ASSOCIATION OF BUSINESS TRIAL LAWYERS

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Q&A with the Hon. Linda S. Marks
By Atticus N. Wegman

[*Editorial Note: Judge Marks attended University of California, Los Angeles for her undergraduate training before enrolling at Southwestern Law School to obtain her law degree. Judge Marks practiced criminal defense and civil litigation before becoming a senior managing partner at Marks & Yocum. Judge Marks was appointed to the bench by Governor Gray Davis.*]

Q: Why did you choose to enter the legal profession?

A: In college, I was an English and Film major. I liked the idea of the courtroom because it is similar to the stage and the lawyer has to bring it to life. I also took a job at a large law firm before entering law school to see if I was suited for the legal profession. Fortunately, I am happy with my decision and I am glad that I spent time before entering the

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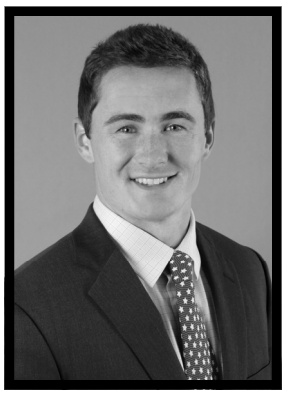
The California Trade Secret Privilege: A Valuable Tool for Resisting Discovery of Proprietary Business Information
By Joseph Gorman and Sean Twomey

Discovery can expose a company's most valuable financial and strategic information to its litigation adversary. Indeed, civil litigation ordinarily provides for broad discovery of any information relevant to any party's claim or defense. Parties can and do often take advantage of the discovery process to seek proprietary information from a competitor, even where the information sought is marginally relevant to their claims. In fact, the primary motive for suing a competitor can sometimes be the allure of potentially procuring a blueprint of the competitor's business.

A valuable shield for resisting unnecessary disclosure of such valuable strategic information is the California trade secret privilege. The privilege has been asserted to successfully resist production of proprietary information such as product formulas, product design specifications, and the identity of product suppliers, and may also protect other information that courts have recognized as trade secrets, including financial documents, marketing plans, advertising strategies, customer lists, and even third-party contracts.



As codified in California Evidence Code section 1060, "the owner of a trade secret has a privilege to re-

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The President's Message
By Jeffrey H. Reeves

I am looking forward to taking the reins as President in what promises to be an exciting year for our Chapter. I appreciate the opportunity, but Mark Erickson leaves behind some pretty large shoes to fill! Refusing to accept the status quo, Mark brought new energy and ideas to our group in recent years. He initiated our Habitat for Humanity program, orchestrated lunch time training programs and came up with the concept of table talking points for our monthly dinner meetings, as just a few examples. He will be a tough act to follow, and I hope you will all join me in thanking him for his efforts the next time you see him.

Fortunately, this particular board presents an embarrassment of riches in terms of enthusiasm and willingness to volunteer time and resources to our cause. Besides our Executive Committee, these board members eagerly accepted invitations to serve as committee chairs in the following capacities:

Dan Sasse – Annual Seminar Chair

Tom McConville – Program Chair

Michael Penn – Membership Chair

Maria Stearns – Public Service Chair

Todd Friedland – Sponsorship Chair

Will O'Neill has again agreed to step up as our Editor-in-Chief, Shiry Tannenbaum will serve as our Young Lawyer Division liaison, and we continue to be blessed with Linda Sampson's talents, institutional knowledge and energy as Executive Director. With a team like this in place, I think you can understand why I am optimistic about a great year for our Chapter in 2014!

The primary benefit of ABTL membership has historically been our strong dinner programming.

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Pay No Attention to the Man Behind That Curtain: High-Tech Judge or Wizard of Oz
By Hon. Nancy Wieben Stock (Ret.)

Under the leadership of past Presiding Judge Kim G. Dunning, the Orange County Superior Court's longstanding commitment to technology came to fruition in a number of significant areas. Not the least of these was our award-winning civil case management system, dubbed "ELF," (Electronic Legal File). The conversion of paper files to electronic files in all general and complex civil cases in Orange County marked a sea change in the way we do business.

Accountability: Gone are the days when the judge was the last one to know what was going on in a case. In the past, when a paper case file grew to many volumes, the delivery of the first and last volumes did not allow for total access. Also, recently filed documents were rarely in the judge's hands in time for the important hearing. With ELF all civil and complex judges on the bench have ready access to every single filing in every file in the courthouse, not just his/her own docket.

Have Gavel Will Travel: In the spirit of collegiality, when trials are ready to commence and the handling judge is otherwise engaged, a posting occurs courtwide, allowing for any other available civil/complex judge to step in and take that trial. Not only is the opportunity communicated electronically, but there is the ability to instantly prepare. Civil ELF permits the receiving judge to commence trial preparation immediately, even as lawyers are getting in their cars to drive to the courthouse. This same access is available for travelling family and probate trials. This has eliminated the need to take time off to "get up to speed."

Homework. The electronic file concept allows state and federal judges in California to access their case

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Mediating the Complex Business Case: Tips from the Mediator's Chair
By Hon. David C. Velasquez (Ret.) and Dave Ruby

Complex business and commercial cases present complex logistical issues, with concomitant special challenges facing advocates, parties and mediator. Advocates for all sides have choices which may influence the quality of the mediation process and even the outcome in complex cases. Attention to role, information and process can mean the difference between success and failure in the negotiation.

