

Q&A with the Hon. Josephine Staton Tucker By Corbett H. Williams



[Editorial Note: Prior to her recent appointment to the federal bench, Judge Tucker sat on the Orange County Superior Court bench and before that was a partner in Morrison & Foerster's labor department. Judge Tucker is on the ABTL's Judicial Advisory Council.]

Q: What drew you to a career in the law?

A: There were several factors that influenced my decision to pursue a legal career. One was the encouragement of my older sister who had been a prosecutor for a number of years by the time I graduated from college. Another factor was my perception that my skill set was better matched to a legal career than, perhaps, a career in medicine or engineering. Finally, I recognized that as a student majoring in English and international relations, law was practically speaking, probably my best option. It was a combination of those factors.

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"Catch the Conscience!" — Scripting a Winning Opening Statement

By Benjamin K. Riley

I'll have grounds

*More relative than this — the play's the thing
Wherein I'll catch the conscience of the King.*

Hamlet, Act 2, Scene 2

In *Hamlet*, the prince writes several lines about murder and adds them to the script of a play to "catch the conscience" of his Uncle, the King. Hamlet believes that Claudius will flinch when watching the play and hearing about the killing of a king, a tell-tale sign that Claudius murdered Hamlet's father.



A dramatic play seeks to capture the audience, either with virtuous deeds or all-too recognizable human folly. The audience is drawn into the story because it identifies with the characters and the injustices foisted upon them. The playwright plots the arc of the play to best secure the audience's immediate and sustained interest and participation in the story. Think of your opening statement as "a play within a play," with the jury as your audience. Script your opening to capture the jurors' conscience and make them care about the trial and the result.

The opening statement is your first and perhaps best opportunity to convince the jury that your client should win. The jurors know very little about the case, are anxious to get started, and give you their full attention. Their impression of you will probably be set by the time you finish your opening. Opening is the time to establish the jurors' expectations, start to develop a bond with them, and whet their appetite for your case.

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The President's Message

By Sean P. O'Connor



It is hard to believe that 2010 is now a thing of the past. For ABTL/Orange County, 2010 was a great year, and it was an honor to have served as the President of this outstanding organization. In my final President's Message, I would like to take this opportunity to briefly highlight the accomplishments of the past year and to thank the many people responsible for them.

First, a few of the highlights from this past year:

- ◆ The total attendance at our five dinner programs in 2010 was at an all time high;
- ◆ Our Chapter's membership count over the past two years has been at an all time high;
- ◆ In early June, 2010, we had our 11th Annual Wine Tasting Dinner Program benefiting the Public Law Center. We were able to continue our annual tradition of raising more money than the previous year, with the proceeds this year at an all time high of \$27,000;
- ◆ Later in June, ABTL/Orange County was honored by the Public Law Center at its Annual Volunteer's For Justice Dinner Program as the corporate partner of the year;
- ◆ At our November dinner program, we had our 4th Annual Holiday Gift Giving Opportunity. We collected stuffed animals and gift cards benefiting CASA--Court Appointed Special Advocates. We presented CASA with over \$2,850 in gift cards in addition to the stuffed animals,

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Employer Perils in the Social Networking Age

By Michele L. Maryott



As the popularity of social networking sites such as Facebook, Twitter and LinkedIn continues to explode and their user demographics broaden, employers face a myriad of risks created by the blurring (or even disappearing) lines between employees' private lives and the workplace. With the press of a button, employees can share with their co-workers the most intimate details of their lives. While wise employees might refrain from sending disparaging or offensive emails at work and may scrutinize every word in an email to avoid being misunderstood, many people do not exercise that (or any) degree of care when they "post" on social networking sites. This is not surprising—a recent study by Deloitte revealed that 60% of employees believe their social networking activities are private and none of their employer's business, but 53% of employers believe they have the "right" to monitor their employees' social networking activities. This clear disconnect emphasizes the need for employers to develop and implement policies regarding their employees' online conduct to minimize potential liability.

The problematic scenarios that might arise from employees' social networking activities are not hard to imagine. For example, employees may claim they have been subjected to "virtual" sexual harassment if their co-workers or supervisors make inappropriate comments or share information about their sexual exploits online. Disgruntled employees may assert that a supervisor's knowledge of information disclosed online by the employee, such as the employee's sexual orientation, religious affiliation or medical condition, led to discriminatory treatment. Companies may face reputational harm if employees post negative comments about the company or their jobs. Well-intentioned supervisors who "recommend" subordinates on LinkedIn may create evidence that would prevent summary judgment or preclude an employer from establishing that it terminated a "recommended" employee for poor performance.

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Litigating Internal Limited Liability Company Disputes: Some Questions Answered, But Others . . . Not So Much

By Brian Neach



Limited Liability Companies, or "LLCs," are hybrid entities with attributes of both partnerships and corporations. Offering liability protection, flexibility in defining management and economic relationships among its members, and flow-through taxation, LLCs are used in businesses of wide-ranging sizes and types, from small retail shops to large-scale real estate development companies. Although little seen until the 1990s, LLCs are now the most popular choice of business entity in the United States. (See Chrisman, *LLCs Are the New King of the Hill*, 15 Fordham J. of Corp. & Fin. L. 459, 459 (2010).)

