

**Q&A with the Honorable Richard M. Aronson**  
By Jay C. Gandhi and Stephanie R. Lam



*[Editors Note: We caught up with the Hon. Richard M. Aronson for this judicial interview. Justice Aronson was appointed to the California Court of Appeal, Fourth Appellate District by Governor Gray Davis in 2001. Prior to that, Justice Aronson served on the California Superior Court, having been appointed by Governor Pete Wilson in 1996 and also served for seven years as a Superior Court Commissioner. Before donning the robe for the past*

*two decades, Justice Aronson also spent many years as a Deputy District Attorney for San Bernardino County and as a Public Defender for Orange County. Justice Aronson is 58 years old, and married with two children.]*

**Q:** What were your early influences leading to a career in the law?

**A:** There were three in particular. First, my uncle was a well-known, criminal defense trial lawyer in Orange County. He had a certain air and confidence that I admired and associated with his professional career. Second, I have always had a keen interest in history and poli-

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**Going Global: Effective American Trial Advocacy in International Arbitration**

By Marcus Salvato Quintanilla

Orange County trial lawyers are routinely called upon to tackle some of the most complex matters that could be put before a jury anywhere in the County, and most believe that, for success, mastery of the core skills of advocacy counts for more than narrow specialization in any given subject matter. Former ABTL President, Mike Yoder, as well as myself and our colleague Jillian Allen, recently put that belief to the test in a series of international arbitrations that pitted our client, Palmco Corporation (an OC-based investment holding company founded by Korean Americans) against JSC Techsnabexport (“TENEX”), the Russian Federation’s chief instrumentality for the export of commercial-grade uranium.



Beginning in the late 1980s, Palmco had pioneered a tripartite supply relationship in which it purchased uranium from the Soviet Union and then resold it to the power utilities of South Korea. At the time, there were no diplomatic relations between the Soviet Union and South Korea, and Palmco was able to leverage its existing contacts within South Korea to open a new market for Soviet nuclear fuel. The relationship worked well for nearly fifteen years – until Russia’s barriers to dealing directly with South Korea were lifted, and the market prices of uranium began to skyrocket. Then TENEX began to look for pretexts to escape its supply obligations under Palmco’s various long-term contracts. Each of the contracts required disputes to be settled by arbitration in Stockholm, under Swedish law – a common forum and choice of law in contracts between Western entities and those from the former Soviet Union. The language of the proceedings was stipulated as English.

Although Palmco initially consulted us with a view to ancillary U.S. court proceedings here in Orange County, it

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## The President's Message

By Martha K. Gooding

It's hard to believe the year is already half over; June has been a whirlwind of summer associate events and busy trial calendars, with a few graduations and weddings thrown into the mix. Amidst all that, I want to take a few moments to highlight an important – and very exciting – change within our chapter and to focus attention on our chapter's singular commitment to community service.



I am pleased to announce that, effective mid-April, we have a new Executive Director: Linda

A. Sampson. Linda is new to this role, but is hardly a new face in Orange County. She has practiced law here for many years, was on our Board of Governors for many years, and seems to know everyone within the legal community (and beyond). We are thrilled to bring her boundless energy and creativity to the administration of our chapter. With that change came new contact information for our chapter. If you have questions about our newsletter, dinner programs, membership – you name it – please contact Linda at:

Linda A. Sampson  
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1100 Irvine Blvd, #717  
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714-602-2505  
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Anniversaries are often a time for reflection, and as we celebrated our tenth anniversary as a chapter last month at the beautiful Mission San Juan Capistrano, it reinforced how much we have to be proud of. As one of five ABTL chapters throughout the state, the Orange County Chapter leads by example in many ways, not the least of which is our commitment, as a chapter, to “giving back” to our community.

For nine of our ten years, the ABTL-OC has supported the fine work of the Public Law Center (“PLC”) through our June meeting and wine tasting fundraiser. Former president Bob Palmer hatched the idea nine years ago, using his personal credit card to guarantee the wine purchases, convinced that our members would generously support the PLC (and not leave him “holding the bag”)—

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## The Game of Negotiation

By Robert A. Steinberg

In negotiation, *everything* is a chip - everything has tradable value. *Substantive* chips involve the merits of the negotiation. *Procedural* chips are the *tactics* your adversary must pay some price to defeat. Your general approach is to gain a little here, gain a little there (“accumulating small advantages”) until your client is satisfied with the negotiating result.



On occasion you may do better than “satisfaction.” But satisfaction should be your goal. Can your client face himself, her family, his employer or her Board or shareholders with that result?

Your case and bargaining position dictate your settlement negotiation strategy. And your negotiation strategy dictates which bargaining tactics you will want to use. You will then be ready to play The Game of Negotiation.

The five main negotiation strategies are Competitive, Accommodating, Compromising, Collaborating and Avoidance. Competitive strategy involves an “I win, you lose” attitude. Accommodation is “I will let you win in exchange for some other benefit I hope to gain now or later.” Compromising is “I don’t care who wins, I just want to get this over with quickly.” Collaboration is “We can both win by expanding the pie before we cut it.” And avoidance is “I don’t really want to play at all.”

### The Competitive Strategy

The Competitive Strategy of “I win, you lose” is the one most often used in settlement negotiations. It involves the use of intimidation, distraction, and diversion tactics to gain leverage.

You can choose a Competitive Strategy regardless of your bargaining position. If you have greater leverage, you can use competitive tactics to realize your advantage. But if your case is weaker, competitive tactics can themselves create value.

Most negotiations of every type begin with a Competitive Strategy. The parties need to test each other’s wills before they begin bargaining seriously. The parties then

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## Two “Brown Bag Lunch” Series Lunches: One Civil, One Criminal

By Andrew Gray and Amanda Halter

This quarter, we were fortunate enough to meet in chambers with judges from both the civil and the criminal panels of the Orange County justice system. From a jury deliberation room at the Central Justice Center in Santa Ana, three civil judges shared practice tips useful to the young business litigators in attendance, while the presiding judge at Harbor Court regaled us with fascinating war stories amassed from years on the criminal bench.

### A Civil Discussion

On Thursday, April 17, 2008, the Honorable Kim G. Dunning, Andrew P. Banks, and Peter J. Polos hosted a lunchtime discussion about best practices for trial attorneys. The judges shared their collective insights on motion practice, discovery, hearings, trial preparation, and client counseling.

Continuing the ever-popular bench and bar debate over demurrers and motions for summary judgment, the judges remarked on attorneys’ overuse of these devices in cases where matters of fact are clearly before the court. Judge Dunning commented that bringing motions that are likely to be denied wastes time and money without accomplishing what some attorneys insist is the overarching goal of introducing the court to a client’s case and arguments before trial. In fact, Judge Dunning insisted that such previewing is simply not necessary because the judges carefully read the papers and understand the arguments raised at each proceeding. Noting that demurrers are rarely successful and often alert opposing counsel to the weaknesses in their cases in time to shore them up for trial, Judge Banks advised attorneys to consider seriously not filing such motions at all.

Arguing the other side, one attorney noted the importance of demurrers for eliminating improper causes of action and shrinking the scope of discovery while shaping settlement discussions, especially in cases with heightened



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## Consequences of Using Outside Service Providers for Business-Related E-Mails: The Stored Communications Act And The Potential Impact of O’Grady

By Alan R. Wechsler

In this “information age,” seeking electronic communications through discovery in civil litigation has become relatively commonplace. Most commercial enterprises have



their own “dot com” e-mail address and internal e-mail server, as well as a document retention policy in place regarding the information stored on those servers or backup media. Businesses and their counsel generally are mindful of the fact that company e-mails may be discoverable if the company or its officers, directors, or employees wind up in litigation.

Indeed, most business litigators are well aware that e-mail messages obtainable through discovery are a valuable source of information and evidence because senders of electronic communications often treat them much more informally than they would treat formal letters.

But to what extent is e-mail content discoverable when the e-mails are maintained by a third party internet service provider (“ISP”) – such as Yahoo! mail, Google’s “gmail,” and Microsoft’s “Hotmail”? A party certainly can seek the production of such e-mails by propounding document requests directly to another party, or by issuing a subpoena to a third party witness who sent or received the e-mails – so long as the requests otherwise comply with California’s Civil Discovery Act, *i.e.*, the information sought is not privileged, is relevant to the subject matter of the action, and either is itself admissible or reasonably calculated to lead to the discovery of admissible evidence. Cal. Civ. Proc. Code § 2017.010.

