ASSOCIATION OF BUSINESS TRIAL LAWYERS

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Motions to Seal: Pluses, Minuses, Rules and Suggestions

Mention "motions to seal," and you are likely to elicit a moan from federal judges, attorneys, and clients alike. They are frequently cumbersome, time-consuming and a distraction from the substantive issues in a case. They are also necessary, because the law presumes the public has a right of access to judicial records, which include documents filed in federal litigation. *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006). By understanding the legal requirements and the process for obtaining a sealing order in the relevant district, you can make the experience considerably less painful, if not outright enjoyable.

Hon. Jacqueline S. Corley

The Legal Requirements

District courts "start with a strong presumption in favor of access when deciding whether to seal records." *Apple Inc. v. Psystar Corp.*, 658 F.3d 1150, 1162 (9th Cir. 2011). This presumption is "justified by the interest of citizens in "'keep[ing] a watchful eye on

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The first installment of this interview covered the cases of Barry Bonds and San Jose Mayor Ron Gonzales. This second installment will explain the strategic decisions in defending the Catholic Church child molestation cases and representing the NFL against well-respected adversary Al Davis of the Oakland Raiders.

Allen Ruby

MR. ZELDIN: What was the nature of the claims against the Catholic Church when you represented the church?

MR. RUBY: The claims were that the diocese of Oakland had been negligent in the appointment and movement of priests, who then were alleged to have molested children.

In this particular case two brothers made a claim for compensatory and punitive damages for the conduct of the diocese.

MR. ZELDIN: Was that case part of a large group of cases?

MR. RUBY: It was. There were 50 or so cases against the diocese. It was determined that this would be the first case to be tried, and that the attorneys and the judge who was presiding over this group of cases hoped it would serve as a test case.

MR. ZELDIN: Test case for liability or damages?

MR. RUBY: Test case for damages. We admitted negligence and we admitted liability to everything except the punitive damage claim.

MR. ZELDIN: Did you have profiles for favorable and unfavorable jurors?

MR. RUBY: No. What we had instead was very extensive

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the workings of public agencies.'" *Kamakana*, 447 F.3d at 1178 (quoting *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978)).

The standard a party must meet to overcome that presumption depends on the type of document sought to be sealed and the procedural posture of the case. For documents filed in connection with a dispositive motion, such as a motion for summary judgment, the proponent of sealing must provide "compelling reasons supported by specific factual findings" that outweigh the public's interest in disclosure. *Id*. at 1178-79. If a court permits sealing, "it must base its decision on a compelling reason and articulate a factual basis for its ruling, without relying upon hypothesis or conjecture." *Id*. at 1179 (internal quotation marks and citation omitted).

In the Ninth Circuit a lower standard applies to documents filed in connection with non-dispositive motions. *Pintos v. Pacific Creditors Ass'n*, 605 F.3d 665 (9th Cir. 2009) (internal quotation marks and citation omitted); *Apple Inc. v. Samsung Electronics Co*., 727 F.3d 1214, 1222 (Fed. Cir. 2013). The sealing of these documents is governed by Federal Rules of Civil Procedure 26(c) which allows a trial court to issue a protective order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Under Rule 26(c) the party asserting that discovery documents should be sealed must show "good cause," that is, that "good cause exists to protect the information from being disclosed to the public by balancing the needs for discovery against the need for confidentiality." *Philips ex. Rel. Estates of Byrd v. Gen. Motors Corp*., 307 F.3d 1206, 1213 (9th Cir. 2002). "The reason for the Ninth Circuit's distinction between dispositive and non-dispositive motions is that 'the public has less of a need for access to court records attached only to non-dispositive motions because those documents are often unrelated, or only tangentially related, to the underlying cause of action.'" *Apple Inc*., 72 F.3d at 1222 (internal quotation marks omitted).

Despite the lower standard, "[b]road allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test." *Beckman Indus. V. International Ins*., 966 F.2d 470 (9th Cir.); see also *Philips*, 307 F.3d 1206 (the party desiring sealing "must make a showing of 'particularized harm' from disclosure of the information to the public."); Apple Inc., 727 F.3d at 1228 (giving examples of the type of financial information that is properly sealed if the required showing is made).

With these legal requirements in mind, and to take advantage of the ability to electronically file documents under seal, the Northern District of California recently revamped its Civil Local Rule governing the filing of documents under seal. See N.D. Cal. Civil L.R. 79-5. The Rule creates a process to obtain a court order permitting a document, or more often, portions of a document, to be filed under seal.

The Ground Rules

First, the Rule reminds parties that no document may be filed under seal except by court order. Civ. L.R. 79-5(b). In the past, some parties assumed that because a protective order governed a case, and a party had designated a document as confidential, the party was permitted to file the document under seal without first obtaining a court ruling. Not so. A court has an independent obligation to weigh the public interest in disclosure with the interests of the party insisting on secrecy. *See, e.g., Kamakana*, 447 F.3d at 1178-79. Thus, the parties' stipulation to filing a document under seal, or an adversary's failure to oppose sealing, is not dispositive or even particularly persuasive. No document may be filed under seal without the trial judge determining it can be so filed.

Second, the Rule directs that any request to file a document under seal "must be narrowly tailored to seek sealing only of sealable material." Civ. L.R. 79-5(b). Just because a deposition transcript contains some confidential information does not mean that the entire transcript may be sealed; a party should only request that the portions of the transcript which reveal the confidential information be sealed. *See In re Roman Catholic Archbishop of Portland*, 661 F.3d 417 (9th Cir. 2011). A common error in this regard is a party's request to seal portions of a pleading that does not itself reveal confidential information , but merely it discusses or cites a deposition or exhibit that includes sealable information. Unless the existence of the deposition or exhibit is secret (a rare occurrence), there is no basis for sealing the pleading passage merely discussing or citing to the deposition or exhibit.

The Sealing Request

A party seeking to file a document under seal must (1) file an administrative motion to file the document under seal, and (2) provide a courtesy copy of the filing to the undersigned judge. Each step has several important requirements that are "designed to ensure that the assigned Judge receives in chambers a confidential copy of the unredacted and complete document, annotated to identify which portions are sealable, that a separate unredacted and sealed copy is maintained for appellate review, and that a redacted copy if filed and available for public review that has the minimum redactions necessary to protect sealable information." Civ. L.R. 79-5(a)(b) (Commentary).

