the abtl REPORT

Effective and Efficient Lawyering

By Judge John Meyer

In the ABTL Report earlier this year I described some of the counterproductive behavior by attorneys that I witnessed in my time as a trial judge in San Diego. This article continues that discussion by highlighting the importance of effective and efficient lawyering as it relates to understanding the structure of the court and the demands on the judges.

Practice matters

Poor lawyering is not confined to jury trials. In motion hearings and bench trials, ineffective and counter-productive practice not only prejudices the client but can also irritate the judge and courtroom clerk. Often times, this poor practice is manifested in poorly-constructed memoranda of points and authorities, trial exhibits, and trial binders. For example, a double-sided pleading is irritating to this reader, in part because it is often difficult to read when taken apart. A memorandum containing several exhibits without tabs are difficult to read and navigate. As a result of these difficulties, some judges simply refuse to read those documents. Organizational details should not be overlooked, and often times, attorneys unnecessarily create confusion and extend the time of trial due to a lack of organization and efficiency.

Attorneys do not seem to understand the critical importance of joint trial binders which are required by the Court. This binder is always reviewed by the trial court before the start of the trial to ensure that everything is in order and that the trial will proceed expeditiously and properly. There are usually two years or more between the filing of the complaint and the commencement of the trial. The joint trial binder is ordered to be filed two weeks before the start of the trial. Since they are provided with such ample time, I am amazed at attorneys who appear at the time of trial with a supposedly "joint" trial binder which contains "our" documents and "their" documents. Several judges simply refuse to proceed with trial without a true joint proposed verdict form. Counsel must meet and confer and assemble a true joint trial binder with an agreed upon verdict form.

In many cases, a number of in limine motions are unnecessary and sometimes silly. When the oppositions are not filed directly behind a given in limine motion, the judge must spend valuable time to search to find the corresponding oppositions. The exercise is exasperating to say the least.

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PRESIDENT'S LETTER:

ABTL San Diego, 2023

By Paul Reynolds


PAUL REYNOLDS

It is my pleasure to present to you our chapter's third quarter ABTL Report. We have a number of great articles for your edification in this issue, not least of which is Judge John Meyer's excellent *Effective and Efficient Lawyering* leading off. This piece provides much practical boots-on-the-ground advice regarding logistical best practices for trying cases in Superior Court; I think even the most experienced among us will benefit from his observations and suggestions.

Let me also take this opportunity to provide an overview of out chapter's year-to-date accomplishments, as well as upcoming events. First, it is my belief that the lifeblood of our organization is providing high-quality dinner events with high-profile speakers that our members are excited to come see—that is what creates engagement and excitement in our organization more than any other single thing. With that in mind, this year we have had, to date, three exceptional dinner events, all of which were very well attended and received: Chief Justice Patricia Guerrero in February, esteemed trial lawyer Daralyn Durie in June, and, most recently, this month, another equally notable trial lawyer, Alex Spiro, introduced by chapter member Kathleen Sullivan, who also acted as moderator. The Guerrero and Spiro events were both held at the U.S. Grant—the first time in many years we have used this superior venue, something that has been met with much excitement and appreciation (the Durie dinner and our fourth quarter dinner were and will be held at Venue 808, a wonderful event space by the ballpark that has proven to be perfect for our needs). Finally, we have started buying drinks for the attendees—subsidized by sponsorship opportunities; this development that has also, not surprisingly, been well-received.

Still to come this year, as mentioned, is our forth quarter event, which, as is our recent tradition, will be a wine auction charity event, coupled with the awards ceremony for our annual mock trial program for local law students, which will be held on November 8. Further, our Dinner Committee co-chairs, Judge Michael Berg and Maggie Schroedter, are in the process of lining up exciting dinners for next year; more to come on that later.

Just around the corner is the all-chapter Annual Seminar, to be held this year at the Fairmont Orchid in Kona, HI, on October 11-15. We currently have 46 members scheduled to attend, an excellent showing. This year's theme is "The Finer Points: Practical Skills in Impractical Situations"; our Annual Seminal co-chairs Dan Gunning and Davis Lichtenstein, have been working hard along with their counterparts in our other chapters to prepare the event, and it promises to be very interesting and informative—to say nothing of a lot of fun.

