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Trial Objections: What Trial Judges Wish Attorneys Would Do and Not Do

Making and responding to trial objections can be a source of some angst for trial lawyers, and dealing with those objections can be a source of frustration for trial judges. When the objection "moment" is happening, lawyers and judges sometimes find themselves wondering of the other: "What is s/he thinking?" To bridge this gap, and based on an informal survey of Bay Area judges, I propose the following short list of things that trial judges wish lawyers would do or not do when it comes to trial objections.

Hon. Patricia Lucas

Give the Judge the Applicable Law and the Time to Consider It

The truest things are said in jest. Most every trial judge knows the duck hunting story, which goes something like this:

A Supreme Court justice, an appellate judge, and a trial judge went duck hunting together. As

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Navigating Post-Trial Motions in State and Federal Court

The jury has returned a verdict against your client. Now what? Post-trial motions should be considered, including a motion for new trial, motion for judgment notwithstanding the verdict ("JNOV") (in state court), or a renewed motion for judgment as a matter of law ("JMOL") (in federal court). Post-trial motions present an opportunity to avoid a lengthy and expensive appeals process. Attorneys must be aware of the distinctions between post-trial motions, and different requirements in state court versus federal court.

Caroline McIntyre

State Court Post-Trial Motions

Code of Civil Procedure Section 629: JNOV

After an adverse verdict in California state court, the first post-trial motion to consider is a JNOV motion. This motion is especially powerful because if the court grants it, judgment is entered in your client's favor, despite the adverse jury verdict.

The JNOV motion challenges the sufficiency of the evidence, and may be granted "if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict." *Teitel v. First Los Angeles Bank*, 231 Cal. App. 3d 1593, 1603 (1991).

Although the trial court's power to grant a JNOV motion is identical to the power to grant a directed verdict, "[a] motion for directed verdict (or nonsuit) is not a prerequisite to a JNOV motion." 3 Wegner, Fairbank & Epstein, *California Practice Guide: Civil Trials and*

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Evidence, p. 18-2, ¶ 18:5 (Rev. 1, 2008). And, "[i]f a nonsuit or directed verdict motion was made, the court's denial thereof is no bar to a later JNOV…" *Id.* at ¶ 18:6.

The JNOV motion must be made either: (1) before entry of judgment (Cal. Code Civ. Proc. ("CCP") § 664); or (2) within 15 days after the clerk's mailing of notice of entry of judgment or 15 days after service by a party of written notice of entry of judgment, or expiration of 180 days, whichever occurs first; or (3) within 15 days after any other party moves for a new trial. CCP §§ 629, 659.

The JNOV motion must be made in writing with any supporting papers filed and served at the time the notice of motion is filed. To the extent motions for nonsuit or directed verdict were made, they may be a good starting point in evaluating possible issues for a JNOV motion, and may provide a useful guide in drafting the motion.

An order denying a JNOV motion is appealable. CCP §§ 629, 904.1(a)(4), 904.2(e). The appellate court determines whether the verdict rests on substantial evidence constituting a *prima facie* case of the claims or defense asserted. *OCM Principal Opportunities Fund v. CIBC World Markets Corp.*, 157 Cal. App. 4th 835, 845 (2007).

CCP Section 657: Motion for New Trial

In California state court, a party may bring a motion for new trial based on any or all of the following grounds:

- Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial (CCP § 657(1));
- Misconduct of the jury (CCP § 657(2));
- Accident or surprise, which ordinary prudence could not have guarded against (CCP § 657(3));
- Newly discovered evidence (CCP § 657(4));
- Excessive damages (CCP § 657(5));
- Insufficient evidence (CCP § 657(6));
- The verdict or decision is against law (CCP § 657(6));
- Error in law, occurring at the trial and excepted to by the party making the application (CCP § 657(7)).

The deadline to file a motion for new trial is comparable to the JNOV filing deadline. CCP §§ 629, 659.

A party seeking a new trial must first file and serve a notice of intention to move for a new trial. CCP § 659. The notice must state the intention to move for new trial and specify the grounds on which the motion will be made, and whether the motion will be made on affidavits or the minutes of the court, or both. *Id*.

A memorandum in support of the motion for new trial must be filed and served within ten days after filing and serving the notice of intention. Counsel should take great care in drafting the memorandum, as trial courts often reference portions of the memorandum in any order granting new trial, which must contain a "specification of reasons." CCP § 657.

Affidavits or declarations can support a new trial motion, and in some instances are required, including particularly for the first four grounds (CCP §§ 665(1)-(4). These affidavits or declarations must be filed and served within ten days of filing the notice of intention to move for new trial. CCP § 659(a).

Counsel should consider whether any potential appellate issues must be raised at the motion for new trial phase or waived on appeal. For example, the failure to timely move for a new trial ordinarily precludes an appeal that the damages awarded were either excessive or inadequate. *Jamison v. Jamison*, 164 Cal. App. 4th 714, 719 (2008). That is because the power to weigh the evidence and resolve issues of credibility is vested in the trial court, not the reviewing court. *Id*. As a result, if "ascertainment of the amount of damages turns on the credibility of witnesses, conflicting evidence, or other factual questions, the award may not be challenged for inadequacy or excessiveness for the first time on appeal." *Id*. Similarly, allegations of juror misconduct are not considered on appeal when not raised during the trial or in a motion for new trial. *People v. Richardson*, 95 Cal. App. 2d 703, 706 (1950).

In deciding the motion for new trial, the court must determine whether the moving party has established one or more of the grounds for new trial, and if so, whether the ground or grounds "materially affect(s) the substantial rights" of the moving party. CCP § 657.

If the court grants the motion for new trial, the judgment or verdict is vacated and the matter will be re-set for trial, absent an appeal.

A party may appeal from an order granting a new trial. CCP § 904.1(a)(4). Such an order, however, is given "extraordinary deference" on appeal. *Sandco American, Inc. v. Notrica*, 216 Cal. App. 3d 1495, 1506 (1990). Indeed, "[t]he determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears." *Jiminez v. Sears, Roebuck & Co.*, 4 Cal. 3d 379, 387 (1971).

Interplay Between Motions for New Trial and JNOV Motions in State Court

A JNOV motion may be, and often is, filed along with a motion for new trial in state court. Because the grant of a JNOV motion results in judgment in favor of your client, and the best outcome from a motion for new trial is only a retrial of the case, or a reduction in damages, the new trial motion should be made in the alternative to the JNOV motion.