The Administrative Motion to File Under Seal (Civ. L.R. 79-5(d))

The motion to file a document or documents, or portions thereof, under seal must be electronically filed in accordance with Civil L.R. 7-1, the local rule governing administrative motions. The motion should explain the reasons the party is seeking to seal the material. In many cases, the party seeking to file the document under seal is not the party who designated the information as confidential. For example, a defendant may move for summary judgment based in part on documents designated by the

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plaintiff as confidential. Under most protective orders, the defendant is obligated to seek to file the documents under seal. In such circumstances, the motion will simply state that the party is seeking to file the document(s) or portions thereof under seal because X party has designated them as confidential under the governing protective order. If, on the other hand, the filing party is the designating party, the motion must set forth the specific and particularized "compelling reasons" or "good cause" (depending on the nature of the proceeding) for restricting the public's access to the filing.

The administrative motion to seal must be accompanied by:

• A declaration which attests to the "compelling reasons" or "good cause," as applicable, for sealing. Civ. L.R. 79-5(d)(1)(A). The declaration should separately address each document or portion thereof by page and line number, if possible. In other words, a party cannot meet its burden by stating that "the exhibit must be sealed because it contains trade secrets." What trade secrets? Why are they trade secrets? Why will disclosure of the information result in "particularized harm." *See Apple Inc.*, 727 F.3d at 1225-1228. While this may appear burdensome, it merely requires evidencing the analysis the party is required to engage in before designating the material as confidential in the first place. If the filing party is not the designating party, the declaration will merely recite that the document, or portions thereof, sought to be sealed were designated as confidential by X party.

• A proposed order that seals only that material which is confidential. Civ. L.R. 79-5(d)(1)(B). The proposed order should identify each document separately, and identify by page and line number those portions of each document sought to be sealed. The filing party is obligated to seek to seal only those portions that are confidential, even if the filing party is not the designating party. What this obligation means in practice is that the filing party should provide a draft of the filing to the designating party in advance of the filing due date so the designating party can identify what it contends is confidential and should be sealed. As attorneys know, during discovery parties will often over-designate documents as confidential; when it comes time to defend those designations to the court the amount of truly confidential information tends to decrease.

• A redacted version of the document to be filed under seal. Civ. L.R. 79-5(d)(1)(C) . For example, if you are filing a memorandum that includes confidential information, you must file, and make publicly available, a version of the memorandum that redacts the confidential information. The same redaction requirement applies to declarations and exhibits.

• An unredacted version of the pleading or exhibit sought to be filed under seal. Civ. L.R. 79-5(d)(1)(D). This

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Fee Awards: Fee-Shifting Cases Versus Attorney's Fees As Damages

Should trial judges in California treat all cases of attorney fee reasonableness the same way, or are there genuine differences between some fee cases that merit different treatment and a different set of rules?

In statutory and contractual fee-shifting cases under federal and California state law, trial judges (and arbitrators) must decide what amount of legal fees is reasonable to award a prevailing party. The prevailing party files a post-trial attorney's fee application seeking an award of its fees. To arrive at a reasonable fee, trial judges in California typically apply the lodestar methodology of multiplying a reasonable hourly rate by a reasonable number of hours billed, then possibly adjusting the lodestar fee upward (or downward in rare instances) with a multiplier enhancement. Only trial judges (or arbitrators) make post-trial fee awards in fee-shifting cases, never juries.

Ken Moscaret

Conversely, in lawsuits where reasonable attorney's fees are claimed as one element of compensatory damages, the trier of fact (which could be a judge, arbitrator, or jury) will determine that amount at trial. Attorney's-fees-as-damages cases can include insurance recovery actions (for example, by a policyholder seeking reimbursement from its insurer of unpaid defense legal fees), some legal malpractice lawsuits (by a client resisting an unpaid balance owing to its former law firm, which the law firm is seeking to recover), and pure attorney-client fee disputes (by a law firm trying to get paid in full).

There are many published decisions by the Ninth Circuit and California appellate courts affirming trial courts that closely scrutinized the prevailing party's fee application. In fact, nearly all of the published (and unpublished) federal and state court decisions at any level in California and nationwide on the reasonableness of attorney's fees involve post-trial prevailing party fee awards in fee-shifting cases.

California federal and state court trial judges have broad discretion to determine reasonable fees, and the appellate courts generally only require that trial judges clearly and adequately explain the basis for any reductions or disallowances they make in the requested fees. Appellate courts generally do not undertake a de novo review of the reasonableness of a post-trial fee award, but apply an abuse of discretion standard.

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Post-Trial Fee Awards

In fee-shifting cases, trial judges are permitted to closely scrutinize the billing records and practices of the prevailing party's law firm. Judges can examine "all the trees in the forest," instead of focusing on the entire forest. They can and have penalized prevailing party fee applicants for all kinds of law firm timekeeping, invoice formatting, and other billing practices which trial judges may consider objectionable or questionable. Examples include heavy block billing and overly vague time entries on a law firm's invoices, if the invoices are submitted in support of the fee application.

This approach to a prevailing party's fee application may end up red-flagging the same kinds of billing issues that legal bill auditing firms hired by insurance carriers are known to flag, such as block billing and vague time entries. Again, it's permissible, and frequently to the consternation of a prevailing party's law firm who suddenly discovers that the manner in which they have been routinely submitting their monthly invoices to their client may not be acceptable to a trial judge in a post-trial fee award proceeding.

The confusion arises in the attorney's-fees-as-damages setting. Trial judges may assume that the rules for determining the reasonableness of a post-trial prevailing party fee award in a fee-shifting case automatically apply in an attorney's-fees-as-damages case, too. But that is not necessarily so. According to the leading treatise in California on attorney fee issues, CEB's 3rd edition California Attorney Fee Awards: "fees sought as damages are subject to different substantive and procedural rules than apply in fee-shifting cases." There are published decisions in the Ninth Circuit and other circuits which are consistent with that distinction, too.

Juries (and, in bench trials, judges) are empowered to award reasonable attorney's fees as compensatory damages at trial in attorney's-fees-as-damages lawsuits. Yet the author has never encountered any published federal or state appellate decision from any jurisdiction in which an appellate court has held that a compensatory damages fee award at trial can or should be reduced to penalize for billing issues such as block billing or vague time entries. The author has only seen that happen in fee-shifting cases.

