

ASSOCIATION OF BUSINESS TRIAL LAWYERS

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REPORT

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TECH TIPS FROM THE BENCH: AN INTERVIEW WITH HON. EMILIE ELIAS



Jordan McCrary

Here are nine technology tips for litigators based on my recent interview with Los Angeles Superior Court Judge Emilie H. Elias, presiding in Department 324 of the Central Civil West Courthouse. Judge Elias is the Supervising Judge of the Complex Civil Litigation Panel.

1. Embrace e-service. Lawyers appearing before Judge Elias are required to use e-service. In most cases, counsel may pick which e-service provider to use. When a document is e-served, counsel receives an e-mail notification, and the document is stored on an electronic database that can be accessed anytime, anywhere there is an internet connection.

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HOW TO TALK TO A JUDGE



Hon. Elizabeth A. Grimes

In a recent conversation with Aaron Bloom, YLD co-chair, Justice Elizabeth Grimes mentioned how important it is for lawyers to know how to talk to a judge. That conversation led to this article, a collaboration among an appellate justice, a trial judge, and a trial lawyer.

It Is Not Just About the Briefs.

In law and motion hearings, lawyers too often expect the judge to engage counsel in discussion only of the evidence, its admissibility, or the fine points of the law in dispute. While you must be thoroughly prepared to discuss such matters, if you have done your job well in briefing, the judge will know what facts and law are in dispute, and at the hearing, the judge may be looking to you for help in resolving the bigger picture. Ah, you say, but how can I know what the judge perceives to be the bigger picture?



Hon. Charles E. Horan



Michael D. Stein

Put yourself in the court's shoes, and think about the daily life of a trial judge, a large portion of which consists of battling to get lawyers, jurors, witnesses, and courtroom staff all in position to begin work. It is a bit like herding cats. Everything you

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PRESIDENT'S REPORT



David A. Battaglia

This has been a banner year for the LA Chapter of the ABTL, and I am *extremely* proud of everyone's collective and committed efforts.

Beginning with our Co-Editors of this ABTL Report, David Axelrad and Margaret Grignon, you are reading the 4th issue of the Report published this year – which has not been done before in the prior 40 years of the ABTL's existence. The quality of the Reports have been superb, with special thanks to all the jurists who

have submitted articles. The addition of valued sponsors for the Reports this year (for the first time) has resulted in substantial savings. (Please use the services of our ABTL Sponsors!)

Our Public Service Committee, chaired by Jeanne Irving and Gretchen Nelson, set records for contributions to the ABTL's Holiday Toy Drive to benefit children at the Edelman's Children's Court and the 93rd and MLK schools, as well as a recent golf event that raised over \$10,000 to benefit Hathaway-Sycamores Child and Family Services which provides mental health assistance to children in need. The Committee also coordinated informative presentations to students at UCLA, Southwestern, Loyola, and Pepperdine law schools (a first), and scholarships to students of all five accredited law schools in Los Angeles.

Our Membership Committee, chaired by Susan Leader with Vice-Chair James Farrell, also set a new record this year. Thanks to you, there were 1,560 ABTL members this past year, an all-time high. And we are nearly at 1,500 members again this year – a far cry from 550 members just five years ago. We are honored to acknowledge those firms that have signed up all of their business litigators as members on the LA page of our ABTL website, www.abtl.org.

Our Courts Committee, chaired by Robyn Crowther and David Graeler (with assistance from all of the jurists on the ABTL Board and Judicial Advisory Council), coordinated the ABTL's active participation in the successful Mandatory Settlement Conference Program and the court funding efforts for the Los Angeles Superior Court, as well as the efforts of the National Women's Judges Association and its Informed Voter Project, among others. The ABTL's commitment to support the federal and state courts remains as strong as ever, and we much appreciate the vigorous dialogue that we help promote between the bench and the bar, and all sides of the bar, on a myriad of business litigation issues.

With the creation of the Judicial Advisory Council this year, and Mary Haas as the Board Liaison Chair, we have gone from 10 judges and justices on the Board to 22 jurists this year with the combined Board

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ASSOCIATION OF BUSINESS TRIAL LAWYERS

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and JAC. The JAC, along with Mary and Jeff Koncius, spearheaded our efforts to revise and enact new Civility Guidelines, a wonderful and lasting accomplishment. And the jurists on the JAC have been most generous in contributing their energy to ABTL events, publications, public service, and the Young Lawyer's Division.

Speaking of events, our Dinner Programs Committee, chaired by Michael Turrill with Vice-Chairs Jason Murray and Sascha Henry, did a superb job upholding the stellar reputation of the ABTL for the very best legal programs, with sell-out dinners featuring Preet Bharara (U.S. Attorney for the Southern District of New York), Kathryn Ruemmler (White House Counsel for President Obama), Titans of the Bar demonstrating for us the Art of Voir Dire, the fascinating story of the "Extraordinary" Trial of *Chevron v. Donziger*, as well as our annual judicial reception honoring all of our local jurists.