Although the motion for new trial is an alternative motion, its value should not be underestimated. The court's discretion to grant a new trial is broader than its discretion to grant JNOV. The trial judge can weigh evidence and determine credibility of witnesses in deciding a motion for new trial. It contrast, it cannot do so with a JNOV motion. Moreover, an appeal from an order granting a new trial is accorded extraordinary deference on appeal.

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Note also that, if both a JNOV motion and motion for new trial are filed, the memorandum of points and authorities in support of the JNOV motion must be served when the notice of JNOV motion is filed, in contrast to the motion for new trial, which only requires that the notice of intention be served initially, followed by supporting papers within ten days after the notice of intent to move for new trial is filed. CCP § 659(a).

Federal Court Post-Trial Motions

Federal Rule of Civil Procedure ("FRCP") 50(b): Renewed Judgment as a Matter of Law

The federal court equivalent to the JNOV motion is a renewed motion for judgment as a matter of law under FRCP 50(b). In federal court, a party may move for JMOL at any time before the case is submitted to the jury. FRCP 50(a). The motion is made on the ground that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue. *Id.* If the court does not grant the JMOL motion, and the verdict is against the moving party, that party may renew the JMOL motion after entry of judgment. FRCP 50(b).

The standard for granting JMOL motions under FRCP 50(a) and 50(b) is essentially the same as a motion for summary judgment, *i.e.*, whether there are any genuine issues of material fact. FRCP 56; 50(a) 50(b). *See also* FRCP 50(a), Advisory Committee Notes, 1991 Amendment, referencing incorporation of summary judgment standard into FRCP 50. Thus, JMOL is proper if "the evidence, together with all reasonable inferences in favor of the verdict, could lead a reasonable person to only one conclusion, namely that the moving party was entitled to judgment." *Clanahan v. McFarland Unified School District*, No. CV F 05-0796 LJO DLB, 2007 WL 2253597, at *10 (E.D. Cal. Aug. 3, 2007). The court draws all reasonable inferences in favor of the nonmoving party, and does not make credibility determinations or weigh the evidence. *City Solutions, Inc. v. Clear Channel Communications*, 365 F.3d 835, 841 (9th Cir. 2004).

Counsel should not let a court's denial of a motion for summary judgment or FRCP 50(a) JMOL motion deter the filing of a renewed JMOL motion. The trial court may be persuaded to grant a renewed JMOL motion based on a more fully developed factual record than previously existed. Indeed, the motion for summary judgment and FRCP 50(a) JMOL motion, even if not granted, may set the stage nicely for the renewed JMOL motion by educating the judge and potentially streamlining issues.

As the name implies, a renewed JMOL motion under FRCP 50(b) may only be made if a FRCP 50(a) JMOL was made before the case was submitted to the jury. *Tortu v. Las Vegas Metropolitan Police Dept.*, 556 F.3d 1075, 1081-83 (9th Cir. 2009). A party may not raise arguments in the renewed JMOL motion that it did not raise in its pre-ver-

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Interviews, Witness Statements, and Attorney Work Product

On March 4, 2010, the Fifth Appellate District issued a 2-1 split decision in *Coito v. Superior Court*, 182 Cal.App. 4th 758 (2010), holding that written and recorded statements taken by an attorney or the attorney's representative are not entitled to protection under the California work product privilege. The majority expressly refused to follow *Nacht & Lewis Architects, Inc. v. Superior Court*, 47 Cal. App. 4th 214 (1996), a case that had reached the opposite conclusion 15 years ago, and a case that is frequently relied upon to shield third party witness statements and the identity of third-party witnesses from discovery.

Niki Okcu

The *Coito* decision is critical for every trial lawyer and their clients because it put the scope of California's work product doctrine squarely in question. On July 9, 2010, the California Supreme Court stated that it will take up the case. When the California Supreme Court ultimately decides the issue, its ruling will likely have a far-reaching affect on the work product doctrine and how third-party discovery is conducted. While the bar waits for a decision, however, attorneys must be mindful of the parameters of the work product doctrine to ensure protection of their work product.

The Scope of the Work Product Doctrine

The work product privilege in California is designed to do both of the following: "(a) Preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases" and "(b) Prevent attorneys from taking undue advantage of their adversary's industry and efforts." Code of Civ. Proc. § 2018.020. In California, the doctrine is not one of the privileges enumerated in the Evidence Code, but it is set out in Code of Civil Procedure section 2018.010, *et seq.*, and it is in the nature of a limitation on pretrial discovery. *Jasper Constr., Inc. v. Foothill Jr. College Dist. of Santa Clara County*, 91 Cal. App. 3d 1 (1979).

Section 2018.030 divides attorney work product into two categories — absolute and qualified work product. Subdivision (a) of section 2018.030 provides absolute protection from discovery of any "writing that reflects an attorney's impressions, conclusions, opinions, or legal

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research or theories. . . ." Such writings are "not discoverable under any circumstances." *Ibid*. Subdivision (b) of section 2018.030 is a catch-all for attorney work product that does not fall within subdivision (a). It provides qualified protection. An attorney's work product "is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice." *Ibid*. Neither subdivision (b) nor any other provision of the Civil Discovery Act provides a description or a definition of what is and what is not qualified work product. Consequently, whether specific material is work product must be determined on a case-by-case basis. In deciding the issue, the courts have typically focused the distinction between derivative or interpretative material on one hand, and nonderivative or evidentiary material on the other. *Mack v. Superior Court*, 259 Cal. App. 2d 7, 10-11 (1968).

Generally, a document falls within the qualified work product privilege if it is of a derivative or interpretative nature such as diagrams, charts, audit reports of books, papers, or records, and findings, opinions and reports of experts. *Id*. at 10; *People v. Williams*, 93 Cal. App. 3d 40, 63-64 (1979). A writing that is "of a nonderivative or noninterpretative nature" and that is evidentiary in character, on the other hand, does not constitute the attorney's work product, and is thus not protected at all by the privilege. *Id*. at 69. Major categories of nonderivative evidentiary material excluded from the concept of an attorney's work product include identity and location of physical evidence, and the identity and location of witnesses. *City of Long Beach v. Superior Court*, 64 Cal. App. 3d 65, 73 (1976). The key principle is that "[i]nformation regarding events provable at trial, or the identity and location of physical evidence, cannot be brought within the work product privilege simply by transmitting it to the attorney." *Mack*, 259 Cal. App. 2d at 10.