There is actually a very logical reason for why the rules for determining fee reasonableness in fee-shifting cases can be different than in attorney's-fees-as-damages cases. Although some published decisions say that a losing party in a fee-shifting case should not have to pay for anything that a regular client would not ordinarily pay for, that simple prescription breaks down under the reality in the marketplace that some clients are willing to pay for certain litigation charges by their law firms that other clients aren't. Trial courts would have to decide which clients in the marketplace were the more appropriate bellwethers. So that particular test may not be the most practical one for fee reasonableness.

Instead, it makes more sense to argue that, in a fee-shifting case, the trial court should be concerned and vigilant about protecting the losing party from unfair surprise in the fee award proceeding. But while unfair surprise is a real risk in fee-shifting cases, it generally does not arise in attorney's-fees-as-damages cases.

In a fee-shifting case, the losing party only learns about the prevailing party's legal fees after trial is over and the fee application has been filed. Only then does the losing party actually find out about the prevailing law firm's hourly rates, case staffing practices, timekeeping practices, and invoicing practices, all of which have been negotiated privately and unilaterally between the prevailing party and its law firm.

Once the fee application is filed, the losing party invariably finds itself having to scramble to react to and mount a credible challenge to the requested fees after the fact, often in a very short time frame before the fee award is made, and with all of the natural disadvantages which that process entails. The risk of unfair surprise to the losing party in that situation is real and obvious.

Trial judges need to balance the desire to fully compensate a successful prevailing party in a fee-shifting case with the need to ensure fairness to the losing party. In the real-world of litigation, this sometimes means a trial judge will scrutinize the prevailing party's legal fees very carefully, even to the point of seeming to nit-pick them, before ordering the losing party to pay them.

In contrast, in attorney's-fees-as-damages cases, the risk of unfair surprise is usually absent. Consider, for example, a lawsuit where a policyholder has sued its insurer to recover defense fees incurred in an earlier underlying action which the policyholder ended up having to pay itself. In such cases, the insurer will usually already have some prior knowledge of the policyholder's legal fees. The insurer may have previously received the defense law firm's invoices or gotten defense cost estimates while the underlying action was ongoing, or had prior communications about the defense fees with either the policyholder or their counsel.

Either way, by the time the insurance recovery lawsuit is filed later on (in which the insurer seeks to challenge the reasonableness of the policyholder's defense fees), the insurer is not learning about those fees for the first time. This is even more true if the insurer was auditing the defense fees in the earlier underlying action as they were being submitted for payment (as so many insurers do), deciding what to pay or not pay. It is the exact opposite of what a losing party faces in a fee-shifting case.

Likewise, in a legal malpractice lawsuit filed by a client (as many probably are) in order to try to negate or offset an unpaid balance owing to its former law firm, the client will obviously know all about the unpaid fees beforehand and would have had the opportunity to discuss the fees with its law firm earlier, around the time they were

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incurred. There is no unfair surprise to a client in that situation when the law firm seeks payment on its bills. The same is true for a pure attorney-client fee dispute.

If typical fee-shifting rules, which allow for close judicial scrutiny of block billing, vague time entries, and other law firm timekeeping and invoicing practices, are not necessarily the correct rules to use in attorney's-fees-as-damages cases, then what other rules could apply instead? The various relevant factors under Rule 4-200 of the California Rules of Professional Conduct, which California appellate courts consider a test of both fee conscionability and fee reasonableness, are one alternative.

Another possible standard may be found in published case decisions such as *Hancock Laboratories, Inc. v. Admiral Insurance Co.*, 777 F.2d 520 (9th Cir. 1985). Hancock discussed how a federal trial judge could determine reasonable fees in awarding attorney's fees as compensatory damages. In Hancock, two insurance carriers on the risk litigated over which of them had a duty to defend the insured, as well as over the reasonable amount of defense fees that they respectively owed the insured. The insured had initially sued both carriers for declaratory relief, but the insured's complaint was dismissed per stipulation. The case that ultimately proceeded toward trial in district court involved one carrier which had paid the defense fees cross-claiming against the other non-paying carrier for contribution. Hence, the Hancock case closely resembled an insurance recovery lawsuit by a policyholder against their insurer.

In discussing whether the award of attorney's fees as compensatory damages made by the trial judge was reasonable, the 9th Circuit said that the major factors considered by California courts in determining the reasonableness of attorneys' fees are: the nature of the litigation, its difficulty, the amount involved, the skill required and the skill employed in handling the litigation, the attention given, the success of the attorney's efforts, the attorney's learning, age, and experience in the particular type of work demanded, the intricacies and importance of the litigation, the labor and the necessity for skilled legal training and ability in trying the cause, and the time consumed. (777 F.2d at 526, fn. 12).

The Ninth Circuit in Hancock upheld the district judge's award of reasonable legal fees as compensatory damages by relying on the above-mentioned factors. The Hancock factors are comparable to the Rule 4-200 factors in substance, even though expressed in different verbiage.

The Seventh Circuit has squarely addressed how trial judges should determine fee reasonableness when attorney's fees are being sought as "indemnity for loss" (*i.e.*, similar to damages) as opposed to a fee-shifting context. For example, *Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.*, 200 F.3d 518 (7th Cir. 1999) involved contractual indemnification owed by the seller to the buyer of a business. The district court awarded compensatory damages to the buyer for misrepresentations made by the seller in connection with the sale of the business, where the condition of the business turned out to be worse than the seller had represented.

The trial judge also awarded reasonable legal fees to the buyer (for having had to litigate against the seller) as damages under a "hold harmless" indemnity provision, which was intended to reimburse buyer for any loss or expense suffered as a result of the seller's breach. This provision was different than a contractual prevailing party fee-shifting clause. The legal fees awarded were part of buyer's loss and expense.