Our Lunch Programs Committee, chaired by Sabrina Strong with Vice-Chair Paul Salvaty, also shined bright. We learned about the legal issues related to legalized marijuana from many perspectives (with MCLE substance abuse credit), heard from plaintiff Ed O'Bannon himself in his fight for the rights of student-athletes in *NCAA v. O'Bannon* (with the invaluable assistance of Jon Loeb), and acquired valuable insights into how to use and defuse the "media circus" in headline business cases.

The Technology Committee achieved so much this year it is difficult to fathom. Chaired by Eric Swanholt, with Jordan McCrary, Christian Nickerson, and Jason Wright, they coordinated the videotaping of many of our programs for posting on our website for MCLE credit for our members; the distribution of program announcements via e-blasts and LinkedIn (with thousands of dollars in savings); the conversion of all of our ABTL Reports to a word-searchable format on our website for easy access; a complete overhaul of our website with postings and tabs for Board and JAC members, our ABTL sponsors, all law firms that signed up their litigators as members, as well as a tab for our new Civility Guidelines; and crafted a Wikipedia page with coordination with all other State chapters.

The Young Lawyer's Division was equally ambitious and accomplished. With Board Liaison Chair Jeff Koncius, and YLD Chairs Ted Andrews and Aaron Bloom and Vice-Chair Rachel Feldman, they created their own Board and strategic plan; had monthly lunches with jurists as well as a sponsored

judicial mixer (a first) to help educate junior attorneys with invaluable insights directly from the bench; held four separate panel programs with topics ranging from class action settlements to advice from inhouse counsel; and assisted in membership recruitment, public service efforts, law school presentations and articles for the ABTL Report. They have been a pure joy to watch – more than tripling the programs and participation of our YLD as we seize the future.

Our Annual Seminar Committee, chaired by Valerie Goo and Bernice Conn, did an amazing job organizing the mock trial presentations at our Hawaii event, as well as the mock jury itself, from which all of us learned from the best and brightest trial lawyers and judges throughout the State – with special thanks to Bruce Broillet, Judge Dan Buckley, Dana Fox, Justice Jeffrey Johnson, Judge Jacqueline Nguyen, Judge Beverly O'Connell and Sabrina Strong. And the dinner on the U.S.S. Missouri with a keynote address by the Commander of U.S. Pacific Fleet was a historic event we will remember forever.

We also had the honor this year of celebrating our 40th Anniversary with a formal dinner event for all present and past Board members. It featured a rousing concert by Don Felder, of Eagles fame, and was coordinated by our Special Events Chair, Olivier Taillieu, and Tom Girardi to whom we owe special thanks. The last time we had a celebratory event for everyone who has served and supported the ABTL on the LA Board through the years was a decade ago.

Finally, I could not have asked for a better team of Executive Officers or Executive Director – true friends and professionals in every way. Bryan Merryman, Nancy Thomas, and Mike McNamara served tirelessly as Officers with verve, nerve and vision behind the scenes. And Linda Sampson, our Executive Director, was indispensable every step of the way; performing a whirlwind of activities with enduring love for the ABTL. They all were instrumental in the ABTL's success this year.

I am eternally grateful for the opportunity to have served you and the ABTL the last eight years on the Board and as an Executive Officer, and to see it continue to grow and flourish. It remains the best bar organization in the State dedicated to promoting the dialogue and mutual respect between the bench and all sides of the bar on business litigation issues. Carry on!

David A. Battaglia

Gibson, Dunn & Crutcher LLP

ABTL President, 2014-2015

**GENERAL JURISDICTION IN
CALIFORNIA STATE COURTS
FOLLOWING *DAIMLER AG V. BAUMAN*
(2014) 134 S.Ct. 746.**



Anne M. Grignon

For only the fourth time in the 70 years since the U.S. Supreme Court issued its seminal personal jurisdiction decision, *International Shoe Co. v. Washington* (1945) 326 U.S. 310, the U.S. Supreme Court has addressed the proper exercise of general jurisdiction over a foreign corporate defendant. In *Daimler AG v. Bauman* (2014) _U.S._, _ [134 S.Ct. 746., 751, 187 L.Ed.2d 624] (*Bauman*), the Court set the boundaries of general jurisdiction for corporate defendants primarily at the corporation's state of incorporation and the state where it has its principal place of business.

Bauman applied California's long-arm statute to a personal injury lawsuit filed in California by Argentinian residents against Daimler AG, based on the alleged actions of Daimler subsidiary Mercedes-Benz Argentina in Argentina. (*Bauman, supra*, 134 S.Ct. at p. 750.) Daimler, a German public stock company headquartered in Germany, manufactured Mercedes vehicles in Germany. (*Id.* at p. 751.) Mercedes-Benz USA, LLC, an indirect subsidiary of Daimler, incorporated in Delaware with its principal place of business in New Jersey, distributed Mercedes vehicles to dealerships throughout the country, including California. (*Ibid.*) Mercedes-Benz USA had multiple California-based facilities. (*Ibid.*) California accounted for 10% of new Mercedes vehicle sales in the United States, and California sales accounted for 2.4% of Daimler's worldwide sales. (*Ibid.*) *Bauman* provided no corporate information for Mercedes-Benz Argentina. (*Ibid.*)

The plaintiffs only named Daimler in their suit. (*Bauman, supra*, 134 S.Ct. at p.752.) Daimler moved to dismiss for lack of personal jurisdiction, and the plaintiffs opposed, claiming Daimler was subject to general jurisdiction in California through its own business

activities or the activities of its agent, Mercedes-Benz USA. (*Ibid.*) The district court granted the motion to dismiss, but the Ninth Circuit reversed. (*Id.* at pp. 752-753.)