Interview Notes

An attorney's written notes or comments about a witness' statements are protected as a "writing that reflects an attorney's [or attorney's agent's] impressions, conclusions, opinions, or legal research or theories." *Dowden v. Superior Court*, 73 Cal. App. 4th 126, 129 (1999). This protection is not limited to writings created by a lawyer, but also extends to agents of the lawyer and those employed by him or for him. *BP Alaska Exploration v. Superior Court*, 199 Cal. App. 3d 1240, 1254 (1988). The reason is that although notes of an interview may not contain overt statements setting forth the attorney's own conclusions, its very existence is owed to the attorney's thought process, and the notes reflect "not only the strategy, but also the attorney's opinion as to the important issues in the case." *Rico v. Mitsubishi Motors Corp.*, 42 Cal. 4th 807, 815 (2007).

The question of discoverability becomes more complicated when an attorney has interviewed third-party witnesses she does not represent. The conversations are not protected by the attorney-client privilege, but how about the notes taken by the attorney? It is unlikely that the attorney would be required to turn over her interview notes. However, different considerations apply when attorney notes are intertwined with recorded statements and/or when the only matter at issue is recorded statements.

Interview Notes Intertwined with Recorded Statements

The case of *Rodriguez v. McDonnell Douglas Corp.*, 87 Cal. App. 3d 626 (1978), addressed discoverability of interview notes intertwined with recorded statements. *Rodriguez* was a personal-injury action based upon a construction site accident. *Id.* at 634. An investigator retained by a defendant's lawyer took notes regarding what a witness stated; the question was whether the statements were entitled to work product protection.

The court found that a portion of the investigator's notes that recorded the statements made by the witness were not attorney work product. The investigator's notes, which recorded witnesses' statements, would not be protected by the attorney's work product privilege, because recorded or written statements of a prospective witness are considered material of a nonderivative or noninterpretative nature. However, that portion of the notes which consisted of the investigator's own comments about the witness statement were protected absolutely from disclosure under the work product doctrine as a "writing that reflects an attorney's [or attorney's agent's] impressions, conclusions, opinions, or legal research or theories." *Id*. at 647-48. Because the investigator's comments were so intertwined with the recorded statements, the court held that all portions of the notes were protected. *Id*. at 648-49.

Witness Statements

The key decisions dealing with the discoverability of witness statements are *Nacht & Lewis*, 47 Cal. App. 4th 214, and the recent decision of *Coito v. Superior Court*, 182 Cal. App. 4th 758. Because these decisions are in direct conflict with each other, the California Supreme Court had no real choice but to take up *Coito*. The facts and issues involved in these two cases are summarized as follows.

In *Nacht & Lewis*, the plaintiff filed a civil complaint based upon claims arising out of her former employment with Nacht & Lewis Architects, Inc. *Id.* at 216. A dispute arose when plaintiff served form interrogatories 12.2 (seeking information concerning witnesses interviewed) and 12.3 (seeking information concerning written or recorded witness statements). The defendants refused to provide responses to both form interrogatories by contending that the information collected from the interviews was protected by the attorney-client privilege and the attorney work product doctrine. *Id.* at 216-17.

The plaintiff successfully moved the trial court to compel a further response. *Id*. at 217. The Court of Appeal

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found that the trial court erred as to form interrogatory 12.2, because a further response "would necessarily reflect counsel's evaluation of the case by revealing which witnesses or persons who claimed knowledge of the incident…counsel deemed important enough to interview." *Id*. But the Court of Appeal also found that the "issue is more subtle as to interrogatory 12.3." *Id.* The court conjectured that defendants' counsel may have either "[taken] notes or otherwise recorded his interviews with employees of Nacht & Lewis" or "collected from the employees statements the employees had previously written or recorded themselves." *Id*. The court found this distinction "significant" and as a result, ruled that "any such notes or recorded statements taken by defendants' counsel," were entitled to qualified work product protection. *Id*.

Coito, on the other hand, reached the opposite conclusion and held that the attorney work product privilege does not apply to the list of witnesses interviewed and to witness statements obtained by counsel. 182 Cal. App. 4th at 761. At issue in *Coito* were response to Judicial Council form interrogatory no. 12.3, by which the plaintiff sought the names of and information about witnesses from whom written or recorded statements had been obtained as well as the recorded witness statements. *Id*. The trial court denied plaintiffs' request to produce these items.

The matter went to the Court of Appeal for the Fifth District, which issued a peremptory writ of mandate and directed the trial court to vacate its discovery order denying Coito's motion to compel a further response to her demand for production of witness statements and further response to form interrogatory no. 12.3. Writing for the court, Justice Dawson criticized and refused to follow the holding of *Nacht & Lewis,* stating that the opinion was "a cursory one" lacking in analysis and "fail[ing] entirely to acknowledge the long line of contrary precedent" provided by *Greyhound Corp. v. Superior Court,* 56 Cal. 2d 355 (1961), *Beesley v. Superior Court*, 58 Cal. 2d 205 (1962), *Christy v. Superior Court*, 252 Cal. App. 2d 69 (1967), and *Kadelbach v. Amaral*, 31 Cal. App. 3d 814 (1973). *Coito*, 182 Cal. App. 4th at 768. These decisions "addressed the question whether witness statements are subject to discovery" and "clearly held that statements prepared by a witness and then turned over to an attorney are not the attorney's work product." *Id*. Justice Dawson characterized witness statements as "classic evidentiary material" since they can be used at trial to refresh a witness's recollection, impeach a witness's testimony, or rehabilitate a witness after cross-examination. *Id*.

She also reasoned that it would be unfair to the requesting party if they were precluded from obtaining witness statements because of the prejudice that would result from the adversary's possible use of the witness statements at the time of trial without affording other counsel a sufficient opportunity to review the statements in advance and to prepare for trial. *Id*. at 768-69.

Finally, she rejected the notion that qualified work product protection should apply to witness statements obtained by counsel, holding that attorneys and their representatives can craft questions to avoid disclosing their impressions, conclusions, and theories about the case. *Id*. at 769. If there was something unique about the particular interview that revealed interpretive rather than evidentiary information, the attorney could request are *in camera* hearing to seek protection of those portions of the statement believed to be privileged. *Id*.