However, the district judge had followed an approach in awarding reasonable fees as damages that mimicked the close-scrutiny approach used in making a fee award in a fee-shifting case. The Seventh Circuit, in an opinion by Circuit Judge Easterbrook, said that instead of performing a detailed, hour-by-hour review of buyer's legal fees in the fashion of a fee-shifting case, the district judge should have instead undertaken an "overview" of buyer's legal fees to ensure they were reasonable in relation to both the stakes of the case and the seller's own litigation defense strategy against buyer. The Seventh Circuit also cited evidence that the buyer had engaged in prudent cost control with its legal fees. Finally, the Seventh Circuit pointed out that, in this instance, the trial court need not concern itself with the level of itemization or detail in the buyer's law firms' invoices, unlike in a fee-shifting case.

A few years later, in an insurance recovery action, *Taco Bell v. Continental Casualty Co.*, 388 F.3d 1069 (7th Cir. 2004), the Seventh Circuit, in an opinion by Circuit Judge Posner, questioned a defendant insurer's use of a legal bill auditor to nit-pick a policyholder's defense fees where the district court was awarding those fees as compensatory damages to the policyholder after the insurer had failed to defend. At one point in its opinion, the Seventh Circuit commented that the affidavit of the legal bill auditing firm which scrutinized Taco Bell's legal bills was so excruciatingly detailed that the amount of time and money involved in its preparation, and which would have been incurred in adjudicating its accuracy in the trial court, probably would have exceeded any potential billing excesses identified in Taco Bell's legal bills.

In summary, the Seventh Circuit has said that attorney's-fees-as-damages cases should not be treated the same as fee-shifting cases for purposes of determining reasonable fees. Some federal and state court trial judges in California may agree with that reasoning, while others may believe that all attorney's fee cases should be treated exactly the same way. Either way, the Ninth Circuit and California appellate courts may wish to provide clearer guidance on this issue in the future.

Ken Moscaret, Esq. is an independent attorney fee expert. His website: www.FeeDispute.com

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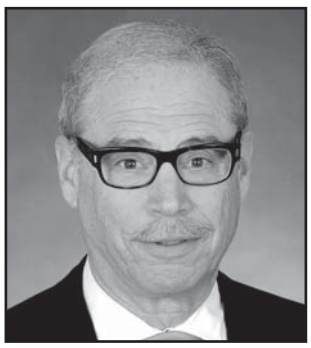
Judgments and Pre-Judgments

and informative voir dire. Jury selection took some weeks, not because there was any time wasted — we all worked hard — and not because the judge allowed anyone to get into areas that weren't pertinent. It was weeks of jury selection because almost every prospective juror was quite well informed about litigation against the church and almost every prospective juror had strong feelings about the lessons that they believed should be drawn from it.

MR. ZELDIN: What type of juror were you trying to get and what type were you trying to avoid?

MR. RUBY: We were hopeful of finding jurors who could focus on the particular facts of the particular injuries that had been suffered by the two young men who were plaintiffs in this case. Since we were admitting responsibility for those injuries, we didn't intend to, nor did we think the trial ought to be, concerned with the mechanisms of injury as much as the nature of the injuries themselves and their consequences.



Joel Zeldin

So to the extent that jurors would be willing to focus and to direct their energies to those injuries rather than how the injuries were inflicted or who was to blame, since we were admitting fault, that would be better.

There were many people during jury selection who disclosed candidly that they had such strong feelings about the whole topic of allegations of abuse of children by priests or anyone else that they couldn't sit fairly on this case.

I thought the prospective jurors were also — every single one of them — people of high integrity, who if they thought they couldn't serve, said so; and who, even if they hated the idea of serving, but believed they could, then they said they could.

MR. ZELDIN: How did you identify these target jurors who would focus on the particular facts of the particular injuries rather than the mechanisms for causing the injuries?

MR. RUBY: That's one of the reasons the voir dire took a while, because we talked to them and gave them the opportunity to speak from the heart about how they really viewed the problem that was going to be put in front of them if they were selected as jurors.

The judge made it clear, and the attorneys were allowed in their questions to make it clear, that the jury was not going to be called upon to render a judgment of conduct in other places by other diocesan officials in cases that had been reported in the media.

It was made clear that the jurors were going to be asked to render a judgment on a particular set of facts about a particular set of injuries to two young men who were plaintiffs. And the jurors were given an opportunity to say how they felt about that, and whether they thought they could do it or they couldn't do it.

MR. ZELDIN: Did you have an overall strategy about the composition of the jury panel as a whole as distinct from the selection of individual jurors?

MR. RUBY: We didn't. It might be of interest that, after weeks of voir dire, the jury was initially selected without either side using a peremptory challenge.

I think we had been given eight or ten peremptories a side, and when it came time to use them, the plaintiffs passed and the defense passed, and we had a jury. I said "initially" because then the court took a recess, and the judge came back on the bench to give the jurors — before we swore them — a general orientation toward the schedule and some legal rules. And in the course of the judge's comments, one of the jurors broke down and began crying and soon was almost hysterical. She was sobbing and in great distress. Recess was taken. She was examined outside the presence of the other jurors, and she said that the enormity of the task before her had just sunk in. And she, in voir dire, had thought first that she could sit as a fair juror; and second, she was convinced that this was academic, and she would never be selected, and when she was selected, it overwhelmed her. So the judge excused her. And about seventeen challenges later we had our jury.

MR. ZELDIN: Did you believe you were able to impanel an impartial jury?

MR. RUBY: I thought the jury was as determined to uphold their oath as people can possibly be. Maybe the conventional matrix of partial/impartial, fair/unfair, proves the limitation of those terms. We are all human beings, and the facts of the case were aggravated.

The jury were told that we admitted fault. So once the jury was told that, what is the meaning of the term impartiality at that point? They're told from the beginning of the trial that it is agreed that they should return a verdict against one side who admitted wrongdoing.

So I think the oath compels jurors to decide a case without prejudice, based on the law, and the facts that are presented to them. And I thought then and I think now that these were people who were deeply committed to doing that.

MR. ZELDIN: When you walked into court every day, did you have the feeling that trial lawyers have that you can't read the jury?

MR. RUBY: I always think that. Although, in this case, the environment, the atmosphere in the courtroom was highly charged every day. The judge decided that the plaintiffs would be allowed to offer testimony from numerous other victims of the priest who had molested these two young men.

So day after day there was testimony from other victims about what they had suffered. I think it would be expecting too much of anybody to hear that testimony and not in some sense reflect the awfulness of what had happened.