Overview

Most business and commercial litigation advocates know that the lawyer's role as an advocate differs significantly from that as negotiator and deal-maker. Business lawyers are especially knowledgeable about making deals and making them stick.

But pivoting from litigation advocate to negotiator and deal-maker can still be difficult. The trial advocate's focus is on managing information, seeking to maximize "good" information and minimize "bad" information. In negotiation, the emphasis is more on *evaluating* risks and benefits from information than on *managing* the information strategically. There is even a time for revealing information in exchange for settlement movement. A key task of the negotiator is managing the expectations of both the opposition and one's own client(s).

That change of role suggests a corresponding change in approach toward mediation, and toward the mediator. Unlike a trial judge, a mediator is not a neutral referee, charged with calling "balls and strikes" and keeping the proceedings in bounds. Rather, a mediator is a strategist, an ally who comes alongside ALL sides and tries to assist each of them in reaching common ground and

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Title Insurers and Escrow Agents: Common But Often Improper Targets in Mortgage-Related Lawsuits
By Matt Brown

Introduction

While the California housing market shows signs of recovering from the housing collapse and foreclosure crisis, the avalanche of mortgage-related litigation continues. Many plaintiffs, including both homeowners and lienholders, take a "shotgun" approach, suing every party whose activities even remotely touch on disputed real estate transactions. Title insurers and escrow agents are common targets, even though they generally have no direct interest in the properties or loans at issue and often have no direct relationship with the plaintiffs. But lack of privity of contract has not deterred plaintiffs in mortgage-related lawsuits from suing parties performing title and escrow services under a variety of theories. Fortunately for title insurers and escrow agents, however, California law substantially limits their duties and liabilities in real estate transactions, especially to third parties.

A title insurer who issues title insurance *owes no duty* to its own insured—let alone to a third party—to correctly represent the condition of title. And an escrow agent's duties run only to the parties to the escrow and are limited to following their specific escrow instructions. An escrow agent generally owes no duty of care to a non-party to the escrow.

Title Insurers and Escrow Agents Perform Separate Functions and Have Distinct Liability and Responsibilities.

The performance of title insurance functions is entirely distinct from the performance of escrow functions in a real estate transaction. (See Fin. Code, § 17000 et seq.; Ins. Code, § 12340 et seq.; *Universal Bank v. Lawyers Title Ins. Corp.*, 62 Cal. App. 4th 1062 (1997).) It is not uncommon for the same entity to perform both functions. (*See, e.g., Markowitz v.*

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ABTL YLD Voir Dire Workshop

On October 25, 2013, the ABTL Young Lawyer Division held their first-ever voir dire practice workshop led by Orange County Superior Court Judge James Di Cesare. This lunchtime event took place in Judge DiCesare's courtroom located in the Central Justice Center. The 50 lawyers who attended enjoyed a walk-through of the entire jury selection process. Judge Di Cesare discussed the various methods Courts use to seat jurors and shared strategies and tips for conducting voir dire examination. Todd Friedland (Stephens Friedland, LLP) kindly supplied a mock breach-of-contract case hypothetical and a brief voir dire examination was conducted with Michael Penn (Aitken*Aitken*Cohn) as plaintiff's counsel and Janet Park (Brown, Wegner & Berliner LLP) as defense's counsel. An extensive question-and-answer session with Judge Di Cesare followed.

The ABTL Young Lawyer Division thanks Judge James Di Cesare for his generous donation of time and energy to this successful educational event. We also thank the CJC Court staff for their kind hospitality.

The ABTL Young Lawyer Division is also proud to announce that Shiry Tannenbaum (Kohut & Kohut LLP) has been selected as Chairwoman of the Leadership Development Committee. She will replace outgoing Chairman Michael Penn, who will be joining the OC ABTL Board of Governors. If you are interested in assisting or participating in ABTL YLD events in the coming year, please contact Shiry Tannenbaum at Shiry@Kohutlaw.com.

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profession working at a law firm.

Q: Can you describe your early years of practice before taking the bench?

A: After graduating from law school, my goal was to gain trial experience. I was fortunate enough to land a position with the Los Angeles Public Defender's Office. While there I tried misdemeanor and felony cases. After about 2 ½ years I lateraled into a civil trial firm in Los Angeles where I received mentoring from the firm's senior partner. The transition was difficult, but with the help of a great mentor I was able to use the skills I gained trying criminal cases to try civil cases. I remember my mentor giving me the California Code of Civil Procedure and Civil Code. He told me to go read them. I probably spent my first six months of civil practice just reading and familiarizing myself with each Code, paying particular attention to the rules of discovery.

Q: Can you describe the feelings you had while waiting for your first civil verdict as opposed to waiting for a criminal case verdict?

A: Uncertainty. My first civil trial was a slip and fall case before Justice Rylaarsdam who was sitting on the Orange County Superior Court bench at the time. The jury returned a favorable verdict in thirty minutes. I recall waiting for the verdict in the cafeteria and feeling very uncertain as to how the jury would respond to all the argument and testimony. I was used to defending criminals facing consequences that would affect their life and liberty. Humanizing a criminal defendant was very much different than humanizing a large corporation.

Q: Why did you pursue a position on the Orange County Superior Court?

