eagerly watched as federal and state courts have navigated issues relating to the arbitrability of PAGA claims.

Last month, the California Court of Appeal issued its decision in *Westmoreland v. Kindercare Education LLC* that addressed the effect of a "poison pill" provision on the arbitrability of an employee's individual PAGA claims.

The *Westmoreland* plaintiff was a director for a childcare company, Kindercare. At the outset of her employment, the plaintiff signed an arbitration agreement adopting the FAA as the controlling law that required her to arbitrate "covered claims," which were defined as any statutory or common law claims alleging underpayment, overpayment, or mis-timed payment of any form of compensation. The arbitration agreement included a provision requiring the arbitration of "covered claims" on an individual basis only and waiving the right to participate in or to receive relief from any class, collective, or representative claim. The arbitration agreement also contained a clause, referred to as the "poison pill," providing that, if the waiver of class, collective, or representative claims was deemed unenforceable, then the entire arbitration agreement was invalid and a court would be the exclusive forum for any claim.

After Kindercare terminated the plaintiff, the plaintiff filed a lawsuit alleging Labor Code and PAGA violations. Kindercare moved to compel arbitration of the plaintiff's individual claims and stay her PAGA claims pending the outcome of arbitration. The trial court granted Kindercare's motion and the plaintiff filed a petition for writ of mandate. On appeal, the court issued an alternative writ of mandate holding that the trial court correctly concluded that the waiver provision was unenforceable as applied to the plaintiff's PAGA claims but it erred by severing the unenforceable PAGA waiver from the remainder of the arbitration agreement in light of the fact that the "poison pill" clause rendered the *entire* arbitration agreement unenforceable.

Unsatisfied with this result, Kindercare filed a *renewed* motion to compel arbitration claiming that the trial court must compel arbitration under newly decided authority. The trial court denied Kindercare's motion prompting Kindercare to file a second appeal. One of the issues briefed in the second appeal was the impact of the decision in *Viking River Cruises*.

But, the results were the same for Kindercare. The appellate court denied the appeal finding that *Viking River Cruises* was distinguishable and that Kindercare's other cited authority did not change the effect of the "poison pill" clause. In sum, had Kindercare included its unenforceable PAGA waiver but omitted the "poison pill" provision, the result would have been different.

Where does the issue of PAGA arbitrability stand today? There is a split in the appellate courts with the majority of the courts affirming the arbitrability of individual PAGA claims while staying the non-individual PAGA claims. There is at least one appellate court that followed the *Viking River Cruises* decision to compel arbitration of individual PAGA claims while dismissing the non-individual PAGA claims. Now that oral arguments are complete in *Adolph v. Uber Technologies Inc.,* we hope to give you the California Supreme Court's take on this issue in the next article. Stay tuned.

Caitlin Macker is an associate at Caldarelli Hejmanowski Page & Leer LLP, and she is co-chair of ABTL's Leadership Development Committee.

Marisa Janine-Page is a Partner at Caldarelli Hejmanowski Page & Leer LLP, an ABTL Past President and she is the chair of the Annual Mock Trial benefiting the local law schools.

The Ever-Evolving Cannabis Litigation Landscape: The Ninth Circuit Rules Cannabis Companies Cannot Sue Under RICO

By PJ Novack

Litigation just became more complicated for licensed cannabis companies. The Ninth Circuit Court of Appeals recently ruled that cannabis businesses cannot sue under the private right of action provision in the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), evidencing the growing divide between state and federal law and raising challenging questions of federalism. To what extent can a business that is illegal under federal law, but legal under state law, avail itself of the protections of the legal system? Even in California, a state with a booming cannabis industry, the answer is not so clear.

Current State of Cannabis Law

Recreational marijuana is legal in twenty-two states and Washington, D.C., with several more states on the brink of legalization. Medical marijuana is legal in thirty-seven states and counting. Irrespective of any state law, cannabis remains federally illegal under the Controlled Substance Act ("CSA"). Congress, however, seems poised to legalize marijuana in the not-so-distant future, as numerous bills have been proposed in both Congress and the Senate with substantial backing.