We will fill you in on the lessons learned seminar in in next quarter's Report; until then, all of us in the chapter leadership wish you the best.

Paul Reynolds

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

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Ineffectively laying a foundation for admission of exhibits also creates confusion and wastes time. Attorneys should understand that is a real trial—not moot court.

Consider the following scenario:

> Attorney: "Your Honor, may I approach the witness?"
>
> Judge: "Why?"
>
> Attorney: "I want to show the witness Exhibit 4 for identification."
>
> Judge: "Very well."
>
> Attorney: "Do you recognize Exhibit 4 for identification?"
>
> Witness: "Yes."
>
> Attorney: "What does it purport to show?"
>
> Witness: "It's a picture of me taken last March."

That silly and unnecessary exercise can be completely avoided by counsel stipulating in advance of trial that Exhibit 4 can be received and published on an Elmo projector.

Another unnecessary and confusing exercise occurs when counsel do not know which exhibits have and have not been introduced into evidence at the conclusion of a lengthy trial. It is a burden on the clerk to accept responsibility for that and, often times, the clerk is confused as to what has and has not be introduced. My practice is to require that exhibits be received and recorded by the clerk as received when the witness is examined. Once the jury has seen the exhibit, it is in.

In long cases sometimes involving significant issues and millions of dollars in potential damages, disorganization and inefficiency can be irritating. Often times after Friday trial call, law firm representatives will come into the courtroom with several boxes full of ten to twenty trial exhibit binders. While this is a monument to the diligence of paralegals, I am amazed at the small number of exhibits that actually find their way into evidence at trial. Unsurprisingly, in trial, these binders are strewn in piles on counsel table and on the bench. As a result, counsel will approach a witness to show an exhibit from Binder 12 only to delay the trial because the exhibit is actually in Binder 17 which is somewhere behind counsel table.

I have two suggestions: First, trial counsel should personally review the binders in advance of trial to ensure that exhibits that will actually be used are located in binder one. Second, exhibits that will not be offered should be removed from a binder before the witness testifies and (unless stipulated to) shown to the witness on the stand on an Elmo projector for identification. This will save time and avoid counsel and witnesses from fumbling around piles of binders to find an exhibit.

Understanding the court

Ineffective practice resulting in efficiency and confusion has had a profound effect on the entire civil litigation system. Many lawyers can avoid frustration and irritation to themselves, judges, and clerks by having an understanding and appreciation of how the Civil Independent Calendar structure operates. This structure is the life blood of the entire system.

After a civil complaint is filed, it goes on a critical path towards trial. The first stop is a trial setting conference where the court calendars future dates, including expert witness exchanges, a motion and discovery cut-off, a trial readiness conference, and a trial call. Counsel must appear at the trial readiness conference after filing trial readiness reports to ensure that both sides will be ready to start trial in two weeks. Bench and jury trials are called Friday morning to start on the following Monday morning at 9 a.m. Trials proceed from Monday through Thursday from 9 a.m. to 4:30 p.m.

Trial briefs in a bench trial must be filed at or before the time of trial call and, in the case of a jury trial, a joint trial binder must be filed at the time of trial call. This joint trial binder must provide an agreed statement of the case, in limine motions with oppositions, witness lists, and an agreed upon verdict form. The binder, including the in limine motions, is generally reviewed by the court over the weekend before trial starts. Generally, in limine motions are argued and decided beginning at 8:30 a.m. on Monday in anticipation of a jury panel appearing in the department where the trial proceeds at (hopefully) 10:30 a.m.

Ex parte hearings are generally conducted Monday through Friday from 8:30 a.m. through 9 a.m. when an existing trial will proceed. A hard copy of an ex parte opposition must be filed in the Department by noon on the preceding day. This should be done by the attorney's office personally, since merely filing the application is untimely and worthless. It is imperative for counsel to understand and appreciate the efforts of the independent calendar judge to properly hear sometimes four to five ex parte matters—each of which must conclude by 9 a.m. when the jury is ready to enter the courtroom and proceed with trial. Counsel should therefore make every effort to cooperate with each other, ensure that ex parte appearances

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are absolutely necessary and understand the difficulties of getting through an ex parte calendar and seating the jury timely. Counsel should understand that poor practice such as filing a mountain of documents—un-tabbed and sometimes unedited—cannot and will not be properly considered by the court.

