ASSOCIATION OF BUSINESS TRIAL LAWYERS

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ORANGE COUNTY

REPORT

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Q&A with the Hon. Ronald L. Bauer

By Casey Kempner

[Editorial Note: Governor Deukmejian appointed Judge Bauer to the Orange County Superior Court on December 31, 1990. Judge Bauer currently sits on the Complex Civil Panel. He is also an Adjunct Professor at Western State University College of Law. Prior to his appointment to the bench, he served as a Judge pro tempore, as an arbitrator for the American Arbitration Association, and as an investigative referee for the State Bar's disciplinary review committee. In private practice, he represented small businesses in landlord-tenant, real estate, and business matters. He was also General Counsel for the Western Center on Law & Poverty in Los Angeles. Judge Bauer obtained his B.A. in Mathematics from Harvard University, his J.D. from the University of Virginia, and his LL.B. from the University of Edinburgh, Scotland.]

Q: What drew you to a career in law?

A: I did what I think is common. I intended to continue my education and thought that law was good

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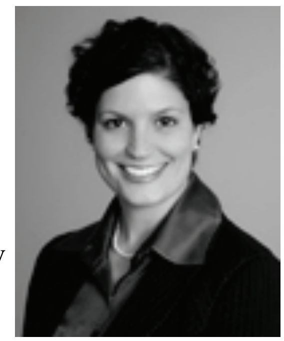
In the First Ruling of Its Kind, Judge Orders Reinstatement of Employees Fired For Facebook Posts

By Maria Z. Stearns



Over the course of the last year, the National Labor Relations Board ("NLRB") has taken an active role in shaping the legal framework of social media use by employees. On September 2, 2011, an NLRB administrative law judge ruled that a non-profit organization violated federal law when it fired five employees for messages posted on Facebook. This groundbreaking decision, together with the NLRB's recently issued report on social media cases, provide important guidance to employers regarding workplace social media policies.

The Legal Framework

Section 7 of the National Labor Relations Act ("NLRA") permits employees to engage in "concerted activities for the purpose of collective bargaining ***or*** other mutual aid or protection." Regardless whether the employer is unionized, employees must be free to discuss the terms and conditions of employment without fear of reprisal. Recent actions by the NLRB make it unmistakably clear that the NLRB shows no signs of retreating from its strong stance that Section 7 rights carry at least equal weight in the context of social media as compared to more traditional forums.

Hispanics United of Buffalo, Inc.

Hispanics United of Buffalo, Inc. ("HUB") is a 30-employee non-profit corporation that renders social services to economically disadvantaged people in Buffalo, New York. HUB terminated five employees after they engaged in a group Facebook discussion about a co-

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Message from the President:
A Call to Action Re Court Funding
By Darren O. Aitken

Most of us can probably recall those law school classmates of ours that viewed law school as a step toward a career in elective politics. While not surprising given the obvious connection between politics and law, my intuition is that most of the members of this organization belonged to a different group of law school students – those that entered law school to actually practice law on behalf of clients. Whatever we were then, that is certainly what we are now – business litigators that advance our clients' interests using the civil justice system as the arbiter of our clients' disputes. While many of us participate in the political process as a matter of choice, our profession rarely requires it. Until now, that is. As all who read this know, our ability to serve our clients is becoming increasingly compromised by the lack of funds being provided the court system by the State Legislature.

The Association of Business Trial Lawyers is a non-partisan, non-political organization, and rightly so. Therefore, it is not appropriate for this organization or any officer thereof (including myself) to propose a specific plan of action or advocate one particular agenda over any other. All of the attorneys who make up the ABTL, however, have sworn an oath to uphold the California Constitution, and that Constitution cannot function as envisioned if the third, co-equal, branch of government is deprived of the funds necessary to perform its Constitutional role. Furthermore, we also owe a duty of loyalty and professional service to our clients. If the civil justice system is unable to process its workload, it is our clients who suffer. It is our clients' claims for damages and restitution that will go undecided for far longer than before, thereby increasing their losses. It is our clients' defenses that will not be heard, thereby greatly increasing their costs of defense due to this delay. If a key witness or piece of evidence goes missing as a result of unwarranted delay, it is justice that suffers.

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False Patent Marking: The Rise and Fall of a Niche Legal Industry
By Mark A. Finkelstein and Jesse Mulholland

The era of the false marking industry is ending nearly as quickly as it began. The false marking statute, 35 United States Code Section 292, is a *qui tam* statute, which previously allowed any person to bring suit on behalf of the United States against any person or entity that falsely marked an article as patented. ("A *qui tam* statute authorizes a private person, known alternatively as a relator or informer, to bring suit on behalf of the government and to share in the financial recovery. The phrase *qui tam* is short for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, meaning who pursues this action on our Lord the King's behalf as well as his own." *Pequignot v. Solo Cup Co.,* 640 F. Supp. 2d 714, 719 (E.D. Va. 2009) (citations omitted).) The plaintiff filing and maintaining the false marking action was permitted to keep one half of the penalty assessed against the false marker, while the other half went to the United States government. Although the false marking statute was enacted in 1842, it was seldom used. (Patent Act of 1842, ch. 263 § 5, 5 Stat. 543, 544 (1842).) But that all began to change when, in 2007, an enterprising patent attorney named Matthew Pequignot, appearing *pro se*, filed a complaint against Solo Cup Company under Section 292. *Pequignot v. Solo Cup Co.,* 540 F. Supp. 2d 649, 650 (E.D. Va. 2008).

Mr. Pequignot alleged that Solo Cup marked its products with patent numbers that had expired and with a statement that the articles "may be covered" by a patent. *Id.* Mr. Pequignot sought an award of $500 "per false marking." *Id.* The *Pequignot* court held that marking an article with an expired patent is a false marking under Section 292. *Id.* at 654. A handful of copycat lawsuits followed and, in 2009, the Federal

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Common Mistakes That May Negate your Right to Enforce ADR
By Jay Freedman and Nathan Owens

As trial attorneys, we know that litigation can be expensive, inefficient and unduly time-consuming. With litigation costs steadily increasing and the backlog in our trial courts growing longer, more and more parties are turning to alternative dispute resolution (ADR) methods to resolve their disputes. Historically, arbitration has been the forum of choice included in contracts and agreements. Unfortunately, many parties often lose their right to compel arbitration due to procedural defects in the arbitration provision itself or mistakes that are created during the contracting process that have nothing to do with the substance of the arbitration provision itself. However, with a little planning and attention to detail, parties can reduce or eliminate the arguments used against them when seeking to enforce ADR provisions and preserve their ability to efficiently and inexpensively resolve their disputes.