Protection of Witness Statements Under Federal Law

The work product doctrine, as set forth in Rule 26(b)(3) of the Federal Rules of Civil Procedure, states that "a party may not obtain discovery of documents or other tangible things prepared in anticipation of litigation or trial by or for another party or that other party's representative" unless the party seeking discovery "has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." An exception is that Rule 26(b)(3)(c) allows any person or party to request "without the required showing,…the person's own previous statement about the action or its subject matter."

The purpose of the work product doctrine under the federal rules is similar to that of California law; to protect an attorney's strategies, legal impressions and mental process so that the attorney can analyze and prepare for the client's case and to prevent an opponent from gaining access to the attorney's investigative and analytical efforts and strategies.

There is no defined limitation on what constitutes a "document or tangible thing" within the meaning of Rule 26(b)(3). However, courts have afforded work product protection to items such as witness statements and interview transcripts. *Hickman v. Taylor,* 329 U.S. 495 (1947); *see also Kintera, Inc., Convio, Inc.*, 219 F.R.D. 503 (S.D. Cal. 2003); *American Standard Inc. v. Bendix*, 71 F.R.D. 443 (W.D. Mo. 1976). This protection is not an absolute immunity, but a qualified immunity, and can be overcome if the party shows substantial need and undue hardship.

While *Coito* has no precedential value because the California Supreme Court granted review, parties responding to discovery should nevertheless be cautious about relying on *Nacht & Lewis* to protect from discovery the list of witnesses interviewed and/or statements obtained by that party's attorney or attorney's representative. If a party wishes to invoke the qualified work product privilege to prevent disclosure of a list of individuals it has obtained written or recorded statements from or the statements themselves, the party needs to be prepared to make a foundational showing that the privileged material is derivative and not evidentiary in nature. While the bar waits for a decision from the California Supreme Court, the practical effect of *Coito* may be that attorneys will take fewer tape recorded statements and do more note taking.

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dict FRCP 50(a) motion. *See Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir. 2003).

In light of these requirements, the summary judgment briefing and pre-jury submission JMOL motion should be used as a framework in drafting the renewed JMOL motion.

The Rule 50(b) renewed JMOL motion must generally be filed within 28 days after entry of judgment. FRCP 50(b). The renewed JMOL motion may include an alternative or joint request for a new trial under FRCP 59. When a motion for new trial is filed with a renewed JMOL motion, the court may either grant the renewed motion, or grant a new trial, or some other combination of relief. Even if the court grants the renewed JMOL motion, however, it must still rule on any motion for new trial in case the judgment is later vacated or reversed. FRCP 50(c).

The Court of Appeal reviews *de novo* a decision to grant or deny a renewed JMOL motion. *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002). Notably, the renewed JMOL motion must have been made or appellate review on the ground of insufficiency of evidence is waived on appeal. *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 396, 399-402 (2006). In contrast, the renewed JMOL motion is not a prerequisite to appellate review of improperly admitted evidence. *Fuesting v. Zimmer, Inc.*, 448 F.3d 936, 939 (7th Cir. 2006).

FRCP 59: Motion for New Trial

Courts have broad discretion to grant new trials pursuant to Rule 59. A new trial may be granted after a jury trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court." FRCP 59(a)(1)(A).

For example, a court may grant a new trial on grounds that the verdict is against the clear weight of the evidence. *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007). The standard for granting a new trial on these grounds is favorable to the moving party because the court can weigh evidence and need not give favorable presumptions to the prevailing party.

Another common ground for a motion for new trial is excessive or inadequate damages. Similar to state court, if the jury has awarded excessive damages, the court may condition denial of a new trial on the prevailing party's acceptance of a remittitur.

Federal courts have granted new trials on myriad grounds, including newly discovered evidence, legal error, and misconduct by jurors, opposing counsel, and the court. The motions based on misconduct can be more difficult to win, however, as the court will require the misconduct to have resulted in prejudice to the moving party.

As with a renewed JMOL motion, a party may move for a new trial within 28 days after the entry of judgment. FRCP 59(b). Timely filing is critical because the court has no discretion to consider late-filed motions for new trial.

If new information is required to support the motion for new trial, such as newly discovered evidence or juror misconduct, the motion for new trial should be supported by affidavits and exhibits, as necessary, and filed with the moving papers.

Although a motion for new trial is not typically a prerequisite for appeal, there are some exceptions, such as when certain objections or evidence are not already in the record. Counsel should carefully consider whether any issues must be brought in a new trial motion or waived on appeal.

Generally, if a motion for new trial is granted, there is no immediate appeal, and the order cannot be reviewed until a final judgment is entered. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33 (1980).

The appellate court reviews the grant or denial of a motion for new trial for abuse of discretion. In that regard, the district court "enjoys considerable discretion in granting or denying the motion." *Jorgensen v. Cassiday*, 320 F.3d 906, 918 (9th Cir. 2003).

Interplay Between Motions for New Trial and JMOL Motions in Federal Court

Parties often simultaneously file both a JMOL motion and a motion for new trial in federal court. Similar to state court, the motion for new trial should be made in the alternative to the renewed motion for JMOL.

Comparisons Between State and Federal Post-Trial Motions

A major distinction between post-trial motions in federal and state court is that a prerequisite to bringing a post-judgment renewed JMOL motion is having made the JMOL motion pre-verdict. In contrast, a motion for directed verdict is not a prerequisite to a JNOV motion in state court.

In state court, motions for new trial may only be made upon the grounds specifically enumerated in CCP § 657. Federal court, on the other hand, does not detail grounds for new trial, and instead relies on a well-developed body of case law for appropriate grounds. Note also that any affidavits supporting a motion for new trial in federal court must be served with the motion, in contrast to state court, which permits affidavits to be filed within ten days of the filing of the notice of intent to move for new trial.

Appeal is not the only remedy available when parties are faced with an adverse verdict. Post-trial motions allow the trial court to correct errors by the jury in an expeditious manner. It is critical for counsel to understand the deadlines and requirements of these motions in state and federal court. Because trial courts are afforded considerable discretion in determining post-trial motions, these motions should be within the arsenal of all trial attorneys.