If a party believes that these methods might be ineffective in obtaining all of the relevant e-mail messages in a party or witness’ ISP-hosted account, there is the alternative of subpoenaing the messages directly from the ISP. As discussed in more detail below, the ISP’s backup servers allows discovery where a party or third party witness has deleted relevant e-mails from his account or there are other reasons to believe that the responding party’s document production was incomplete. Whether and under what circumstances an ISP can disclose the content of users’ e-mail messages is controlled by the federal Stored Communications Act

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tics, where lawyers made key contributions. Third, I was drawn to the law because of the drama portrayed in jury trials. I recall watching “Anatomy of a Murder,” based on a book of the same name and starring Jimmy Stewart. In the movie, a high-powered prosecutor came down from the “big city” and was pitted against a small-town lawyer, whose client was charged with first-degree murder. Although acquitted, the viewer was left with uncertainty about the verdict. It struck me that the orderly search for fairness and truth in a trial is compelling.

Q: *Why did you decide to become a judge?*

A. During my two years as a senior staff attorney for the Court of Appeal, the presiding judge at the time, Justice James Smith, urged me to apply for the commissioner position. After my experiences as both a Deputy DA and PD, I welcomed the opportunity to analyze each case objectively and enjoyed the freedom to search for the right answer. Lawyers are, of course, advocates. They must advance their clients’ positions and there is a reward there, but I derive a greater satisfaction in achieving the right result.

Q: *Which was the more difficult transition – from trial lawyer to trial judge or from trial judge to appellate justice?*

A: Adjusting from lawyer to trial judge, I would say. I presided over the civil law and motion docket for my first assignment. That was a departure from my years of experience as a criminal law attorney. I had to consider issues I had not considered since law school. Even given my experience as a Superior Court Commissioner, I also had to assume the new, somewhat unfamiliar administrative tasks of the trial bench. In comparison, my experience transitioning to an appellate justice was facilitated by the “practice” I received as a Justice Pro Tempore and as a senior staff attorney for the Court of Appeal.

Q: *What advice would you have for complex business litigators on how to preserve their win on appeal, or reverse their loss?*

A: Appellate practice is its own unique beast. This requires not only a specific skill set, but also knowledge of unique substantive and procedural issues. The expertise of attorneys specializing in appellate practice should be utilized early in the litigation process. While it may be difficult for business litigators to surrender some control over

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their cases, referral to – or at least co-counsel with – a skilled appellate litigator may be their client’s best option.

*Q: What advice would you give attorneys appearing before the Court of Appeal for the first time, or any time for that matter?*

A: Preparation is key, no doubt, and that can take many forms. First, attorneys appearing before the Court of Appeal for the first time should observe other oral arguments. This is not only to understand procedure, but to mentally prepare for the different and demanding format, particularly the questioning during oral arguments. Second, attorneys should carefully review legal treatises and other secondary resources on appellate practice, including the standards for appellate review. Third, attorneys should consult with attorneys specializing in appellate practice. You can always learn from those who have already been in the trenches. Last, but not least, there is no substitution for knowing your case well and preparing for the most critical questions.

*Q: What common mistakes have attorneys made before you?*

A: **Lacking objective perspective:** Lawyers who emphasize only the strengths of their case do not give proper consideration to the objective perspective a judge will likely use. A colorable argument will not satisfy a weakness in a litigator’s case. Appellate justices will absolutely press an attorney about the ungrounded arguments he presents.

**Ignoring prejudicial impacts:** Attorneys often fail to properly address the prejudicial nature of the errors they attribute to lower court decisions. While lawyers are adept at spotting legal errors, they often focus less attention on whether the errors are prejudicial. When drafting lengthy briefs outlining errors made by the lower court, lawyers should give more attention to the error’s prejudicial impact on their client’s case.

*Q: How would you describe your judicial philosophy?*

A: There are no labels for me. In fact, particularly for justices sitting in intermediate appellate courts, we are generally bound by the facts determined below and the controlling precedent from above. My judicial philosophy – if one could ever be ascribed to me – acknowledges the duty to faithfully interpret the law, wherever it may

lead for one party or the other. Quite simply, I weigh and balance the facts and law on a case-by-case basis, and do my best to achieve the right decision.

*Q: Have you learned anything as a Justice (or previously as a judge) that you wish you had known as a lawyer?*

A: I lacked an appreciation for how policy arguments tailored to broader concerns affect a judge’s decision. Many lawyers do not fully understand the importance of balancing the competing policy implications in close cases. Where the law is indeterminate, policy implications can be a powerful influence under certain circumstances. One should understand the significance of policy arguments in the appellate courts.

*Q: Why do you choose to be active in the ABTL?*

A: What’s not to like about the ABTL? The ABTL allows judges to build and maintain that important bridge to the bar. Without it, judges would be more isolated from the attorneys appearing before them. My experiences on the Board of Directors have been particularly rewarding since many of my fellow board members are not only colleagues, but friends. In addition, the programming, always dealing with relevant and current topics, piques my interests.

*Q: If you have a dinner with a famous person – living or dead – who would it be and why?*

A: Two individuals come immediately to mind: Winston Churchill and Jerry West. Churchill’s power and decisions in the 20th century political arena would provide any history buff with plenty of interesting dinner conversation. Jerry West is an equally natural choice for me. Growing up in Southern California and as an avid Lakers fan, I would have many questions about his career and his decisions as general manager. Few athletes exhibited the dignity and class he did as a player and coach.

*Q: If you could choose any job in the world other than a judge, justice, or lawyer, what job would you choose?*

A: General Manager of any professional basketball team or the General Manager of the Los Angeles Dodgers. Bill Bedsworth and I have offered our services gratis to the Dodgers, but they haven’t responded. Including Bedsworth might have been a mistake. Oh well. All things considered, I enjoy competition, so if I had to assume any other profession, involvement in sports would be an easy choice.

*Q: What do you enjoy doing when you are not working?*

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A: Aside from spending time with my family, I enjoy running, reading, and watching sports. I am an avid runner, having participated in numerous 10K races, and I still run three to four times a week. I also enjoy reading, especially historical works. And, I follow sports and watch a lot of basketball and college football games.

*Thank you Justice Aronson for your time.*

◆ *Jay C. Gandhi is a partner and Stephanie Lam is a summer associate at Paul, Hastings, Janofsky & Walker*

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became clear that the real battle would be fought in arbitration half a world away. After an unbroken string of victories, our belief in the value of core trial lawyering skills has been repeatedly confirmed.

**A Short Overview of International Arbitration**

This is not the place to outline the legal framework of international arbitration, nor to offer practice pointers on the array of complex tactical issues that such arbitrations present. A few remarks for background will suffice:

International arbitration is a process for obtaining enforceable rulings in business disputes between parties from different countries where enforcement may be sought in a foreign jurisdiction. Unlike litigants in state or federal court, parties to an international arbitration have given up their right to a jury of their peers, and they have exchanged a publicly-funded court system for a tribunal of private, for-hire judges who charge a premium for their services. They also secure what can be significant advantages:

- Commercial arbitration proceedings are private – not part of the public record.
- Unlike some domestic arbitrations, each of the arbitrators (including party-appointed arbitrators) has a duty to be independent and objective and, in our experience, they tend to be very high caliber legal professionals – whether advocates, former judges, or prominent academics.
- The process of reaching a final award is often faster and less costly than a comparable U.S. litigation.

- Under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”), the resulting arbitral awards are far more likely to be enforced in foreign jurisdictions than are judgments from U.S. courts.

There are well over a dozen leading arbitration institutions with their own distinct rules and there are many *ad hoc* arbitrations in which the tribunals choose their own procedures. Nevertheless, based on the series of arbitrations we conducted – before arbitrators hailing from locations as diverse as London, Stockholm, Brussels, Paris, and Hong Kong – certain basic patterns remain consistent.

The first step involves selection of the tribunal itself. In larger transactions, the parties’ agreement often provides that, in the event of a dispute, each party selects one arbitrator and that those two arbitrators (generally after consultation with their respective appointing parties) select a third arbitrator, who will serve as chair of the tribunal. Thereafter, the chair typically handles organizational and administrative aspects of the arbitration and may be empowered to rule by himself or herself on procedural questions. Once the tribunal is impaneled, the chairman typically issues a procedural order and timetable for the case (again after consultation with the parties).