MR. ZELDIN: Was it palpable that the jury was antagonistic to your client?

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TRENTON H. NORRIS

On ENVIRONMENTAL LAW

In most of the country, environmental law is federal law with an overlay of state implementation and enforcement. But in California, environmental law is predominantly state and local law. Our laws are not only more stringent; they also regulate in novel ways. Companies caught unawares by these differences consider California a treacherous place to do business.

Proposition 65 is the best known example — nowhere else in the world can a consumer product manufacturer face private litigation over very low levels of chemicals. But recent efforts in California to address new environmental issues such as climate change and pharmaceutical waste have prompted new laws and new litigation.

Those efforts are frequently challenged as inconsistent with the system of nationwide regulation preferred by businesses seeking to distribute and sell their products efficiently. The main doctrinal grounds for court challenges seeking national uniformity are federal preemption, primary jurisdiction, and the dormant Commerce Clause. Perhaps due to Washington gridlock, or perhaps to conscious policy choices, federal preemption challenges often are based on meager statutory or regulatory language, and primary jurisdiction challenges often flounder on federal regulators' lack of resources and lack of enthusiasm for confrontation with California officials. Recent developments suggest that challenges under the dormant Commerce Clause will fare no better. not.

Under the Commerce Clause, Congress has the authority "to regulate commerce…among the several states." The dormant Commerce Clause is the implied converse: state (and local) governments may not unduly interfere with interstate commerce. The U.S. Supreme Court has set out the doctrine in two parts. First, state or local laws that favor in-state interests over out-of-state interests, *i.e.*, laws that appear fundamentally protectionist, are generally unconstitutional unless there is no alternative non-discriminatory means to serve the legitimate state or local interest. Second, even-handed laws that have indirect effects on interstate commerce can be unconstitutional if the burden on interstate commerce exceeds the local benefits. This balancing test is notoriously indeterminate.

In two recent high-profile cases, regulated industries challenged novel California environmental laws under the dormant Commerce Clause. Neither has fared well so far.

At the heart of the first case, *Rocky Mountain Farmers Union v. Corey*, was California's low carbon fuel standard aimed at addressing climate change. The law restricts fuels used in California based on the amount of carbon associated not only with the fuels' use in California but also with their production and transportation to California. In other words, California regulators count not just the carbon in the gasoline, but also the carbon emitted outside of California by burning other fuels to get the oil out of the ground, to refine it, and to ship it to a gas station in California. A federal court in Fresno enjoined the law because it discriminated against fuel produced outside of California, which naturally must be transported farther.

The Ninth Circuit reversed, and despite the concerted effort of the business community, the U.S. Supreme Court recently refused to hear the case. The Ninth Circuit held that the law did not facially discriminate against out-of-state actors and did not exceed California's authority. While the lawsuit had called into question the power of states to regulate the "life cycle" environmental effects of a product, the resolution of the facial challenge may prompt other states — reportedly Washington and Oregon — to enact similar approaches.

The second case also deals with life-cycle effects but involves a local ordinance: Alameda County's first-in-the-nation requirement that producers of prescription drugs fund or operate "take back" programs for proper disposal of unused products. The law is part of the "extended producer responsibility" movement aimed at regulating the "cradle to grave" effects of consumer products and shifting the disposal costs for items that may require special treatment (*e.g.*, electronics containing mercury) from local governments to the items' manufacturers.

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A federal court in San Francisco rejected the dormant commerce clause challenge of pharmaceutical manufacturers and distributors, finding no discrimination even though the ordinance ultimately shifts the costs of disposal in Alameda County from local taxpayers to purchasers of prescription drugs nationwide. The court was unswayed by the "happenstance" that most producers of prescription drugs have no presence in Alameda County and that 99 percent of prescription drugs in the U.S. are made outside of Alameda County. The Ninth Circuit recently heard arguments on the appeal, which is being closely watched by state and local governments interested in such cost-shifting efforts as well as by producers of other products that may be targeted.

California continues to innovate in environmental regulation; for example, the state's Green Chemistry statute allows for "life cycle" considerations in future regulatory actions. As businesses continue to confront a growing patchwork of laws that increase costs and decrease efficiency, with little prospect of preemptive federal legislation, dormant Commerce Clause challenges are sure to continue.

Mr. Norris is a partner in the San Francisco office of Arnold & Porter LLP. trent.norris@aporter.com.

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Judgments and Pre-Judgments

MR. RUBY: I don't think antagonistic is the right word, because I think antagonistic implies an element of unfairness. I don't think any juror came to trial in the morning thinking, I'm going to do wrong to one side or the other. But there was a strong sense that this evidence was so grave that a responsible person would have to be moved by it, and I think people were.

MR. ZELDIN: Did the jurors seem to carry over that feeling to the lawyers — in particular, to you as the personification of your client?

MR. RUBY: I didn't feel that. "I don't know" is the answer. But I didn't feel that the jury was all that concerned with the lawyers. My sense was the jury perceived rightly that they had more important things to do than to decide if they liked or disliked a particular lawyer.

I think from the beginning there was a feeling in the courtroom that this work that the jury embarked upon was very important for a lot of reasons, and anything else would be a distraction. So they were polite and respectful, and I thought they listened to both sides.

But I thought that their goal was to render a just verdict based on the evidence and the law.

MR. ZELDIN: What was the result?

MR. RUBY: The result was a damage award in favor of each of the young men, an award of compensatory damages that was in my opinion entirely within the evidence and would have been entirely within the evidence if the same injuries had been presented in another setting.

So if this had been another kind of tort, and the same injuries had been suffered, you'd say would have a range of between X and Y, and this verdict awarded compensatory damages between X and Y to each of the brothers.

MR. ZELDIN: Was there an award of punitive damages?

MR. RUBY: Punitive damages of course was the subject of great interest. And part of the test case idea was to get a sense of how a jury might respond to the opportunity to express its abhorrence of certain conduct in an award of punitive damages. We tried to defend the punitive damage case, and to make the case that an award of punitive damages was not warranted because the diocese had taken measures to make sure that this could never happen again. And to the extent that punitive damages served the purpose of deterrence, they were in this instance not necessary. We had some powerful evidence of measures that had been taken to prevent this from occurring within this diocese ever again.