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Walter Stella

On EMPLOYMENT

In recent decisions by both the United States and California Supreme Courts, employers' rights to conduct searches prevailed over employees' rights to privacy. The United States Supreme Court in *City of Ontario v. Quon*, 560 U.S. ___, 130 S.Ct. 2619 (2010). held that the City of Ontario did not violate an employee's rights to privacy when it reviewed employee text messages sent on city-issued pagers. The California Supreme Court in *Hernandez v. Hillsides, Inc*., 47 Cal. 4th 272 (2009), upheld an employer's right to install a hidden surveillance camera in a private office. Do these decisions portend the death of employee privacy in the workplace? The short answer is no. However, the decisions do make clear that employee expectations of privacy in the workplace are not absolute. Employers may encroach upon legitimate employee privacy expectations when it is justified by a legitimate business purpose and done in a manner that is narrowly tailored to achieve that purpose.

City of Ontario v. Quon

Jeff Quon ("Quon") was employed by the police department of the City of Ontario ("Ontario"). Ontario issued text-enabled pagers to Quon and other employees. The pagers had a monthly character limit and imposed an additional fee for any character overage.

Ontario maintained a written "Computer Usage, Internet and E-Mail Policy." The policy (1) reserved the right to monitor all network activity and (2) stated that users had no expectation of privacy when using those resources. The policy did not specifically apply to pagers. However, at the time the pagers were issued, Ontario officials verbally told officers that the use of the pagers were subject to the policy.

Quon and other officers consistently exceeded the monthly allotment of characters. In light of these repeated overages, Ontario's Chief of Police initiated an investigation to determine whether the existing character limit was too low to meet the business needs of the police department. The audit was limited to two months of on-duty text messages. The investigation revealed that Quon frequently used his pager for personal communications, some of which were sexually explicit. Quon was disciplined and he (along with those individuals with whom he exchanged personal messages) sued Ontario for, among other things, violation of their Fourth Amendment rights and California privacy laws.

Without deciding the issue, the Court assumed, arguendo, that Quon had a reasonable privacy expectation and that Ontario's review of those messages implicated the Fourth Amendment. Nevertheless, the Court found that the search was reasonable and did not violate the Fourth Amendment because: (1) it was motivated by a legitimate work-related purpose and (2) the scope of the search was not excessive under the circumstances. For these same reasons, the Court also concluded that the search would be regarded as reasonable in the private employer context.

Hernandez v. Hillsides, Inc.

Hillsides, Inc. ("Hillsides"), a private, non-profit residential facility for neglected and abused children, employed two female clerical workers who shared an enclosed office. Hillsides determined that certain computers were being used to access pornographic websites late at night in breach of company policy. Hillsides did not suspect the two clerical employees, but installed a hidden, remote-operated camera in their office to monitor computer use during non-business hours. Upon discovering the camera, the two workers sued Hillsides for invasion of privacy and intentional and negligent infliction of emotional distress.

Walter Stella

The Court found that the enclosed office generated a reasonable privacy expectation. The office had a door with a lock and window blinds that could be drawn. Privacy expectations were not diminished simply because the office door had a missing "doggy door" or because other individuals had access to the office. The Court found that the enclosed setting created a legitimate expectation that not all office activities would be work-related.

The Court, however, held that Hillsides' conduct did not violate the employees' privacy rights. The Court concluded that the use of the camera was narrowly tailored in place, time, and scope and that the surveillance was justified by legitimate business concerns. The employees were not at risk of being monitored or recorded during regular work hours and were never actually videotaped. As a result, the Court held that the surveillance conducted by Hillsides did not violate the privacy rights of the employees.

Take Away

What are the lessons to take away from these cases? First, workplace privacy is not dead. Both decisions recognize that circumstances my give rise to constitutionally protected privacy expectations in the workplace. Whether such expectations exist and are reasonable is a fact-specific inquiry. Second, even if protectable privacy interests exist, they are not absolute. As both *City of Ontario* and *Hernandez* held, the law will countenance an intrusion upon employee privacy rights if it is supported by legitimate business reasons and limited in scope.

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Trial Objections

they stood in the marsh, a bird flew overhead. The Supreme Court justice looked up at the bird and, while watching it fly by, said: "I think that might be a duck, perhaps engaged in interstate commerce, and it may have a privacy interest in being free from governmental intrusion in the form of judges with guns." By that time, of course, it was too late to take aim at it. A short time later, another bird flew overhead. The appellate judge watched it and said, "I think that could be a duck, but on the other hand, it might not. Yes, I do believe it is a duck." She then aimed at it, but by then it was out of range. Eventually a third bird flew overhead. The trial judge took aim and fired, and then said: "I sure hope that was a duck."

Trial judges want to get it right, but we do not have the luxury of time to contemplate evidentiary objections at great length while the witness is on the stand. We must "take aim" at an evidence issue, make a decision quickly, and move on — even in complex business cases.

For this reason, effective business litigators will arm their judges in advance with an identification of the evidentiary issues they expect the trial to present, and a parsing of the relevant authorities. I commend to you Diane Webb's excellent article on motions *in limine* in the fall 2009 issue of the ABTL Report. In particular, I endorse her observation that lawyers should not waste the court's time by making *in limine* motions without first meeting and conferring. You will lose precious credibility with the judge if you file and expect her to read a motion to exclude evidence that the other side has no intention of offering. *See Kelly v. New West Federal Savings*, 49 Cal. App. 4th 659, 670-71 (1996).

Remember that despite the Latin name meaning "at the threshold," *in limine* motions can — and in my view, should — be made at any time during the trial. *See People v. Morris*, 53 Cal. 3d 152, 188 (1991) (approving of use of both oral and written motions *in limine* at the beginning of or during trial, in part because "[m]otions *in limine*…permit more careful consideration of evidentiary issues than would take place in the heat of battle during trial."). Although some court rules preclude written motions *in limine* after a specified pretrial deadline, when the need to address an evidentiary issue becomes apparent only after the trial has started, most judges will appreciate an opportunity for more reflection at any time during the trial. *See* duck hunting, *supra*.

Keep the Record Clear, But Avoid Speaking Objections

Making a clear record concerning admission and exclusion of evidence is one of the most important responsibilities of trial counsel. The basic rules are set forth in Evidence Code sections 353 and 354. Unless an objection is timely and clearly stated with a specific legal ground, a verdict or finding will not be set aside for erroneous admission of evidence. Similarly, with respect to erroneous exclusion of evidence, no relief is given unless the court has been advised — by questions or offer of proof — of the substance, purpose and relevance of the evidence made known, or unless court rulings made such advisement futile or the evidence was sought on cross-examination or recross-examination.