No two procedural orders are ever exactly the same, but there are commonalities. For example, the order will typically provide for four sets of submissions at specified intervals: first, the claimant’s Statement of Claim; then the respondent’s Statement of Defense; followed by the claimant’s Statement of Reply; and finally the respondent’s Statement of Rejoinder. Each of these submissions may include legal and factual argumentation by counsel and will typically be accompanied by witness statements from both percipient and expert witnesses, as well as expert legal opinions by recognized authorities in the applicable law. In addition, each party’s submissions will include copies of any documentary evidence upon which it intends to rely. Because international arbitration clauses often fix a time limit within which an award must be issued, the time table for these submissions can be quite compressed.

The tribunal’s procedural orders typically specify the time, place and duration of the merits hearing, and indicate how the hearing will be conducted. Usually, counsel for each side will be permitted a short opening presentation (in our experience no more than one hour and often significantly less) which is then followed by witness examination generally confined to cross-examination and redirect. What U.S. lawyers would think of as “direct testimony” is usually very abbreviated (10 to 15 minutes) since the witnesses’

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direct testimony has been fully presented in the written witness statements.

Either before, during, or after the fact witnesses are heard, the tribunal will typically call for examination of the parties' respective fact and legal experts. Depending on the preferences of the arbitrators, these examinations can proceed by way of standard cross-examination and redirect or – just as commonly – by way of a process that the Australians have dubbed “hot tubbing,” in which the opposing experts (whether of fact or law) appear together and are questioned jointly.

At the conclusion of witness testimony, each side typically delivers a summation (in our experience no more than two to three hours). Sometimes in lieu of summations the tribunal will call for post-hearing briefs.

The tribunal's award will be delivered to the parties at some later date – usually a matter of months. Before the issuance of the award, the arbitrators will typically have invited both parties to make cost submissions summarizing all fees and costs incurred in the arbitration. Provided that the contract at issue permits recovery of such amounts by the prevailing party, these submissions allow the arbitrators to include an award of fees and costs in the final award itself, as required for the fee award to be enforceable. It is considerably easier for a prevailing party to recover a significant portion of its fees and expenses in international arbitration proceedings than in an equivalent U.S. litigation.

**Key Differences between U.S. Litigation Strategy and International Arbitration**

The basic flow of an international arbitration is easy to understand and (with practice) to turn to your advantage, but the process poses some significant departures from U.S. litigation. With some of the world's most respected international arbitration practitioners backing us up, we were able to avoid the pitfalls and flourish in what was initially an unfamiliar arena, using the skills of American trial lawyers. Nevertheless, the importance of mastering both the written and unwritten rules in the international setting should not be underestimated. As we learned, a number of key procedures that we take for granted do not exist in international arbitration or are of very limited use; and even when the rules seem to contemplate procedures familiar to American lawyers, they often require a different approach. Two areas are illustrative: discovery and cross-examination.

There typically are mechanisms for some form of discovery in international arbitration, but they are far more re-

stricted than anything experienced in U.S. civil practice. There are, for example, usually no provisions for interrogatories or depositions. Each party must set forth its position in writing through the witness statements that constitute its direct testimony, but there is very little opportunity to probe behind those carefully crafted statements before the time of the hearing.

Second, the availability of document discovery is drastically more limited than in U.S. courts. Most national arbitration laws and institutional arbitration rules leave the scope of discovery to the discretion of the arbitrators. In our experience, most of the top arbitrators are open to some form of document exchange, guided by the “spirit” of the International Bar Association's Rules on the Taking of Evidence in International Commercial Arbitration (the “IBA Rules”). What this often means in practice is that, after the parties have already exchanged one round of written submissions, the parties may propound very focused requests for specific documents or narrowly defined categories of documents. In making these requests, the requesting party must typically explain in detail which of the parties' specific allegation(s) the requested documents are expected to refute or confirm and why those allegations are material to the outcome of the case. The requesting party must also typically explain why it cannot obtain the documents from some other source. Once the request is made, the responding party will frequently object to making one or more of the requested disclosures; then it will be for the tribunal to rule. Based on our experience, international arbitrators are reluctant to order document production and will often decline to do so for all but a handful of requests. Then, assuming the tribunal does order some production, the responding party has a choice to make: whether or not to obey the order.

Unlike a court, which can back up its ruling by contempt sanctions, an arbitral tribunal typically does not have the power to enforce such interlocutory rulings. If a party flouts a discovery order, this may color the tribunal's assessment of the case, and it may even lead the tribunal to draw “negative inferences” – *i.e.*, to conclude that, if produced, the documents would have been unfavorable to the responding party's case. Nevertheless, that ill-defined threat may be a risk that a party is willing to take rather than produce the smoking-gun document.

In short, when it comes to proving your case in international arbitration, you are largely on your own and, when the time for cross-examination comes, the experience is in many ways like the Wild West of civil practice before the advent of discovery: there are fewer safe questions, more

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possibilities for surprise, and a heightened need for sound instincts on when to take risks and when to play it safe.

But the discovery devices at your disposal in preparing for cross-examination are not the only – nor even the most important – difference between American styles of cross-examination and those typically observed in international arbitration. Just as important are differences in the arbitrators' attitudes about fair play. To understand these differences it helps to recall that the unwritten rules of international arbitration represent a compromise between Anglo-American judicial culture and the civil law tradition prevalent on the European Continent. As we all know, in Anglo-American practice, witness testimony is of critical importance and documents are usually inadmissible unless they can be authenticated by a witness. Within the realm of witness testimony, lawyers of the common law tradition usually view cross-examination as a uniquely effective tool for getting at the truth.

Historically, civil law attitudes toward witness examination have been very different. On the Continent, the emphasis has traditionally been much more on the documentary evidence (whether or not authenticated) rather than on witness testimony. Adversarial cross-examination is not even permitted in some of these systems, and practitioners from such countries have little relevant experience or training. As a result, although cross-examination is at the core of most merits hearing in international arbitration, there is often a sense that the American trial lawyer must somehow be prevented from taking advantage of his European counterpart. In addition, our experience has been that arbitrators typically do not welcome aggressive questioning or the incisive impeachments that American trial lawyers relish. For example, they will typically not permit a witness to be impeached with a document that was not disclosed well in advance of the hearing.

In short, to an American trial lawyer accustomed to aggressive cross-examination and a certain amount of well-calculated courtroom drama, international arbitration proceedings seem reserved. In part, this is a result of different cultural norms; in part it is based on the arbitrators' desire to do nothing and permit nothing that could give rise to a colorable due-process challenge from the losing side. In any case, the pragmatic point is the same: some of our more flamboyant tendencies as American trial lawyers have to be

checked at the door. The trick is to know when to hold back and when to use your American training to the fullest.

### **Knowing When to Hang on to Your American Trial Instincts**

The importance of knowing when to let go of your American instincts and when to hold onto them cannot be overstated. When we began this series of arbitrations – against a team headed by one of the most prominent arbitration lawyers in Stockholm – our adversaries viewed us with only thinly veiled condescension. Over and over, they resisted our proposals on procedure and case management with the refrain, “we just don't do that in international arbitration.” What we quickly learned, however, is that there is no single right way to handle these cases. Many times, an American approach is perfectly acceptable to the arbitrators and is more effective than the techniques used by counsel who have never learned the art of communicating to a jury.

The advantages of U.S.-style advocacy were especially obvious in two areas: our ability to develop an effective narrative for the case, and our decision to make full use of audio-visual technology and demonstrative aids. On both scores, our American approach paid off.

To a successful U.S. trial lawyer, the importance of being a good story teller requires no explanation. A trial – or an arbitration – is not a law review article; a formalistic presentation of bloodless facts and abstract legal principles will never be as persuasive as a human story. As business trial lawyers, each of us has experience in presenting sometimes dry commercial disputes as human stories with central (often moral) themes. Where the Palmco Team stood out was in its ability to develop the material facts in ways that tapped into commonsense notions of fairness that, fortunately, are the same all over the world.

This is not to say that you can neglect the peculiarities of foreign law. To be effective, we had to master the intricacies of Swedish contract law and, with coaching from our local legal experts and the study of relevant treatises, we were ultimately able to discuss legal doctrine in ways that Swedish judges and law professors found more convincing than the analyses presented by our Stockholm-based opponents. Nevertheless, a cogent presentation of the facts was indispensable to our victories and something for which our American training stood us in good stead.

Our adversaries were less effective in this area. Regardless of the specific attorneys or the firm involved, they did not

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have the knack for storytelling that becomes second nature to an American trial lawyer. In our view, this limited their ability to persuade the tribunal when it really mattered.