Most of us are aware that courts will deny a party's motion to compel arbitration or judicial reference based upon defects in the ADR clause. California courts have historically been hostile towards arbitration provisions where they believe the parties to be in unequal bargaining positions and will invalidate them if they find them to be "unconscionable." To be unconscionable, an agreement or contractual provision must be both substantively and procedurally defective, though not necessarily in equal parts. If both are present, less of one can be offset by more of the other.

Procedural unconscionability is a primary reason cited by courts to invalidate ADR provisions. The most common procedural mistake is the tendency to bury the ADR provision deep in a contract. The stronger party's "burying" the ADR provision "in a prolix printed form" drafted exclusively by the

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Brown–Bag Lunch with Hon. Andrew J. Guilford
By Parker Tresemer

Many young lawyers may find the federal courthouse in Santa Ana to be imposing, and perhaps a bit intimidating. However, the Honorable Andrew J. Guilford who presides there is anything but. On June 16, 2011, Judge Guilford treated ABTL members and a few fortunate law students to a lively brown-bag lunch program discussing the basics of oral advocacy and legal writing.

Judge Guilford began with a simple question to the group: should attorneys be restricted to the lectern during trial, or should they be allowed to roam the courtroom? The general public is familiar with scenes of attorneys pacing before the jury, flailing their arms, and employing all manner of courtroom antics in the name of effective advocacy. Judge Guilford, however, explained that these antics are much more the stuff of television drama, because attorneys in federal court are generally restricted to the lectern. Judge Guilford theorized that by making an attorney's presentation as dry, unexciting, and un-television-like as possible, cases could be decided on the merits rather than on attorneys' theatrical prowess. While engaging and exciting courtroom presence is often effective, the judge emphasized that powerful oral advocacy can be delivered from the lectern quietly and confidently. The judge reenacted some of the more flamboyant presentations he had seen over the years, but he also provided examples of speakers who stood apart without theatrics: Martin Luther King, Jr., John F. Kennedy, and particularly, Winston Churchill.

Judge Guilford next asked the group why the plaintiff always sits closest to the jury box and whether the plaintiff's table should actually face the jury box. Again, it comes down to tactics. Judge Guilford explained that the plaintiff has the burden of proof, and the court theorizes, therefore, that the plaintiff needs as much help as he or she can get.

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Top Four Family Law Issues Business Litigators Need to Understand
By Kathleen O. Peterson

Many business litigators go through their entire careers happily knowing as little as possible about what happens in family courts. However, clients often need assistance and guidance from their business litigation counsel when they, their partners or co-owners are going through a divorce. Complex issues often arise during required exchanges of financial information, the discovery phase, or when a business is required to provide documentation and testimony for a trial. Business litigators need to be familiar with a few basics of how things are done in family court so that they can best advise their clients and coordinate with their clients' family lawyer.

<u>The Pace of Family Law Matters Can Be Lightning Quick or Glacially Slow.</u>

To date the family courts in Orange County do not use the Case Management rules. When cases are filed, they are not assigned to a judge until one of the parties requests some relief. As a result, it is possible to go for months without knowing which judge will be assigned to the case for all purposes. When some sort of relief is requested, through the filing of a motion or a request for an order to show cause, a judge is then assigned to the case for all purposes. This means that no judicial officer is immediately tasked with moving the case along.

Nevertheless, key matters are often litigated at the very beginning of a case. Many important issues in family law matters are decided through live hearings via a request for an order to show cause. An OSC hearing can be set on 16-court-days' notice under California Code of Civil Procedure Section 1005, just like motions. It is not at all unusual for a party to seek an OSC on temporary child custody, temporary child or spousal support, or for possession of real property along with the filing of a petition for divorce. This relief is often requested on an ex parte basis. Thus, the opposing party must scramble to prepare for a hearing, with live testimony (sometimes including ex

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The 38th Annual Seminar: Complex Issues in Complex Cases
By Adina L. Witzling

This year's Annual Seminar entitled, "Complex Issues in Complex Cases: A Focus on Damages, Daubert & Ethics," was held at the beautiful Bacara Resort & Spa in Santa Barbara, California. As is evident from the seminar's title, the programming provided attendees invaluable practice tips and insights from lawyers, judges, and consultants from across the state regarding damages, expert testimony, and ethics -- issues that affect all trial lawyers. Additionally, the seminar schedule provided ample opportunity for lawyers and judges to get to know one another in a relaxed atmosphere and allowed attendees plenty of opportunity to take advantage of the Bacara Resort and the Santa Barbara area. Orange County was the host chapter of this year's Annual Seminar, so we are particularly proud to report that it was a smashing success. Indeed, attendance was at an all time high for a non-Hawaii seminar.

The seminar kicked off with a welcome reception held under the stars where everyone had an opportunity to mix and mingle with other business trial lawyers and state and federal judges from across the state. Additionally, Orange County's ABTL young lawyer's division hosted a pre-welcome reception mixer where lawyers in practice ten years or less from different ABTL chapters could network with one another.

On Friday morning, the seminar officially began with panels on lost profits and other damages theories, strategies in presenting damages, and *Daubert* motions. Orange County was represented on the morning's panels by Wylie Aitken, of Aitken *Aitken * Cohn, who provided us with some creative and persuasive ways to present damages, and the Honorable James Selna, who gave the attendees his insights into *Daubert* motions.

The day's programming concluded with a key note address delivered by Professor Rory Little from UC Hastings College of Law who gave a lively presentation on ethics, law and the founding fathers. Did

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training for a variety of activities. I was a math major and realized that I wasn't going to be a mathematician, and law school seemed like a door toward a variety of alternatives.

Q: What areas of law did you practice before becoming a judge?

A: Basically civil litigation here in Orange County, with [Kindle and Anderson] and later in a smaller firm.

Q: What do you like most about being a judge?
A: I like the decision-making aspect of solving the problems and being able to reach a neutral evaluation and resolution as opposed to being required to pursue one point of view. I find it pleasing to be able to pursue what we hope is the right result on the law.

Q: How would you compare being a judge to being an arbitrator?

A: Very similar. In fact that's what got me interested. When I was practicing, one of my partners was an arbitrator with the American Arbitration Association. It was just a part-time thing. It's not like it is now, where people look upon arbitration/mediation as a career. It was a public-service-type thing. I don't recall if there was any remuneration or anything. So he said, "Ron, you should sign up." I did and I got a few really interesting assignments, and I really loved synthesizing the evidence and reaching a decision-making point. So it was arbitration that got me thinking that this would eventually make a good career.

Q: Do you miss anything about working in a law firm?

A: I like this job so much, and having twenty-seven years pass since working in a law firm, the memories fade. I'm sure there were a lot of wonderful events. I have no regrets, let's put it that way, because saying I miss something might hint at a regret. But I have none whatsoever and I like this so much.

Q: What advice would you give a lawyer appearing before you the first time?