The Supreme Court reversed the Ninth Circuit. (*Bauman, supra*, 134 S.Ct. at pp. 759-760.) The Court held that a corporation is at home for general jurisdiction purposes in its state of incorporation or place of headquartering, because these locations "afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims." (*Id.* at p. 760.) Only in "exceptional cases" may general jurisdiction be based on whether a corporation's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State." (*Id.* at pp. 761, 762, fn. 20.) Being "at home" requires more than merely "doing business in" a state. (*Ibid.*) Because neither Daimler *nor* Mercedes-Benz USA were at home in California (both were incorporated and had principal places of business in locations other than California), California could not exercise general jurisdiction over Daimler. (*Id.* at p. 762.)

Last year, Daimler AG contested jurisdiction in California state court. In *Young v. Daimler AG* (2014) 228 Cal.App.4th 855 (*Young*), California plaintiffs sued Daimler in a products liability action arising out of an accident in California. (*Id.* at pp. 857-858.) The vehicle at issue was designed and manufactured by a former indirect subsidiary of Daimler. (*Ibid.*) The subsidiary was a Delaware corporation with its principal place of business in Michigan. (*Id.* at p. 858.) Other subsidiaries of Daimler allegedly had extensive California contacts. (*Id.* at p. 859.) The trial court granted Daimler's motion to quash service of summons. (*Id.* at p. 860.) Applying the Supreme Court's decision in *Bauman*, the Court of Appeal affirmed the absence of general jurisdiction over Daimler. (*Id.* at pp. 865-867.) The court rejected plaintiffs' arguments that (1) *Bauman* is limited to foreign parties and events occurring outside the United States,

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and (2) general jurisdiction may be premised on the activities of Daimler's indirect subsidiaries in the state. (*Ibid.*)

The California Court of Appeal again tackled the post-*Bauman* general jurisdiction analysis in *BNSF Railway Co. v. Superior Court* (2015) 235 Cal.App.4th 591 (*BNSF*). The plaintiffs filed suit against BNSF and numerous other entities for the wrongful death of their husband and father from mesothelioma allegedly caused by exposure to BNSF's asbestos in Kansas. (*Id.* at p. 595.) BNSF is incorporated in Delaware and headquartered in Texas. (*Id.* at p. 596.)

BNSF moved to quash service of summons based on lack of personal jurisdiction. (*BNSF, supra*, 235 Cal.App.4th at p. 595.) BNSF argued that general jurisdiction did not exist because BNSF was not at home in California. (*Id.* at p. 596.) BNSF submitted evidence that it provided freight transportation over 23,319 miles of railroad track through 28 states and two Canadian provinces. (*Id.* at p. 596.) Its principal officers were all located in Texas, as was BNSF's central operations center. (*Ibid.*) BNSF's highest concentrations of employees (approximately 20%) and railroad track (approximately 12%) also were in Texas, where it generated most of its revenue. (*Ibid.*) California housed only 8.1% of its total workforce (3,520 employees), provided only 6% (\$1.4 billion) of its revenue, and contained less than 5% of its total track mileage (1,149 miles). (*Ibid.*) The trial court denied BNSF's motion, and BNSF filed a petition for writ of mandate. (*Id.* at p. 597.) The Court of Appeal vacated the order. (*Id.* at pp. 605-606.)

In discussing *Bauman*, the Court of Appeal noted that the exercise of general jurisdiction in states other than a corporate defendant's state of incorporation or principal place of business is permitted only in exceptional cases. (*BNSF, supra*, 235 Cal.App.4th at pp. 602-603.) The court also noted that general jurisdiction must include an appraisal of a corporation's activities in their entirety, *nationwide and worldwide*, not just within a particular

state. (*Id.* at 603.) Applying these principles, the court held that California did not have general jurisdiction over BNSF. (*Id.* at pp. 602-605.) It rejected the argument that *Bauman* did not apply to U.S. corporations. (*Id.* at pp. 603-604.) It refused to rest jurisdiction on BNSF's conduct of substantial business in California, because that business was relatively small in comparison to BNSF's activities elsewhere, and was directed by the Texas operations center. (*Id.* at pp. 604-605.) Finally, the court declined to find exceptional circumstances related to multiple defendants allegedly causing a number of indivisible asbestos exposures. (*Id.* at p. 605.)

The U.S. Supreme Court limited the reach of general jurisdiction against a foreign corporate defendant in *Bauman*, and the California Courts of Appeal followed suit in *Young* and *BNSF*. But this area of the law is continuing to develop. Indeed, issues relating to *Bauman* currently are pending in the California Supreme Court. (*Bristol-Myers Squibb Co. v. Superior Court*, Case No. S221038.)