The effective use of demonstratives is an extension of this basic point. American trial lawyers are accustomed to using audio-visual technology to keep the attention of the jury and to summarize sometimes complex facts in compelling ways. With the help of our team back in California, we were able to do just that – using sophisticated PowerPoint presentations for openings, witness examinations, and summations. (Given the time difference, there were significant advantages to having a technical team in California whose morning would start just as the day's hearings in Europe were coming to a close.)

Our European adversaries tended not to use visual aids to any comparable extent. As if trying not to “insult the arbitrators’ intelligence,” they often relied instead on flat, lecture-style oral arguments. Notwithstanding the obvious intelligence of our arbitrators (all of whom were top judges, academics or advocates, in their own countries), we chose to present some key facts in the intuitive, graphic manner we would use with a jury, thus freeing them up to use their considerable mental energies on the difficult legal questions. Based on the results we achieved, our instincts appear to have been sound.

**Conclusion**

To business trial lawyers in Orange County, the breadth, complexity, and variety of business disputes that can arise in our community comes as no surprise. But the international scope of some of those disputes – and the fora in which they must sometimes be fought are less familiar. Our experience confirms that, with the right network of supporting professionals, American trial lawyers are entirely up to the task. Being energetic in learning new law and procedure and humble in adapting ourselves to new practices, while remaining committed to the advocacy skills we have learned at home, has proved a powerful combination.

◆ *Marcus Salvato Quintanilla is Counsel in the International Dispute Resolution and Intellectual Property and Technology practice groups in the Newport Beach office of O'Melveny & Myers LLP.*

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or, more accurately, a few dozen cases of wine). He was right, of course. In the years since, the June PLC fundraiser has expanded to the point where I am confident it exceeds even Bob's ambitious expectations. In the first eight years alone, the ABTL-OC raised nearly \$95,000 for PLC. That translates into innumerable hours of free legal services to those who need it most. This year's event was every bit as successful as the prior eight; I am confident that we will well exceed the \$100,000 mark this year.

My thanks to all our generous sponsors – including our corporate sponsors, law firms, and Board members – and to the several hundred of you who attended the event and helped make it such a success. My thanks, too, to Terree Bowers and Genevieve Cox for a sobering but inspirational presentation. Please join us at our September 10 meeting when we present the check to Ken Babcock, the Executive Director and General Counsel of PLC. Our program that evening will be a very special event: Ninth Circuit Judge M. Margaret McKeown will present a program on appellate advocacy. I believe this marks the first time a sitting Ninth Circuit judge has presented a program for us – another milestone for the chapter!

As exciting as our June PLC fundraiser is, we decided last year that we could do more to support our community. The chapter therefore undertook two new community giving initiatives that – because of you – were a tremendous success. All attendees at the November meeting were invited to bring with them to the meeting either a gift card to donate to Orangewood Children's Home or a stuffed animal to donate to the Orange County Superior Court. Orangewood, an emergency shelter for abused, abandoned and neglected kids, uses the gift cards – which are best in small increments of, say, \$10, \$15, or \$20 – to give to the children who live there for incentive bonuses and rewards for the children. As for the animals: the Court gives a stuffed animal to each child who appears in court for final adoption proceedings. In these days of budget crunches, there is no money in the court budget for this lovely gesture, and we were chagrined to learn that our caring judges were going out of pocket to purchase the animals themselves. That's where you all came in. Thanks to your generosity last November, we collected more than \$1,300 in gift cards for Orangewood and a veritable *mountain* of stuffed animals for the Court – so many we stopped counting!

We plan to make both of those initiatives an annual event at our November meeting, so that we can continue the ABTL-Orange County tradition not only of presenting great programming and networking opportunities, but of identifying and

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meeting needs in our community.

Thank you for your continued support of our chapter, and for your generosity in supporting PLC, Orangewood, and our own courts. The Orange County legal community is second to none in its willingness to step up and help those who are in need. I hope you all have a lovely summer, and I look forward to seeing you in September.

◆ *Martha K. Gooding is a partner in the Global Litigation Group at Howrey LLP*

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**-Negotiation: Continued from page 3-**

continue their competitive bargaining or shift their approach to one of the four other strategies.

Following are examples of some competitive tactics:

**Alternatives to Settlement:** Emphasize you have better choices than settlement. The side that cares more about settling is weaker. If you have the better BATNA (Best Alternative to a Negotiated Agreement), you have more “chips.” Make that clear to your adversary.

One example is the threat to “beat your adversary in the marketplace.” This threatens the lawful use of market power to make a legal victory Pyrrhic. Properly used, this tactic is effective.

• **“Anything But That”** — Claim your adversary’s offer is not enough, even when it is. Pick up other concessions before he “wrenches” your agreement from you.

• **Bluffing** — Bluffing is at negotiation’s core because each side has limited information. A good bluff uses your adversary’s *uncertainty* to create even more doubt. And doubt translates into risk, and risk into money. Look for signs of uncertainty on her face or in her body language. But a bluff is not a lie – never expressly mislead.

A standard “bluff” is “take it or leave it.” Meet this bluff (and most others) by calling it. You won’t know your adversary’s limit unless you push for it.

• **Bringing in the Media** — Threaten to report some action or *behavior* to the media to induce concessions. Plaintiffs will use this tactic in media-sensitive industries, such as the entertainment industry. Recognize that parties

in such industries have fair resistance to this tactic and will combat your disclosure through press releases of their own.

• **Creating Deadlock** — Create deadlock to force your adversary into concessions to move the negotiations along. But distinguish *this* tactic, as a tactic, from a legitimate impasse. Even reasonable people can disagree.

• **Diversion/Distraction** — If you feel you are losing an important issue, shift the discussions to a different issue before you *concede*. Even change the subject altogether or use some other technique to distract your adversary from completing the current discussion.

• **Done Deal** — Take some unilateral action and present it to other side as a “done deal.” Your adversary is thus forced to *acquiesce* or walk out. An example is when a co-party shows up at the negotiation only to discover that the other co-party has already settled.

• **Good Cop/Bad Cop** — Team an aggressive negotiator with a friendly negotiator to win concessions. The aggressive negotiator uses competitive tactics to anger and *distract* your adversary. The friendly negotiator steps in to smooth things over. The friendly negotiator becomes the mediator between your adversary and the aggressive negotiator, and you can strike a deal on the friendly negotiator’s terms.

• **Irrational Behavior** — Sometimes act irrationally, not only to distract and unnerve, but also to undermine your adversary’s *confidence*. Lawyers tend toward rational argument. The irrational can throw off even an experienced negotiator.

• **Limited Authority** — Claim to lack authority to settle at some amount and ask your adversary to reduce the offer to your *authority* limits. To prevent your adversary from using this tactic, determine her authority in advance. If she lacks full authority, do not proceed.

• **Limited Time** — Constrain the time limits of the negotiation. *Counter* this tactic by clarifying time constraints in advance.

• **“Poor Me”** — Act like you have no background or training in negotiation and ask your adversary’s help. He may *sympathize* with you and be more reasonable than he intended. This tactic can be especially effective for younger advocates.

• **Silence** — Very few people can endure silence. Silence

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**-Negotiation: Continued from page 10-**

can impel your adversary to give you more information or concede more than he intended.

If your adversary's silence discomforts you, say something like, "I see you are thinking about my offer. I'm going to leave the room for a bit. Please let me know when you are ready to respond." And begin to leave. The silence will end before you reach the door.

•**Straw Man** — Demand agreement on Issue 1, which your adversary cares about most. Create deadlock and then "reluctantly" concede Issue 1 to gain agreement on Issue 2 (the one you care about most) – and maybe Issues 3 and 4 as well.

•**Turnabout** — After you have conceded an issue or otherwise acted defensively, "gain space" by coming out strong on the next issue. But choose that issue wisely. It must be important, and you must win it.

•**Use of Power** — Threaten to use your power and sometimes actually use it. But heed this chess axiom: "The threat is more powerful than its execution." The threat creates doubt and, hence, concessions; but once implemented, you limit your adversary's choices, and she will do what she must to respond.

### **The Accommodation Strategy**

An Accommodating party will sublimate its concerns to satisfy the other party's, at least for the present. You choose an Accommodation Strategy if you have done wrong and want to get the matter over with quickly and less expensively (airplane crashes and oil spills are two examples where quick settlements will save money). And there are less dramatic examples where a desire to limit personal or business disruption will encourage you to end the matter quickly. Or maybe you wish to gain some goodwill or other benefit now or later through a quick resolution.