A: Over the years, bench ambitions came up in conversations with colleagues and counsel on cases. I did not consider the bench until I reached a point of professional development that I felt I could give back. I wanted to make sure that I had sufficient experience and had tried enough cases.

Q: What recent book did you read? Can you give us a judicial review?

A: I recently finished the book *The Sense of an Ending* by Julian Barnes. I thought the book was interesting because it deals with memory and our perception of events, and how each of us interprets events differently. The narrator tells the story based on his own perceptions when he was a young man. The reader learns at the same time as the narrator, now in his later years, that events he thought he understood at the time were vastly different. His memory of past events was shaped by his perception of self and not others. Basically, he got it all wrong! I think the book is interesting from a judicial bench officer's perspective because as judges we learn about past events through a witness' testimony, and the courtroom serves as the testing ground for accuracy and credibility. But, we always have to be mindful as to the lens we are using in the process.

Q: What advice do you have for those business litigators trying lengthy cases with complex issues?

A: Attorneys should try to use visual devices. We are past the days when lawyers can simply depend on a pen and piece of paper. Attorneys should be aware of the various jurors. For instance, a present-day jury could be comprised of four generations of jurors. Organization is key, and attorneys should strive to employ methods that make it easier for the jury to understand the issues in a relatively short length of time. This is particularly true in a heavy document or complicated accounting case. Finally, attorneys should remember that "less is more."

Q: Do you see any changes coming to our civil jury system?

A: I think there will come a time when expedited jury trials are the norm. The luxury of having weeks to try cases will need to give way based on budget constraints. We cannot continue with the same jury trial system as the budget and funding for our courts decreases. This may not apply to complex cases. I hope that business attorneys will be proactive and guide the shaping of any new system as we proceed into the future. Act as stewards, so to speak. I foresee the new model including the use of declarations instead of live

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testimony, and a reduction in peremptory challenges and jury panel size. It may look like the civil limited case with its rules of discovery. None of the changes that may be afoot, in my opinion, will necessarily equate in different trial results.

The ABTL thanks Judge Marks for her time.

♦*Atticus N. Wegman is an associate at Aitken*Aitken*Cohn and Assistant Editor of the ABTL Report.*

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fuse to disclose the secret" during discovery, unless doing so would "conceal fraud or otherwise work injustice." (Cal. Evid. Code § 1060.) The privilege thus protects trade secret information by imposing a heightened burden on the party seeking production of trade secret material. The requesting party must show that the trade secret information not only meets the bare threshold of relevance, but is also "necessary" to prove a material element of a claim or defense such that it is "essential to a fair resolution of the lawsuit." In effect, the evidence must be the only way of proving a material element of a claim or defense.

This article presents the legal framework under which the trade secret privilege may be successfully asserted and discusses best practices for doing so.

The Trade Secret Privilege Framework

Whether nondisclosure of trade secret information "works injustice" within the meaning of Evidence Code section 1060 is analyzed under the framework established in the leading trade secret privilege case, *Bridgestone/Firestone, Inc. v. Superior Court* (1992) 7 Cal. App. 4th 1384. Interpreting the legislative history of section 1060 and related authority, the California Court of Appeal held in *Bridgestone/Firestone* that compelling discovery of trade secret information requires more than simply showing the information is "generally relevant to the subject matter of an action or helpful to preparation of a case." (*Id.* at 1395.)

The Court set forth a three-prong burden-shifting test for application of the privilege:

> The party claiming the privilege bears the initial burden of showing that the material at issue falls within the definition of trade secret information;
>
> The burden then shifts to the party seeking discovery to make a "prima facie, particularized showing" that the information sought is not only "relevant" but also "necessary to the proof of, or defense against, a material element of one or more causes of action presented in the case, [such] that it is reasonable to conclude that the information sought is essential to a fair resolution of the lawsuit"; and
>
> Upon such a showing, the burden then shifts back to the party claiming the privilege to demonstrate that "an alternative to disclosure" (including under a protective order) "will not be unduly burdensome" to the party seeking discovery.
>
> Each step is reviewed in turn below.

Step One: What Constitutes Trade Secret Information?

In the first step, the initial burden is on the party resisting discovery to show that the information at issue is a trade secret. The Uniform Trade Secrets Act (UTSA) defines trade secrets in California. (Cal. Civ. Code § 3426 et seq.) Under Civil Code section 3426.1 (d), a trade secret is any "information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) [d]erives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

Courts have construed section 3426.1(d) to cover a wide range of materials, including cost and pricing information, profit margins, marketing research, advertising plans and techniques, customer lists, third-party contracts, product design specifications, manufacturing

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methods and technologies, and investment trading models. But a trade secret is not limited to these examples. As courts interpreting the UTSA have held, a trade secret can be *any* information that: (1) would be "valuable if known by a competitor" and (2) the owner has reasonably "attempted to keep secret." (*Whyte v. Schlage Lock Co.* (2002) 101 Cal. App. 4th 1443, 1454-56.)

To successfully claim the trade secret privilege, it is critical to establish both the value and secrecy elements by submitting a declaration from someone with firsthand knowledge of the information at issue. As to the first element, courts have found sufficient economic value in information that would enable a competitor to "more selectively" and more efficiently direct its sales efforts in the industry, set prices which "meet or undercut" another party's prices, and to "predict and counter" another party's advertising and marketing strategies. (*Whyte*, *supra*, 101 Cal. App. 4th at 1454-56; *Morlife, Inc. v. Perry* (1997) 56 Cal. App. 4th 1514, 1522.) The declaration should specifically set forth how the information, if known by a competitor, would supply economic value in one of these ways or in some similar fashion. It is critical that the declaration offer some particular and specific demonstration of substantial and serious competitive harm that would result in the information's disclosure.