In addition to presiding over a week-long trial and hearing multiple ex parte matters at 8:30 a.m. from Tuesday through Thursday, a judge in a Civil IC department must prepare for the Friday law and motion calendars during the week. A law and motion calendar usually consists of a wide variety of motions: motions to compel discovery; motions for judgment on the pleadings; motions to be relieved; motions to disqualify; traditional writs of mandate and writs of administrative mandate; and many, many more. The law and motion horizon has become even more difficult with the recent addition of lemon law and private attorneys general (PAGA) cases. Attorney fee motions have become endemic.

Attorney friends have told me that I have an easy job because I have a personal research attorney to do the heavy lifting. If only that were true. Every independent calendar judge is assigned a research attorney who is usually a recent Bar member with limited or no experience practicing law or trying cases. Research attorneys read the cases that are cited and various submitted points and authorities and advise the judge accordingly. However, most judges themselves read and consider the actual cases that are vital to a decision. Research attorneys have their hands full preparing the Friday law and motion calendars and generally do not get involved with in limine motions, ex parte motions, or other matters that arise during the course of trial. The research attorney will usually provide a recommendation as to which direction a judge should follow with regard to a legal issue. It is, however, the responsibility of the judge alone to make a decision which sometimes acts as a death sentence for a significant, highly publicized case involving vital issues or millions of dollars.

Because of the stringent and demanding time constraints on Civil IC judges, attorneys should always strive to be efficient and cooperative. Tentative rulings are usually published to counsel Thursday afternoon. When the Friday motion calendar is called, counsel orally argue the merits of each motion. This is a time when counsel should cooperate and make every effort to convince the court in the limited time available that its tentative ruling is or is not correct, so that the judge has enough time to get through the calendar. It is painful to experience what are often times woefully inadequate and sometimes counterproductive oral arguments. For example, some attorneys fail to isolate their most effective point because of a perceived need to cover every single point and authority that has already been set forth in a written memorandum. Some attorneys simply read a prepared oral argument while completely oblivious to the fact that it is often times boring and hard to follow.

I am amazed at another counterproductive practice that occurs when arguing legal authorities in motion hearings and in bench trials. Counsel will raise a particular case—usually for the first time—suggest that it is controlling, and simply offer a legal citation, expecting that the judge will take the matter under submission to read the particular case when time is available. It is my practice that if counsel finds a case prior to arguments that he or she believes is truly controlling, he or she should provide a copy of the case to the court and to opposing counsel at the time of the hearing. At this time, counsel should also provide a reason as to why the case was not cited previously. Nearly every time this practice is pursued, I will take the matter under submission and read the proffered case as soon as possible. This is obviously a more effective practice than to simply bombard the court with a series of citations which the court will usually ignore.

One thing is clear: the proper functioning of a Civil IC department cannot proceed without the understanding, appreciation, and cooperation of practitioners who appear there. This has become abundantly clear with regard to ex parte requests for orders shortening time.

Efficiency in practice is more important than ever. The recent pandemic has caused a significant backlog for all events involved in civil litigation. Expedited dates are at an absolute premium, which fact is confounded by certain legislative cutoff mandates, particularly in the area of summary judgement motions. The bottom line is that counsel who wish to calendar a motion to compel further discovery responses or to continue a summary judgement motion should understand that they are battling a tsunami if they expect to calendar a quick appearance before trial.

Online appearances have become much more prevalent, and this phenomenon has brought with it its own series of negative issues and challenges. Effective and professional practice online should mirror that of a courtroom. It goes without saying that counsel appearing online should make an effort to appear timely and unmuted so as not to delay and disrupt their own appearance and cause a shutdown of the entire hearing.

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Additionally, counsel making a remote appearance from home should remember that they are still attorneys representing clients in a court of law. They must always dress, act, and speak like attorneys. Some judges have reported attorneys appearing virtually in t-shirts, shorts, and—incredibly—P.J's.

It is therefore imperative that counsel understand and appreciate the present real world legal landscape and stipulate and cooperate as much as possible. Attorneys who fail to do this do a disservice to themselves and their clients, and potentially irritate and antagonize the judge and clerk.

Concluding thoughts

The San Diego Independent Calendar process is well-designed and effective. But when attorneys fail to cooperate with each other, or are oblivious to or fail to follow the rules, everyone—attorneys, clients, judges, jurors, and clerks—suffers. We really are all in this together.