•**Face-Saving** — Prioritize the other side's dignity. Use every opportunity to give "face" and respect to the other side. Allow the other side to make tactful retreats to avoid embarrassment.

•**Identification** — Align your interests with your adversary's, see the facts from her perspective, and agree with her arguments. But don't concede unnecessary issues.

•**Take the Lead Oar** — Move the negotiation forward

regardless of who created the difficulty. Suggest solutions, offer to prepare the documents, and be flexible about timing.

•**Take Reasonable Actions** — Always be the party of reason, whether setting realistic deadlines or other conditions of the negotiation. Rarely if ever use a competitive tactic to move the other side.

### **The Compromising Strategy**

Compromisers look for an expedient, partially satisfactory middle ground. Their primary interest is haste and "rough justice." Thus, compromisers are willing to trade concessions, sometimes despite the merits, simply to make a deal. One example is a dispute involving an ongoing business relationship. You may choose to give a little to preserve the relationship.

Following are the compromiser's tactics.

•**Bit-by-Bit** — Gain your concessions "bit-by-bit" rather than all at once. As the direction of the incremental movement becomes clear, suggest meeting at the mid-point.

•**Conditional Proposals** — Make a proposal conditioned upon your adversary's acceptance of issues you need favorably resolved.

•**Log-Rolling** — Concede on an unimportant issue to you (but important to your adversary) in exchange for your adversary's concession on an issue that does matter to you.

•**Splitting the Baby** — At some point offer to split the difference with the other side, whether through an exchange of remaining issues or halving the dollar amount still in issue.

•**Tit-for-Tat** — Never make a concession without obtaining one in return. This rule underlies all bargaining ("I won't negotiate against myself!"). But you must adhere to it when compromising or you will "compromise" away all your value simply for expediency's sake.

### **The Collaborative Strategy**

The Collaborative Strategy ("Win-Win") seeks to create value for both sides. Its focus is on each side's underlying interests and not their positions. You give the other side something it wants in exchange for something you want. You both gain in the process.

Business negotiators use the Collaborative Strategy.

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Business negotiations involve many different components of value and risk allocation, all of which can be traded against one another for an ultimately satisfactory outcome. The lesser opportunities for value and risk allocation in litigation settlement talks explain why most litigants begin with a Competitive Strategy.

•**Flexibility** — Be flexible, the hallmark of a skilled collaborator. Know when to mount a tactical retreat and when to press for an important point. Be willing to reexamine decided issues, but don't feel obligated to make further concessions unless you also gain something.

•**Focus on Process** — Process often translates into improved substance. Rearrange the mechanical steps of the negotiation to overcome impasse and deadlock and enhance problem-solving prospects. Typical examples: take a break in the negotiation; change the physical setting of the negotiation; or return the negotiation to the fact-finding stage.

•**Identify with Others in Similar Circumstances** — This tactic might be termed the “transitive rule” of negotiation: argue that the other side has already treated similarly-situated X in a particular way, and they should treat you the same way. Defendants in multi-defendant suits often use this tactic when the plaintiff has settled favorably with one of them.

### The Avoidance Strategy

Avoiders try to ignore the entire dispute, or some specific issues, for at least some period of time. The avoider uses tactics to sidestep or postpone an issue or withdraw altogether from what the avoider perceives as a threatening situation.

•**Negotiate Money Issues First** — If you prioritize money, insist that money be negotiated first. By fixing the money component of the settlement, you avoid discounts for the cash-worth of any non-money concessions.

•**Negotiate Non-Money Issues First** — But if you wish to avoid paying money, address the non-money issues first. You can then value your non-monetary concessions and use those values to reduce the amount of money you will pay your adversary.

•**Refuse to Combine Negotiation of Related Disputes** — If you are litigating multiple related actions, refuse to negotiate the actions together if you determine that you are stronger in one case than another. You can thus avoid offsetting your strong case with the other cases' weaknesses.

•**Walk Out of the Negotiation** — If you become engaged in negotiations you are not ready for, walk out. You may state dissatisfaction with your adversary's proposals, but your goal is to defer discussions to a later time.

•**Withdraw an Issue** — If you are not yet ready to address an issue, perhaps because it is too painful or simply not ripe for discussion, remove that issue from the negotiation, for at least some period of time.

### Switching Strategies

You may decide to switch strategies if you feel you are making insufficient progress. As negotiations move forward and you want to encourage continued progress, you may abandon a Competitive Strategy for one of the cooperative strategies (Accommodation, Compromising, or Collaborative). Or you may instead move to a more Competitive Strategy in response to the other side's competitive behavior.

### Conclusion

The Game of Negotiation requires specific strategies and the right tactics to implement that strategy. Your case and bargaining position will determine which negotiation strategy will work best for you: Competitive, when you must have what you want; Accommodation, when you have done wrong and want to settle quickly; Compromising, when expedience matters most; Collaborative, when you want to create a bigger pie; and Avoidance, when you are not yet ready to bargain.

♦ *Robert A. Steinberg is an attorney and mediator and an active member of ABTL.*

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### *-Brown Bag: Continued from page 3-*

pleading standards such as securities actions. Another attorney indicated that clients often demand these types of motions, and the judges quickly agreed that a client's insistence on frivolous motions demands frank communication with the client about the cost and limited likelihood of success for such motions.

The group alighted on a number of other topics of interest to civil practitioners, such as how often the judges change their tentative rulings and how they deal with oral argument. The judges concurred that tentative rulings are rarely disturbed. Judge Dunning advised attorneys to listen carefully to the judge's questions during argument because

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***-Brown Bag Lunch: Continued from page 12-***

these questions indicate what the judge considers important in making her decision. Too often attorneys are so concerned about conveying their prepared points that they inadvertently neglect to listen carefully to or respond directly to the judge's questions, even though these questions are usually reflective of what the judge needs from the advocate in order to resolve the issues.

Turning to trial materials, Judge Banks extolled the importance of a trial notebook organized by the elements of each cause of action. This simple tool can keep an attorney focused on the matters that must be proved at trial, while minimizing distracting factual detours that diminish the effectiveness of the advocacy. When questioned about the use of media in the courtroom, Judge Polos discussed how media can both enhance and detract from an argument. Although using technology to present exhibits during a witness's testimony can make a presentation easier for the jury to follow, many media projections actually divert the jury's attention away from the key issues. Judge Banks observed that PowerPoint presentations often reduce the quality of advocacy because attorneys too often allow their attention to shift from the jury to the screen.

The judges also stressed the value to young attorneys of serving on a jury. Jury service provides the best and most direct insight into the mechanics and mysteries of the jury's deliberation process. It also creates an opportunity to better perceive the hallmarks of effective courtroom advocacy. The judges discussed their own experiences as jurors and refuted the suggestion that attorneys are always dismissed in voir dire.

Finally, Judge Banks talked about the process of becoming a judge, highlighting the role that peer evaluation plays in the judicial selection process. He cited this fact as just one more reason attorneys should always deal with one another civilly. Throughout the conversation, both the judges' and attorneys' comments underscored the importance of diligent preparation and candid communication with clients, opposing counsel, and the court.

#### Of Crime and Punishment

Our next courtroom lunch began with an opportunity to observe several guilty pleas, the criminal sentencing process, and the surrender of one defendant into custody, as we civil attorneys stepped out of our normal practice and into the courtroom of the Honorable Glenda Sanders, presiding judge at Harbor Justice Center in Irvine. On Thursday, May 29, 2008, Judge Sanders led us on a tour

of her chambers before hosting us in the judges' library for an insider's perspective on the Orange County criminal justice system.

During the lunchtime discussion, Judge Sanders elaborated on some differences and similarities between her service as a criminal judge and her former work in private civil practice. She emphasized that although the contours of civil and criminal practice are markedly different, both practices present opportunities to confront intellectually engaging challenges on a daily basis. The group discussed issues that are particularly resonant in the criminal courts, including drug abuse, juvenile justice, mental illness, and constitutional concerns such as search and seizure. The hour flew by as Judge Sanders relayed story after story of the highs and lows of criminal practice in Orange County.

#### About the Judges

Judge Dunning was first elected to the bench in 1998, and on June 13, 2008, was elected as Presiding Judge of the Superior Court of Orange County. Judge Banks began his judicial career in the Municipal Court in 1997 and was elevated to the Orange County Superior Court in 1998, where he now serves on the Civil Panel. Judge Polos, who also serves on the Civil Panel, was appointed in 2001. Judge Sanders was elected to the bench in 2002, after 15 years with Latham & Watkins LLP as an associate and then partner. The ABTL and all attorneys in attendance at both lunches are deeply grateful to Judges Dunning, Banks, Polos, and Sanders for sharing so graciously of their time and insights.