Anne M. Grignon is Counsel in the Appellate Group at Reed Smith

DEVELOPMENTS IN POST-*CONCEPCION* ARBITRATION LAW AT THE U.S. AND CALIFORNIA SUPREME COURTS: THE CONVERSATION CONTINUES



John F. Querio

In *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), the United States Supreme Court held that the Federal Arbitration Act (FAA) preempted California case law invalidating as unconscionable arbitration clauses containing waivers of the right to proceed on a class basis. *Concepcion* built on the

U.S. Supreme Court's earlier ruling in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010) that a party cannot be forced to arbitrate on a classwide basis absent consent to such procedure in the arbitration clause. *Concepcion* and *Stolt-Nielsen* have spawned litigation regarding a number of follow-on questions that have now reached the United States and California Supreme Courts. The following cases concern the most significant of these questions:

1.) *Sanchez v. Valencia Holding Co., LLC*—the meaning of unconscionability after *Concepcion*

In *Sanchez v. Valencia Holding Co., LLC*, 201 Cal. App. 4th 74 (2011), *review granted* Mar. 21, 2012, S199119, the California Supreme Court will address the contours of California unconscionability law and the scope of FAA preemption in the wake of *Concepcion*. In *Sanchez*, the plaintiff challenged arbitral appeal and self-help remedies provisions in an arbitration clause included in his auto purchase agreement. The Court of Appeal held that these provisions were unconscionable and that this holding was not preempted by the FAA because *Concepcion* is limited to the class action context.

The California Supreme Court granted review in *Sanchez* several years ago. Last year, it requested supplemental briefing regarding the proper formulation for substantive unconscionability (e.g., “unfairly one-sided,” “so one-sided as to shock the conscience,” “unreasonably

favorable to one party,” “overly harsh,” “unduly oppressive”). The Supreme Court heard oral argument in *Sanchez* on May 5th, and will issue its opinion within 90 days. The Court’s decision will likely stand as a landmark setting the course of unconscionability law and the impact of FAA preemption in California for years to come.

2.) *Sandquist v. Lebo Automotive, Inc.*—whether a court or an arbitrator decides whether class proceedings are authorized by an arbitration clause

In *Sandquist v. Lebo Automotive, Inc.*, 228 Cal. App. 4th 65 (2014), *review granted* Nov. 12, 2014, S220812, the California Supreme Court will decide whether a court or an arbitrator has the power to determine whether class claims can proceed in arbitration, where the parties’ arbitration agreement is silent on the question. The Court of Appeal in *Sandquist* held that whether the plaintiff’s employment discrimination claims could be arbitrated on a classwide basis was an issue for the arbitrator to decide. This issue is significant because if the class arbitration question is relegated to arbitrators, errors in resolving that question will be largely immune from judicial review and could result in massive liability for defendants.

In granting review, the California Supreme Court enters an area of the law that has remained unsettled for over a decade. In *Green Tree Financial Corporation v. Bazzle*, 539 U.S. 444 (2003), a plurality of the United States Supreme Court said that an arbitrator should decide whether class arbitration is permitted where the arbitration agreement is silent on that point. However, in *Stolt-Nielsen*, the United States Supreme Court held that *Bazzle* was only a plurality opinion and therefore was not binding. Due to a shift in membership, the *Stolt-Nielsen* Court held that, where an arbitration agreement is silent regarding class arbitration, such arbitration is impermissible because it cannot be imposed where the parties have not agreed to it. *See Stolt-Nielsen*, 559 U.S. at 680, 684-87. The Court has since clarified that the question of who decides whether class arbitration is permissible remains open. *See Oxford Health Plans, LLC v. Sutter*, 133 S. Ct. 2064, 2068 n.2 (2013) (holding arbitrator’s ruling that parties agreed to class arbitration could not be vacated under FAA, but

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POST-CONCEPCION ARBITRATION LAW...continued from Page 6

noting that question of whether class arbitration is a matter for the arbitrator or the court was not at issue and has not yet been decided). A number of federal courts have reached conflicting decisions on the point, and California's appellate courts are also split on this issue. No matter which way the California Supreme Court decides this question, there is a significant chance the issue will find its way back to the United States Supreme Court.

3.) *McGill v. Citibank, N.A.*—whether state law prohibiting arbitration of public injunctive relief claims as against public policy is preempted by the FAA

In *McGill v. Citibank, N.A.*, 232 Cal. App. 4th 753 (2014), *review granted* Apr. 1, 2015, S224086, the California Supreme Court will decide whether its so-called “*Broughton-Cruz* rule” prohibiting arbitration of public injunctive relief claims survives *Concepcion*. In *Broughton v. Cigna Healthplans of California*, 21 Cal. 4th 1066 (1999), and *Cruz v. Pacificare Health Systems, Inc.*, 30 Cal. 4th 303 (2003), the California Supreme Court held that California public policy prohibits arbitration of claims for public injunctive relief brought under the Unfair Competition Law or the Consumers Legal Remedies Act, and that the FAA does not preempt this state public policy. Borrowing from federal cases holding that the FAA does not require arbitration where to do so would prevent the effective vindication of a federal statutory right, *Broughton* and *Cruz* applied this effective vindication exception to state statutory claims as well.