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A: I teach a class in trial practice, and we emphasize the need to cultivate a reputation for professionalism, integrity, honesty and so forth. That's not as simple as appearing in court on one occasion, but that is a career-long goal. But to be more specific about an appearance in court, it may seem trivial, but on the first day of class I tell them that we will start on time. Part of our training as trial attorneys is being on time, not just in class, but in court, papers, deadlines, and so forth. We talk about professionalism, but each relationship should be to the highest level of integrity. It will be to your own benefit to treat other lawyers professionally. Even selfishly, that is the right thing to do.

Q: What common mistakes do lawyers make to lose the appearance of professionalism?

A: Sometimes lawyers get too personal in their approaches to each other. If they recognize that each has a professional calling to represent their client in an ethical and respectful way, then they wouldn't be personal about it. I have the good fortune in this assignment [*eg: complex civil panel*] to encounter lawyers who understand that, because in complex litigation we have more experienced lawyers generally who do encounter each other regularly who know each other and may even have friendships with each others.

Q: What was your motivation to teach as an Adjunct Professor?

A: I always had an interest in teaching. Out of law school I gave serious thought to a teaching career. So I really like the fact that I have been able to practice law and be on the bench and teach. I teach at the summer judicial college for judges. I teach for law school and have been doing so for about twenty years. I also do a fair amount of teaching for continuing education classes for lawyers. Its something I really enjoy doing. When I had two careers in mind I ended up doing both.

Q: Would the ideal teaching position draw you away from your job at the bench?

A: I don't think so, certainly not at this point. I get a high level of enjoyment in what I do now and I've gotten to do both. I realize I could teach more by retiring from the bench, but I don't think I would do that. I like it the way it is.

Q: What do you do in your free time?

A: Referee soccer games for kids from the smallest up through high school. I still do some running. I promised my law school class that before I finished I would run one more marathon. Since then I've ran two half marathons, but I don't think that counts. I do a lot of reading and enjoy watching sports.

The ABTL thanks Judge Bauer for his time.

♦*Casey H. Kempner is an associate of Haynes & Boone LLP.*

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worker's criticism of their work performance. The co-worker saw the Facebook posts written about her and complained to her manager. HUB viewed the Facebook posts as a form of co-worker bullying and harassment and terminated the employees on that basis.

Thereafter, one of the terminated employees filed an unfair labor practice charge with the NLRB, claiming that his Facebook posts qualified as protected concerted activity and could not be used as the basis for termination. In response, HUB argued that the employees were not engaged in protected concerted activity because they were merely griping that another employee had criticized their work performance. According to HUB, the employees were not trying to change their working conditions and did not communicate their concerns to management. Following a three-day trial, the judge rejected HUB's argument, concluding that:

> "if employees have a protected right to discuss wages and other terms and conditions of employment, an employer violates [the NLRA] in disciplining or terminating employees for exercising this right – regardless of whether there is evidence that such discussions are engaged

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> in with the object of initiating or inducing group action."
>
> Based on its conclusion that the Facebook postings qualified as protected concerted activity, the judge ordered HUB to reinstate the five terminated employees with back pay. In addition, the judge ordered HUB to post a workplace notice stating, in part:
>
> "we violated Federal labor law and [the NLRB] has ordered us to post and obey this notice. WE WILL NOT discharge or otherwise discriminate against you for engaging in protected concerted activity, including discussing amongst yourselves your wages, hours and other terms and conditions of your employment, including criticisms by coworkers of your work performance."

HUB has indicated it intends to appeal the decision.

NOT ALL SOCIAL MEDIA USE IS PROTECTED

Although the *HUB* decision is alarmingly broad, a recent report from the NLRB demonstrates that Section 7 of the NLRA does not extend to all social media use. On August 18, 2011, the Acting General Counsel of the NLRB issued a report summarizing fourteen social media cases decided by the NLRB during the last year. While the report does not establish bright line rules, the following general themes emerge:

Two-Pronged Analysis: Section 7 protects employees' right to engage in "protected concerted activity." The cases summarized in the NLRB's report suggest that an employee's social media use is protected if the employee's comments: (i) relate to the terms and conditions of employment; and (ii) can reasonably be interpreted as acting with, or on behalf of, other employees. The NLRA does not protect personal gripes and/or comments that have no real connection to work conditions.

Related to Terms and Conditions of Employment: Examples of social media cases where the NLRB concluded the comments were sufficiently related to the terms and conditions of employment involved topics of job performance, workload, supervisors, and staffing levels. In contrast, employee comments about the employer's customers or third parties were not entitled to protection under the NLRA.

Concerted Activity: To be concerted, social media use must be directed to or involve coworkers and invite or induce them to engage in further action. In several cases, the NLRB concluded that, although the employee's social media posts were read by fellow coworkers and elicited responses by some, the complaints did not constitute "concerted activity" because they were individual gripes and not aimed to induce group action. For example, in one case, an employer disciplined an employee for profane Facebook comments that were critical of management, and several coworkers posted supportive responses. The NLRB concluded the employee's Facebook postings were not concerted because:

> "they contained no language suggesting that the employee sought to initiate or induce coworkers to engage in group action; rather they expressed only his frustration regarding his individual dispute with the [manager] . . . . Moreover, none of the coworkers' Facebook responses indicated that they had otherwise interpreted the employee's postings. They merely . . . offered emotional support."

Overly Broad Social Media Policies Are Unlawful: In several cases, the NLRB found social media policies overbroad and unlawful because the policies "chilled" or discouraged protected concerted activity. According to the NLRB, the mere existence of an overly broad social media policy exposes the employer to an unfair labor practice charge even if no disciplinary action is taken against an employee.

Given the significant cost and distraction of defending an unfair labor practice charge, any employer seeking to regulate employee social media use should give careful consideration to the NLRB's reasons for

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SOCIAL MEDIA POLICY LANGUAGE	NLRB RULING
Policy prohibited employees from using social media in a way that: (1) violates, compromises, or disregards the rights and reasonable expectations as to, privacy or confidentiality of any person or entity; (2) constitutes embarrassment, harassment or defamation of the employer or any of its employees; and/or (3) lacks truthfulness or damages the reputation or goodwill of the employer or its employees.	Unlawful. Employees could reasonably interpret policy as prohibiting their discussion of wages and other terms and conditions of employment. Employer did not include any language excluding Section 7 activity.
Policy subjected employees to disciplinary action, including termination, for engaging in "inappropriate discussions" about the company, management, and/or coworkers.	Unlawful. Because policy did not define "inappropriate discussions," employees could reasonably interpret the rule to prohibit criticism of the employer's labor policies, treatment of employees, and terms and conditions of employment.
Policy prohibited employees from making "disparaging remarks" when discussing the company, supervisors, co-workers or competitors.	Unlawful. The policy proscribed a broad spectrum of conduct, did not define "disparaging," and contained no limiting language to clarify that the rule did not limit an employee's right to discuss matters related to the terms and conditions of employment.
Policy prohibited employees from posting pictures of themselves in any media that depicted the company in any way, including a company uniform or corporate logo.	Unlawful. Policy would prohibit an employee from engaging in protected activity; for example, an employee could not post a picture of employees carrying a picket sign depicting the company's name, or wear a t-shirt portraying the company's logo in connection with a protest involving the terms and conditions of employment.

declaring certain social media policies unlawful. The policy provisions examined by the NLRB include the following:

Social Media Policies Should Exclude Section 7 Activity: The NLRB recommends that a social media policy include language clearly informing employees that the policy does not apply to Section 7 activity and that employees are permitted to engage in concerted activity regarding matters related to their terms and conditions of employment. It remains to be seen whether such language, by itself, can overcome legal challenge to a broadly drafted social media policy.