In the meantime, federal courts have wrestled with the question of whether a licensed cannabis business can sue for an alleged harm in federal court—often answering in the negative. For example, federal courts have denied relief to cannabis businesses under federal laws like the Lanham Act, the Bankruptcy Code, and 42 U.S.C. § 1983. They have also refused to grant tax-exempt status under 26 U.S.C. § 501(c)(3) to non-profit cannabis companies. They have even refused to enforce private contracts and award damages if doing so would compel a party to violate the CSA. In January 2023, the Ninth Circuit added RICO to the list of federal laws that cannabis businesses cannot utilize—at least, in federal courts.

Shulman v. Kaplan, 58 F.4th 404 (9th Cir. 2023)

Around 2017, Francine Shulman, a farmer in Santa Barbara who operated two cannabis companies, sought to expand her business upon California's legalization of recreational marijuana by bringing in several business partners led by an individual named Todd Kaplan. The relationship quickly soured. Kaplan and his associates allegedly engaged in a variety of illegal conduct all in an effort to take over Shulman's cannabis businesses. Shulman and her two companies ("Shulman") sued Kaplan and his associates ("Kaplan") under RICO and the Lanham Act, as well as alleged numerous state causes of action.

The federal district court dismissed Shulman's complaint in its entirety. Kaplan argued that Shulman did not have a "legally cognizable interest" in her RICO claims because her damages related to a cannabis business that is illegal under the CSA. The district court agreed, holding that Shulman lacked standing because her injuries were not redressable under RICO. Specifically, the district court determined that any order requiring monetary payment to Shulman for lost profits or injury to her cannabis business would provide a remedy for actions that are "unequivocally" illegal under the CSA and would therefore require the court to contravene federal law. As for Shulman's trademark claims, the Lanham Act does not protect trademarks used in connection with the sale of marijuana because the Act only protects trademarks that involve legal uses. Having dismissed each federal cause of action, the court declined to exercise supplemental jurisdiction over any of the remaining twenty-one state causes of action.

Shulman appealed the district court's dismissal of her RICO claims, but the Ninth Circuit affirmed based on her lack of standing. Unlike the district court, the Ninth Circuit's standing analysis was twofold: constitutional and statutory. Beginning with the Article III analysis, the Ninth Circuit held that Shulman had *constitutional* standing to sue. Neither party disputed that Shulman suffered an injury to her cannabis-related property interests recognized under California law, nor did any party dispute that Kaplan had caused such injury. The parties did, however, disagree over redressability. The Ninth Circuit held that Shulman's injuries were redressable by an award of monetary damages, the quintessential remedy for a civil RICO violation, finding irrelevant the fact that the alleged economic harms related to cannabis (without much analysis). The fact that a court could "theoretically" fashion a remedy for Shulman was enough for the panel.

However, the Ninth Circuit held that Shulman lacked *statutory* standing to sue under RICO. Under RICO's standing provision, only persons (or entities) injured in their *business or property* by

Continued on page 16

BACK to Inside this issue

The Ever-Evolving Cannabis Litigation Landscape | *Continued from page 15*

reason of a RICO violation may bring a RICO claim. RICO does not define *business or property*. In the absence of a definition, courts usually look to state law to determine whether an interest amounts to property. But the Ninth Circuit, as well as several of its sister circuits, have held that state law does not control if it conflicts with RICO's statutory purpose or congressional intent. For this reason, the Ninth Circuit evaluated two indicators of Congress' intent.