The Hon. John S. Meyer is a judge for the Superior Court of San Diego County.

SCOTUS Ruling Defines Liability under Securities Act of 1933, Impacting Investor

On June 1, 2023, the United States Supreme Court settled a long-standing dispute over the interpretation of a provision in the federal securities laws. The case, ***Pirani v. Slack Technologies, Inc.,*** centered around the meaning of Section 11 of the Securities Act of 1933 (the "1933 Act") and its implications for investors seeking to recover losses due to false or misleading registration statements.

Before this decision, the majority of lower federal courts held that liability under Section 11 of the 1933 Act attaches only when buyers could trace their purchases of shares issued under a false or misleading registration statement. However, the Ninth Circuit Court of Appeals recently departed from this interpretation, ruling that a plaintiff may sometimes recover under Section 11 even when the shares they purchased were not directly traceable to a misleading registration statement.

The Supreme Court's task was to determine which approach aligns better with the terms of the statute. The 1933 Act and the Securities Exchange Act of 1934 (the "1934 Act") form the foundation of the federal securities laws. While the 1933 Act primarily focuses on the regulation of new offerings, the 1934 Act extends to ongoing disclosures and trading on secondary markets.

Section 11 of the 1933 Act imposes strict liability on issuing companies when their registration statements contain material misstatements or misleading omissions. The critical question before the Supreme Court was whether the term "such security" in Section 11 refers only to a security issued pursuant to the allegedly misleading registration statement or if it can encompass securities not directly linked to that statement.

After carefully examining the language and context of the statute, the Supreme Court disagreed with the Ninth Circuit Court of Appeals and sided with Slack Technologies. It found that the term "such security" in Section 11 refers to a security registered under the specific registration statement alleged to contain false or misleading information. This means that investors seeking to bring a claim under Section 11 must demonstrate that the securities they hold are traceable to the particular registration statement in question.

Writing for a unanimous Court, Justice Gorsuch emphasized that the Court's interpretation is consistent with prior Supreme Court decisions and the contextual clues provided by the statute itself. He also noted that the broader interpretation suggested by Mr. Pirani, the plaintiff in the case, lacked sufficient clarity and raised concerns about the limits and implications of such an approach.

This ruling has significant implications for investors seeking recourse under Section 11 of the Securities Act. It clarifies that recovery for misstatements or omissions in registration statements is limited to securities traceable to the specific registration statement alleged to be false or misleading. The decision aligns with the longstanding interpretation of the lower courts and provides certainty for issuers and investors alike.

The ruling may impact the recoverability of losses for investors who purchased unregistered shares or shares not directly connected to a defective registration statement. Investors will need to ensure their claims meet the traceability requirement set forth by the Supreme Court to establish liability under Section 11.

Overall, the Supreme Court's decision in ***Pirani v. Slack Technologies, Inc.*** brings clarity to the interpretation of securities laws and sets a precedent for future cases involving claims under Section 11 of the 1933 Act. Investors and issuers will need to carefully consider the implications of this ruling when assessing potential liabilities and evaluating investment decisions.

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Permission from Frank Johnson, Partner at Johnson Fistel and Board of Governors Member of ABTL.

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Can Employers Compel Arbitration of PAGA Claims? The California Supreme Court Has The Last Word

(PART 4 OF THE 4 PART SERIES)

by Caitlin Macker, Attorney at Caldarelli Hejmanowski Page & Leer LLP
Review and revisions by Marisa Janine-Page, Partner at Caldarelli Hejmanowski Page & Leer LLP

For the past year, the fate of Private Attorney General Act litigation has unfolded in this ABTL Newsletter. The California Supreme Court has delivered the last word on the matter – or has it?

Refresh On How We Got Here.

Two decades ago, the California Legislature enacted the Private Attorneys General Act to respond to a shortage of government resources to pursue enforcement of Labor Code violation complaints; it allows private plaintiffs to pursue claims of those violations, as to all persons affected, on behalf of the state and without the need for class certification. One decade ago, the California Supreme Court held in ***Iskanian v. CLS Transportation Los Angeles, LLC*** (2014) 59 Cal.4th 348 that an employer's arbitration agreement with its employees was unenforceable as to PAGA claims. As a result, the number of PAGA lawsuits being filed dramatically increased and employers were forced to incur the costs and bear the discovery burdens and litigation delays associated with litigating these claims in court.