THE NLRB'S INCREASING PRESENCE IN THE WORKPLACE

The NLRB has not signaled any intention to depart from its active involvement in social media related employment issues. If anything, the NLRB's presence may increase as a result of a new rule that goes into effect on January 31, 2012, requiring employers to post a notice informing employees of their rights under the NLRA.

Given the NLRB's stance in applying the NLRA to social media policies and the rapidly evolving law on this topic, employers should exercise caution in implementing such policies and before imposing social media related disciplinary action.

♦ *Maria Stearns is Of Counsel in the Labor and Employment department of Rutan & Tucker.*

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As officers of the court, and as the guardians of our clients' interests, we therefore have an obligation to take whatever steps we feel are appropriate to protect the court system's funding. The court system is at an inherent disadvantage in the funding process since its primary guardians – our judicial officers – are not as free to aggressively lobby and advocate as their competitors for funding at the Legislative level. Fortunately, we as lawyers are under no such restriction. We may have different comfort levels in regard to what steps we are willing to take to become involved, but we should all, each and every one of us, do something. The issue of court funding is too important to our profession and to our clients to remain on the sidelines. So whether it is by spearheading your firm's efforts to e-file where ever and whenever possible (thereby saving the court significant administrative costs), or by contacting state legislators in support of court funding or by becoming directly involved in the political process as a court funding advocate, some level of action is required. Our oath and our duty to our clients require it.

Also, on another note, I would be remiss in not thanking Scott Garner, Mark Finkelstein and Karla Kraft for their work this year as the Orange County representatives to the Annual Seminar Committee, with Scott serving as the Committee Chair. As the host chapter this year, the pressure was on the Orange County Chapter to deliver a great location, interesting speakers and lively entertainment for the benefit of statewide membership of the ABTL. As further discussed in Adina Witzling's article, the Annual Seminar Committee more than delivered, and the attendance at the Bacara Resort in Santa Barbara achieved an all-time record for a non-Hawaii seminar. Not only was the seminar well-attended, it was innovative – introducing new wrinkles to the program such as a lunch time keynote speaker, employing a stand up comic for entertainment, and providing several hours of those harder to get MCLE ethics credits. I am sure many of these innovations will be incorporated into future annual seminar programs. The Annual Seminar Committee in 2012 will have a hard act to follow. A sincere "well done" and thank you to all involved – including, of course, our Executive Director Linda Sampson who acted as Event Coordinator.

♦*Darren Aitken, the President of the Orange County chapter of the ABTL for 2011, is a partner with Aitken Aitken Cohn in Santa Ana. He can be reached at darren@aitkenlaw.com.*

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Circuit opened the flood gates for false marking cases with its decision in *Forest Group, Inc. v. Bon Tool Co*. 590 F.3d 1295, 1301 (Fed. Cir. 2009). In *Forest Group,* the Federal Circuit was called upon to interpret whether the civil penalty for the false marking of goods under Section 292 required a fine of not more than $500 "on a per article basis" or "a single fine for continuous false marking." *Id.* at 1301. The Federal Circuit held that "*each article* that is falsely marked with intent to deceive constitutes an offense under 35 U.S.C. § 292." *Id.* (emphasis added). The Federal Circuit identified a number of policy considerations for its interpretation of the marking statute, including: (1) the false marking statute exists to give the public notice of patent rights; (2) acts of false marking deter innovation and stifle competition in the marketplace; (3) acts of false marking may dissuade potential competitors from entering the same market; (4) acts of false marking may deter scientific research when an inventor sees a mark and decides to forego continued research to avoid possible infringement; and (5) acts of false marking can cause unnecessary investment in design around or costs incurred to analyze the validity or enforceability of a patent whose number has been marked upon a product with which a competitor would like to compete. *Id.* at 1302-03. The Federal Circuit acknowledged that interpreting the fine of Section 292 to apply on a per article basis "would encourage 'a new cottage' industry of false marking litigation by plaintiffs who have not suffered any direct harm." *Id.* at 1303. The Federal Circuit stated that "[t]his, however, is what the clear language of the statute allows." *Id.*

Before the Federal Circuit's *Forest Group* decision, courts generally adopted one of two approaches for defining what constitutes an "offense" under the marking

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statute. One approach for defining an offense was the "continuous offense" approach. Under this approach, courts considered each decision to falsely mark a single "offense." *Id.* at 1301; *London v. Everett H. Dunbar Corp.,* 179 F. 506 (1st Cir. 1910). That is, continuous false marking constituted a single offense warranting a single penalty of up to $500, regardless of the duration of false marking or the number of products marked. The other approach was a "time-based approach," whereby the courts interpreted a given time period of false marking as a separate offense. *Forest Group, Inc.,* 590 F.3d at 1302. For example, there could be a fine of up to $500 for each day, week, or month an article was falsely marked. Under either of these two approaches, plaintiffs lacked an incentive to bring actions on behalf of the United States government because the potential for recovery was simply not lucrative enough. Under the continuous offense approach, the maximum penalty was $500, and this had to be split with the United States government. Under the time-based approach, even if each day constituted a $500 penalty, one year of false marking would only yield $182,500. Again, half of this amount would go to the government and there was no guarantee that the requisite time for an offense would be one day. Under each approach, the continuous offense approach and the time-based approach, the cost of litigation left little motivation to pursue these claims.

But after *Forest Group*, plaintiffs realized that they could seek staggering damages for any mass-produced article. For example, in *Pequignot v. Solo Cup Co.,* the plaintiff alleged that the defendant falsely marked more than 21 *billion* articles and sought an award of $500 per article. *Pequignot*, 608 F.3d at 1359. Although the Federal Circuit expressly stated that Section 292 did not require a penalty for false marking of $500 per article marked and that "a court has the discretion to determine that a fraction of a penny per article is a proper penalty," *Forest Group, Inc.,* 590 F.3d at 1304, even a small fraction of a potential award could prove fatal for a target and a lottery ticket for the plaintiffs and their attorneys. Moreover, attorneys seeking these huge sums did not usually even bother with finding or retaining clients. The plaintiffs were often the attorneys themselves or limited liability companies established for the sole purpose of pursuing false marking claims. *See* Justin Gray, *False Marking Settlement Information,* GRAY ON CLAIMS, http://www.grayonclaims.com/false-marking-settlement-info/.