The plaintiffs were very aggressive in their requests for punitive damages. And the ultimate award of punitive damages was, I think, right around a million dollars more or less.

MR. ZELDIN: Did you feel that your client's position was helped by acknowledging responsibility in the sense that you admitted negligence and said this is a damage case?

MR. RUBY: Yes. I came to believe that not only this jury, but jurors in other similar cases, not that many have been tried, but in the other similar cases, jurors were very, very concerned with this question, "Will this happen again?"

And there are a number of verdicts across the country, which I believe are a product of jurors perceiving that it could happen again, unless there was some intervening action. Jurors have a strong sense of the power that the wield to impress upon a party the need to change behavior.

It would have been inconceivable to say to the jury, "It won't happen again," but we still want to deny the undeniable. That I thought was the highway to nowhere.

If we were going to have any chance of being considered seriously when we said that punitive damages or a large punitive damage award wasn't called for, we needed to be willing to demonstrate a recognition of the wrongs that had been done in the diocese.

MR. ZELDIN: I'd like to turn to the other side of the table, when you're opposing a very well-known, well-respected adversary. I'd like to talk about the Raiders versus the NFL case where the Raiders were represented and personified by Al Davis, the owner and long-time general manager. What was that case about?

MR. RUBY: That was a case filed by the Raiders claiming that the NFL had wrongly interfered with the Raiders' ability to remain in Los Angeles and to play their games at a stadium that was to be newly constructed at the Hollywood Park Racetrack.

The lawsuit was sometimes framed in terms of a claim that the league had forced the Raiders to leave Los Angeles and come back to Oakland.

MR. ZELDIN: How was it to have Al Davis as an adversary in a case like that?

MR. RUBY: The Raiders' record in litigation over the years had been very, very good. And a big part of that was Mr. Davis, who was a widely-admired person, an excellent witness, and someone with whom I think many people on many planes could identify, even if some people didn't agree with every single thing that he espoused.

MR. ZELDIN: What about his brash personality?

MR. RUBY: My observation was that his brash personality in the courtroom came across as quite an agreeable personality. He was respectful to the court. He was respectful to the jurors. He was well prepared. He was on time. Didn't ask for special privileges. He was someone who accorded deference to the court and to the jury, and I think that elevated him from starting in a position of esteem to a position of even higher esteem.

And he was a very good witness. He was well prepared. He was knowledgeable, certainly. When he talked about football and the business of football, everybody that was listening knew they were hearing somebody who really knew this and who had invented important parts of it. So his success in the courts was no accident.

MR. ZELDIN: What was the outcome of that case?

MR. RUBY: The jury ruled in favor of the league in that case. It was a long and very sternly-contested trial.

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CHIP RICE

On LITIGATION SKILLS

Most litigators look forward to oral argument because we love the sound of our own voices. But we need to be disciplined and thoughtful to be effective, so here are a few tips.

• *Be prepared*. Start by outlining all of your arguments with citations to the record and the case law. If there are many cases that may have to be discussed, prepare a chart with short descriptions of each case, including the underlying facts, the holdings and the important similarities with and distinctions from your case. Don't wait until the last minute to do this basic preparation. Leave plenty of time to ruminate and add new points, and keep reviewing your materials until you know them backwards and forwards. Then organize all of your materials in a notebook or folder so that you can access them as the need arises, without fumbling or delay.

• *Seek input from others*. It's easy to get stuck in your own frame of reference and fail to understand how someone else may look at your case. To avoid the "unknown unknowns," as Donald Rumsfeld would put it, ask one or more colleagues to "moot court" you by asking questions that may come at the hearing. And take every opportunity to talk through your arguments with anyone that will listen so that you can sharpen your points and avoid surprises.

• *Be in the moment*. The point of all this preparation is to be comfortable, alert and instinctive once the hearing starts. To use a metaphor I've used before in this column, preparation for a hearing is the art of building a cage that you can go wild in. If you are well prepared, you will know what you can and can't say so you will be able to trust your instincts once the hearing starts.

• *Be concise*. Too many lawyers feel that they have to make every point that they have ever thought of, but don't tax the court's patience. Come up with a short introduction that makes your most persuasive points in less than half a dozen sentences. Then memorize this opening so you can deliver it without notes.

• *Listen*. Most litigators are much better at talking than listening, but listening is the only way to learn what the judge or arbitrator is thinking. Make sure that you pay attention to every clue about what matters to your decision maker. And never interrupt or show any impatience when he or she is speaking. Listening to your opponent is also crucial because you may hear an admission or omission that you can use.

• *Answer the court's questions*. I'm often surprised by lawyers who treat the court's questions as annoying distractions to be brushed aside so that they can get back to what they want to say. What matters is what the court thinks, and the court's questions are the best indication of that. Be respectful and thoughtful as you listen and ask for clarification if you are not sure what the question is. Then answer the question as directly and concisely as possible.

• *Maintain your credibility.* With the benefit of your colleagues, identify in advance the points that you may have to concede. Your credibility and confidence are crucial, so don't undermine them by making weak arguments or distorting the facts or case law. Candid admission will help convince the court that you can be trusted.

• *Don't bang your head against the wall*. The court may surprise you by dismissing out of hand one of your favorite arguments. You can try to rescue the point by reframing or rephrasing it, but don't put your credibility at risk by going down fighting. Have some back-up arguments ready so you will have more than one way to win.

Chip Rice

• *Be gracious*. No matter how contentious your relationship with your opposing counsel be, don't show that at the podium. Being sarcastic or snarky is a sure way to turn off judges and arbitrators, and no judge will want to hear the long history of your grievances against opposing counsel (and their equally lengthy response). And don't just be gracious to opposing counsel. Treat everyone in the courtroom, including the court clerk and reporter, with the utmost respect.

• *Don't rush*. Like many other lawyers, I've always tended to talk too fast so I have to consciously remind myself to slow down. Give the court time to absorb what you are saying and to interrupt you easily with questions. And your transcript will be much more accurate if you don't overwhelm the court reporter.

• *Silence can be golden*. Pausing for a beat or two is be a great way to emphasize a point. In addition, pauses are very effective if the court's attention is wandering. Judges and arbitrators will usually look up from whatever they are doing if you suddenly stop talking.