◆ *Andrew Gray and Amanda Halter are associates in the Irvine office of Latham & Watkins.*

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***-Stored Communications: Continued from page 4-***

("SCA"), set forth at 18 U.S.C. Sections 2701-2712, which is part of the Electronic Communications Privacy Act ("ECPA").

#### The Stored Communications Act

For e-mail accounts maintained through third party ISPs such as Yahoo! mail or Google mail, e-mail messages are stored on the ISP's servers either while a user has access to them (e.g., messages that are unopened, have been manually saved, or are automatically set to be saved unless and until deleted), or for a certain length of time as backup storage for the account. As a result, discovery of such information is possible even though, as a practical matter, the infor-

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**-Stored Communications: Continued from page 13-**

mation is no longer available to the target of the discovery request.

In 1986, Congress enacted the ECPA based on concerns that there were disparities between the protections given to telephonic and other established modes of communication and those afforded to new communications media such as computer technology and new forms of telecommunications. See S. Rep. No. 99-541 at 5 (1986), as reprinted in 1986 U.S.C.C.A.N. 3555, 3559. As explained in *O'Grady* (discussed below), Congress sought not only to shield private electronic communications from government intrusion, but also to encourage innovative forms of communication by granting them protection against unwanted disclosure. *O'Grady v. Superior Court*, 139 Cal.App.4<sup>th</sup> 1423, 1445 (2006). Congress was concerned that in the absence of a degree of privacy at least roughly comparable to that accompanying more traditional modes of communication, potential users might be deterred from using the new forms merely out of a feared inability to communicate in confidence. *Id.*

In general terms, the SCA prevents providers of electronic communications from divulging private communications to certain individuals and entities, including government entities. The SCA provides, among other things, that subject to certain conditions and exceptions, “a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service . . . .” 18 U.S.C. § 2702(a)(1). The SCA defines an “electronic communication service” (“ECS”) as “any service which provides to users thereof the ability to send or receive wire or electronic communications.” 18 U.S.C. §§ 2510(15), 2711(1). If a subpoena is determined to have been issued to an ISP in bad faith and results in the disclosure of a user’s e-mails, the subpoenaing party could be exposed to civil liability and/or criminal penalties under the SCA (and possibly other federal statutes). See 18 U.S.C. §§ 2701, 2707. Subject to certain conditions and exceptions, an ISP itself also can be held civilly liable for its disclosure of information in violation of the SCA. See 18 U.S.C. § 2707.

Additionally, subject to certain additional conditions, the SCA provides that “a person or entity providing remote computing service to the public shall not knowingly divulge to any person or entity the contents of a communication which is carried or maintained on that service . . . .” 18 U.S.C. § 2702(a)(2). A “remote computing service” (“RCS”) is defined as “the provision to the public of

computer storage or processing services by means of an electronic communications system.” 18 U.S.C. § 2711(2).

The SCA enumerates several exceptions to the general rule that ISPs may not disclose the contents of stored e-mail messages, which are set forth at 18 U.S.C. Section 2702(b)(1)-(8). These exceptions include, among others: disclosure to an addressee or intended recipient of such communication or to their agent (18 U.S.C. § 2702(b)(1)); disclosures related to authorized wiretaps (18 U.S.C. § 2702(b)(2)); disclosures that are necessarily incidental to the rendition of the service or to the protection of the rights or property of the service provider (18 U.S.C. § 2702(b)(4), (5)); disclosures related to child abuse (18 U.S.C. § 2702(b)(6)); disclosures made to a law enforcement agency where messages inadvertently received by the ISP appear to relate to the commission of crime (18 U.S.C. § 2702(b)(7)); and disclosures made to a government entity if the service provider believes in good faith that it must make the disclosure without delay due to an emergency involving danger of death or serious physical injury (18 U.S.C. § 2702(b)(8)).

Significantly, the SCA also authorizes disclosures that are made with the consent of a party to the communication, or the consent of a subscriber to an RCS (but not a subscriber to an ECS). 18 U.S.C. § 2702(b)(3). The significance of the distinction between an ECS and an RCS in this context was demonstrated by an important opinion recently issued by the Ninth Circuit Court of Appeals in *Quon v. Arch Wireless Operating Co., Inc.*, 2008 DJDAR 9051 (9<sup>th</sup> Cir., June 19, 2008). In *Quon*, the court held that an outside provider with whom the City of Ontario contracted for text messaging services violated the SCA by disclosing to the City the transcripts of the text messages sent to and received by certain officers of the Ontario Police Department on their City-issued pagers. *Id.* at 9056. Although the City was a “subscriber” and consented to the disclosure, the *Quon* court found that the consent exception to the SCA was inapplicable because the provider was an ECS rather than an RCS. *Id.* at 9054-55. It follows that an employer likewise would be unable to obtain copies of its employees’ e-mail messages if the employer contracted its e-mail service out to an outside provider rather than maintaining its own internal e-mail server. Notably, the court in *Quon* also found that the City violated the officers’ Fourth Amendment and California constitutional privacy rights because the officers had a reasonable expectation of privacy in the content of their text messages, and the search was unreasonable in scope. *Id.* at 9060.

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*O'Grady v. Superior Court*

The “consent” exception to the SCA also has significant implications for civil litigants after the decision in *O'Grady v. Superior Court*, 139 Cal.App.4<sup>th</sup> 1423 (2006). In *O'Grady*, the Court of Appeal for the Sixth Appellate District held that there is no implied exception for civil discovery subpoenas to the SCA’s prohibition against disclosure by ISPs of the content of their subscribers’ electronic communications. In *O'Grady*, Apple Computer sued several unknown “Doe” defendants for misappropriation of trade secrets after it was learned that information about a new Apple product had been released to publishers of certain “online news magazines.” *O'Grady*, 139 Cal.App.4<sup>th</sup> at 1431. The trial court granted Apple authority to issue discovery subpoenas to the publishers of the websites and to the service provider that hosted one publisher’s e-mail account. *Id.* at 1431, 1437. The subpoenas sought documents relating to the identities of the defendants who provided the information from which the articles regarding Apple’s product were derived, as well as all communications to or from such persons relating to the Apple product. *Id.* at 1436-1437. The publishers moved for a protective order to prevent the discovery sought by Apple on the grounds that, among other things, the subpoenas issued to the e-mail host and its owner could not be enforced without violating the SCA. *Id.* at 1438.

The *O'Grady* court held that the trial court’s denial of the motion for protective order was error, and issued a writ of mandate directing the trial court to grant the motion. *O'Grady*, 139 Cal.App.4<sup>th</sup> at 1480. In the process, the court rejected Apple’s primary argument that there is an implied exception to the SCA for civil discovery, finding instead that the SCA “clearly prohibits any disclosure of stored e-mail other than as authorized by enumerated exceptions.” *Id.* at 1443. In enacting a number of specific exceptions to the rule of non-disclosure, the *O'Grady* court reasoned, Congress demonstrated that it knew how to make exceptions to that rule and it can be presumed that Congress meant to exclude from the list of exceptions anything that was not specifically mentioned. *Id.*

The *O'Grady* court also discussed the SCA’s purpose of encouraging new forms of communication by inhibiting the possible wrongful use and public disclosure of stored information by law enforcement authorities as well as unauthorized private parties. *O'Grady*, 139 Cal.App.4<sup>th</sup> at 1444. The court also noted that the type of discovery sought by Apple was rarely possible with traditional modes of communication. In the case of oral communications, there is no

facsimile of the message to discover. After a letter is delivered by the postal system, the original and any copies would remain in the hands of the recipient, and possibly the sender if he or she retained a copy. A telephone conversation, meanwhile, was as ephemeral as a conversation on the street, and no facsimile of it existed unless a party recorded the conversation (an illegal act in some jurisdictions, including California). To obtain copies of traditional forms of written communications, a civil litigant would have had to identify the parties to the communications and seek copies directly from them. It would be the rare instance where such documents would be in the possession of a third party from which such discovery could be sought. *Id.* at 1445.