The *Broughton-Cruz* rule was called into question by *Concepcion*, where the United States Supreme Court held that the FAA does preempt state laws (such as bans on class arbitration waivers) that prohibit outright the arbitration of a particular type of claim or that otherwise stand as an obstacle to the FAA's objective of ensuring that arbitration agreements are enforced according to their terms.

In *McGill*, the California Court of Appeal—agreeing with an earlier Ninth Circuit opinion (*Ferguson v. Corinthian Colls., Inc.*, 733 F.3d 928 (9th Cir. 2013))—held that the California anti-arbitration rule announced in *Broughton* and *Cruz* does not survive *Concepcion*, and that the state public policy of prohibiting arbitration of public

injunctive relief claims is preempted by the FAA. The Court of Appeal explained that *Broughton* and *Cruz* incorrectly relied on the effective vindication exception which applies only to federal statutory claims, not state statutory claims. The California Supreme Court will now decide the future of the *Broughton-Cruz* rule. Should it uphold *Broughton-Cruz*, this case may also make its way up to the United States Supreme Court.

4.) *DirecTV, Inc. v. Imburgia*—the effect of the Supremacy Clause on the interpretation of arbitration clauses under state law

In *DirecTV, Inc. v. Imburgia*, 135 S. Ct. 1547 (2015), the United States Supreme Court recently granted certiorari to address how the Supremacy Clause applies to the interpretation of an arbitration agreement under state law. Specifically, the Court will decide whether a reference in an arbitration agreement to “the law of your [i.e., the customer's] state” means California law divorced from the preemptive effect of the FAA or California law as preempted by the FAA.

DirecTV's customer agreement contained an arbitration clause including a class action waiver along with a non-severability clause stating that, if “the law of your state” would find the class action waiver unenforceable, then the entire arbitration clause would be unenforceable as well. DirecTV customers brought a putative class action in California state court challenging early cancellation fees DirecTV charged them. DirecTV moved to compel arbitration on an individual basis, but the trial court found the class action waiver, and thus the entire arbitration clause, unenforceable. The California Court of Appeal affirmed, holding that the non-severability clause's reference to “the law of your state” meant California law shorn of the preemptive effect of the FAA. Before *Concepcion* struck it down as preempted by the FAA, California's so-called *Discover Bank* rule prohibited enforcement of class action waivers in consumer arbitration agreements under most circumstances. The Court of Appeal in this case held that the *Discover Bank* rule governed the DirecTV arbitration clause, regardless of *Concepcion* or the FAA.

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POST-CONCEPCION ARBITRATION LAW...continued from Page 7

In another case interpreting the same language in the same agreement, the Ninth Circuit called the argument the California Court of Appeal adopted “nonsensical.” See *Murphy v. DirecTV, Inc.*, 724 F.3d 1218, 1226 (9th Cir. 2013). While the issue the Supreme Court has taken up is comparatively narrow, the Court’s grant of review demonstrates its continuing interest in FAA preemption and the California courts’ uneven track record in ensuring that arbitration agreements are enforced according to their terms.

These cases are good examples of the ongoing conversation between the United States and California Supreme Courts about the meaning of *Concepcion*, the scope of FAA preemption of state law, and in what circumstances arbitration clauses in consumer and employment contracts will be enforced in state courts. Stay tuned for further developments.

John F. Querio is a partner at the civil appellate law firm of Horvitz & Levy LLP and an ABTL Member.

ABTL LOS ANGELES CHAPTER AWARDS ANNUAL SCHOLARSHIPS

Every year the ABTL awards \$2,000 scholarships to each of five third-year law students. The selection criteria for the scholarships include demonstrated commitment to public service, academic performance, likelihood of success in the legal profession and financial need. This year’s scholarship recipients were **Cameron Bell**, Editor-in-Chief of the Loyola of Los Angeles Law Review and Vice Chair of Loyola’s Public Interest Law Foundation; **Andres Holguin-Flores**, Co-President of Southwestern Law School’s Immigration Law Student Association and the Scholarship Coordinator for

Southwestern’s Public Interest Law Committee; **Sierra Gronewold**, President of the Public Interest Law Foundation at USC Gould School of Law and Senior Submissions Editor of the Southern California Law Review; **Jason Stavely**, Symposium Editor for the UCLA Law Review and an editor and Career Forum Chair of the UCLA Journal of Law and Technology; and **Joseph Spano**, Chapter President of the International Justice Mission and Vice President Emeritus of the Advocates for Public Interest Law at Pepperdine School of Law.



[L to R] ABTL Board member Gretchen Nelson, scholarship recipients Cameron Bell, Andres Holguin-Flores, Sierra Gronewold, Jason Stavely and Joseph Spano, and ABTL Board member Jeanne Irving.

“HOW TO TALK TO A JUDGE”...continued from Page 1

do to assist the court in the fundamental logistics of dispute resolution will inure to your client’s benefit, and earn you the respect of the court.