One year ago, SCOTUS upended ***Iskanian*** in its ***Viking River Cruises, Inc. v. Moriana*** (2022) 142 S.Ct. 1906 decision, holding that the Federal Arbitration Act ("FAA") preempted California's rule prohibiting the arbitration of PAGA claims. The SCOTUS majority held that an employee with a valid arbitration agreement covered by the FAA may be compelled to arbitrate their individual PAGA claims and thereafter lack standing to pursue the representative PAGA claims. However, in concurring opinions, the lack of standing to pursue the representative PAGA claim was called into question as a matter of state law for California courts to decide.

One month ago, the California Supreme Court addressed this issue in its highly-anticipated decision in ***Adolph v. Uber Technologies*** (2023) 14 Cal.5th 1104.

What Happened In Adolph v. Uber Technologies?

In ***Adolph,*** the plaintiff employee filed a PAGA complaint against Uber Technologies alleging he and other individuals were misclassified as independent contractors when they signed up to be delivery drivers on the "Uber Eats" app, and that Uber violated numerous Labor Code sections as a result.

As part of the employee's onboarding process, the employee signed an arbitration agreement. The arbitration agreement provided that the employee would not "bring a representative action on behalf of others under [PAGA] in any court or in arbitration." The agreement also contained a severability clause requiring that if the PAGA waiver was ever found to be unenforceable, the representative PAGA claim must be stayed pending the outcome of any individual claims in arbitration.

Uber successfully moved to compel arbitration of the employee's individual PAGA claims. The employee then amended his complaint to eliminate his individual PAGA claims, retaining only the representative PAGA claim and sought a preliminary injunction preventing arbitration. Uber moved to compel arbitration of the employee's independent contractor status and to compel the arbitration agreement. The trial court granted the plaintiff's motion for preliminary injunction and denied Uber's motion to compel, and the appellate court affirmed.

Uber filed a petition for California Supreme Court review. Before briefing even began, SCOTUS published its ***Viking River Cruises*** decision. Shortly thereafter the California Supreme Court granted review in ***Adolph*** – positioning itself to have the last word on standing and arbitration of PAGA claims.

The California Supreme Court's Last Word on PAGA

On July 18, 2023, the California Supreme Court held that an order compelling arbitration of an employee's individual PAGA claims does not strip the employee of standing to litigate non-individual PAGA claims in court.

What Does The Adolph Decision Mean For California Employers?

There are a two key takeaways for California business and employment attorneys and their clients.

First, a carefully crafted arbitration agreement is key to navigate the nuances that have developed in the case law over the past two decades and especially the last year. While employers will not be able to prevent an employee from bringing a representative PAGA action in court, employers can

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Can Employers Compel Arbitration of PAGA Claims? | *Continued from page 8*

streamline the process with certain provisions in their arbitration agreements: 1) provide for FAA law, 2) include a severability clause, 3) expressly provide that the arbitration of individual PAGA claims proceeds first, 4) agree that the issue of whether the individual is an "aggrieved employee" must be decided by arbitration, and 5) agree that any representative PAGA claim is stayed pending the finality of the arbitration of the individual PAGA claim.

Second, proceeding with the individual PAGA claim in arbitration first still lessens the costs, delays, and burdens of litigating a PAGA action in court. For example, by arbitrating individual PAGA claims before a representative action, employers can target proving the plaintiff employee is not an "aggrieved employee." If successful, the employee then lacks standing to pursue the stayed representative PAGA claim and it must be dismissed without having to face the burden and expense of overbroad discovery regarding every non-exempt employee during the PAGA limitations period. Moreover, the risks of an adverse outcome in arbitration may encourage early settlement.

But Will The California Supreme Court's Last Word Be The Last Word?

California citizens and/or the Legislature may get the last word. There is currently a petition circulating for signatures that seeks to put a revamped version of PAGA on the 2024 ballot. The proposed law seeks to curtail abusive tactics in soliciting otherwise happy employees to sue their employers with enticing false promises of money and reallocate resources to enable the government to effectively enforce Labor Code violation complaints. It has also been rumored for a while now that PAGA reform is underfoot at the Legislative level.