The *O'Grady* court concluded that given these inherent traits of the traditional media of private communications, Congress could rationally have decided that a litigant seeking the disclosure of the contents of e-mail, like a litigant seeking disclosure of old-fashioned written correspondence, “should direct his or her effort to the parties to the communication and not to a third party who served only as a medium and neutral repository for the message.” *Id.* at 1446. Concluding that the SCA makes no exception for civil discovery and the denial of such discovery was not contrary to the Legislature’s intent or purpose, the court held that applying the SCA in accordance with its plain terms rendered unenforceable the subpoenas seeking to compel the ISP and its owner to disclose the contents of e-mails stored on their facilities. *Id.*

Implications of Dicta In *O'Grady* Suggesting That A Party To Litigation Can Be Compelled to Authorize Disclosure of E-mails On Pain of Discovery Sanctions

Perhaps to soften the impact of its decision, the court in *O'Grady* noted that copies of electronic communications could still be sought from an ISP if the discovery fell within one of the enumerated exceptions to the SCA, “most obviously, a disclosure with the consent of a party to the communication.” *O'Grady*, 139 Cal.App.4<sup>th</sup> at 1446. Significantly, the court then stated, as dicta, “**Where a party to the communication is also a party to the litigation, it would seem within the power of a court to require his consent to disclosure on pain of discovery sanctions.**” *Id.* (emphasis added).

Despite the potential implications of this statement as a loophole to the protections afforded by the SCA, the *O'Grady* court did not provide any further discussion about its position. Moreover, the court’s use of the words “it would seem . . .” suggests that even the court may not have

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been entirely convinced of the position. *O'Grady*, 139 Cal.App.4<sup>th</sup> at 1446. The only authority for its dicta that is cited by the *O'Grady* court is a journal article published by an industry association, and two cases – *Miranda v. 21<sup>st</sup> Century Ins. Co.*, 117 Cal.App.4<sup>th</sup> 913, 929 (2004), and *Emerson Electric Co. v. Superior Ct.*, 16 Cal.4<sup>th</sup> 1101, 1112 (1997) – which are dubious support for the position. *O'Grady*, 139 Cal.App.4<sup>th</sup> at 1446.

In *Emerson*, the Supreme Court held that a deponent could be compelled to give nonverbal answers – specifically, reenactment of an accident from the use of power saw – at a videotaped deposition. *Emerson*, 16 Cal.4<sup>th</sup> at 1104. *Emerson* provides no support for the dicta in *O'Grady*, particularly in light of the issues and policies that are unique to the SCA.

In *Miranda*, the plaintiff was injured in a car accident with an uninsured motorist and sued her insurer, among others. *Miranda*, 117 Cal.App.4<sup>th</sup> at 917. After the plaintiff testified in her deposition that she had been treated for lightheadedness, dizziness and diagnosed with epilepsy before the accident, the insurer sought to compel the plaintiff to authorize the release of plaintiff's medical records during that time. *Id.* at 918. The plaintiff's counsel elected not to oppose the motion other than to challenge the court's personal jurisdiction over the hospitals at the hearing. Ultimately, without any discussion of the propriety of the lower court's order compelling plaintiff to authorize the release of her medical records, the appellate court held that the trial court did not abuse its discretion by dismissing the plaintiff's arbitration demand as a sanction for her refusal to obey the court's discovery order. *Id.* at 928. Clearly, the insurer in *Miranda* had demonstrated both relevance and a compelling need for the information. Whether *Miranda* can be applied in the context of electronic communications and the SCA, however, is debatable.

The *O'Grady* court's dicta can be read for the proposition that the Discovery Act trumps the protections of the SCA, or creates a new exception of "compelled consent." Given the federal preemption doctrine and the court's rejection of Apple's argument for an "implied exception," the dicta does not seem consistent with the rest of the opinion. The *O'Grady* court stated, for example, "The treatment of rapidly developing new technologies profoundly affecting not only commerce but countless other aspects of individual and collective life is not a matter on which courts should lightly engraft exceptions to plain statutory language without a clear warrant to do so. We

should instead stand aside and let the representative branch of government do its job." *O'Grady*, 139 Cal.App.4<sup>th</sup> at 1446. The court then applied the principle that the enumeration of things to which a statute applies is presumed to exclude things not mentioned. As an example, the court noted with approval the holding in *F.T.C. v. Netscape Commc'n Corp.*, 196 F.R.D. 559, 561 (N.D. Cal. 2000) that the SCA's authorization for the disclosure of certain information to government agencies under a *trial* subpoena did not permit disclosure under a civil *discovery* subpoena given the well-known distinctions between the two types of subpoenas. *O'Grady*, 139 Cal.App.4<sup>th</sup> at 1443-44.

Applying this same reasoning to the *O'Grady* court's notion that "consent" of party to an e-mail communication can be presumed to include instances in which a party is *compelled* by a court in the civil discovery process to authorize disclosure, the position is questionable. Despite the importance of e-mail as a rapidly-developing new technology significantly affecting commerce and private life, and without a clear warrant from Congress, the dicta espoused by *O'Grady* essentially provides litigants with a loophole that would allow them to avoid the protections of the SCA simply by obtaining a court order compelling a party's consent to the release of e-mails from his or her private e-mail account.

The Court's 'Gatekeeper' Role And Other Practical Issues

Although the *O'Grady* court's suggestion that a party to litigation can be compelled by a court to authorize an ISP to disclose the content of messages from their private e-mail accounts is only dicta, it could have significant repercussions if trial courts and other appellate courts decide to follow *O'Grady's* lead on this issue. Citizens undoubtedly have a strong expectation of privacy in their personal e-mail accounts. E-mail is a unique medium because, among other things, e-mail "inboxes" often contain a veritable smorgasbord of highly personal and sensitive information. Such information can include confirmations of online shopping purchases; messages from a staggering variety of websites with which the subscriber may have registered an account; casual or highly-sensitive interpersonal communications; and, of course, "spam" messages for which, in some instances, it can be difficult to ascertain whether they were solicited by the user. Obviously, disclosure of such information should not be treated lightly as it could be potentially embarrassing to the account holder.

Given the substantial privacy interests at stake, and the policies underlying the SCA, to the extent trial courts decide to follow *O'Grady* and compel a party to authorize an

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ISP to release the content of the subscriber's e-mail messages or else face discovery sanctions, they should tread carefully before permitting such extraordinary discovery. As with other discovery into private matters, the courts serve an important function as the gatekeepers for such information. Curiosity of a party to litigation concerning what may be in the private e-mail accounts of a litigant is not enough to justify this kind of intrusion. Because the discovery affects a person's constitutional right of privacy, the burden falls on the party that issues the subpoena to demonstrate (i) the direct relevance of the information sought, and (ii) that the right of privacy is outweighed by a *compelling* need for the information when the two competing interests are carefully balanced. *Lantz v. Superior Court*, 28 Cal.App.4<sup>th</sup> 1839, 1853-54 (1994); *Harris v. Superior Court*, 3 Cal.App.4<sup>th</sup> 661, 665 (1992).

Presumably, in order to meet this standard, a party seeking to subpoena another party's e-mail messages from an ISP would need to show, at a minimum, that the account was being used for business purposes, and/or that the account may contain e-mail messages relevant to the subject matter of the litigation. Examples of scenarios in which a principal or employee of a commercial enterprise might use his or her private e-mail address include while the company's e-mail server is temporarily out of service; while he or she is away from the office at home or traveling and the business does not have a method of remotely accessing the company server; or where the company (typically a smaller business) uses an outside provider to host the company's e-mail accounts rather than maintain its own internal server and "dot com" e-mail address.