California is no stranger to the LLC explosion. In 2001, the California Secretary of State received about 32,000 new domestic and foreign LLC registrations. By 2009, that number had more than doubled, with 62,386 domestic and 8,998 foreign LLCs starting business here in 2009. (See IACA, Business Organization Section, *Annual Report of California*, available at <http://www.iaca.org/node/80>.) By the end of 2009, more than 520,000 domestic and foreign LLCs were active or in good standing with the California Secretary of State. (*Id.*) With all these LLCs, the odds are good that a significant number will be involved in some sort of legal dispute at any given time.

Disputes involving LLCs come in different varieties and postures, but a significant percentage involve struggles between members of the LLC itself. As relative newcomers to the law of business associations, internal LLC disputes have not been the subject of much judicial discourse in California. The Supreme Court of California has yet to decide a case requiring interpretation of California's LLC statutes or analysis of substantive LLC issues. A perusal of the annotated version of California's LLC statutes reveals only a handful of case decisions.

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Q: In what areas of the law did you practice before becoming a judge?

A: During practice, I specialized in employment law. I primarily represented employers, but in the later years of my practice, I took on some plaintiff cases as well. So, I handled employment matters on both sides.

I began my career as an associate in the San Francisco office of Morrison Foerster. After practicing there for seven years, I moved down to the Orange County office, became a partner and then served as co-chair of the Employment Law Group.

Q: Did you have any role models early in your career?

A: I didn't have any one person who acted as a role model, but there were a number of excellent attorneys in Morrison Foerster's San Francisco office who I admired and who shaped my views of what it takes to be a good lawyer. One was Linda Shostak, a partner in the firm who was my team leader in the litigation department. Linda took great pains to help me and other young lawyers understand how to work a case strategically. Another was Jim Brosnahan—a pretty familiar name in the legal community. He was just a great lawyer to watch in action. Another partner at the firm, Jack Londen, had an incredible commitment to pro bono work. It was truly inspiring. I really had the benefit of a group of outstanding role models and I tried to draw a little from each of them.

Q: What influenced your decision to become a judge?

A: I was at a stage in my career when I felt ready to transition into something different. After the September 11th attacks, I began thinking more about those things I believe many people in this country were thinking about. I began to consider my priorities in life and what I could do to serve my community and country. Becoming a judge was a way to serve both while remaining in the legal community. I think that was a major influence on my decision.

Q: How would you compare your experience as a state court judge with the federal bench?

A: Generally speaking, and keeping in mind that I was sworn in as federal judge in June of this year, I believe both positions present unique challenges. On the state court bench, the volume of matters that come before you each day can be daunting—depending upon your particular assignment. So far on the federal bench, the challenge has really been the incredible breadth and depth of knowledge necessary to competently decide the issues that come before me.

Q: How would you describe the Senate confirmation process for federal judges?

A: I think the best one word description of the confirmation process is “thorough.”

Q: Is there anything you consider special or unique about the Orange County Superior Court?

A: One thing I do consider special about the Orange County Superior Court is its strong commitment to public service even during times when budget constraints make that commitment difficult. I was very proud of our leadership in that regard.

Q: How would you describe your judicial philosophy?

A: I don't believe I have a “judicial philosophy” *per se*. My job is to understand the relevant facts and the applicable law and then make a decision. I'm relatively straightforward and I don't have an agenda.

Q: What, if anything, do you miss about being a lawyer?

A: There are times when I miss the excitement of being a trial lawyer. In practice, I especially enjoyed making open statements and closing arguments in trial. I also love a good cross-examination. Now, I enjoy watching them from the bench.

Q: What advice would you give to lawyers appearing before you for the first time?

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A: I would advise them to be familiar with and follow the Local Rules, along with the standing orders and trial orders issued in the case. The rules and orders really provide a roadmap of what is expected by the Court—by me.

The Local Rules, for example, require counsel to discuss thoroughly, and preferably in person, the substance of any contemplated motions in my court. Failure to do that is likely to result in denial of the motion, so I would encourage all attorneys to carefully review the Local Rules and any standing orders that a Judge might have. That will make things go much more smoothly.

Q: What do you enjoy doing in your spare time?

A: My free time is limited of course, but when I have it, family comes first. I enjoy watching my daughter's soccer games and my son's jazz band perform. I also like to run and try to get a few miles in each week.

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

A: I think the ABTL's programs are exceptional. They are informative, topical, and always top-notch. The ABTL has the kind of programs that when I have a conflict and can't make it, I'm actually disappointed. I think it is important to be part of an organization like that.

Thank you Judge Tucker for your time.

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Script an opening statement that takes advantage of the natural drama of this moment. Develop a theme that the jurors will care about. Start with a dramatic flourish, organize your points for maximum interest and persuasive effect, and focus on the facts that establish the human conflict and unfairness of the situation. Other than accounting for “bad facts,” jettison discussion of evidence that does not directly support your theme or advance the conflict. Talk to the jury — do not diminish this critical opportunity with slavish use of notes or PowerPoint. And trust your own personal “performance” style. At the end of the trial, jurors will recall only a portion of what you seek to teach them. However, if your opening statement provides them with a clear theme and a compelling reason why your client should win, you will be well on your way to a successful result.