It's time to give someone else a chance at the bully pulpit that I've occupied for close to 20 years, so this will be my last column for the *ABTL Report*. I've enjoyed the opportunity to speak my mind. Thanks for listening.

Mr. Rice is a partner at Shartsis Friese LLP in San Francisco. crice@sflaw.com.

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Judgments and Pre-Judgments

Carmen Policy, formerly the president of the 49ers, testified for the league. He was a very, very good witness. And interestingly, even though Mr. Davis and Mr. Policy had a record of disagreeing on a great many issues over the years, when it came right down to it, they both testified to an important event in the history of that particular case. And really, they didn't disagree much about what had happened. And they didn't have much to quarrel about with the other's recollection of how this meeting unfolded and who said what to whom.

MR. ZELDIN: How did that impact the outcome?

MR. RUBY: Of course you never know. But the jury was out for weeks. How one particular piece of evidence affected the ultimate outcome, we don't know.

We thought, on our side of the case, that it was an important meeting, but there were a lot of important ingredients to the evidence in the case.

MR. ZELDIN: How did Al Davis' courtroom persona effect your strategy?

MR. RUBY: I thought that it would be unwise and fruitless to try to challenge him as a person. I think people in the courtroom for the most part liked him and respected him. And that didn't mean under the evidence that they necessarily had to accept the legal claims that the Raiders were making. So we tried to draw a distinction between whatever feelings or admiration somebody might have for the Raiders' side or for our side.

We were in the position of saying that to decide this case, it wasn't necessary for a juror to accept or to agree with the point of view of the principal witnesses on either side. Because there was quite, as you might imagine, a paper record, and quite a trail through some very complicated transactions that didn't depend upon informal likes or dislikes that people might have.

MR. ZELDIN: Is there any common thread in all of these cases we've talked about and others where you represented a prejudged or misunderstood client?

MR. RUBY: In all of these cases, the cases we've been talking about and others, I will always remember how staunchly the jury was determined to get it right. When I think about those cases, I think about jurors who were grappling with, in some instances, highly emotional content, and they were determined, I believe, to decide the case based on the legal substance of the claim as explained by the judge.

The jurors in the cases we've been talking about were determined — that's the word I'm looking for — determined to get it right.

In the Raiders' case, for example, the jurors deliberated for a very long period of time. They didn't ask a lot of questions during their deliberations. But one of the notes they sent out asked for some further guidance on a document, among hundreds of documents, but this was a particular document, a letter, where the judge had ordered that they should consider the second paragraph for a limited purpose.

And the jury sent a note out reminding the judge of the instruction he had given them as to this exhibit and then asking a very sophisticated question about whether the limited purpose was this limited purpose or another limited purpose. And you just have to be in awe of the dedication of people who are so devoted to their task.

They didn't send that note because they wanted to take more time in their deliberations or because they wanted a better understanding of the laws of evidence.

They sent that note, and they spent a very large amount of time, because they wanted to get it right.

And to the extent as lawyers we can try to connect with the desire, the determination the jury has to get their work right and to get to the right outcome under the law, we're not likely to go very far astray.

Allen Ruby is a litigation partner in the Palo Alto office of Skadden, Arps, Slate, Meagher & Flom LLP. Joel Zeldin is a litigation partner at Shartsis Friese LLP.

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Motions to Seal

document is filed electronically under seal (instructions are on the ECF website). The public, and even the parties, will not be able to access the document through ECF; only court staff can access the electronically-filed sealed material. You do not need an order to file this material under seal in the first instance; it is maintained under seal while the court decides the motion to seal. Tip: it is extremely helpful if this unredacted version highlights the portions of the document that the party seeks to seal. Some judges will reject the filing if it is not so highlighted.

Courtesy Copies (Civ. L.R. 79-5(d)(2).)

Providing the court with a courtesy hard-copy of your filing is critical to the court's ability to timely address the administrative motion to seal and the underlying filing. The courtesy copy should be an exact copy of what was filed, including the ECF header with docket number at the top (because judges often cite to docket numbers in their orders, or law clerks refer to docket numbers in their memoranda to a judge). In other words, if you filed a declaration with attached exhibits, the declaration with all of the exhibits, including those containing sealed information, should be provided together to the court. The Rule directs that the sealed material should be placed in an envelope and clearly marked as subject to a motion for sealing. 79-5(d)(2). This requirement does not mean, however, that, for example, Exhibit H, which contains material sought to be sealed, should be placed in an envelope separate from the rest of the filing. Instead, place the entire filing (for example, the declaration with attached exhibits) in

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ANDREW LEIBNITZ

On TRADEMARK

On June 18, 2014, "Washington Redskins" joined "Heeb" clothing, "Doughboy" condoms, and "Khoran" alcoholic beverages as unregistrable marks under the Lanham Act, which bars registration of a mark that "consists of or comprises…matter which may disparage…persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt or disrepute." A divided Trademark Trial and Appeal Board ("the Board") denied the NFL football team protection previously afforded "Amish Cigars," "Squaw" ski equipment, and "Black Tail" adult magazines. The decision raises questions about whether three administrative law judges ***should*** act as arbiters of "disparagement" or — on the other hand — whether Congress should go ***further*** in canceling protection for marks that become disparaging following registration.

The Redskins battle extends back to 1992, when seven Native Americans petitioned to cancel six registrations comprising various combinations of "the Redskins," the "Washington Redskins," a profile of a Native American, and "the Redskinettes." The Board canceled the marks in 1999, but that decision was reversed in 2009 on laches grounds (*i.e.*, unreasonable delay in initiating litigation by petitioners). Six younger Native Americans were able to reinstate the dispute in 2010, because laches begins to run only when the claimant reaches the age of majority. The Board then addressed the disparagement issue, asking: (1) what is the meaning of the matter in question, and (2) does that meaning disparage Native Americans?

While the first question may seem straightforward — *i.e.*, "redskins" refers to "Native Americans" — the Board had found in 2006 that "Squaw" referred to the ***geographic location*** of Squaw Valley as opposed to "American Indian woman or wife," and thus allowed registration of "Squaw" as a mark for ski equipment. Here, the Redskins' attempt to define "Redskins" as a reference to their football team rather than "Native Americans" failed, as the word retained its original meaning even when used with the team's services.