Of course, a party seeking such discovery has a much better likelihood of defeating the inevitable motion for protective order if the subpoena is reasonable in scope and the issuing party makes an effort to avoid overreaching. In *Theofel v. Farey-Jones*, 359 F.3d 1066 (9<sup>th</sup> Cir. 2004), for example, defendants issued a subpoena to an ISP seeking production of "[a]ll copies of e-mails sent to or received by anyone" at the company of which the plaintiffs were officers, and contained no limitation as to time or scope. *Theofel*, 359 F.3d at 1071. The Ninth Circuit Court of Appeals found that the defendants had acted in bad faith and with gross negligence in preparing and issuing the subpoena, and the court described the subpoena as "deceptive" and "a piece of paper masquerading as legal process." *Id.* at 1074. The court found that the subpoena was invalid and that its falsity "transformed the access from a bona fide state-sanctioned inspection into

**NOTICE OF NEW EXPEDITED  
WEAPONS SCREENING ENTRANCE AT  
ORANGE COUNTY SUPERIOR COURT**

**THE ORANGE COUNTY SUPERIOR COURT  
HAS ANNOUNCED IMPLEMENTATION OF  
AN EXPEDITED WEAPONS  
SCREENING ENTRANCE  
FOR ALL ATTORNEYS  
AND SUPERIOR COURT EMPLOYEES  
AT EACH OF THE FIVE JUSTICE CENTERS  
IN THE COUNTY.**

**THE CHANGE, EFFECTIVE JUNE 30, 2008,  
PROVIDES AN EXPEDITED SCREENING ENTRANCE  
FOR ATTORNEYS WHO DISPLAY THEIR BAR CARDS  
AND COURT EMPLOYEES WITH IDENTIFICATION  
BADGES ISSUED BY THE SUPERIOR COURT.**

**THE EXPEDITED LINES WILL OPERATE DURING  
HOURS OF PEAK ACTIVITY, TYPICALLY EARLY MORN-  
ING AND EARLY AFTERNOON AFTER LUNCH.  
SIGNS WILL BE POSTED IDENTIFYING THE LINE FOR  
"SUPERIOR COURT EMPLOYEES AND OFFICERS OF  
THE COURT." PLEASE NOTE THAT CLIENTS MAY  
NOT USE THE EXPEDITED LINE AND THAT FULL SE-  
CURITY SCREENING WILL CONTINUE TO APPLY TO  
USERS OF THE EXPEDITED LINES.  
THE PURPOSE OF THE CHANGE IS TO BETTER SERVE  
THE PUBLIC BY ENSURING THAT COUNSEL AND  
COURT STAFF ARE AVAILABLE  
AS COURT USERS ARRIVE.**

private snooping." *Id.* at 1073. Thus, where possible, a subpoena should be limited to time and to only e-mail messages to or from particular persons.

If a party seeking e-mail messages from another party's privately-hosted account cannot narrow down the messages it seeks by sender or recipient, however, the situation becomes more complicated. Requesting all e-mails or only e-mails relating to a specific subject matter presents various problems from a practical standpoint. Certain aspects of the manner in which e-mails are typically maintained could make compliance burdensome for the subscriber and for the service provider. Indeed, the *O'Grady* court's desire to avoid imposing a substantial new burden on service providers contributed to its decision to preclude disclosure by ISPs in response to third party subpoenas absent an applicable exception. *See O'Grady*, 139 Cal.App.4<sup>th</sup> at 1446.

Given the sheer number of users that maintain accounts through the major ISPs and the volume of communications sent to or from these accounts each day, many ISPs have

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L-R: Robert Gooding, Martha Gooding, Kathleen Peterson, Mark Peterson, Ken Babcock, Justice Kathleen O'Leary, and Bill Grenner

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neither the desire nor the ability to store archived data of all e-mail content. The e-mail content stored by these ISPs with regard to any given user account usually consists only of those e-mails that are accessible to the account holder (e.g., unread messages or opened messages that are saved). Also, many ISPs delete all stored e-mail content if the account has been inactive for a certain number of days. But for other ISPs who do archive or backup their subscribers' messages, the burden of sorting through a subscriber's messages for those relating to a certain subject matter could be substantial, and, for reasons discussed below, actually may be impossible.

If the dicta in *O'Grady* grows legs, courts and litigants will have to be creative in fashioning protective orders that provide parties issuing subpoenas the information they seek while protecting the legitimate privacy interests of the holders of private e-mail accounts, and which avoid imposing an undue burden on ISPs, the parties, and the courts. Even where an intrusion on the right of privacy is deemed necessary under the circumstances of a particular case, "such intrusion should be the minimum intrusion necessary to achieve its objective." *Lantz, supra*, 28 Cal.App.4<sup>th</sup> at 1855. Unfortunately, it is difficult to conceive of a protective order that is not fraught with problems.

By way of example, a protective order may provide that an ISP shall produce all of the messages from a party's e-mail account for a specific time period to counsel for the subscriber only, as well as a log of all e-mail content listing each e-mail by date, sender, recipient(s), and subject line. Counsel for the subscriber could then redact any privileged information in the subject lines on the log and provide the redacted log and a corresponding privilege log to counsel for the subpoenaing party. Counsel for the subpoenaing party could then review the redacted e-mail log and meet-and-confer with the subscriber's counsel about which messages the parties agree can be produced, and prepare a written stipulation to the ISP requesting production of those e-mail messages. If the parties disagree over the production of any specific e-mails or information, the parties can agree that any disputes shall be brought before the court for resolution, perhaps on an *ex parte* basis.

This procedure or variants currently being used by California courts in response to motions to compel/for protective orders are problematic for several reasons. First, there is an inherent lack of correlation between e-mail subject lines and the content of the messages themselves. As a practical matter, e-mail subject lines sometimes have little, if any, relation to the actual content of the message. This is particularly true where there is a "string" of several e-mail messages, because the sender of a particular e-mail message often finds it easier to hit the "reply" button to any message the user can easily locate from his or her intended recipient (even on an unrelated topic), than to manually type in the recipient's e-mail address or go through a series of steps to retrieve the address from an address book or contact list. Additionally, the subject of the messages in string of e-mails often changes or meanders to other topics without any corresponding change in the subject line. As a result, a log of subject lines would be of little value to the subpoenaing party as the corresponding messages would frequently have nothing to do with whatever text or subject matter description happens to be in the "re" line, and could result in the production of irrelevant material. The subpoenaing party may be more likely to cast a wide net in requesting full messages for production, which ultimately could result in more disputes requiring judicial intervention. The sheer number of e-mails in cyberspace makes the sifting of e-mails from the ISP and separating the "wheat from the chaff" a burdensome and expensive proposition that may not have been fully anticipated by the *O'Grady* court.

Related to this burden and the privacy interests involved is the concern that litigants could use a subpoena to an ISP seeking the content of electronic communications to harass

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their opponents. Once a personal e-mail address is revealed through a party's document production as having been used for business purposes, even in limited instances, the opposing party can issue a subpoena to an ISP seeking e-mails from that account. Whereas a subpoena is relatively inexpensive to prepare, the account holder would almost always be forced to file a more costly motion for protective order to preserve the client's privacy. Depending on the number of e-mails or time frame involved, the expense of fashioning and implementing a disclosure procedure that balances discovery rights and privacy may well dwarf the costs of such a motion.

Second, due to the informal nature of electronic mail, the speed with which they are transmitted, and the way messages are displayed in a typical "inbox," it is quite common for e-mail users to put substantive message content in the subject line instead of or in addition to the body of the message. As a result, the subject lines in the log that is produced to the subpoenaing party could reveal substantive information that is extremely private and sensitive, and which may itself "tell a story" of the subscriber's personal life or unrelated business matters. For instance, a subject line may contain purchase information for a certain product or website access, mention of an embarrassing medical condition, or mention of an issue relating to a personal relationship. If only attorney-client privileged matter or attorney work product can be redacted under the terms of the protective order, such information could not be redacted. The parties and court could agree on a procedure for redacting private, unrelated information to avoid this situation, but redaction of matters on privacy or relevance grounds may lead to an even greater number of disputes that would need to be resolved by the court.

#### Conclusion

The difficulty of crafting an appropriate protective order that adequately protects an account holder's privacy concerns, and the burdens associated with objecting to and responding to such a subpoena, are just a few of the consequences of *O'Grady's* statement that a party to litigation can be compelled to consent to an ISP's disclosure of his or her private e-mails. They also highlight for courts the importance of requiring direct relevance and a compelling need for seeking such information in the first instance.

In light of *O'Grady* and *Quon*, businesses should carefully consider the pros and cons of using an outside ser-

vice provider to host their e-mail accounts. Business clients and their counsel also should be cognizant of the potential repercussions of using – particularly their personal e-mail account – e-mail accounts for business purposes. If such use cannot be avoided, it may make sense for companies or certain employees to establish a separate third-party-hosted e-mail account (*e.g.*, one that is web-based if company employees do not have remote access to their company internal e-mail account) that is used only for business-related purposes. Sending or receiving a business-related e-mail with a so-called "personal" e-mail account could end up being expensive and time consuming, and could result in the disclosure of more sensitive, personal information if the company or account holder winds up in litigation and an opponent has cause to subpoena an ISP for e-mails from that account.

Ultimately, as *O'Grady* and *Quon* demonstrate, developing jurisprudence regarding the SCA will have a significant impact on how commercial enterprises use electronic communications, as courts continue to grapple with how to protect users' privacy rights in the face of these developing technologies. Recent decisions such as *Quon* may signal that courts are becoming increasingly sensitive to the substantial privacy interests of users in their electronic communications.

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