Listen to the judge. Judges do not appreciate lawyers who re-read their arguments, try to artfully steer the conversation away from the court’s questions to other areas where they feel on firmer ground, misstate the facts or law, or refuse to concede points when they are clearly on the losing side. When the court asks a question, answer *that* question, not the one you wish the court had asked. Lawyers who ignore the concerns made obvious by the court’s questioning and guidance are missing the most crucial part of the proceedings—where the court explains what is important to the *court*.

Respect the court’s time. Each motion, each objection, and each request for a conference outside the presence of the jury is a problem to be solved as efficiently as possible, because of the time pressures and competition for scarce courtroom resources. Be on time, pay attention, speak briefly and to the point, and anticipate ways to help the judge.

Most of a trial judge’s day is not spent issuing outcome-determinative rulings, but rather dealing with concerns about efficiency, settlement opportunities, obtaining stipulations rather than requiring court intervention, and seeking avenues to narrow and clarify the issues that are actually important to the outcome of the case, rather than being important to someone’s ego. Every case, after all, will be resolved, and it is the goal of the court to do so fairly, expeditiously, and as painlessly as possible. Not every issue must be litigated to the death. Every judge appreciates a reasonable advocate who maintains credibility by cooperative actions that ease the path to an eventual just resolution.

That is where you come in, the good advocate who has anticipated what the judge may be thinking. Look at your motion in the context of the overall disposition of the lawsuit. If your motion is outcome determinative, how confident are you that it will survive appellate review, as opposed to being merely a temporary and ultimately costly victory? In other words, be careful what you ask for.

If your motion is not outcome determinative, but may be raised as prejudicial error on appeal, can you help the trial judge find a way to resolve the dispute without creating an appellate issue? Just as most cases are eventually settled, so too can most issues be resolved by reasonable counsel.

***Six Things You Should Never Do (But First,
One Thing You Should Always Do)***

Always address the judge as “Your Honor.” This custom varies in other parts of the country, but in California, it is not appropriate to address the court as “Judge.” The terms “Sir” or “Ma’am” are respectful in many contexts, but when used to address a judge, they set one’s teeth on edge. (On the appellate court, counsel occasionally refer to the panel as “you guys,” also with teeth-gritting effect.)

Here are “Six Nevers When Talking to Judges”:

Never “bury the lead.” Stated differently, get to the point! Do not expect a trial judge with many other matters on the morning calendar and a jury likely waiting in the hallway to be enthralled with an argument that starts slowly and builds to a triumphant crescendo. Rather, lead with your best argument that in one or two sentences makes clear (a) what relief you seek (or oppose); (b) what authorities best support granting (or denying) the requested relief; and (c) what efforts you have undertaken, if appropriate or required (i.e., discovery motions), to resolve the dispute informally.

Never attack your opponent’s integrity. Judges are used to, and frankly tired of hearing, lawyers make grandiose statements attacking their opponent’s integrity or motives. Perhaps the most overused term in many lawyers’ written and spoken comments is “dilatatory.” As is true with arguing to a jury, if the lawyer has to dress up the facts with too many adjectives, that is a good sign that an opponent’s argument is not quite as “dilatatory” as the

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lawyer would have the judge believe. Be different from the rest of the pack. If your opponent’s antics are truly reflective of an integrity gap, just highlight what he or she has done – his or her antics will speak for themselves without your added characterizations.

Never belabor a lost point. While it is undeniably true that you should, and are entitled, to “make your record” for later appellate review of an adverse ruling, know when “making your record” has devolved into beating a dead horse. Continuing to argue a lost point is not only annoying, it may prompt the judge to mistrust you, or worse, may be viewed as crossing into contempt. Once you have made your record, yield gracefully when it becomes apparent that you have lost an argument.

Never misrepresent legal authorities or the facts. Your reputation before the court is everything and no one other than you can preserve the sanctity of your bar number. Remember, judges talk to each other about members of the bar they admire and those they do not. Do not end up on the second list by misrepresenting a statute or case holding. Do not distinguish cases by relying on minuscule differences. Do not cite a case as supporting authority on account of favorable language arising in a wholly different context from your case. Your untenable position will be exposed; trial court error will be reversed; and the trial judge will remember who led the court into error. Make sure the cases you cite have not been overruled and the Supreme Court has not granted a petition for review of a recent opinion. Verify that you have not missed any recent authority on a point you are arguing to the court.

Never show disdain for adverse rulings or the judge.

The title “officer of the court” should mean something to every practitioner. Considering that this is your judge for the life of the case, it should go without saying that displays of disdain for an adverse ruling (eye rolls, head shakes and/or audible sighs of frustration), in addition to being disrespectful of the bench officer and the process, are strategically shortsighted. Avoid arrogant phrases like “with all due respect” since what follows such an opening is generally the antithesis of respectful. Finally, unless you are disabled, stand when addressing the court.

Never interrupt the court. Interrupting the judge and talking over the judge do not make the judge want to listen more carefully and with greater patience to what you are saying. Ordinarily, you should stop speaking when the judge begins to speak and listen carefully so you can respond directly to the judge’s concern.