Develop Your Theme

Every play, and every case, requires a theme. In a trial, the theme synthesizes why the jury should care and why your client should win. The theme needs to be expressed simply and involve fundamental human emotions, failings or rights. Disloyalty and treachery abound in *Macbeth*; hubris, misperception and human frailty are on display in *King Lear*. Identify and explore your theme carefully. In a trade secret case, the theme will likely be theft and disloyalty; in a patent case, respecting one's property rights; and in a complex commercial dispute, the greed of an over-reaching plaintiff. Regardless of the theme you choose, it should be the lens through which you view every fact and theory. It will be raised in your *voir dire*, the center piece of the opening statement, and then built fact-by-fact during the trial.

When you start to craft your opening, identify your theme and keep it close at hand. Each fact and legal theory should be measured by and further that theme. If a fact amounts to detailed background or does not directly advance the theme, do not mention it. By necessity, there will be background and surplus evidence presented during the trial. Such evidence is not needed — and distracts — in the opening statement.

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Once you have selected your theme, revisit and refine it frequently. Motions *in limine* may affect key evidence that you were planning to highlight. Even more importantly, during *voir dire* you will learn about your jurors and their interests and proclivities. Review and revise your theme and factual presentation to appeal to the individual jurors' values.

Plotting the Arc of the Statement

The author of a great play plots the presentation of the story to capture the audience and provoke the desired reaction. Starting with a powerful and foreshadowing scene, the play immediately entangles the protagonist in a deep but personally-identifiable conflict, and then introduces complications and obstacles to resolution as he or she struggles to escape. The climax of the play is carefully planned to capture the audience's full attention before a speedy resolution. Strive for this same dramatic arc in your opening statement.

Most trial lawyers agree that an opening statement should not exceed 45 minutes, even in the most complicated cases. Lawyers who do not distill the key facts and themes deliver long openings. It takes work and attention to structure the opening. You have a good chance to keep the jury attentive and receptive during a crisp, well-organized 45-minute opening. If your opening is longer or if each part is not closely honed, you will likely lose the jury's attention.

Outline the points you want to cover in the opening, and then take a critical look at them. If you figure five minutes for your introduction, and five minutes for the ending, you have 35 minutes left. Divide this time into distinct sections of no more than seven to eight minutes each, or four to six segments. Rather than presenting a straight chronology, consider organizing the presentation by key facets of the case, such as the various stages of trial, the legal claims, two or three "scenes" of the key facts, and the two or three critical witnesses. Provide topic sentences as you move from one segment to the other. By making each of these sections short and distinct, you have a chance to refocus the jury on your developing theme every seven to eight minutes.

The Dramatic Prologue

Like any powerful play, an opening statement should start strongly and dramatically. Think how *Macbeth* opens with the foreboding "toil and trouble" of the Weird Sisters, or how the cast of *The Tempest* is literally blown around the stage during the opening shipwreck scene. The audience cannot turn away — every eye is on the performers. Yet 95% of opening statements start with the lawyer identifying him or herself, providing some background on the client, thanking the jury for their service, and other small talk. Jettison the clutter and unnecessary introductions. The first two minutes of the opening may be the most important moment of the trial. Why waste that opportunity — this singular moment of high drama — on introductions and thank-yous?

Walk to the front of the jury box, set your feet, and make eye contact with each juror. Take at least 10 seconds. Command center stage. THEN speak. Don't introduce yourself or say hello. Have a two minute soliloquy memorized and ready to go. No notes, no documents, just you and the jury. Present the distillation of the most important facts, the theme of your case, and why your client should win. Perhaps start with your best analogy. Make the moment weighty and solemn — two minutes of high drama. Then pause, relax a bit, and offer whatever brief introductions and thank-yous may still be necessary. In the meantime, you have already presented the foundation of your case, imparting it to the jurors when they are most attentive and impressionable.

Conflict

Jurors need to care about your case. They need to see a wrong they can right. Fortunately, the conflict inherent in a trial presents a signal opportunity to capture the emotions and interest of the jury. Humans cannot help but react to and invest themselves in conflict, especially when they must ultimately resolve it. Think of the audience's mounting suspense and even understanding of the horrors committed by *Macbeth*, especially because they result from his all-too-human and egotistical failings. The play's conflict captures the audience; it cannot be put aside or ignored.

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So too the presentation of the facts in a winning opening statement. Focus on the facts that present the conflict and advance your theme. Make the jurors see the start of the conflict and how the opposing party escalates it and seeks to unfairly turn the conflict or misunderstanding to its advantage. Emphasize the alternatives available and the misguided choices taken by the other side leading to the ultimate dispute. Bring the conflict down to a personal, understandable level with which the jury will identify. Eliminate facts that do not advance your theme or demonstrate your conflict. Although you must anticipate and account for “bad facts” on which the other side will rely, if you can, build them into your conflict scenario as the client’s justifiable or understandable reactions to the other side’s bad acts. Use the case’s conflict to present segments of facts that capture the jurors’ attention and make them want justice for your client.