As to the second element, reasonable efforts to maintain secrecy have been held to include advising employees of the existence of a trade secret, requiring employees to sign confidentiality agreements, limiting or controlling access to the information, and labeling the information as a trade secret or as confidential. (*Whyte*, *supra*, 101 Cal. App. 4th at 1454; *Courtesy Temp. Serv. v. Camacho* (1990) 222 Cal. App. 3d 1278, 1288.) The declaration should recite specifically which of the above measures or similar steps the party undertakes with regard to the information sought.

Step Two: Can the Party Seeking Discovery Satisfy Its Heightened Burden?

The burden then shifts to the party seeking discovery to make a "particularized showing that the information sought is *relevant and necessary* to the proof of, or defense against, a material element of one or more causes of action presented in the case, and that it is reasonable to conclude that the information sought is *essential to a fair resolution of the lawsuit*." (*Bridgestone/Firestone*, *supra*, 7 Cal. App. 4th at 1393 (emphases added)).

As the *Bridgestone/Firestone* court emphasized, it is not enough, under this standard, for the party seeking discovery to show that the information would be "relevant", "helpful," "useful," or even "important" in proving its case. Rather, the party must make a particularized showing as to how the evidence is "necessary" to its "ability to carry their burden of proof" on a material element of a cause of action or defense and "essential" to a fair resolution of the lawsuit.

This protection is the heart of the privilege. Virtually *any* proprietary business information could be characterized as "helpful" to proving a case, but Evidence Code section 1060 does not permit discovery of that information absent a heightened showing of need.

Applying this standard, courts have found that if there are any other means for the party to prove the material elements of a claim or defense without the trade secret information, then the material is not necessary, and thus, not discoverable. For example, in *Bridgestone/Firestone*, the court denied discovery after finding an expert witness was "able to draw conclusions" regarding a defective tire design without learning the formula for the compounds which made up the tire. (*Id.*) Another recent decision analyzed whether disclosing a distributor's contact information was necessary where the defendant claimed such information constituted a trade secret. (*Citizens of Humanity, LLC v. Costco Wholesale Corporation* (2009) 171 Cal.App.4th 1.) The *Citizens* court concluded that Costco satisfied its initial burden to show that the distributor information was a trade secret, but the plaintiff failed to meet its burden under *Bridgestone/Firestone* because the plaintiff had other means of determining whether Costco was reselling stolen product, such as investigating whether the plaintiff's wholesalers were missing product or examining the terms of Costco's vendor transactions without learning the identity of the supplier. (*Id.* at 15-16.) Importantly, *Bridgestone/Firestone* makes clear that

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while the burden of showing "particularized need for a trade secret is on the party seeking discovery," the trial court "need not ignore evidence presented by the opposing party on the question whether the information sought is a trade secret." Thus, in asserting the trade secret privilege, the party resisting discovery should not merely sit back idly, but should affirmatively present the court with evidence that the party seeking discovery has some alternative means for proving its case without use of the trade secret information. Even if the alternative method appears more difficult or burdensome, the existence of another means of proof may be sufficient to deny discovery of the trade secret.

Step Three: Is There an Appropriate Alternative to Disclosure, Including Under a Protective Order?

In the event that the party seeking discovery meets its burden under step two, the burden then shifts back to the party resisting discovery to show that either that there is some "alternative to disclosure" that "will not be unduly burdensome" to the party seeking discovery, or that the protection provided by a protective order is inadequate.

In practice, once the party seeking discovery shows disclosure of the trade secret is necessary to prove a material element of a claim or defense, the majority of courts have compelled disclosure of the trade secret under a protective order limiting the scope of that disclosure.

Nevertheless, a party may still be able to avoid disclosing the trade secret by offering to stipulate to the material element that the party seeks to prove with the privileged information. The party asserting the privilege may also be able to resist discovery by demonstrating the shortcomings of a proposed protective order if, for example, the order is not limited to outside counsel, or if there is a risk that counsel might disclose (intentionally or inadvertently in the course of his or her job duties) the information to in-house personnel at the competitor.

Regardless, parties asserting the trade secret privilege should be wary of opponents prematurely urging a court to order disclosure of the trade secret information simply because there is a protective order in place. Under the framework of *Bridgestone/Firestone*, the question of whether disclosure under a protective order is appropriate does not even come into play until *after* the party seeking discovery meets the burden discussed in step two. (7 Cal. App. 4th at 1393). In other words, the mere fact that a protective order is in place does not change the need for proof that the requested trade secret is both *necessary* to proof of a claim or defense and *essential to a fair resolution of the lawsuit*.

Conclusion

The trade secret privilege is an important tool that can be asserted to protect a wide range of sensitive business information from disclosure in discovery. The general principles discussed in this article may even be more broadly applicable to any civil proceeding in federal court. Federal Rule of Civil Procedure 26(c) permits a court to issue an order "requiring that a trade secret or other confidential research, development, or commercial information not be revealed," and numerous courts applying Rule 26(c) have required the party seeking discovery to make a heightened showing that the information is "necessary" to prosecute a claim or defense, beyond merely demonstrating its relevance. (*DirecTV v. Trone* (C.D. Cal. 2002) 209 F.R.D. 455, 460; *Synopsys, Inc. v. Nassda Corp.* (N.D. Cal. Sept. 16, 2002) 2002 WL 32749138, at *1).