Many of these plaintiffs sought to exploit the false marking statute by alleging that marking products with expired patents constituted false marking. The only effort required to pursue these false marking claims included: (1) strolling down the aisles of local grocery, department, or hardware stores and looking for any mass-produced products with low patent numbers, (2) confirming on the United States Patent and Trademark Office website, or one of the many other free websites that exist today, that the patents were in fact expired, and (3) filing a form complaint. In almost all of these suits, the plaintiff suffered no injury and the only injury alleged was a general harm to the public at large. The defendants in these actions faced great costs and expenses in defending themselves and the real threat of extreme penalties for violating Section 292. Some defendants pejoratively referred to these plaintiffs as "patent-less trolls."

Since the Federal Circuit's decision in *Forest Group, Inc. v. Bon Tool Co.,* over 1000 new false marking cases were filed in district courts throughout the country. *See* Justin Gray, *False Marking Case Information,* GRAY ON CLAIMS, http://www.grayonclaims.com/false-marking-case-information/. And the plaintiffs had at least moderate success. More than 400 settlements were reached in these cases, which resulted in a total payout of more than $20,000,000. *See* Justin Gray, *False Marking Settlement Information,*GRAY ON CLAIMS, http://www.grayonclaims.com/false-marking-settlement-info/. The settlement ranges varied, but they reached as high as $2,000,000. *Id*

Defendants tried numerous tactics to fight these cases, often arguing over the statute itself. In one of its opinions, the *Pequignot* court advised Solo Cup, and any other potential defendants in false marking actions, that any arguments against Section 292(b) based on policy concerns are "addressed to the wrong

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forum." *Pequignot,* 640 F. Supp. 2d at 728-29 (citations omitted). The court recognized that the history of "*qui tam* actions in general, indicates that when these actions have been subject to abuse by profit-seekers with little public motivation, legislatures, both in the United States and England, have reacted." *Id.* at 729. And that is exactly what happened.

On September 16, 2011, about twenty months after the *Forest Group* decision, the President signed into law the Leahy-Smith America Invents Act (the "America Invents Act"), which dramatically altered Section 292. Section 16 of the American Invents Act made several amendments to Section 292 including: (1) amending Section 292(a) so only the United States may sue for the penalty, (2) amending Section 292(b) so those with a competitive injury may file a civil action, and (3) adding an additional subsection that reads: "[t]he marking of a product, in a manner described in subsection (a), with matter relating to a patent that covered that product but has expired is not a violation of this section." *See* Leahy-Smith American Invents Act, Pub. L. 112-29, 125 Stat. 284 (2011).

The America Invents Act applies retroactively to pending suits. As such, *qui tam* plaintiffs no longer have standing to assert false marking claims. Since the signing of the America Invents Act, courts have started to dismiss false marking cases *sua sponte. Kilts Resources LLC v. Uniden Direct In. USA Inc.,* 100 USPQ2d 1088 (2011); *GHJ Holdings, LLC v. WMS Gaming*, Inc., 2-11-cv-02761 (CACD September 27, 2011, Order). Now, only the Federal government may pursue the $500 per item penalty, while competitors must seek damages adequate to compensate for a competitive injury suffered as a result of the false marking. With the rise of many more demanding legal issues, the limited resources available to the United States government, and the cost of litigation, it is difficult to see how or why the government would bring these cases on their own except in extreme situations. Likewise, competitors of companies that falsely mark products may have difficulty justifying the costs and expenses associated with pursuing false marking claims. To be sure, it likely would be difficult in most situations to quantify the competitive injury suffered as a result of false marking.

While companies cheered the death of the false marking industry, not everyone was thrilled about the amendments to the false marking statute. Opponents of the amendments claimed that these changes will allow corporations to continue to tout unpatented products as patented by eliminating the ability of Americans to protect themselves from corporate dishonesty. *See* Daniel Ravicher, *Don't Protect Patent Lying*, HUFF POST BUSINESS (March 29, 2010, 8:30 AM), http://www.huffingtonpost.com/daniel-b-ravicher/dont-protect-patent-lying_b_516365.html. Of course, the resources available today to the public for determining whether a product is marked with an expired patent is vastly different than it was in 1842 when the statue was first enacted. In 1842, one can imagine the difficulty of traveling to the Patent Office to research a patent number. (*See* Trevor K. Copeland & Laura A Lydigsen, *Qui-tam-osaurus, the Statutory Dinosaur: Evolution of Extinction for the Qui Tam Patent False Marking Statute?*, ENGAGE, Oct. 2009, at 86; H.R. 102, 30th Cong. § 12 (1st Sess. 1848) (USPTO published descriptions of issued patents in the Franklin Institute of Pennsylvania).) Today, the public readily has access to patents electronically through numerous websites including the United States Patent and Trademark Office website, Google patents, http://www.pat2pdf.org/, http://www.freepatentsonline.com/, and http://free.patentfetcher.com/. In addition, the public has access to websites that actually calculate the expiration date of patents. *See* http://www.patentcalculator.com/; http://www.maxval-ip.com/patent-tools-patent-term-estimator.html.

Just as the course of technology progresses, so do the patent laws of the United States. We can only wait and see what the next battlefront will be.

♦ *Mark A. Finkelstein is a partner and Jesse Mulholland is an associate at Jones Day. Both focus their practice on complex litigation, including patent litigation and trademark infringement. The views set for the herein are the personal views of the authors and do not necessarily reflect those of their law firm.*

-ADR Mistakes: Continued from page 3-

stronger party often results in a finding of "oppression" or "unfair surprise" and the offending provision is voided.

Because otherwise enforceable ADR provisions will be invalidated if not properly presented to the other party, those seeking to enforce ADR must pay special attention to the manner in which they present these provisions if they want to protect their ability to compel ADR. This defect is compounded when consumers review and sign contracts without being provided sufficient time to review the contracts. Many parties oppose attempts to enforce ADR with testimony that they were not given an opportunity to actually read what they were signing and/or that they felt rushed, and courts often give great weight to this evidence. We must remember that the right to a jury trial is a fundamental right, and the courts want to ensure that the waiver of this right was knowing and voluntary.

Fortunately, procedural unconsionability can be avoided. If possible, parties seeking to enforce ADR should provide the ADR materials early in the contracting process and document that the materials were provided. They must then make sure that the identical materials are incorporated into the contract that is signed, and whenever possible avoid using "sample" or "exemplar" provisions prior to signing. Parties will not be able to argue they did not have enough time to read and understand the ADR provisions when the provisions were received days, weeks, or months prior to signing.