Performance

When Richard III’s horse is slain during the climatic battle with Richmond and Richard yells “a horse, a horse, my kingdom for a horse,” the audience knows his denouement is near. Think of the diminished effect if Richard delivered the line from upstage left, behind a post. Or if he read the line from the script or paraphrased it from bullet points on a screen while turning his back to the audience. Yet most lawyers deliver their opening statement while safely hiding behind a podium. Nearly all give the opening with notes or even the entire typed presentation clutched firmly in their hand. And who would dream of delivering an opening statement without a full PowerPoint? In the process, lawyers lose the drama of the opening and their ability to best connect with the jurors.

Unless required by the Court, do not use the podium in opening. Deliver the opening in front of the jury box, grabbing center stage. If possible, do not use any notes. Nothing should interfere with your discussion with the jurors. At a minimum, have your opening and closing segments fully memorized and rehearsed. If you must have some notes for the other 35 minutes of the opening, make them bullet points condensed to one or two pages which you can

glance at if needed when you change topics. Without notes, there is always a risk that you might miss a point or two that you thought were important. However, that slight downside is greatly outweighed by the persuasive force you will gain by speaking in the moment, without notes, making constant eye contact with your audience.

Similarly, presenting your opening through a PowerPoint presentation misses the point of persuasive advocacy. There is no doubt that presenting the outline of your argument may free you from notes and make the presentation easier for you. However, the jurors’ eyes will be on the screen rather than you; if they do look at you, they will see your back as you reference the screen. You need to command the jury’s attention through your heartfelt words, demeanor, body language and eye contact. Presenting your main points through slides forfeits that opportunity. Of course you will want to display the key demonstrative exhibits and charts. Walk to the screen and highlight the key provisions. Strategically intersperse demonstrative evidence to keep the arc of the opening moving and interesting. When you are done demonstrating the significance of an exhibit, turn the projector off. Bring the jurors’ eyes back to you. Tell them why the document advances or demonstrates the conflict.

Although an entire trial cannot be scripted and committed to memory, most of the opening statement can be. No one will ever know your case as well as you. Have the confidence that you will deliver your best opening mostly from memory while standing in front of the jury and commanding their attention.

Style and Language

Of all Shakespeare’s characters, Richard III may be the deepest and most complex. A brutal serial murderer, he also is a contemplative philosopher who understands and is tortured by his own crimes. He rises to great power despite a prominent disability. This complexity leads actors to numerous interpretations and differing methods to play and develop Richard. Each brings his or her own personality and skills to the part, turning a dusty character from a script into a living and conflicted villain.

There are myriad ways to “play” your opening

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statement and trial persona. Each lawyer should develop and be comfortable with his or her own style. Although we can all learn valuable techniques from experienced and great trial lawyers, it is a mistake to think that we can fundamentally change or mask our natural presentation style. In a situation where you need all your preparation and legal skills simply to mount your best case, attempting to change basic personality and style traits will not work. Artificial or false mannerisms will impede the jurors from getting to know and trust you. Your most effective style will likely be the one to which you are accustomed.

Relying on your own style does not mean that you should refrain from attempting to raise the level of discourse. A great play has the ability to elevate everyday issues into thought-provoking and memorable moments of discovery. Jurors expect that the opening statement (and closing argument) will challenge them to think and care deeply. Not only should you never talk down to jurors, you should aim to talk “up” to them — dare them to be intellectually curious in solving the meaningful conflict of your case. In preparing your opening, read some of your favorite soliloquies, speeches or short stories. Like a playwright, carefully plan and select the language and imagery you use. Then take the complex ideas of the case and distill them into understandable and memorable themes and facts, structured to make the jurors care about the dispute.

Finish Strong

Whether you leave the jurors laughing or crying (or angry with or suspicious of the other side), finish your opening statement with a bang. Think how in the last scene of *A Midsummer Night's Dream* the young couples are reunited with their proper partners as Puck weaves his spell of words. Leave one or two of your most important points for last. Consider providing the jurors with three questions to ponder or by which to measure the evidence which you will discuss with them during your closing argument. Energize the jury for the start of testimony so it can begin its important tasks. And have your opening's final “scene” fully rehearsed and memorized so that you can talk directly

to the jury and be at your most persuasive.

An opening statement offers an opportunity for solemn, high drama. Like a lead actor, make use of this spectacle by taking center stage and commanding the jury's attention. Script your opening to grab the jury with a dramatic first segment, build your theme through the facts and conflicts of the dispute, and finish strong. Challenge the jurors to reach beyond their everyday lives to untangle the web of conflict foisted upon your client. Make them care. After all, you are the playwright and lead actor; how the jurors react and invest themselves in your client's dispute depends on you. Use the drama of your opening statement to “catch their conscience.”

♦ *Benjamin K. Riley is a principal with the San Francisco firm of Bartko, Zankel, Tarrant & Miller, practicing Intellectual Property and Complex Commercial Litigation. He served as President of the Northern California chapter of the ABTL in 2007.*

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- ♦ Only members receive this ABTL Report.