Further, ***Adolph,*** in its desire to respond to the ***Viking River Cruises*** decision, failed to consider the fact that the plaintiff employee amended his complaint to eliminate his individual PAGA claim as an end-run around the order compelling him to arbitrate his individual PAGA claims. By ignoring this nuance and tactic – that is gaining traction throughout the trial courts – the California Supreme Court left ***Adolph*** and PAGA exposed to once again give SCOTUS the last word. Will it? Unless and until then, this four-part PAGA series comes to an end.

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.

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JUDICATE WEST CELEBRATING 30
Alternative Dispute Resolution

We Proudly Welcome to Our Exclusive Roster of Neutrals

Hon. Nita L. Stormes, Ret.

Based in San Diego, Judge Stormes is available for mediation, arbitration, and private judging throughout Southern California.

We congratulate Judge Stormes on her retirement after 23 years of distinguished service to the U.S. District Court for the Southern District of California.

As a Federal Magistrate Judge, with five years as Presiding Magistrate Judge, she heard thousands of civil cases as a settlement judge, handling virtually every type of civil matter filed in federal court. Prior to her appointment, she served for 16 years as an Assistant U.S. Attorney in San Diego.

She is widely recognized for her wealth of knowledge and experience delivered in tandem with an assertive but compassionate demeanor, and, most importantly, an unrelenting determination to reach fair resolutions.

Learn More About Judge Stormes

JudicateWest.com
(619) 814-1966

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Interview with Justice Kelety

By Janelle Neubecker

On April 7, 2023, Julia C. Kelety was appointed as an Associate Justice of the California Court of Appeal by Governor Gavin Newsom. Justice Kelety has a strong grounding in appellate work. She served as a judge in the appellate division in the California Superior Court. And, as an Assistant United States Attorney, she wrote briefs and argued appeals in the United States Court of Appeals for the Ninth Circuit for cases she had handled at the trial level. Justice Kelety also began her legal career at the appellate level, as a judicial law clerk to Judge Mary M. Schroeder of the Ninth Circuit.

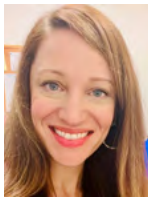
Originally from Arizona, Justice Kelety graduated summa cum laude from the University of Arizona in 1982. Her parents died quite young, so she was used to figuring things out on her own, and she has always been confident and independent. Although in college she initially lacked a clear idea of what she wanted to do, given her strong academic record and her enjoyment of writing and analysis, Justice Kelety ultimately decided she would go to law school.

In 1985, Justice Kelety graduated magna cum laude from Cornell Law School. She was invited to join Cornell Law Review, for which she served as Article Editor, and was a summer associate at Gibson, Dunn & Crutcher LLP in New York City. After law school, Justice Kelety accepted a clerkship with Judge Schroeder in Phoenix, and then returned to New York City to join Gibson Dunn as an associate. While she litigated accountant defense cases, Justice Kelety saw how the discovery process played out at trial, which she has kept in mind ever since. In 1990, after working in New York City for three and a half years, Justice Kelety decided to return to the western United States to fill one of the positions with the United States Attorney's Office in San Diego, where she litigated financial fraud cases, primarily telemarketing fraud.

Justice Kelety reflects on how important it was for her to have served as a judicial clerk to Judge Schroeder, specifically, to see a woman working in such an important position. United States Supreme Court Justice Sandra Day O'Connor was also a role model for Justice Kelety. Before Justice O'Connor became the first woman to be appointed to the United States Supreme Court, she had briefly left the practice of law to care for her children, while maintaining a career by becoming politically involved.

In 1997, after Justice Kelety married and had children, she began working in estate planning at a small San Diego law firm, Wiggins & Kelety LLP. Like Justice O'Connor, Justice Kelety became involved in the legal community, especially in the Lawyer's Club of San Diego. Several years later, she was encouraged by United States District Court Judge Cynthia Bashant and former United States Attorney Carol C. Lam, both California state court judges at the time, to apply for one of the vacant judgeships with the California Superior Court. In 2003, she was appointed by Governor Gray Davis as a Judge of the Superior Court. Justice Kelety spent 20 years as a Superior Court Judge, in the Appellate, Probate, Criminal, and Juvenile Dependency Divisions, until her appointment to the Court of Appeal.