Clearly, just saying "Objection" is not enough to preserve your record. But how much more is required? How much is too much?

The answer is simple: State the legal basis for the objection, and STOP. Anything more becomes a "speaking" objection, the impropriety of which is a topic on which more judges agree than on whether robes should have zippers or snaps. Attorneys are sometimes fond of the idea of speaking objections because they provide an opportunity to sneak in a little closing argument right in the midst of witness examination. But that good feeling may be short-lived. At a minimum, counsel risk a strong judicial reprimand which will convey to the jury that this attorney does not follow the rules. And it could get even worse: the best rationale I have heard for why attorneys ought not to make speaking objections is that such an objection invites a "speaking ruling" in which the judge lets the jury hear directly the reason why the argument you just blurted out is not convincing. Particularly if the argument-in-the-midst-of-examination is a violation of a specific pretrial order proscribing speaking objections, the trial judge may decide that this is the most effective way to ensure your future compliance.

A cautionary note here concerning bench trials: although judges may be less concerned about the evils of speaking objections when there is no jury, nevertheless there may still be a concern that such objections may be used to coach or to distract a witness. The best strategy is to assume that speaking objections are never allowed, whether the trial is before a jury or a judge.

"May We Approach?": The Use and Abuse of Sidebars

The flip side of the speaking-objection conundrum is that sometimes just stating the legal ground is not enough, either because the record is not sufficiently developed or because the trial judge needs more information to make a ruling. Often judges do not truly "need" information counsel thinks is essential, but there are also times when the judge (who likely does not know the case as well as counsel do) does not know what she does not know — and a further explanation of an objection, outside the hearing of the jury, would facilitate justice. This is particularly true when issues of relevance arise that have not been vetted *in limine*.

The stakes are high: you need to make a record, and you need to do everything you reasonably can to get evidence in or to keep it out. *See People v. Boehm*, 270 Cal. App. 2d 13, 17 (1969) (objection made off the record at sidebar cannot support contention of error on appeal).

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JOHN GREEN

On INSURANCE

In recent years, insurers increasingly assert rescission claims as a defense against coverage. Many of these claims involve alleged non-disclosure regarding ordinary operational matters, which only appear material in hindsight, after a loss involving that operation has occurred, or matters involving events occurring many years ago when the understanding of certain risks were different than they are today.

In asserting such non-disclosure claims, insurers often contend that they need only satisfy two elements to prevail on rescission: first, that there was a non-disclosure of fact; and second, that the fact was subjectively "material" to the underwriter. Insurers contend that the insured's state of mind — including whether the insured even understood the omitted fact could be material — plays no part in the claim. One can immediately see the danger of this position. For example, take a case where an insured owns a blue house, but does not disclose the house is blue. The underwriter subjectively believes that blue houses are riskier to insure. Under the test advocated by insurers, these facts alone would be sufficient to allow the insurer to rescind the policy — there was the non-disclosure of a subjectively material fact — even though the insured had no reason to believe he had a duty to disclose that fact.

This position reflects a fundamental misunderstanding of the scienter rules that apply to rescission of insurance policies. Both the California Insurance Code and courts recognize that "unintentional" misrepresentation can lead to rescission. *See, e.g.*, Cal. Ins. Code section 331 ("Concealment, whether intentional or unintentional, entitles the injured party to rescind."). Courts also recognize that an insurer may establish the materiality element by showing the fact was subjectively material to the underwriter (not that it would be material to a "reasonable" underwriter). Taken together, these two propositions can make it appear that rescission can be granted even if the insured had no reason to believe a fact was material and should be disclosed.

A closer look at the "unintentional" misrepresentation rule, however, makes it clear that the rule merely means that an insurer need not show that the insured intended to mislead or defraud the insurer. *See, e.g., Mitchell v. United National Ins. Co.*, 127 Cal. App. 4th 457 (2005) Moreover, the argument ignores section 332 of the Insurance Code, which spells out the limited scope of the insured's duty to disclose. Entitled "Required Disclosure," § 332 merely requires the parties to "communicate to the other, in good faith, all facts *within [their] knowledge which are or which he believes to be material* to the contract...." Cal. Ins. Code section 332. An insurer may not rescind an insurance policy unless the insured has concealed material facts *that it is under a duty to disclose under* section *332. See Rallod Transp. Co. v. Continental Ins. Co.*, 121 F.2d 851, 853 (9th Cir. 1984) (citing § 332 and stating "Absent such a duty there can be no actionable concealment."). The California Supreme Court also recognized that the disclosure obligation is limited to facts the insured understands to be material. *Thompson v. Occidental Life Ins. Co.*, 9 Cal. 3d 904, 916 (1973).

This rule has been applied in a variety of circumstances where the insured fails to appreciate the materiality of information. *See, e.g., Ransom v. Penn Mutual Life Insurance Co.*, 43 Cal. 2d 420 (1954) (no misrepresentation when applicant for life insurance did not disclose he had "high blood pressure" because he may reasonably have failed to understand the doctor's diagnosis of "mild hypertension"). Most of the case law developed in the life insurance context, where insured frequently do not understand technical terms, or fail to appreciate the medical significance of their condition. These concepts, however, are equally applicable to commercial insurance claims. For example, an insured may have known about leaking or spilling from a containment pond or storage tank in the 1960s, but failed to appreciate at the time that such an event could eventually result in migration to the underlying groundwater years later.

John Green

Since the standard for "materiality" is subjective materiality from the insurer's point of view, insurers sometimes argue that an insured cannot even offer evidence to rebut an underwriter's self-serving testimony. Recent case law makes it abundantly clear that the insured *may* rebut this showing through any relevant evidence. *See Nieto v. Blue Shield of California,* 181 Cal. App. 4th 460 (2010). Of course, the insured is not in a position to directly testify to the lack of materiality to an underwriter. Sometimes the claim can be undermined by discovery into the insurer's general policies and practices, or its handling of other policies and claims for other insureds. Often, however, rebutting the insurer's testimony requires the insured to hire a retired broker or an underwriting expert who is familiar with the particular line of coverage, who can explain why the particular type of information omitted was generally not considered material to underwriters at the time the policy was issued.

Insureds, however, should not lose sight of the fact that, in addition to rebutting the insurer's case-in-chief, the insured also has its own story to tell. Evidence should be developed where appropriate to support the often overlooked element of the insured's subjective understanding regarding materiality.