To establish your 2011 membership, please visit us on-line at www.abtl.org

-President's Message: Continued from page 2-

again representing an all time high for our organization.

There are many people responsible for the successes during this past year. First, are my fellow officers: President-Elect Darren Aitken, Treasurer Melissa McCormick, and Secretary Mark Erickson. All are a pleasure to work with and all are committed to keeping our organization as strong as ever. They will be joined this year by Jeff Reeves, who will serve as Secretary in 2011. It is safe to say that the organization is in very good hands.

A hardy thanks is also due to the state and federal judges who actively support our chapter by serving on the Board of Directors and on our Judicial Advisory Council, participating in our brown bag lunch programs, and attending our dinner programs. The participation from judicial officers has always been one of the greatest assets of our organization, and this past year was no different.

Also deserving of recognition is Karla Kraft, our chapter's Dinner Program Chair. Karla (and her predecessor Jeff Reeves) organized five fantastic dinner programs this past year – Professor Norbert Ehrenfreund gave a presentation on the Nazi war crimes; defense attorneys for the Broadcom executives gave a presentation on their successes on obtaining dismissals for their clients; Joe Cotchett talked to a full house in June about his representation of Bernie Madoff fraud victims; attorneys from the Proposition 8 litigation team discussed the recently concluded trial at our September dinner program; and the always entertaining Mark Geragos closed the dinner programs this year with a presentation on litigating in the spotlight.

This past year we continued with our popular brown bag lunch programs, headed by Adina Witzling. Sherry Bragg served as our Membership Chair this last year and did an excellent job at keeping our membership ranks incredibly high.

Last, but certainly not least, our Executive Director, Linda Sampson deserves special thanks. Linda's organization and energy have been a blessing to our Chapter, and made my job as President an easy one.

Thank you for the opportunity to serve as President of ABTL/Orange County.

♦ *Sean P. O'Connor is managing partner of the Orange County office of Sheppard, Mullin, Richter & Hampton LLP.*

Thank You for Making Our Fourth Annual Holiday Gift Giving Program a Smashing Success!

The Orange County Chapter of ABTL collected gift cards totaling over \$2,850 for donation to the worthy cause of CASA: Court Appointed Special Advocates program. In early December, ABTL President, Sean P. O'Connor, was invited to attend a CASA board meeting at which the CASA board very gratefully accepted the gift cards from ABTL.

We also had a wonderful showing of support for the Orange County Superior Court's adoption program.

Thank you to our wonderful members and supporters as none of this would be possible without you. Happy New Year!



-Employer Perils: Continued from page 3-

On the other hand, many employers find social networking sites provide a goldmine of useful information about prospective and current employees. Indeed, many employers “screen” job applicants and current employees to ensure diligence in the hiring and promotion process. Although this is not a bad practice, it carries risk. For example, if a decision-maker obtains information on a social networking site regarding the protected status of an applicant, the decision-maker’s knowledge may create difficulties in defending a claim for discrimination even if she did not base her decision on that information. Employers who gain access to employees’ personal sites through other employees or by other means of pretext may face liability for those actions as well. Companies must also be careful not to run afoul of California law, which prohibits employers from taking adverse employment actions based on an employee’s lawful off-duty conduct.

More subtle issues may also arise because people have little guidance regarding appropriate social networking etiquette. For example, is it appropriate for a supervisor to invite a subordinate to be “friends” on Facebook? What if Employee A “unfriends” Employee B but not Employee C? In some situations, an employer’s carefully tailored policy discouraging employees from connecting with one another may provide a much appreciated shield for employees grappling with these issues.

Employers will face risks somewhat beyond their control as long as employees connect online with their co-workers, supervisors or subordinates. Consequently, employers should establish clear policies regarding social networking, tailored to the company’s values and culture, and strive to heighten employee awareness regarding the potential ramifications of their online behavior. An admonition as simple as, “If you wouldn’t say it in person or write it in an email, don’t ‘say’ it on your Facebook page,” might provide useful guidance to employees who do not consider their audience when they share the details of their personal lives online. At a minimum, employers should consider giving the following key “reminders” to their employees:

- The information and comments employees post on social networking sites are not private and are likely not protected speech. In a recent case, a California appellate court held that the plaintiff had no reasonable expectation of privacy as to information posted on her MySpace page.
- The fact that a co-worker accepts an invitation to connect online does not mean that the co-worker would welcome viewing of offensive comments or comments about a co-worker’s sexual exploits any more than they would welcome hearing about those things in person.
- If employees do not want co-workers to know their political affiliations, sexual orientation or other personal information, they should refrain from connecting, block co-workers from “following” them or simply not post their personal information online.
- Employees who post negative comments about their company or their jobs could harm the company’s reputation. Where applicable, employees must also be reminded of their obligation to retain the confidentiality of their company’s trade secrets and other proprietary and confidential information.

As the case law governing employee and employer rights and obligations in this area develops, company management should stay attuned to legal developments and work closely with their employment professionals and legal counsel to meet the challenges created by the intersection of social networking and the workplace.