♦*Joseph A. Gorman and Sean S. Twomey are associates in Gibson, Dunn & Crutcher LLP's Orange County office and are members of the firm's Litigation Practice Group.*

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files from home and anywhere else in the world. Judges accomplish this through a virtual private network and in some cases through a wireless connection from their court-issued laptops. This capability allows the busy judge to complete work over the weekend and at night, when for example, the judge and lawyers are still finalizing the jury verdict form at the 11th hour.

Mandatory E-filing. E-filing and now, mandatory e-service, were logical follow-ons to the Court's commitment to go with "paper on demand." Orange County was the first statewide pilot for mandatory e-filing in certain civil case types. In difficult economic times, the streamlined and efficient process of e-filing is a great benefit to the Court. "Smart forms" relieve the Court of tedious and error-producing data-entry tasks.

Through continued discussions with lawyers and vendors, other improvements have emerged, such as optical character recognition searchability by the judge and the visualization of red-lined documents. Book-marked exhibits and hyper-text links within documents have also proved to be an advantage over paper filings.

Knowledge is Power. Consistent with requirements banning true ex parte communications with the Court, the high-tech judge will use available technology to communicate with counsel. This capability may be built-in to the Court's public offerings, such as websites, or may be harnessed using one of the many vendor products such as CaseAnywhere, LexisNexis File and Serve or Case Homepage, among others. Some judges are in the cloud(s), via Google Docs and other outside resources. An example of a typical communication is the judge who has a document to sign in chambers and has a question that can easily be addressed without the need for noticing and scheduling a motion. The judge will post a "note to counsel" and attempt to resolve the matter. Another example is a judge who wishes to communicate indicated rulings on law and motion matters. If the court holds with the tentative, the rulings can be "pasted" directly into the minutes, ensuring accuracy.

In all of this, the basic concept is that all documents served in a case are served through a web-based e-service provider; the provider has an established web-site on which all e-service cases are maintained; and documents served in each case are available only to parties and counsel that are on the service list. The website becomes an effective electronic docket that gives all parties and the court instant access to all documents served in the case. Email notifications are sent whenever a document is served (or a daily summary of documents served in a case may be provided in a single email). Message boards are available on each e-service case—and may be used by the parties or the Court on an as-needed basis (Note: the Court may have the message board turned on or off at its election.) Utilizing these services, Judge Carl West [Ret.] reports that in 11 years on the Complex Civil Panel in Los Angeles, he did not have more than a handful of ex parte applications.

Finally, at least one Southern California judge has ruled, on a Motion to Tax Costs, that electronic depository and cloud-based tools are necessary and proper costs in handling complex litigation.

The Illusion of Control. Some lawyers may not realize that the judge's bench mostly resembles the cockpit of an F-18, with all the high-tech controls and multiple screens that are available. On my bench, I have control over the sound system, the evidence presentation screens, the LiveNote court transcript, the ELF files, my calendar, all Word files containing my personal judicial notes, Westlaw, all software programs installed on the laptop, including for jury instructions, child support calculation, legal folios, etc. Could all these functions be controlled though a tablet? Probably.

I Dream of "JENIE." Wouldn't it be convenient for a judge to have every application, internal and external, necessary to perform one's duties on a SINGLE page? Welcome to the Superior Court's *Judicial Events, News, Information & Education* site. The site has links to all bar and judicial sites of interest, internal directories, a Presiding Judge's blog (rarely used…), Ethics Hotline and educational tools. In case you are wondering about attorney access, the answer

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is: no. This site is only available to our judges.

Intra-Courtroom Communications. Although most lawyers would not want to believe this, judges do multi-task while on the bench. The responsible judge ensures that this occurs only for the benefit of the case at hand. Examples are the e-mail and instant messaging capabilities that the judge has with staff. Juror No. 5 needs more water? The Courtroom Attendant gets a friendly message from the judge that pops on screen and supersedes other tasks. The judge is in oral argument on a motion and wants to revise the language of a tentative ruling? Done. Before the lawyers have left the courtroom, the Clerk has the revised ruling. Is the Legal Research Attorney going to sit as a temporary judge for a Status Conference? The judge's personal case notes are sent to him/her forthwith.

Don't Forget the Telephone. Enterprising judges around the State routinely use the telephone to save parties time and money. Many judges will, on very short notice, take a request to rule telephonically on the record in ongoing depositions. Many judges enjoy the benefit of reduced law and motion calendars, as they invite telephonic conferences, coupled with simple letter briefs to solve problems that would otherwise require a motion. Though not universally embraced, many judges actually prefer a Court Call appearance if it means that the handling partner will be participating because the time commitment has been substantially reduced. The development of video-conferencing into the courtroom will also widen the possibilities to trial testimony as well.

Looking Good. Hopefully, once lawyers realize how much their judges use technology, this will serve as motivation to try new and intuitive ways to be persuasive in court. Whether it is to the jury or to the court, electronic evidence presentation is the standard of practice these days. In Orange County we offer Nomad podiums capable of displaying material from your personal laptop to any number of screens positioned around the courtroom. Annotating is possible by both counsel and the witness. A free 20-minute tutorial is provided through the Court's IT staff, so even a budget-conscious trial team can be accommodated.