First, Congress expressly defined "racketeering activity" to include the manufacture, importation, receiving, concealment, buying, or selling of, or otherwise dealing in, cannabis. Second, Congress passed the CSA and RICO in the same year as part of a comprehensive legislative package. The CSA itself explicitly states that no property right shall exist in substances made illegal under the CSA. Because Congress treated cannabis businesses as a form of organized crime and expressly disclaimed the existence of any property rights arising from cannabis transactions, the Ninth Circuit determined that Congress did not intend to use RICO as a vehicle to obtain damages for cannabis-related injuries. Musing toward the end of its opinion, the Ninth Circuit substituted a drug like heroin for cannabis, noting that the result would be obvious—a heroin dealer cannot recover RICO damages from someone who stole a shipment of heroin.

Implications for Litigating in the Cannabis Industry

Shulman adds to the growing list of federal decisions denying claims brought by licensed cannabis businesses because those businesses deal in a federally illegal substance. Indeed, at least one federal district court already has relied on *Shulman* to deny a litigant relief for this very reason.

In *Brinkmeyer v. Washington State Liquor and Cannabis Board,* Case No. C20-5661 BHS, 2023 U.S. Dist. LEXIS 20564 (W.D. Wash. Feb. 7, 2023), the Washington State Liquor and Cannabis Board ("LCB") informed Todd Brinkmeyer, an Idaho resident, that it would not grant Brinkmeyer a license to own a cannabis business in Washington due to the state's residency requirements for commercial cannabis licenses. Brinkmeyer then sought an order from the federal district court preventing the LCB from enforcing the residency requirements, claiming that the requirements violated several constitutional provisions including the dormant Commerce Clause, the Due Process Clause, and the Equal Protection Clause by discriminating against out-of-state citizens. The court granted the LCB summary judgment as to each claim, stating not only that the Commerce Clause cannot be read to protect federally illegal interstate commerce, but also that the Constitution has never established an individual right to engage in federally illegal commerce like cannabis.

These recent decisions have narrowed the venues and causes of action available to cannabis businesses. It has become increasingly evident that counsel for cannabis businesses should be wary of filing suit in federal court for any sort of relief. While one could pursue these federal claims in state court, this route presents its own challenges. In the absence of Supreme Court guidance, California courts often give great weight to lower federal court decisions interpreting federal law, even though they do not necessarily have to follow such decisions. Until Congress legalizes (or at least decriminalizes) marijuana, counsel for cannabis businesses considering a lawsuit should think carefully about these uncertainties before choosing their venue and claims.

PJ Novack is a Litigation Associate at Seltzer Caplan McMahon Vitek and a member of ABTL's Leadership Development committee.

Thank You 2023 SPONSORS

Platinum

SIGNATURE RESOLUTION

ADR SERVICES, INC.

JAMS

JUDICATE WEST
Alternative Dispute Resolution
*Results Beyond Dispute*SM

Gold

SPONSORSHIP SLOTS AVAILABLE

Silver

ankura

Array

Consilio

ESQUIRE DEPOSITION SOLUTIONS

BACK to Inside this issue

Association of Business Trial Lawyers – San Diego

2022 Officers and Board Members

Officers

President —
Paul Reynolds

Vice President —
Andrea Myers

Treasurer —
Jenny Dixon

Secretary —
Jon Brick

Board of Governors

Christian Andreu-Von Euw
Alexandra Barlow
Eric Beste
Callie Bjurstrom
Benjamin Brooks
Gary Brucker
Bill Caldarelli
Elizabeth A. French
David M. Greeley, Esq.
Dan Gunning
Valentine Hoy
Rachel Jensen
Frank Johnson
Randy Jones
Noah A. Katsell
Rachael Kelley
Jason Kirby
Robert Knaier
Chris Lyons
Katie Mcbain
Brett Norris
Kelly O'donnell
Adam Powell
Marty B. Ready
Rebecca Reed
Maggie Schroedter
Logan Smith
Cheryl Dunn Soto
Colin L. Ward
Vince Whittaker
Anne Wilson
Summer J. Wynn