♦ *Michele L. Maryott is a partner in Gibson Dunn’s Orange County office. Ms. Maryott’s practice focuses on complex business, employment and class action litigation.*

-LLC Disputes: Continued from page 3-

As litigators see more and more LLC member disputes come through their doors, recognizing the issues will become all the more important because neglecting them can result in unwanted and expensive consequences, including sanctions. (*See Belleville Catering Co. v. Champaign Market Place, LLC*, 350 F.3d 691, 694 (7th Cir. 2003).) The discussion here focuses on three specific areas that involve new and evolving issues that arise in the early stages of litigation: attorney conflicts, arbitrability, and jurisdiction. While the discussion generally focuses on the perspective of the suing party, no plaintiff-bias should be presumed. After all, the legal pitfalls that plaintiffs fail to see often become the grounds for a winning defense motion.

Importance of Organizational Documents —

Before jumping into more specific issues, it is important to understand that, like other jurisdictions, California's LLC statutory scheme generally allows the members of the LLC to define by contract the relationships between themselves and with the LLC. (*See Cal. Corp. Code* § 17005(a).) The flexibility given to members in designing their LLC means that there is a good deal of variation in the operation and structure of each LLC.

In California, the two primary documents defining the members' relationships are the articles of organization, which are filed with the California Secretary of State, and the operating agreement. (*See id.*) Proper analysis of any legal issue arising among members of an LLC starts with these two documents. Even threshold issues such as diversity jurisdiction may hinge on what the organizational documents say. (*See Implants Int'l Ltd. v. Implants Int'l N.A., LLC*, 2008 WL 4104477 at *4 (E.D. Mich. Sep. 4, 2008) (reviewing member withdrawal provisions of operating agreement to determine diversity jurisdiction).)

Direct or Derivative? — Determining whether a member's potential claims are direct or derivative has important ramifications. The characterization of an action as derivative affects, among other things, the analysis of attorney conflicts, arbitrability, jurisdiction, and the availability of a jury. In addition, improperly bringing a derivative claim as a direct one can leave the claim open to attack on demurrer.

An LLC member, as a signatory to the operating agreement, may have a claim against another member based on breach of one or more provisions of the written agreement. (*See Roodenburg v. Pavestone Co., L.P.*, 171 Cal. App. 4th 185, 187 (2009).) Alternatively, a member's dispute may be based on a claim not personal to the member, but on some asserted injury to the LLC. In that instance, claims must be brought derivatively under California Corporations Code Section 17501. (*See Paclink Comm'n's Int'l, Inc. v. Superior Court*, 90 Cal. App. 4th 958, 966-67 (2001).) When suing derivatively, the member essentially steps in the shoes of the LLC and "seeks to recover for the benefit" of the LLC and its members for injury to the LLC as a whole. (*Id.* at 964 (citing *Jones v. H.F. Ahmanson & Co.* 1 Cal. 3d 93, 106-07 (1969).) A claim of mismanagement, for example, is one that must be brought derivatively because the alleged mismanagement affects the entity as a whole, not one particular member. (*See Avikian v. WTC Financial Corp.*, 98 Cal. App. 4th 1108, 1115 (2002).)

The line between what qualifies as a direct claim as opposed to a derivative claim is not always clear. In *Paclink*, the plaintiffs, who were members of an LLC, brought a direct action alleging that other members had fraudulently transferred assets out of the LLC, thereby leaving the LLC insolvent and unable to pay the plaintiffs for their ownership interests. (*Paclink*, 90 Cal. App. 4th at 961-62.) Looking to the "gravamen of the wrong alleged in the pleadings," the *Paclink* court concluded that the plaintiffs alleged an injury to the LLC that "incidentally" resulted in an injury to the plaintiff members. (*Id.* at 965.) Based on this conclusion, the *Paclink* court ruled that the plaintiffs' fraudulent transfer claims were subject to demurrer as they should have been brought derivatively. (*Id.* at 966-67.)

The difference between derivative and direct claims was also discussed in *Denevi v. LGCC*, 121 Cal. App. 4th 1211, 1218-20 (2004). In that case, the plaintiff received an interest in an LLC in exchange for contributing his rights to purchase a piece of real estate. (*Id.* at 1215.) The LLC subsequently failed to obtain the property and the plaintiff brought a derivative action against the other members that re-

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sulted in a judgment in the plaintiff's favor, though for the benefit of the LLC. (*Id.* at 1215-16.) Separate from the derivative action, the plaintiff filed a complaint with several causes of action based on the allegation that the other members fraudulently induced him to contribute his purchase rights to the LLC. (*Id.* at 1216.) The question the *Denevi* court faced was whether the recovery in the derivative action barred relief to the plaintiff on his individual complaint. Looking to the "gist" of the derivative action, the *Denevi* court concluded that those claims focused on events after formation of the LLC, while the direct claims pertained to events before formation. (*Id.* at 1218-19.) Based on this analysis, the court concluded that the plaintiff could pursue all but two of the causes of action in his direct suit against the other members. (*Id.* at 1223-24.)