Justice Kelety is inspiring to me not only because of the hard work she has put into her career and her resulting achievements but also because she seems to have largely blazed her own trail.



Janelle Neubecker is a Judicial Law Clerk at the United States District Court for the Southern District of California

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The Breadth and Precision of California's Anti-SLAPP Statute

By Nathaniel R. Smith

Introduction

Experienced practitioners know that California's anti-SLAPP statute provides a potent procedural weapon for early dismissal and attorneys' fees. But you may be surprised by the substantive scope of conduct it protects, or the precision with which it can be deployed.

Overview of Anti-SLAPP Laws

Code of Civil Procedure section 425.16 codifies California's anti-SLAPP statute, which seeks "to resolve quickly and relatively inexpensively meritless lawsuits that threaten free speech on matters of public interest." Common examples of SLAPP suits – strategic lawsuits against public participation – include defamation, interference with contract or prospective business advantage, nuisance and intentional infliction of emotional distress.

California is one of 32 States (plus the District of Columbia) having an anti-SLAPP law on the books as of April 2022. The laws share the same core function: providing a defense against lawsuits brought primarily to chill the valid exercise of constitutional rights. But they vary in the scope of rights protected and in the procedure for vindicating those rights. Some protect only a narrow range of conduct. Massachusetts, for example, only protects defendants against cases brought in retaliation for petitioning the government. Others lack a procedure for early dismissal of anti-SLAPP claims but instead decide the SLAPP issues at trial; Virginia is an example there.

Substantively Broad

California's anti-SLAPP law is robust both in substance and procedure. Substantively, the law authorizes a special motion to strike a claim "***arising from*** any act of that person in furtherance of the person's ***right to petition or free speech*** under the United States Constitution or the California Constitution ***in connection with a public issue***." Procedurally, the statute authorizes a special motion to strike the SLAPP claim(s) at an early stage, and a mandatory fee award to a defendant who prevails on the motion.

The anti-SLAPP statute identifies four categories of protected activity that fall within its substantive reach. Subdivisions (e)(1) and (e)(2) cover "any written or oral statement or writing made before [or in connection with an issue under consideration or review by] a legislative, executive, or judicial body, or any other official proceeding authorized by law." Subdivision (e)(e) and (4) protect certain speech made "in connection with a public issue or an issue of public interest."

Speech before a legislative body or in connection with an issue under consideration by a legislative body calls to mind core political speech; speech on issues under review by a judicial body harkens the policies underlying the litigation privilege. No surprise that the anti-SLAPP statute would aim to protect those speakers from lawsuits intended to chill such speech. But note also the inclusion of "any other official proceeding authorized by law" in subsection (e)(1) and (2). One might be surprised to learn it encompasses medical peer review proceedings, which are now mandated by statute.

The term "issue of public interest" is construed broadly in the anti-SLAPP context. For example, a dispute between a fourth grade basketball coach and members of a parent teacher organization regarding parental complaints about the plaintiff's abrasive coaching style constituted an issue of public interest because "the safety of children in sports" is an issue of public interest, the "suitability" of the coaching style "was a matter of public interest among the parents," and "problem coaches/problem parents in youth sports" is an issue of public interest. A tweet by a not-terribly-well-known actor (Damon Wayans) referencing his even-less-well-known movie (***A Haunted House*** 2) has likewise constituted a "matter of public interest."

Procedurally Precise

Litigating a special motion to strike involves a two-step process. First, "the moving defendant bears the burden of establishing that the challenged allegations or claims 'aris[e] from' protected activity in which the defendant has engaged." Second, for each claim that does arise from protected activity, the plaintiff must show the claim has "at least 'minimal merit.' " If the plaintiff cannot make this showing, the court will strike the claim."

The special motion to strike is sometimes referred to as a "mini summary judgment" or "summary-judgment-like procedure" because the second prong requires the plaintiff to provide evidence supporting its SLAPP claim and prohibits the plaintiff from relying on the allegations of the complaint.