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Trial Objections

On the other hand, it can feel embarrassing when the judge, in front of the jury, declines your request for a sidebar: will the jurors conclude that the judge thinks that what you have to say is not important?

Judges feel strongly — and differently — about this issue. It is important to discuss with the trial judge, before jury selection begins, how to communicate a request for a sidebar and when you will have the opportunity to put sidebar discussions on the record.

Objecting after the answer: "What do you want me to do, counsel?"

Occasionally, counsel will object after the witness has answered. When that happens, *please* make a motion to strike the answer — unless you do not care about the answer, in which case I wonder why you've objected.

A motion to strike is a proper and necessary procedure if *either* (a) the witness answered an objectionable question too quickly to lodge an objection or (b) although the question was proper, the answer was not responsive. Like an objection, a motion to strike needs to be made timely and the legal basis needs to be clearly stated. Evidence Code section 353(a).

When the witness is a blurter who answers an improper question before you can object, consider standing as soon as you realize that the question is objectionable. That gesture, accompanied if necessary by an outstretched palm, will stop most people from blurting. If nonverbal cues are unsuccessful, the next step in progressive discipline might be to tell the witness, if you are currently questioning her, that she needs to stop talking when an objection is made. Most judges would not be troubled by this admonition, if delivered respectfully and professionally. If you are not conducting the questioning, the best course would be to request that the judge give the admonition which is something most judges are willing to do. Counsel should consider inquiring about the judge's preferences at the pretrial conference.

In other circumstances, the question may be unobjectionable but the answer is not responsive. In that case, *either* the questioning attorney *or* the opposing attorney may request that the nonresponsive answer be stricken. Evidence Code section 766. If only a part of the answer is nonresponsive ("Yes, but...."), be careful to direct your motion only to the nonresponsive portion. *Bates v. Newman*, 121 Cal. App. 2d 800, 804 (1953) (not error to deny a motion to strike that is directed to both responsive and nonresponsive testimony). If the witness's answer to a proper question includes inadmissible matter, counsel should timely specify the portion to be stricken and the legal reason why it is inadmissible. *See* 3 Witkin, California Evidence, *Presentation at Trial*, § 385 (4th ed. 2000).

More On a Clear Record: The Perils of "Continuing" Objections

Attorneys sometimes request that the court recognize a "continuing" objection, because they do not want to annoy the jury by repeating an objection to each question on a certain subject. Whenever possible, this request should be made pretrial or at least outside the hearing of the jury, so that the judge will have an opportunity to clarify, if necessary, the scope of the "continuing" objection.

A variation on this request is often made when the court has denied a motion *in limine*: "Your honor, will the motion in limine be sufficient to preserve our objection?" The important issue here is whether the record is sufficiently clear and precise so that the motion *in limine* satisfies Evidence Code section 353. If the motion sought to exclude evidence, seek a stipulation that the ruling excluding the evidence is binding; in the absence of such a stipulation, make the objection. *People v. Jennings*, 46 Cal. 3d 963, 975 (1988). When a motion *in limine* is denied, the judge may state that the attorney need not object when the evidence is offered to preserve the point for appeal. *People v. Morris*, 53 Cal. 3d 152, 188 (1991). If the judge has denied a motion conditionally to see "how the evidence comes in," it is important that counsel renew the objection when the evidence is offered so that the judge has that opportunity to evaluate the evidence in context before making a final ruling. However, counsel should take care *not* to mention the *in limine* ruling in the presence of the jury.

Please Do Not Waste the Jury's Time

Good trial judges are performing a balancing act all the time: balancing the needs of the parties to present their cases most effectively with the need to respect jurors' time and to ensure that they have a reasonable opportunity to comprehend all the evidence. Nearly all judges dislike keeping juries waiting if it can reasonably be avoided.

If there is an evidentiary objection that will require an Evidence Code section 402 hearing for a court determination of a foundational or other preliminary fact, flag this issue with the court as early as possible — and in any event, before a jury panel is called. Be prepared to articulate precisely why such a hearing is necessary. Do not delay, and do not overstate the need for a 402 hearing: either of these will cost you credibility that you will wish you had as the trial progresses.

In dealing with objections, as with trial practice in general, the key to success is to retain your credibility with the court. When your motions *in limine* are thoughtful and your citations reliable, when you respect the time of the court and of the jury, when you are both attentive to and honest about making a record, the credibility you have preserved can make all the difference.

The Honorable Patricia Lucas is a judge of the Superior Court for the County of Santa Clara, and is on the Board of Governors for the Northern California chapter of ABTL.

PETER BENVENUTTI

On CREDITORS RIGHTS

Not only businesses and individuals are experiencing financial woes in the current economic climate — state and local governmental agencies now find themselves in that predicament in numbers not seen since the Great Depression. As in so much else, California is a leader in this phenomenon, thanks to a perfect storm of declining tax revenues, institutional and political constraints against increasing taxes or reallocating available public funds, rigid funding requirements imposed by public employee labor contracts, and precariously underfunded public employee retirement plans.

Many public entities are now being forced to consider — and some will have to invoke — protection of the federal bankruptcy courts under previously little-used provisions of chapter 9 of the Bankruptcy Code. Debt relief proceedings under other Bankruptcy Code chapters (7, 11, 12 and 13) provide an integrated structure in which the bankruptcy court has ultimate authority over virtually every aspect of the debtor's assets and affairs and its restructuring or liquidation process. Chapter 9, in contrast, has to recognize Constitutional limits on the exercise of federal power over core governmental affairs of states and their political subdivisions, resulting in a patchwork incorporation of some, but far from all, of the provisions governing other types of bankruptcy cases. Here is a brief overview of some special aspects of chapter 9 that could be of interest to public entities' creditors and their lawyers. Section references are to the Bankruptcy Code, Title 11 U.S.C.

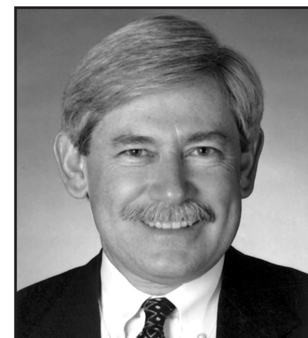
• *Eligibility for chapter 9.* Chapter 9 is available only to a "municipality," defined by § 101(40) to mean "political subdivision or public agency or instrumentality of a State." There are many additional eligibility criteria specified in § 109(c), including that state law expressly authorizes the entity to file under chapter 9. Current California law gives essentially unlimited chapter 9 authorization to all public entities — cities and towns, counties and special districts of all sorts — but that could change if pending legislation (Assembly Bill 155) pushed by public employee unions becomes law. AB 155 would require public agencies to be authorized to file a chapter 9 case by a nine-member state commission that could restrict the relief the public entity debtor could seek in the chapter 9 case. The eligibility requirements create fertile ground for creditors to challenge a chapter 9 filing at the outset.