Classification of a claim as direct or derivative has other important consequences that are worth mentioning. First, an attorney bringing a derivative LLC action must be aware of the ownership and demand requirements found in Corporation Code Sections 17501(a)(1) and (2). No California courts have addressed these provisions in any significant respect, but the statute clearly sets forth minimum pleading requirements for a plaintiff bringing a derivative action. In addition, it should be noted that because they are historically equitable in nature, there is no right to a jury trial on corporate derivative claims in California, (*see Rankin v. Frebank Co.*, 47 Cal. App. 3d 75, 92 (1975)), nor is there any reason to believe that there would be any difference with respect to LLC derivative claims.

Conflicts and Disqualification — Perhaps nothing is more frustrating to a client, not to mention expensive and wasteful, than disqualification of a representing attorney during the course of litigation. By the time a complaint is filed, the representing attorney has likely spent considerable time learning the facts, interviewing the client, gathering and analyzing evidence, and preparing initial court filings. If the representing attorney is disqualified, the client will then have to spend considerable time and resources to locate a new attorney and, once found, will have to pay additional fees as the new attorney learns the case. The disqualified attorney, of course,

may be subject to disgorgement of fees. (*See Jeffrey v. Pounds*, 67 Cal. App. 3d 6, 12 (1977).) Avoiding conflicts at the outset of representation is therefore crucial and, with respect to LLC derivative actions, requires careful analysis.

There is no reported California case addressing attorney conflicts in LLC derivative actions, but there is significant authority addressing the issue in corporate derivative actions. Conflict issues arise in derivative actions because the corporation, though generally labeled a "nominal defendant," is in fact the real party in interest. (*See Schuster v. Gardner*, 127 Cal. App. 4th 305, 312 (2005) (internal quotations and citations omitted).) As a result, courts generally require that the corporation be included in the complaint and consider the entity an "indispensable party." (*See Grosset v. Wenaas*, 42 Cal. 4th 1100, 1108 (2008).) Because attorneys often defend a corporation's shareholders, officers, or directors in a derivative action, conflicts may arise if the same attorney also represents the corporation. In one case, the court required an attorney to withdraw from representing a corporation because certain shareholders — who were clients of the same attorney — were accused of fraud and the court was concerned that the attorney would not be able to maintain neutrality between the corporate and shareholder clients. (*See Forrest v. Baeza*, 58 Cal. App. 4th 65, 81-82 (1997).) Fortunately for the shareholder defendants, the court allowed the attorney to continue representing them despite the plaintiff's request to disqualify the attorney from representing both the corporation **and** the shareholders. (*Id.* at 82.)

A dispute between an LLC's members will "deeply and inextricably implicate the rights or obligations of the LLC." (Bishop & Kleinberger, *Diversity Jurisdiction for LLCs?: Basically, Forget About It*, 14-Oct Bus. Law Today 31, 36 (2004).) As a result, like a corporation in a corporate derivative action, an LLC will be an indispensable party in an LLC derivative action. If an LLC is a party in a derivative action, the same attorney conflict issues that appeared in *Forrest* can just as easily arise in the LLC action. An attorney representing defendant LLC members in a derivative action should therefore consider recommending that the LLC retain separate counsel. (*But see Kira, Inc. v. All Star Maintenance, Inc.* 2008 WL 510508 (5th Cir. Feb. 26, 2008) (affirming denial of

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motion to disqualify in derivative LLC action where “conflicts asserted . . . [we]re more theoretical than real”).)

Plaintiffs’ attorneys are not free from conflict concerns. A suing LLC member’s attorney may decide to stuff a complaint with both derivative claims against other members and direct claims against not only the other members, but also the LLC. (See *Denevi*, 121 Cal. App. 4th at 1214 (plaintiff member brought direct claims against LLC members and LLC).) In that situation, the plaintiff’s attorney is — for the derivative claims — purporting to represent the LLC, at least in a nominal sense. Yet, for the direct claims, the plaintiff’s attorney is adverse to the LLC. Such dual representation could be a violation of Rule 3-310(C)(2) of the Rules of Professional Conduct of the State Bar of California, which prohibits representation of clients with adverse interests in the absence of informed written consent from both clients.

Availability of Arbitration — Many LLC agreements contain arbitration provisions. With respect to a direct suit between an LLC’s members, there is no real issue beyond determining the scope of the claims that the parties agreed are arbitrable. (See *Gilbert Street Developers, LLC v. La Quinta Homes, LLC*, 174 Cal.App.4th 1185, 1197-99 (2009).) But can the members agree to arbitrate **derivative** LLC claims? In Delaware, they clearly can. (See *ELF Atochem N.A., Inc. v. Jaffari*, 727 A.2d 286, 291-92 (Del. 1998).) The answer is not so clear with respect to California LLCs. No California courts have addressed the issue, and the relevant statutes are a bit of a jumble.