Judicial Board of Governors

Hon. Cynthia Bashant
Hon. Michael Berg
Hon. Karen Crawford
Hon. Peter Deddeh
Hon. Mitch Dembin
Hon. Kevin Enright
Hon. William Hayes
Hon. Marilyn Huff
Hon. Linda Lopez
Hon. Margaret Mann
Hon. Laura Parsky
Hon. Janis Sammartino
Hon. Michael T. Smyth
Hon. Nita Stormes

Judicial Advisory Board

Hon. Katherine A. Bacal
Hon. Anthony J. Battaglia
Hon. Wendy Behan
Hon. Roger Benitez
Hon. Victor E. Bianchini
Hon. Larry Burns
Hon. Daniel E. Butcher
Hon. Carolyn Caietti
Hon. Timothy Casserly (Ret.)
Hon. Gonzalo Curiel
Hon. Robert Dahlquist
Justice William Dato
Hon. Steven Denton (Ret.)
Hon. Ronald Frazier
Hon. Loren Freestone
Hon. Allison H. Goddard
Hon. Irma E. Gonzalez
Hon. Charles Hayes (Ret.)
Hon. Judith Hayes (ret.)
Hon. Christopher Latham
Hon. Joan Lewis (Ret.)
Hon. Marcella McLaughlin
Hon. Kenneth J. Medel
Hon. John Meyer
Hon. Victor Pippins
Hon. Ronald Prager (Ret.)
Hon. Linda Quinn
Hon. Todd W. Robinson
Hon. Andrew Schopler
Hon. Eddie Sturgeon
Hon. Timothy Taylor
Hon. Randa Trapp (ret)

Past Presidents

Mark C. Mazzarella, 1992-1994
Michael Duckor, 1994-1996
Peter H. Benzian, 1997
Hon. Ronald L. Styn, 1998
Claudette G. Wilson, 1999
Meryl L. Young, 2000
Alan Schulman, 2001
Howard E. Susman, 2002
Hon. J. Richard Haden, 2003
Frederick W. Kosmo, Jr., 2004
Charles V. Berwanger, 2005
Hon. Maureen F. Hallahan, 2006
Hon. Jan M. Adler, 2007
Robin A. Wofford, 2008
Edward M. Gergosian, 2009
Mark C. Zebrowski, 2010
Anna F. Roppo, 2011
Hon. M. Margaret McKeown, 2012
Rich Gluck, 2013
Marisa Janine-Page, 2014
Jack R. Leer, 2015
Brian A. Foster, 2016
Paul A. Tyrell, 2017
Michelle L. Burton, 2018
Randy Grossman, 2019
Alan Mansfield, 2020
Rebecca Fortune, 2021
Hon. Lorna Alksne (Ret.), 2022

Annual Seminar

Dan Gunning, chair
David Lichtenstein, vice chair

Membership

Anne Wilson, chair
Rebecca Reed, vice chair

Sponsor Relations

Mark Mazzarella, chair
Alex Barlow, vice-chair

Dinner Programs

Hon. Michael Berg, chair
Maggie Schroedter, vice chair

Civility

Michelle Burton, chair
Alan Mansfield, vice chair 1
Judge Alksne, vice chair 2

Community Outreach

Hon. Linda Lopez, chair
Tess Esqueda, vice chair
Rachael Kelley, resource

Judicial Advisory Board

Hon. Carolyn Caietti, chair

Leadership Development Committee

Rachel Jensen, chair
Caitlin Macker, vice chair

Specialty MCLE Lunches

Vivian Adame, chair
Ivana Torres, vice chair

Bi-Annual Seminar

Frank Johnson, chair
Christian Andreau von-Euw, vice chair

Mock Trial

Marisa Janine-Page, chair
Ryan Caplan, vice chair 1
Paul Belva (LDC), vice chair 2

The ABTL Report

Lori McElroy, design
Eric Beste, editor

www.abtl.org

BACK to Inside this issue

abtl SD

The Association of Business Trial Lawyers
8030 La Mesa Blvd., #127
La Mesa, CA 91942

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