In sum, be honest, never do anything the court will perceive as being in the least misleading, as it will hurt you in the long run, and do not be a contentious jerk.

Hon. Elizabeth A. Grimes is an associate Justice of the California Court of Appeal, Second Appellate District, Division Eight.

Hon. Charles E. Horan is a retired judge from Los Angeles County Superior Court.

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YLD UPDATE



Aaron Bloom

The Young Lawyers Division of the ABTL has continued its strong start in 2015 with a number of successful events for young lawyers throughout the spring. On March 4, 2015, approximately 50 YLD members attended a panel on negotiating, drafting, and obtaining court approval for class action settlements. The panel featured Hon. Lee Smalley Edmon, Hon. Philip S. Gutierrez, Jeffrey S. Koncius of Kiesel Law, and David M. Walsh of Morrison Foerster, and was moderated by YLD member Bobby Pouya of Pearson, Simon & Warshaw, LLP.

Koncius and Walsh provided insightful advice on key information to consider when contemplating a class action settlement from both the plaintiff and defense perspectives, sharing helpful examples from their own experiences to ground the discussion. Presiding Justice Edmon and Judge Gutierrez revealed the critical factors that they each have considered in addressing proposed class action settlements, emphasizing the importance of counsel appreciating the judge's concerns before submitting the proposed settlement for approval. The session closed with time for a number of the attendees to ask questions of the panel. "I attended and spoke to a number of attendees and believe the event was informative and successful," said Aaron Bloom, one of the YLD co-chairs. "We are extremely grateful to the panelists for taking time out of their busy schedules to provide valuable advice to our ABTL attorneys."

The YLD also has organized two additional brown bag lunch events this spring. On March 25, 2015, Judge Richard A. Stone welcomed YLD members to the LAX Courthouse for a superb presentation on dealing with difficult clients, holding your own with more experienced opposing counsel, and making a favorable impression on a judge. On April 15, 2015, Chief Judge George H. King hosted another well-received brown bag on the "dos and don'ts" of motion practice, sharing his tips for successful motions, including details such as his preferences for introductions and headings.

"The brown bag lunches are at the heart of what the YLD aims to provide," explained Ted Andrews, co-chair of the YLD. "Each brown bag allows a number of our younger attorney members to participate in an intimate conversation with members of the judiciary and to gain practical knowledge which will help them succeed in their careers. We want to thank each of the judges and justices for their willingness to participate."

As the 2014-2015 year comes to a close, the YLD is working on offering an additional brown bag opportunity, and also a panel on opening and closing statements. The YLD Board is preparing for another tremendous year in 2015-2016, and welcomes the involvement of all attorney members with ten years of practice or less. To the extent you, or someone at your firm, is interested in applying to join the YLD Board, please contact Aaron Bloom at abloom@gibsondunn.com or Rachel Feldman at rfeldman@whitecase.com for further information.

Aaron Bloom is an associate at Gibson, Dunn & Crutcher LLP in Los Angeles and Co-Chair of the Los Angeles ABTL YLD.

Want to Get Published? Looking to Contribute An Article?

The ABTL Report is always looking for articles geared toward business trial lawyers

If you are interested, please contact one of the Co-Editors,

David M. Axelrad, daxelrad@horvitzlevy.com,

or

Hon. Margaret M. Grignon (Ret.), Mgrignon@ReedSmith.com

“TECH TIPS FROM THE BENCH”... continued from Page 1

Not only are e-served documents remotely accessible and centrally organized, e-service avoids disputes over whether or when service took place. Lawyers are not the only ones who benefit. Judge Elias and her staff use e-service to circulate orders and efficiently communicate with dozens or even hundreds of parties at a time. Also, Judge Elias and her staff often pull parties’ papers directly from the e-service database because they can do so remotely, and it is quicker than the court’s official, decades-old document management system, which still runs off MS-DOS.

2. Appear via videoconference (not just by phone).

Judge Elias allows attorneys to appear via videoconference through CourtCall. This technology provides all the benefits of a telephonic appearance plus a view of the courtroom. All you need is a computer with a video camera and an internet connection. The courtroom is equipped with a large monitor that displays the remotely appearing attorney and two cameras, one trained on the bench and the other on counsel table, allowing the remotely appearing attorney to pick up on non-verbal communications and tailor arguments accordingly. This technology is offered to all attorneys scheduling a standard CourtCall telephonic appearance, and it costs only a few dollars more, yet surprisingly few attorneys take advantage of it. Those who do not “are missing out, because you get so much from seeing facial expressions,” said Judge Elias. Notably, this technology is not just for attorneys: witnesses also have appeared via videoconference.

3. Bring your laptop. Judge Elias’ courtroom is equipped with WiFi that you may use. You log on to the network “LA Guest” and no password is required. Unlike some other judges, Judge Elias does not mind attorneys using laptops or mobile devices while waiting for their case to be called. But, put such devices away at counsel table or when a jury is present. Even then, have your device available if Judge Elias asks you to look up something.

4. Email proposed orders. Because Judge Elias may need to revise your proposed order, consider asking for the court’s email address (it will be provided when appropriate) to email an editable version of the proposed order in Word format. You still must file a printed copy for the official record.