Section 17005 of the California Corporation Code allows members to vary provisions of the LLC statutes in their operating agreement (see Cal. Corp. Code § 17005(b)), but Section 17005(c) states that certain provisions, including the derivative action provisions beginning with Section 17500, may be varied in the articles of organization or operating agreement “only to the extent expressly provided.” (Cal. Corp. Code § 17005(c).) None of the provisions with respect to derivative actions “expressly provide” that the members may vary their

terms by agreement. (See Cal. Corp. Code §§ 17500, 17501.) That seems to end the analysis and suggest that the right to bring a derivative action cannot be waived through an arbitration provision.

Section 17005, however, also states that the presence of phrases such as “unless otherwise provided in the articles of organization or operating agreement” in certain provisions “does not imply” that other provisions cannot be varied by the members. (Cal. Corp. Code § 17005(e).) It is not clear how helpful this more general clause is in light of Section 17005(c)’s requirement that exceptions must be “expressly provided.” Until a California court addresses the issue, which should include consideration of whether cutting down the ability to arbitrate derivative claims runs afoul of the Federal Arbitration Act, the ability to arbitrate derivative claims arising from a California LLC is in question.

Where to Sue: Personal Jurisdiction and LLCs

— After resolving the character of the action to be brought, clearing any conflict issues, and determining that arbitration is not an option, the next question may be: “Where can we file the lawsuit?” With respect to personal jurisdiction, analysis of whether an LLC can be haled into a particular state’s court relies on the familiar “minimum contacts” analysis applicable to individuals and other entities. (See *Vons Companies, Inc. v. Seabest Foods, Inc.*, 14 Cal. 4th 434, 444 (1996).)

Say, for example, Harry is a Nevada resident who transacts business with a California LLC that has no connection to Nevada other than the fact that one of its members, Sally, is also a Nevada resident. If Harry wants to sue the LLC in Nevada, is Sally’s Nevada residence sufficient to establish personal jurisdiction? Based on the cases to date, the answer appears to be no. In a recent decision, the Third District ruled that the court did not have jurisdiction over limited partners residing in Oregon merely because the limited partnership operated in California. (See *Sacramento Suncreek Apartments, LLC, Cambridge Advantaged Properties II, L.P.*, 2010 WL 2980722 at *16-17 (July 30, 2010).) Likewise, federal district courts have refused to “automatically extend” personal jurisdiction over an LLC to its members. (See *Mountain Funding, LLC v. Blackwater Crossing, LLC*, 2006 WL 1582403,

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at *2 (W.D.N.C. June 5, 2006); *Graymore, LLC v. Gray*, 2007 WL 1059004, at *8 (D. Colo. April 6, 2007).)

Where to Sue: Federal Diversity Jurisdiction and LLCs — Sometimes, there are clear answers. The ability to bring an internal LLC dispute in federal court based on diversity jurisdiction, especially a derivative action, has essentially disappeared. Attempts to file one in federal court could even lead to imposition of Federal Rule of Civil Procedure 11 sanctions. (See *Bishop & Kleinberger*, 14-Oct Bus. Law Today at 35.) Following the United States Supreme Court's decision in *Carden v. Arkoma Assocs.*, 494 U.S. 185 (1990) — in which the Court concluded that, for diversity jurisdiction purposes, a limited partnership is a citizen of every state in which its partners reside (*id.* at 195) — every federal appellate court that has addressed the issue has ruled that LLCs are citizens of every state in which their members reside. (See *Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077, 1079-80 (5th Cir. 2008) (listing decisions).)

These decisions leave little room for diversity jurisdiction over an internal LLC dispute because of the requirement of complete diversity. (See *Bishop & Kleinberger*, 14-Oct Bus. Law Today at 35.) Without complete diversity, there is no federal diversity jurisdiction. (*Harvey*, 542 F.3d at 1079.) An action between a member and the LLC will always result in at least one party on each side of a case having the same citizenship, thus destroying diversity jurisdiction. In a derivative action, which typically includes members as parties and generally requires that the LLC be a party to the litigation, complete diversity would be next to impossible as the LLC would share citizenship with every member. (See *Bishop & Kleinberger*, 14-Oct Bus. Law Today at 35.)

Attorneys who attempt to bring an LLC action in federal court based on diversity jurisdiction without doing minimal diligence to check the residency of an LLC's members do so at their peril. In *Belleville Catering*, the Seventh Circuit sharply criticized the attorneys before it for not determining that one of the LLC members was incorporated in Illi-

nois, rather than Missouri as had been the understanding throughout the case all the way to the end of trial. (350 F.3d at 692-93). The Seventh Circuit was especially miffed because it discovered the jurisdictional fact on its own using the Internet. (*Id.*) The court concluded its lecture by exercising its authority to “govern the practice of counsel” and required the lawyers to perform, “without additional fees, any further services that are necessary to bring this suit to a conclusion in state court, or via settlement.” (*Id.* at 694.)

Conclusion — LLCs' are no doubt here to stay and their popularity as a business entity appears to be growing, not waning. With the number of LLCs doing business in California, it seems only a matter of time before courts write decisions that shed some light on the issues discussed here. Nonetheless, resolution of one issue often leads to more questions about other issues. This is especially the case with respect to LLCs, where the members' flexibility in designing their own operating agreements means that nearly every LLC dispute will supply a new issue to consider. That is what keeps things interesting.

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