No More Back Strain. Tired of hauling around the various trial exhibit binders? In my department we no longer use paper exhibits. The Plaintiff's exhibits are on a flashdrive and the Defendants' are on a CD. Of course, we still utilize the all-important "key documents" binder, especially when a jury is present. This way, everyone has the ability to refer to and write notes on key exhibits. Jurors take them back to the jury room as well. CRC 3.1032 encourages such notebooks in complex civil trials. I recommend them in almost every civil trial.

Where Do We Go From Here? In the courtroom, our ultimate goal is to place information in the hands of our fact-finders so that due process is ensured by a judicial decision that is the product of a thorough understanding of the matter decided. A partnership between judge and lawyer and a commitment to using available tech tools will go a long way to achieving this goal. Why would we want anything less?

♦ *Hon. Nancy Wieben Stock, former Presiding Judge, has recently retired from the Complex Civil Panel of the Orange County Superior Court, and serves as a neutral at JAMS.*

Don't Forget
All ABTL Memberships
Expired on December 31st

Renew Today!

To establish your
2014 membership,
please visit us on-line at
www.abtl.org.

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building the momentum which is so critical to making a deal.

While the negotiation may still bear marks of competition between or among the parties, the negotiator should work with the mediator *collaboratively*, not *competitively*, if the mediation is to have a higher probability of success.

Changing role from litigator to deal-maker requires thoughtful preparation. The most effective business lawyer in mediation will no longer regard settlement, process management, problem-solving, creating or maintaining momentum, and the like, as only the "mediator's problem". An approach which is more likely to have a successful result will include a plan to take a pro-active role in managing the mediation process. Such management includes, for example, preparing and educating the mediator, helping to solve logistical issues, focusing on the chemistry of the parties' personalities, and managing the expectations of the parties in the other rooms.

With that perspective in mind, let us examine some of the issues in mediating a complex business/ commercial case and suggest how to maximize your client's outcome in the successful business mediation.

Process decisions

What involvement do (should) you as an advocate have in shaping/designing the process in a complex case?

A case can be complex because it involves numerous parties, voluminous documents, novel issues of law or complicated relationships which require resolution of threshold issues before the central issue can be resolved. Each of these comes with unique and special challenges to the mediation process.

Multiple parties create significant issues of allocating the mediator's time to maximum effect. Too many rooms can mean the mediator is away from each room for long periods of time, and that in turn can be a serious momentum-killer. Leaving a party alone for too long can cause the party to believe the mediator has forgotten them, or does not feel that party's interests are important.

The timing of sessions is important. Who appears when, how the mediator's time is divided, how much intra-team mediation is required-- all these and more decisions face every mediator in the complex business or commercial case. Deciding when the parties appear can be critical to the success of the mediation process. Should the parties appear all at the same time for a general caucus or presentation, or should the parties' appearances be spread out over the course of the day or two? Does the case require an incremental approach involving several sessions over time? In some cases, some, but not all, of the parties may need to appear for a mini-mediation to discuss sub-issues in the case.

Instead of leaving the mediator alone to the task of organizing and managing the process, the skillful business negotiator sees opportunity in the challenges of managing process to maximize his client's interests at the end of the day.

Indeed, complex case mediators often look for individual negotiators who will help to organize and manage the process. It is readily apparent that those negotiators who accept the invitation (expressed or not) are always closer to the "heart" of the "action", and can derive benefit to their client thereby. Even if the client's settlement position is not itself improved, the probability of settlement will increase dramatically with assistance of experienced counsel helping to manage the process.

Selecting the mediator

There is wide disagreement among seasoned and experienced practitioners about how to select a mediator. It is time to re-examine one's method of selecting a mediator, especially in a complex case. Should subject matter expertise be the end-all to the process? Or, should the parties look for a mediator skilled in relating to people, in building trust, and in helping people find common ground? Isn't the ability to forge an agreement between warring factions the most important qualification of an effective mediator?

This is not to say that subject-matter expertise is utterly irrelevant. Subject matter expertise has its place in

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the selection process. It is important that the mediator have sufficient knowledge in the subject matter to keep up with the conversation, digest and understand the issues, and be able to work with strengths and weaknesses of each side's legal positions. But subject matter expertise is only one dimension of the mediator's ability to be successful in helping the parties reach agreement.

If you are approaching mediation in a franchise case, for example, it is far more important to have a mediator who is skilled at settlement of complex cases than an ineffective mediator who is highly skilled in franchise issues and law but lacks effective people skills. How effective is a mediator who can predict or proclaim the outcome of the case based on the mediator's knowledge of the law, but who lacks the ability to connect with the hearts and minds of the parties? There are many disappointed advocates who have experienced the effects of selecting a mediator who is only too happy to poke holes in their arguments as the "true expert" in the room, but who lacks the skill to move the parties through difficult challenges and to a satisfactory agreement at the end of the day?

What are the obstacles to resolution in this particular case? The answer will determine what kind of skill set your mediator needs to have, and whether "subject matter expertise" is a significant criterion in the selection process.