In addition to the "traditional" basis for denying arbitration, courts now look beyond the arbitration provision and consider parole evidence. An otherwise enforceable agreement may be negated by the court based on discussions that take place between the parties prior to contracting. While parole evidence is generally inadmissible to alter the terms of an integrated contract, a recent decision from the Second District Court of Appeal approved the introduction of extrinsic evidence to drastically limit the scope of the arbitration provision in an integrated contract with the effect of voiding it. *Burch v. Premier Homes, LLC* (2011) 2011 WL 4471805, 2011 Daily Journal D.A.R. 14,777.

In *Burch*, the plaintiff filed a construction defect action and the defendants moved to compel arbitration. The parties used a standard California Association of Realtors form contract for the sale. Paragraph 17 of the contract contained the following arbitration provision: "Buyer and Seller agree that any dispute or claim in Law or equity arising between them out of this Agreement or resulting transaction, which is not settled through mediation, shall be decided by neutral, binding arbitration. . ." An addendum to the contract contained a different, but not inconsistent, arbitration provision:

> Paragraph 17 of the Agreement shall only apply to disputes that arise before the Close of Escrow. [¶] B. The following provisions shall only apply to disputes that arise after the Close of Escrow. It is hereby agreed that all claims, disputes, and controversies between Buyer and Seller arising from or related to the Property, or to any defect in or to the Property or the real property on which the Property is situated, or the sale of the Property by Seller including, but not limited to, any claim for breach of contract, negligent, or intentional misrepresentation, shall be submitted to binding arbitration by and pursuant to the arbitration provision contained in the most recent edition of the HBW Limited Warranty Booklet, as of the date of the execution of this Agreement.

In response to the defendants' motion to compel, the plaintiff argued that she never intended to submit construction defect claims to binding arbitration and attempted to introduce evidence of the parties discussions leading up to her signing the purchase contract. The plaintiff's counsel went so far as to state that she had never heard of an arbitration provision in a contract for the sale of a house. After tentatively granting the motion to compel, the trial court determined that the contract was ambiguous, allowed the evidence, and then ruled that the parties never agreed to submit the construction defect claims to arbitration. The appellate court affirmed the trial court's decision. Interestingly, for an opinion concerning the arbitration of a construction defect or consumer matter, neither the trial court nor the appellate court discussed unconsionability or the substance of the arbitration

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provision. Instead, the opinion relied entirely on parole evidence and the plaintiff's testimony that she never intended to arbitrate defect claims.

Although arbitration clauses have long been the more traditional method of ADR, judicial reference provisions under Code of Civil Procedure section 638 are a common alternative to arbitration clauses included in contracts. Section 638 of the Code of Civil Procedure provides that a "referee may be appointed upon the agreement of the parties … or upon the motion of a party to a written contract or lease … if the court finds a reference agreement exists between the parties." Judicial reference provisions are often included as a safety net in the event that an arbitration clause is deemed unenforceable, and generally include a right to appeal. If an arbitration clause is found unenforceable by the trial court, a judicial reference provision requires the parties to submit their disputes to a retired judge in lieu of a jury trial.

Enforcement of a judicial reference provision requires an analysis similar to that required to enforce an arbitration provision. Yet, even when an arbitration provision is found unenforceable, California courts have still enforced judicial reference provisions. However, the Supreme Court recently cut a large hole in the judicial reference "safety net" when it empowered trial courts to deny judicial reference provisions in contracts where there is a risk of "inconsistent rulings" and "the considerations of judicial economy" warrant denying a party's request even when the provision is otherwise enforceable. *Tarrant Bell Property, LLC v. Superior Court* (2011) 51 Cal. 4th 538.

In *Tarrant Bell*, the Supreme Court held that even if a judicial reference provision between the parties is otherwise enforceable, the trial court still has discretion to deny a party's request to compel judicial reference. In *Tarrant Bell*, residents of a mobile home park sued the park owners for failure to properly maintain the common areas and facilities. A majority of the plaintiffs' lease agreements contained an ADR provision stating: "[i]f these arbitration provisions are held unenforceable for any reason . . . all arbitrable issues in any judicial proceeding will be subject to and referred on motion by any party or the court for hearing and decision by a referee (a retired judge or other person appointed by the court) as provided by California law, including [Code of Civil Procedure] section 638."

The defendants moved to compel arbitration or, in the alternative, for appointment of a referee under section 638. The trial court found the relevant arbitration provision unenforceable and also denied the defendant's request to compel reference, finding that to do so would lead to a multiplicity of lawsuits and would not promote judicial economy. On appeal, the Court of Appeals held that a trial court "had discretion to refuse to enforce the reference provisions because of the 'possibility of conflicting rulings on a common issue of law' and 'other circumstances related to considerations of judicial economy.'"

The Supreme Court granted review "to decide whether, under Code of Civil Procedure section 638, a trial court has discretion to refuse to enforce a predispute agreement providing that, in the event of dispute, a referee may hear and decide certain contested issues." The Supreme Court found that "a trial court has such discretion and that the trial court here properly exercised that discretion on the facts of this case."

Although not the basis for its decision, the Court acknowledged that parties have long considered Code of Civil Procedure section 1281.2 (c) [the code section governing arbitration] to vest the trial court with discretion to deny an otherwise enforceable arbitration provision if there is a possibility of conflicting rulings on common issue of law or fact. (*Abaya v. Spanish Ranch I, L.P.* (2010) 189 Cal.App.4th 1490.) Instead, the focus of the Supreme Court's analysis was on the legislative history of section 638 and the use of the permissive word "may" in the statute. The Court concluded that the Legislature never intended for section 638 to be mandatory and based thereon, the trial court "acted well within its discretion in basing its refusal to appoint a referee on a risk of inconsistent rulings and considerations of judicial economy."

Consequently, a carefully drafted contract is no longer the only consideration when deciding whether to pursue ADR or evaluating if your ADR provision

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will be upheld on a motion to compel. Because these issues are left to the discretion of the trial court, each case will be evaluated and determined on its own facts. So, when multiple plaintiffs are suing your client, you need to identify whether there is an ADR agreement with each plaintiff, the terms of the agreements, and whether those terms and the facts of each complaint are similar enough to justify and satisfy "considerations of judicial economy."

At the end of the day, ADR is a useful tool that can reduce litigation expenses and shorten the dispute resolution process. By paying attention to the process leading up to the signing of the contract, parties can reduce or eliminate the grounds used against them to avoid ADR and obtain the dispute resolution mechanism for which they bargained.