The Board then turned to whether "Redskins" was considered disparaging by a "substantial composite" of the referenced group at the time of the registration. First, the majority found that, beginning in 1967, dictionaries began characterizing "redskin" as "often offensive." The dissent derogated this finding as primarily based on two dictionary entries ("[t]wo does not make a trend"), but one expects dictionaries to follow established realities rather than lead public opinion.

Second, the majority turned the Redskins' linguistics expert against the football team. Since only two percent of references in 143,920 media articles between 1969 and 1996 used "redskin" outside the sports context, the drop-off in usage compared with preceding periods demonstrated the ***opposite*** of the expert's conclusion that "redskin is acceptable in both formal and informal speech or writing of educated people." While the dissent cleaved to the expert's refusal to opine about the drop-off in usage, in modern society it seems misguided to defend the current acceptability of referring to people by the color of their skin.

Third, the majority emphasized a 1993 resolution of the National Congress of American Indians — "the oldest and largest intertribal organization" — stating that "the term Redskins…has always been and continues to be a pejorative, derogatory…and racist designation for Native Americans." However, the dissent systematically attacked the evidentiary value of the resolution, concluding that "there is no reliable evidence supporting the number of Native Americans or tribes that…were members of the organization during the relevant time frame between 1967 and 1990." While damaging to the majority opinion, the legal inquiry does not require disparagement to anywhere near a "majority" of Native Americans (as opposed to a "substantial composite").

Andrew Leibnitz

The majority went on to recite additional evidence of disparagement, such as: a 1972 meeting between Native American representatives and the then-president of the Washington Redskins in which the Native Americans sought withdrawal of the "derogatory racial epithet"; and nineteen anecdotal letters of protest, including missives envisioning a contest with the New York Jews. The Redskins' anecdotal evidence of ***support*** from Native Americans for the team name, or adoption of name in certain high schools, did little to counteract the offense registered by others.

The ruling raises questions about the degree to which a division of the Patent and Trademark Office should opine on offensive commercial speech. While the First Amendment yields to regulation for the sake of avoiding consumer confusion, offensive business names have no bearing on that interest, and might properly warrant oversight simply by the marketplace and public opinion (which has already resulted in modification of mascots by hundreds of high schools and colleges). On the other hand, if governmental regulation ***does*** pass constitutional muster, then little reason exists to confine cancellation to perceptions at the time of registration, rather than consider the offense caused by the mark today.

Even without federal registration, the Washington Redskins may still enforce their trademark rights under common law. Should the decision be affirmed, the Redskins will lose access to statutory damages, treble damages for willful infringement, attorney fee-shifting, the ® symbol as notice of trademark rights, and exclusion of infringing products at the United States border by Customs (likely resulting in increased counterfeiting). The Cleveland Indians, Kansas City Chiefs, and perhaps even Notre Dame's Fighting Irish will attend the result.

Mr. Leibnitz is a partner in the San Francisco office of Farella Braun + Martel LLP. aleibnitz@fbm.com.

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the envelope with the notation that portions of the documents contain material subject to a sealing motion. The exhibit itself, however, should be clearly marked as subject to a sealing request so when chambers are reviewing the filing they will know what material is sought to be filed under seal and which is public.

Again, you must highlight those portions of the documents that you are seeking to seal. This enables the court to more efficiently review your request, and to determine at a glance what material has been sealed (if your motion was granted) and thus should not be included in the order or, if it is included, whether the order itself needs to be filed under seal.

Another word about courtesy copies bears mentioning. The Rule notes that ordinarily courtesy copies will be recycled — not shredded. If the client desires to have the courtesy copies destroyed, it is counsel's responsibility to arrange to retrieve the courtesy copies when the motion is terminated.

When the Filing Party is not the Designating Party

When the filing party is not the designating party, it may be unable to provide the compelling or good cause reasons for sealing the material, and may even disagree that such reasons exist. In such circumstances, the administrative motion should identify the material sought to be filed under seal and the designating party. The designating party then has four days to file a declaration providing the compelling reason or good cause for sealing the material. Civ. L.R. 79-5(e)(1). If no such declaration is filed, the sealing motion will be denied, and the filing party may publicly file the unredacted version of the document. It is somewhat surprising how often the designating party fails to file the supporting affidavit. *See, e.g., Morse v. San Francisco Bay Area Rapid Transit District*, 2014 WL 554595 (N.D. Cal. Feb. 7, 2014). Is it because they are not aware of the requirement or because they do not believe their designations can be justified?

The Order on the Sealing Motion

If the judge grants the motion to seal in full, there is nothing more to be done. The docket will contain the redacted public version of the document, as well as the unredacted sealed version, both of which were attached to the administrative motion to seal. 79-5(f)(1).

If the judge denies the motion seal, , the court will not consider the material sought to be sealed unless the filing party files an unredacted version of the document within 7 days of the court's ruling. 79-5(f)(2)(3). Sometimes the judge will not rule on the motion to seal until she has already ruled on the underlying motion, in situations where the material sought to be sealed was not necessary to the court's ruling.

The public's right to access to judicial documents requires the court's to scrutinize any attempt to file "secret" documents. To increase the likelihood that a motion to seal will be granted without requiring further effort (and concomitant expense) from the parties, try to do the following.

- If you are not representing the designating party, provide a copy of your filing to the designating party at least a few days in advance of your filing deadline so that the party can highlight what portions of the filing it believes should be sealed.
- Make the client's declaration in support of sealing as specific as possible as to each page and line sought to be sealed and as narrow as possible; seal only that which reveals confidential information.
- Review all of the administrative motion to seal attachments for consistency. It is not uncommon that a party will seek to seal material in a declaration or exhibit which is revealed in the publicly filed memorandum. *See, e.g., Optimize Technology Solutions, LLC v. Staples, Inc.*, 2014 W.L. 1477651 *3 (N.D. Cal. April 14, 2014).

Magistrate Judge Jacqueline Scott Corley has presided over a variety of civil cases in the Northern District, San Francisco Division, since May 2011.

ASSOCIATION OF BUSINESS TRIAL LAWYERS
abtl NORTHERN CALIFORNIA

c/o Michèle Silva, *Executive Director*
P.O. Box 696 • Pleasanton, California 94566
(925) 447-7900 • www.abtl.org