Is the suggestion surprising that subject matter expertise may be one of the least important considerations in mediator selection? Just as a great trial lawyer can try cases over a wide range of subject matters, an excellent mediator can work in a wide variety of types of litigation. As your (ultimate) job is to persuade judges and juries, the mediator's (ultimate) job is to assist parties in conflict to resolution.

In mediation, people skills are usually more important than technical knowledge. A great communicator with acceptable fluency in the subject matter is far better than the genius who cannot communicate or work through barriers and the dead-end streets often thrown up by those in conflict. And subject matter expertise is only an effective tool, if at all, where the parties have confidence in the correctness of the expert. It is not uncommon that counsel for the parties are equally expert in the particular subject matter, but hold a legitimate difference of opinion on the critical point(s) of law or factual nuance on which potential settlement depends.

This does not mean that complete ignorance of the subject matter is a qualification for a mediator. The mediator must still be able to understand the issues based on some knowledge of the subject matter in order bring his or her analytical ability to bear on the obstacles to settlement. The skills necessary to bring the parties to an agreement are not easily employed by one who does not understand the "language" of the case. So the issue of subject-matter expertise is not black and white, but a question of subtle shades of gray.

A mediator's belief that he or she has a "superior" depth of subject matter expertise may actually hinder settlement. This is especially true where the mediator employs a primarily "evaluative" approach to the mediation process (as opposed to a "facilitative" approach). For example, take the not-too-hypothetical case where a mediator (not a retired judge, by the way, but a former lawyer) announces to the plaintiff's counsel, at the beginning of the mediation, "You have six causes of action in your amended complaint. Four are worthless bull---- and I am not going to waste my time on those.
We'll focus on the other two." Needless to say, that was the beginning of a very bad day for the Plaintiff's lawyer – and the plaintiff.

Be careful what you wish for. If you want a strong-willed, highly evaluative mediator to whip your opponent into shape, you may end up as the "whippee" instead.

On the other hand, there are occasions when subject matter expertise can be extremely helpful. One example is when your opponent fails to appreciate the significance of evidence or law which supports your client's position. Mediator subject matter expertise may be useful in those cases where your opposition needs to be "set straight" on factual or legal misconceptions. Of course, there is the unfortunate circum-

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stance in which you are the one who misconstrues the law and needs to be straightened out.

In the experience of these authors, it is a very small percentage of cases where the primary obstacle to settlement is the opponent's total lack of understanding of the pertinent law governing the outcome of the case if it were to go to trial. Yet lawyers perceive or fear that this is a problem in a significant percentage of cases. Lawyers think this problem will burden settlement discussions far more than is actually the case. But where this really is a problem, a mediator respected as an authority in the field may have a significant beneficial impact on your negotiation – but only as long as he or she agrees with you on the important substantive issues!

Consider, too, that every good mediator has to become an expert every day -- not in the entire field of law at hand, but in the particular law – and the facts --applicable to your specific case. Every good mediator must be a "quick study". With the skilled mediator's high communication and rapid comprehension skills he or she is usually a much better choice to accomplish the "straightening out" than the subject matter expert.

One more point on mediator selection: one should never surrender the choice of mediator to the opponent. The choice of mediator is often critical to achieving resolution. Even more important, it may be critical to achieving an outstanding resolution. The oft-heard expression: "whoever they want is fine with me, as long as he or she is minimally competent" should be removed from your lexicon. It assumes that you cannot find a mediator who will both be acceptable to your opponent(s) and do a great job for you.

It is usually prudent to find a dispute resolution provider who not only books and bills mediators but works with parties to bring them the best talent for a particular case. When one does not know who to select as a mediator, working with a dispute resolution provider you are comfortable with and trust is usually the best way to find a mediator who will be a good choice for all sides.

Implications of logistical complexity

Logistical complexity can add a huge amount of time to the process. Bear in mind that in the first 4 hours of a 6-party mediation, assuming the mediator takes zero minutes in greeting, coffee and restroom breaks, the mediator will spend an average of 40 minutes in each room, including yours.

Much can be done before the actual mediation hearing. Advance mediation sessions (pre-mediation conferences) with the individual parties are extremely helpful to get the mediator up to speed and hone in on the real issues. There are matters that counsel need to share with the mediator before the actual mediation session which, for good reason, would not appear in the mediation brief. Pre-mediation conferences and telephone calls are always helpful to expedite the process and to share any back-story to help make the session more successful.

While these pre-mediation steps are always helpful to expedite the process, complex cases often require more in the way of advance work. There are cases in which intra-team negotiation is required in advance of the mediation to facilitate a smooth and effective process. In class actions, for example, there may be multiple plaintiff firms with different ideas of negotiation strategy or opening demand. The goal is that by the time the full mediation session occurs, the plaintiff team will be of one mind in how to pursue negotiations. Pre-mediation conferences can shorten the process considerably. Waiting to conduct these individual caucuses until the date of the mediation, while the other side waits in another room, will make for a long, frustrating and difficult day.

Information flow

Give the mediator as much information as will help identify the obstacles to settlement and work on them. Naturally it is important for the mediator to understand your positions on the issues in the lawsuit, both legal and factual. But that is really only a part of what a good mediator needs to help you resolve the case. Be candid with the mediator about where you think the obstacles are and why. Before the session, the mediator needs to identify the problems that may impede settlement. He needs your best assessment of the opponent, and of potential obsta-

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Fid. Nat. Title Co., 142 Cal. App. 4th 508 (2006); Siegel *v. Fidelity Nat. Title Ins. Co.*, 46 Cal. App. 4th 1181, 1189 (1996); *Universal Bank,* 62 Cal. App. 4th at 1064, fn. 8.) When this occurs, the entity's acts still are assessed as a legal matter based on the particular function performed.