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But an anti-SLAPP motion differs from a motion for summary judgment in the precision with which it can be granted. Unlike a motion for summary adjudication, a special motion to strike can eliminate less than an entire cause of action. As the California Supreme Court recently explained:

Analysis of an anti-SLAPP motion is not confined to evaluating whether an entire cause of action, as pleaded by the plaintiff, arises from protected activity or has merit. Instead, courts should analyze each claim for relief — each act or set of acts supplying a basis for relief, of which there may be several in a single pleaded cause of action — to determine whether the acts are protected and, if so, whether the claim they give rise to has the requisite degree of merit to survive the motion.

An anti-SLAPP motion can thus be used to strike, for example, some but not all of the acts a plaintiff alleges to support a retaliation cause of action. In that sense, it is more akin to an ordinary motion to strike than a "mini summary judgment" or adjudication – but carrying a right to attorneys' fees and little chance of post-hearing leave to amend.

Conclusion

California's anti-SLAPP law is potent and robust. It protects a broad range of conduct and provides an early mechanism for weeding out meritless claims. SLAPP claims can be found in some non-obvious settings, like a tweet about a movie or complaints about an abrasive youth sports coach. Additionally, the anti-SLAPP law can be used with scalpel-like precision to excise less than an entire cause of action. The anti-SLAPP law should be at the forefront of a litigator's mind when analyzing an incoming (or drafting an outgoing) complaint, with that duality in mind.

Nathaniel R. Smith is a Senior Counsel at Duckor Metzger & Wynne, A Professional Law Corporation, and a past member of ABTL's Leadership Development Committee.

An Interview with Justice Jose S. Castillo

By: Sydney Leigh Martin

Justice Jose S. Castillo was nominated to the California Court of Appeal on February 17, 2023, and was confirmed on April 7, 2023. Justice Castillo was kind enough to accept an interview with the ABTL and share his amazing insights from over 17 years of legal practice.

"I am proactive in dealing with new situations." As an immigrant who arrived here as a young child, Justice Castillo had to figure out how things worked in this new land he described as a "world completely different from anything [he] had known before." He absorbed everything he could to be able to understand English and the culture, and these observational skills have translated to his position as both a state court judge and now an appellate justice. Justice Castillo is constantly gathering information to become proactive in dealing with new situations, such as his new experience on the Court of Appeal. Once he reviews the parties' briefs and relevant case law, he organizes his thoughts and contemplates potential outcomes during long morning runs.

"At the end of the day, I serve the public and I think mentorship is important because it increases the legitimacy of the judicial system." Justice Castillo remains proactive in the legal profession by seeking and providing mentorship. He heavily emphasizes mentorships for all attorneys as a key to navigating the profession. He cites mentors as those who helped him make it to where he is, and he also views mentorship as a tool for advancing the broader community. As an active participant in Just the Beginning – A Pipeline Organization, a program that introduces San Diego youth to the legal profession, he encourages lawyers to volunteer as mentors to high school students. We should be role models, he says, because "as lawyers we can influence the future leaders of our community."

"Making the decision to become a judge should only be done if it is right for you." When asked what advice he had for ABTL attorneys seeking to pursue the bench, Justice Castillo also emphasized mentorship. As someone who has been through the application process twice for both his time as a trial judge and now as an appellate justice, Justice Castillo thought long and hard before applying. He encourages civil practitioners, and anyone else, interested in pursuing a career on the bench to seek mentors who can help them through the application process. He also encourages lawyers to seek out opportunities to file pleadings and engage in oral argument. If those opportunities are not readily available, he encourages attorneys to volunteer as a ***pro tem*** judge in the Superior Court or even teach at a law school. There is no right path to the bench, but having experience contemplating the law and being in the courtroom is a step in the right direction.

"Sometimes, brevity is more forceful than being repetitive." For those who are not interested in being on the bench, but want advice on appearing before a judge, Justice Castillo also had some helpful insight. He first recommends that your briefs be clear and concise. For example, "if the brief could be 15 pages, there is no need to make it 20." He also encourages attorneys to listen to the questions that are being asked by a judge or appellate panel, because there is a reason why those questions are being asked and the answers could affect the ultimate disposition of the case.

So, ABTL, when you are out in the field, be proactive, seek and provide mentorship, and be intentional about the work you are producing before the court. These insider tips from Justice Castillo could help you be a better lawyer not only in front of the court, but in the community more broadly.

Sydney Leigh Martin, Esq. is a Law Clerk at the U.S. District Court for the Southern District of CA

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