♦ *Jay Freedman is a partner and Nathan Owens is an associate at Newmeyer & Dillion, LLP.*

-Brown-Bag: Continued from page 4-

Sitting close enough to actually interact with the jury allows an attorney to attempt to read the individual jurors. As Judge Guilford explained, however, this is much more an art than a science. The judge recounted his own experience as a trial lawyer. Throughout one of his trials, a young female juror's continual nodding, smiling, and eye contact in his direction all but assured him, in his mind, of victory. Only after that juror voted against Judge Guilford's plaintiff-client

did he learn that the juror had actually been smiling at the defendant seated directly behind him.

While there may be no clearly "right" formula for oral advocacy, Judge Guilford was not so flexible when it comes to legal writing. In this regard, the judge believes that two constants continue to characterize the legal field: 1) the rules of clear, concise legal writing, and 2) a core of ineffective writers willing to disregard those rules. The judge graciously provided the group with some helpful tips to avoid becoming one of those ineffective writers.

First, Judge Guilford stressed that legal writers, like any writers, must develop and maintain a common theme throughout their works. Judge Guilford explained that briefs are often laden with stilted language and jargon because the attorneys who write them may forget that clear, concise, simple language remains the most effective type of writing.

Judge Guilford then suggested a game attorneys can play to simply but dramatically improve their legal writing. Imagine sitting at the breakfast table trying to explain a complex legal issue to an untrained friend. The judge explained that writing in a conversational tone simplifies and clarifies one's writing. For example, rather than saying "the plaintiff secured a mortgage," which creates ambiguities as to whether the plaintiff took out a mortgage or whether she pledged some collateral for the mortgage, simply say "the plaintiff *got* a mortgage."

Finally, the judge pointed to the towers of papers around his chambers and explained that the shorter brief is almost always the winning brief. He emphasized that short sentences, short paragraphs, and short words force legal writers to communicate more quickly and clearly. In contrast, confusing sentences result in lost opportunities to connect with the reader, and time spent confusing the reader is time spent losing one's case.

This brown bag lunch gave each attendee a new perspective on the federal courthouse in Santa Ana and the opportunity to learn some helpful oral advocacy and legal writing tips from Judge Guilford.

♦*Parker Tresemer was a 2011 summer associate in the Orange County office of Knobbe, Martens, Olson & Bear LLP.*

-Family Law: Continued from page 4-

pert forensic accountants or psychologists), sometimes before the party has even filed a response to the petition. Practically, hearings on OSCs are often set about six weeks from the time of filing, which gives a party some time to prepare, but in cases where the respondent is a business owner who must present evidence of cash flow in order to avoid a perhaps crippling temporary support order, this is not enough time to put together a knowledgeable legal and accounting team who will be ready to present a comprehensive case so soon.

As a result, it is very easy and almost a matter of course for matters to be continued one or more times. Because of how quickly hearings on OSCs and trials can be set, the family law courts and bar are typically very amenable to granting continuances. Many of these continuances are caused by scheduling conflicts of counsel, but often the continuances are necessary because of the impossibility of preparing the necessary evidence in such a condensed time frame. For example, if the court determines that a court-appointed expert is necessary under Evidence Code 730 on the issue of child custody, the hearing on the OSC will be put off, perhaps four to six months, to allow the court-appointed psychologist time to undertake an evaluation and make a report to the Court.

On the other hand, because Orange County family law courts do not use the Case Management rules, if the parties wish to let the case linger and/or do not request that the Court set a trial date or any other deadlines/guideposts, the Court will not do so on its own. In order to have a trial date set, one of the parties must file an At Issue Memorandum. Once that is filed, a trial date is set very quickly, sometimes as little at 60 days after a Trial Setting Conference. But it is not unknown for family law cases to push up against the five-year dismissal statute of Code of Civil Procedure Section 583.310 (but obviously there is no bar to the action being filed again).

<u>Fiduciary Duty Claims Are Increasingly Common</u>

Business litigators need to be aware that the fiduciary duty between spouses triggers heavy disclosure obligations for their clients in family law proceedings.

Family Code Section 721 states that "in transactions between themselves, a husband and wife are subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other." This relationship imposes a duty of "the highest good faith and fair dealing" and is a "fiduciary relationship subject to the same rights and duties of nonmarital business partners." The code specifically refers to Sections 16403, 16404 and 16503 of the Corporations Code, where the "rights and duties" of business partners and associates are set forth.

This creates a very high standard of care and disclosure between husband and wife, not only during the course of a marriage, but also during divorce proceedings. The fiduciary duty created by Section 721 remains in place "until such time as the assets and liabilities have been divided by the parties or by a court." *Family Code Section 1100e*. Thus, if one spouse operates a business which is community property, that spouse must act toward the other as a fiduciary, even while a divorce is pending. This includes an obligation to "make full disclosure to the other spouse of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest… and to provide equal access to all information, records, and books that pertain to the value and character of those assets and debts, upon request." *Family Code Section 1100e.* Disclosures of assets by each party must be done twice in each case via declaration under penalty of perjury; once at the beginning of the case and once before the trial or final judgment is entered. *Family Code Section 2100 et seq.* However, under Section 1100e additional disclosures should also be made as new events occur.

This is a very difficult concept for business operators going through divorce to understand and accept. There is great reluctance by "in spouses" (and their business associates and corporate counsel) to allow the full scope of disclosure and access to a divorcing "out spouse" which is plainly required by Section 721. Imagine a closely held corporation in which a spouse is the chief executive officer and owns one third of the company as community property. If that corporation is offered a new opportunity – for a new line of manufacturing or a new territory or to pur-

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chase a competitor – that information must be fully disclosed to a spouse during the pendency of a divorce. Often the last thing that chief executive officer and his or her other shareholders want to face is the prospect of the other spouse's attorney and forensic accountant spending days demanding and reviewing documents and raising questions as to the advisability of the transaction. This can be a no-win situation, in which the other spouse either opposes the transaction or decides that it was an unsurpassable opportunity only after the shareholders turn it down.

The stakes for failing to comply with this fiduciary duty are high. Family Code Section 1101 provides that spouses can bring claims for breach of fiduciary duty against each other if a breach has resulted in some "impairment" of the claimant spouse's interest in the community estate. For example, if one spouse purchases stock from community property cash and either out of spite, forgetfulness or otherwise fails to advise the other spouse, a breach of fiduciary duty claim can be brought. As a remedy the court can award the complaining spouse 50% of the value of any improperly disclosed or transferred asset, plus attorneys' fees and costs. The court also has the ability to award 100% of the asset to the complaining spouse in the nature of punitive damages. *Family Code Section 1101(g) and (h).*

The leading case in this area is *In re Marriage of Feldman,* 153 Cal.App.4th 1470, 64 Cal.Rptr.3d 29 (2007). Mrs. Feldman sought sanctions against Mr. Feldman for his failure to disclose certain financial transactions in the course of the required disclosures. These transactions included the purchase of a personal residence through one of his companies, the purchase of a $1 million bond, and the existence of a 401(k) account. The Court of Appeal affirmed the trial court's award of $250,000 in sanctions and $140,000 in attorneys' fees to Mrs. Feldman. Of most note perhaps was the Court of Appeal's conclusion that it was not necessary for Mrs. Feldman to have been harmed by the lack of disclosure in order for sanctions to be awarded. Since the *Feldman* decision, family law practitioners have questioned the scope and timing of the disclosure requirements. What level of detail in disclosure is necessary? When should the information be provided? Does the "out spouse" in essence now have a seat at the bargaining table? It is not at all uncommon to see "*Feldman* motions" being filed in many family law cases when one spouse remains in control of community assets or a business while a case is pending.