5. Test your set up in advance. Department 324 is equipped with a large monitor and a digital projector that counsel may use. You may also bring your own hardware. Whatever you do, arrange for a time to test the equipment in advance. Generally, Judge Elias’ staff will find time for you to access the courtroom on the morning of your presentation or the day before. During your visit, be sure to identify the closest electrical outlets to supply your devices with power.

6. Bring a technology professional. Even if you are comfortable with the technology that you will be using, consider retaining a technology professional to assist you. According to Judge Elias, bringing a technology professional to trial is the norm. Doing so allows you to focus on your presentation, rather than fumbling to do multiple things at once.

7. Have a backup plan. Technology failures occur. Hardware dies. Batteries run low. Files become corrupted. So, back up all your files and have substitute equipment available. If problems arise, Judge Elias will generally allow a brief recess. But if a problem cannot be fixed, you must be prepared to move forward without your technology. So, bring printed copies of important documents as a last resort.

8. Call to resolve discovery disputes. Judge Elias accepts conference calls to informally resolve discovery disputes. For example, parties may agree to call the Judge directly from a deposition, and she will take the call if she is available. Alternatively, to ensure that the Judge is available, parties may schedule a time for a conference call. Of course, attempt to resolve disputes before involving the Judge. If you cannot meet in person, consider using FaceTime or Skype to communicate with opposing counsel. Face-to-face communications promote civility and make it more difficult to maintain unreasonable positions. Through calls, disputes are often quickly resolved, avoiding expensive travel, letter-writing campaigns and motion practice. Because Judge Elias accepts conference calls and finds them to be more efficient, she does not accept messages from parties sent via e-service platforms (though some other judges do).

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DID YOU KNOW? TIPS ON CALIFORNIA APPEALS

Conflicting Appellate Court Decisions



David M. Axelrad

A dispositive California Court of Appeal decision virtually guarantees your summary judgment motion will be granted. The problem is your golden ticket case comes from the Court of Appeal in Fresno and your case is in Los Angeles where the local Court of Appeal has reached the opposite result. There is no California Supreme Court case on the issue. How can you ask the trial court to follow your Fresno case when the local Los Angeles Court of Appeal decision is against you?

Do not despair. Where there are conflicting Court of Appeal decisions, the trial court is not bound to follow the local Court of Appeal decision. The court can and must choose the decision it thinks best. “[W]here there is more than one appellate court decision, and such appellate decisions are in conflict . . . the [trial] court . . . must make a choice between the conflicting decisions.” (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456.) It’s true that “[a]s a practical matter, a superior court ordinarily will follow an appellate opinion emanating from its own district even though it is not bound to do so” (*McCallum v. McCallum* (1987) 190 Cal.App.3d 308, 315, fn. 4), but don’t be deterred from relying on and advocating for the best of conflicting Court of Appeal decisions, no matter where they come from.

Are Posttrial Motions Necessary?

A California state court jury returns a large money verdict against your client. You believe the Court of Appeal is likely to reverse because of a legal error during trial. Should you go straight up on appeal or should you first file posttrial motions?

No matter how good your appeal may be, you should probably file posttrial motions. Here are two reasons why, on your way to the Court of Appeal, you may need to ask the trial court to take another look at the case:

- a. A claim of excessive or inadequate damages is waived

on appeal if not raised in a timely motion for new trial. (*Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 759.) (Caveat: Legal errors in the trial of damages, such as evidentiary or instructional errors, or application of the wrong measure of damages, are not waived by failure to move for a new trial. (*Ibid.*))

- b. The trial court has authority not only to grant judgment as a matter of law to the losing party (Code Civ. Proc., § 629, 663), but also, on motion for new trial, to reweigh the evidence and order a new trial if the weight of the evidence appears contrary to the jury’s verdict (e.g., *Candido v. Huitt* (1984) 151 Cal.App.3d 918, 923). (Note: the trial court has equally broad authority on a motion for new trial following a bench trial. (Code Civ. Proc., § 660.))

While appellate courts also have authority to order judgment as a matter of law for the losing party (Code Civ. Proc., § 43), they lack the trial court’s authority to reweigh the evidence (e.g., *Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 919). So, where posttrial motions are filed, a trial judge who is skeptical or surprised by a verdict has greater power than the appellate court to grant relief to the losing party.

David Axelrad is a partner with the civil appellate law firm of Horvitz & Levy LLP, and co-editor of the ABTL Report.

“TECH TIPS FROM THE BENCH”... continued from Page 12

9. Avoid distractions. Keep visual presentations simple and concise. Make sure text is readable and images are sharp. Use short statements and key words to maintain focus. Do not use distracting noises or moving images that divert attention away from your message. While technology can enhance your presentation, it can also detract. So, use technology judiciously to emphasize key points and important aspects of evidence.

While technology cannot replace the skills of a good litigator, and it won’t make a good advocate of a poor one, when used correctly, technology can make every lawyer better.

Jordan McCrary is an attorney at Morgan, Lewis & Bockius LLP and a member of ABTL’s technology committee.

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