• *Automatic stay.* The automatic stay (§ 362) applies in chapter 9 cases, enjoining almost all litigation against the debtor entity and giving the bankruptcy court broad discretion to decide whether and when to vacate the stay. The stay is a primary immediate benefit of a bankruptcy filing, giving the debtor "breathing space" while it tries to restructure its debts. There are some exceptions to the stay that are especially significant for public entities; for example, the stay does not enjoin enforcement of remedies in structured financial instruments and relationships such as derivatives, repurchase agreements and credit default swaps.

• *Executory contracts.* Section 365, governing assumption and rejection of executory contracts generally, applies in chapter 9 cases, but § 1113 (dealing specifically with collective bargaining agreements and prescribing extensive procedural requirements and a rigorous standard for rejection) does not. Consequently, courts will apply some variation of the more relaxed "business judgment" standard, which is extremely deferential to the debtor entity, much to the distress of public employee unions.

• *Avoiding powers and actions.* The authority to challenge and recover preferences and fraudulent transfers and to invalidate unperfected liens (among other avoiding powers) is available in chapter 9 cases, essentially as in other types of bankruptcy cases. Hence, payments made to creditors in the 90 days before the petition date are at risk with one special exception — payments on bonds and notes issued by the public entity debtor are absolutely insulated under § 926(b) from preference attack.

• *Administration of assets.* In other bankruptcy cases, there is an "estate" comprising all assets of the debtor entity at the time of the filing, plus certain types of property acquired later (§ 541); bankruptcy court authorization, on notice to creditors, is required for any disposition or other use of assets not in the ordinary course of business (§ 363). Neither § 541 nor § 363 applies in chapter 9 cases, so a municipal debtor is free to deal with its property as it pleases, subject to any constraints under applicable non-bankruptcy law.


Peter Benvenutti

• *Case administration.* The provisions for retention and compensation of professionals (§§ 326 – 331) do not apply in chapter 9 cases; hence bankruptcy court oversight of these matters, common in every other bankruptcy case, is absent in chapter 9. Chapter 9 authorizes appointment of creditors' committees (§§ 1102, 1103), but does not require a committee's professionals' fees to be paid by the debtor. Still, a municipal debtor may be persuaded to do so on the basis that a functioning committee is in the debtor's own interest.

• *Trustee/liquidation.* With certain limited exceptions, the bankruptcy court under other chapters can order a trustee appointed to supplant the debtor or can convert a reorganization case to a liquidation. Not so in chapter 9 — the court's only recourse is to dismiss the case.

• *Standards for plan confirmation.* Plan confirmation is the objective of all non-liquidating cases, including in chapter 9. Plans for private debtors are constrained by objective standards to assure that dissenting creditors and classes of creditors are treated fairly. In chapter 9, however, these standards are significantly watered down, offering the court broader discretion to approve a plan over creditor objections.

Bankruptcy lawyers expect a significant increase in chapter 9 filings. Litigators whose clients do business with local governments are likely to find themselves becoming better acquainted with chapter 9 than they — or anyone else — would have thought possible just a short time ago.

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Letter from the Editor

Sun, sand, and…seminars! The ABTL conference is coming up next month, in Hawaii — Wednesday, October 20 – Sunday, October 24. Your own Northern California chapter is hosting this event for the other ABTL chapters (Orange County, Los Angeles, San Diego, and San Joaquin), and has put together a great program. This year's theme is "2020 Foresight: Business Trials In The New Millenium" — about the way in which the practice of law is changing for business trial lawyers.

The kickoff will be a conversation between Justice Carol A. Corrigan and Justice Richard D. Huffman. Justice Corrigan joined the ABTL Northern California board last year and her program last year with Justice Mark Simons was a hit. We can look forward to more at the Hawaii conference.

Thomas Mayhew

Thursday's program will be a morning of three sessions on *voir dire*: on changing demographics and attitudes, on how to effectively conduct *voir dire*, followed by an hour long mock *voir dire* to show us how it's done well. After a session on "Mediation in the New Millenium," the afternoon and following morning are free to enjoy the Big Island.

On Friday, the main topic is how technology changes our cases in the new millenium. Programs on the best practices for using technology in the courtroom, and again a live demonstration of how to make closing arguments and witness examinations come alive with the use of technology, will fill the afternoon, along with a short program on e-discovery perils and pitfalls. Then spend an evening with ABTL friends and make new ones at dinner.

Saturday's sessions are in the morning. The morning starts with a session with in-house counsel discussing the changing relationship between lawyers and clients. Next are programs on "New Media in the New Millenium": "There Are No Secrets Anymore," and "Legal Issues Arising from New Media." The morning ends with what have always been one of my favorite parts of the ABTL Annual Seminar: small "breakout" sessions where lawyers and judges talk about how to improve the practice of law. This year's breakout sessions topic will pick up on the earlier discussions of "best practices in voir dire." Then, more free time in Hawaii for the afternoon before some remarks by the very funny Hon. William W. Bedsworth and a dinner under the stars. The program ends with a farewell breakfast on Sunday October 24.

The programs are packed with judges and experts to share their thoughts with you. And if you've missed this important reason to go, you probably can't be helped: *it's in Hawaii*. (Note to Hawaii-haters: You can still go to the program and then spend the down-time working in your room; the Mauna Lani has high speed internet access.) It's at the beautiful Mauna Lani Resort on the western side of the Big Island. Go to *www.abtl.org/ annualseminar. htm* for more details, and *www.maunalani.com* for more on the resort (ABTL has negotiated a great rate for rooms with the resort).

A letter from the editor would not be complete without this final note: Write an article for the ABTL Report! Teaching other people is the best way to learn something well. By writing an article you will become a better lawyer, and contribute to the ongoing discussions of how to practice business trial litigation in Northern California. Howard Ullman, my co-editor, and I await your ideas. Today is a perfect time to get in touch.

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