It is crucial that business owners and operators have a thorough understanding of their disclosure obligations during divorce. Corporate counsel can assist greatly in assuring that proper disclosures are made.

Protective Orders Are Not As Common in Family Law Cases

Business litigators and their clients are accustomed to having protective orders entered in almost every case, almost as a matter of course. The protective orders typically govern how confidential information and documents will be handled by the parties during discovery and in preparing for trial, including how that information may be shared with third parties, such as witnesses or experts.

As if the disclosure obligations discussed above aren't frightening enough, protective orders are a rarity in family law cases. Perhaps because the courts and the family lawyers are so accustomed to having financial information openly shared between the parties and presented as evidence, a request for a protective order by one party is likely to be greeted by reluctance, if not incredulity, by opposing counsel. I have seen this most often come up when the employer or business entity in which one of the parties has an interest is required to provide financial information in response to a subpoena. This often is relevant to the valuation of the business interest or some aspect of the party's employment, such as deferred compensation. Perhaps the reason for the reluctance to enter into protective orders is the concept that when an item of community property is at issue, both parties to the dispute are "owners" of that asset and thus the need for secrecy, especially in discovery or pre-trial proceedings, seems contrary to the spirit of the proceeding, where a high level of disclosure is necessary and expected.

Therefore, it is necessary to come up with some creative way to provide the necessary information while still protecting any privacy rights. This is often accomplished through negotiation rather than a formal

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motion to the Court.

Attorneys' Fees Are Routinely Ordered to be Paid by the Higher Earning Party

Family Code Section 2030 provides authority for the Court to require one party to pay for the attorneys' fees of the other party: "In a proceeding for dissolution of marriage…the court shall ensure that each party has access to legal representation, including access early in the proceedings, to preserve each party's rights by ordering, if necessary based on the income and needs assessments, one party…to pay to the other party, or to the other party's attorney, whatever amount is reasonably necessary for attorney's fees and for the cost of maintaining or defending the proceeding during the pendency of the proceeding." *FamilCode Section 2030(a)(1)* (emphasis added).

This embodies an "even playing field" concept that is unfamiliar to civil litigators. It is quite common to see multiple requests for fee awards while a matter is pending and courts are quite open to entering such orders. One strategic approach for the party who has greater access to the couple's assets or a higher stream of post-separation income is to propose that the Court order an early distribution of a community asset from which both parties can pay their attorneys' and expert fees. However, the Court can reject such a request and require that the party with greater means pay the fees out of post-separation separate property.

Family Code Section 271 is another basis for awarding attorneys' fees: "the court may base an award of attorneys' fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys." (Emphasis added.) This provision allows the Court to issue a sanction against a "bad actor" who is driving up the cost of litigation or being a hindrance to getting a case resolved. Again, as with Section 2030, it is common to see multiple requests for Section 271 sanctions as a case goes along. While it is much more difficult to obtain an award of sanctions under this section, the possibility of this helps curb the temptation of parties to take litigation positions or employ tactics that cannot be completely justified. It is also a useful tool for lawyers to rein in clients who may be tempted to "play hard ball" on issues that should not require a full hearing or lengthy proceedings.

In sum, the proper coordination of effort between family lawyers and business litigators can lead to more efficient litigation, which certainly should result in lower attorneys' fees overall, but also a better overall resolution, which the parties, their businesses and partners can be more satisfied with in the long-term.

♦Kathleen O. Peterson practices family law and business litigation in Irvine, California.

-Annual Seminar: Continued from page 5-

you know, for example, that John Adams prepared for trial by reading Cicero? Or that Alexander Hamilton was convinced that he ought not take a case if he felt he would not prevail? Professor Little, whose research in this area is ongoing, noted that originally attorneys swore oaths to deal faithfully with the merits of the facts brought to them, but that this later shifted to a more client-centered approach where the emphasis was on zealous client representation within the bounds of the law.

That afternoon and the next morning, seminar participants and guests had an opportunity to indulge in one or more activities offered, such as a tennis tournament, wine tasting, or a golf shotgun.

On Saturday afternoon, the seminar resumed with a live action demonstration of a *Daubert* motion. Thereafter, the program shifted focus to complex ethical issues with panels on ethical screens, other thorny conflicts issues and judicial ethics. The panelists tackled very timely issues affecting business litigators such as whether judges and lawyers can be friends on Facebook. Not surprisingly, the panelists' bottom line was -- that depends. Orange County was represented on the afternoon's panel on judicial ethics by the Honorable Richard Fybel.

Thereafter, the attendees met in small breakout sessions with many members of the bench. Our Orange County judges were well represented by the Honorable Gail Andler, Andrew Banks, Thierry Colaw, James DiCesare, Charles Margines, Kathleen O'Leary, Steven Perk, Nancy Wieben Stock, and David Velasquez (Ret.).

The program concluded with a dinner buffet and entertainment from comedian Tom Wilson (most famously known for his role as Biff from Back to the Future, but we learned that he is a little worn out from discussing that role). His sharp wit kept us all laughing. And special thanks to those attorneys who dared sit in the front rows and bore the brunt of Mr. Wilson's "in-your-face" comedic style. The seminar wrapped up the next morning with an outdoor breakfast buffet set out on an upper lawn area of the resort with a gorgeous view of the ocean below.

The entire Orange County Chapter's annual seminar planning committee that organized this wonderful event rightly deserves major kudos. The group, including committee chair Scott Garner, and committee members Darren Aitken, Mark Finkelstein, Karla Kraft, as well as Executive Director Linda Sampson, made our Chapter very proud.

We hope to see each of you at next year's Annual Seminar, which will be held at the Grand Hyatt Kauai Resort & Spa on September 19 -23, 2012, where the tradition of informative programming and invaluable networking, along with ample time to enjoy the beauty of Hawaii, will continue. The seminar will feature an interview with Chief Justice Tani Cantil-Sakauye by Justice Richard Huffman. Aloha!

♦*Adina L. Witzling is a partner at Manatt, Phelps & Phillips, LLP and Editor of the ABTL Report.*

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September 12, 2012
Dinner Program — The Westin South Coast Plaza

September 19-23, 2012
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