On one hand, title insurance involves an insurer's promise to indemnify the insured against loss due to certain defects, liens and encumbrances affecting title to real property. (Ins. Code § 12340.1; *First Amer. Title Ins. Co. v. XWarehouse Lending Corp.*, 177 Cal. App. 4th 106, 113 (2009).) A title insurer's primary function is to search the chain of title to property, prepare preliminary reports setting forth its findings, and issue title insurance policies. (Ins. Code, § 12340.11. ["Preliminary reports" are "furnished in connection with an application for title insurance and are offers to issue a title policy subject to the stated exceptions set forth in the reports."]; Ins. Code, § 12340.2 ["Title policy" is statutorily defined as "any written instrument or contract by means of which title insurance liability is assumed."].)

On the other hand, an "escrow" is a transaction in which one person deposits documents and/or money with a third party to be delivered on the occurrence of some condition "for the purpose of effecting the sale, transfer, encumbering, or leasing of real or personal property." (Fin. Code § 17003(a); *see also Summit Financial Holdings v. Continental Lawyers Title Co.*, 27 Cal. 4th 705, 711 (2002) ("*Summit*").) An escrow agent is someone who "receiv[es] escrows for deposit or delivery." (Fin. Code, § 17004.) Among other things, escrow agents receive and disburse funds, prepare and record deeds and other documents, and request payoff demand statements from existing lienholders and arrange for lien releases upon consummations of the payoffs.

Given their separate roles, title insurers and escrow agents face distinct legal duties and obligations. (*See Universal Bank*, 62 Cal. App. 4th 1062 [recognizing distinction between title insurers' and escrow holders' duties and liability]; *Contini v. Western Title Ins. Co*., 40 Cal. App. 3d 536, 547 (1974).) As one leading treatise notes, "[e]ven when [title and escrow] functions are performed by the same entity, liability and responsibilities are based on the particular function performed." (3 MILLER & STARR, CAL. REAL ESTATE (3d ed. 2010) § 6:2.) Thus, for example, if a title insurer performs title services (e.g., searching title, issuing a preliminary report, and issuing a title insurance policy) and escrow services (e.g., preparing and recording documents) in the same transaction, its duties and liabilities under each function are generally considered separately and independently. (*Id.*; *Universal Bank*, *supra*, 62 Cal. App. 4th 1062; *Contini, supra*, 40 Cal. App. 3d at 547; *Siegel*, *supra*, 46 Cal. App. 4th at 1190; *Seeley v. Seymour*, 190 Cal. App. 3d 844, 860 (1987).)

A Title Insurer Owes No Duty of Care to Its Own Insured, Much Less to a Non-Client, When Performing Record Searches or Issuing a Title Insurance Policy.

A title insurer ordinarily owes no duty of care to *anyone* when searching title records and issuing title insurance. (*Siegel*, *supra*, 46 Cal. App. 4th at 1189-90 ["[A] title insurer who has not undertaken to perform as an abstractor owes no duty to disclose recorded liens or other clouds on title."]; *see also Soifer v. Chicago Title Company*, 187 Cal. App. 4th 365 (2010).) This is because "a title insurance policy is a contract of indemnity, not one of guarantee. The insurer does not represent that title is in any particular condition, but only agrees to indemnify to the extent the insured suffers a loss caused by defects in the title or encumbrances on the title." (*Karl v. Commonwealth Land Title Ins. Co.,* 20 Cal. App. 4th 972, 978 (1993); *see also Lawrence v. Chicago Title Ins. Co.*, 192 Cal. App. 3d 70, 74-75 (1987) ["the insurer does *not* represent expressly or impliedly that the title is as set forth in the policy; it merely agrees that, and the insured only expects that, the insurer will pay for any losses resulting from, or he will cause the removal of, a cloud on the insured's title within the policy provisions"].) Thus, a title insurer's only potential liability is to its *insured under a title policy*. (*Vournas v. Fid. Nat. Title Ins. Co.*, 73 Cal. App. 4th 668, 675-76 (1999).) Neither the insured nor a third party may make any claim for negligence or negligent misrepresentation against a title insurer based on the title insurance policy. (*Id.* at 675-76; *Lawrence, supra*, 192 Cal. App. 3d at 74-75.)

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In these respects, a title insurer's preliminary report and resultant title insurance policy differ markedly from an abstract of title, which is a representation of the condition of title. (Ins. Code § 12340.10; *Siegel,* 46 Cal. App. 4th at 1191.) Insurance Code section 12340 et seq. codified this key distinction. An "abstract of title" is statutorily defined as "a written representation, provided pursuant to a contract, whether written or oral, *intended to be relied upon by the person who has contracted for the receipt of such representation*, listing all recorded conveyances, instruments or documents which, under the laws of this state, impart constructive notice with respect to the chain of title to the real property described therein." (Ins. Code § 12340.10; emphasis added.) Section 12340.10 further provides that "[a]n abstract of title is not a title policy." On the other hand, Section 12340.11 specifically provides that preliminary reports "are not abstracts of title, nor are any of the rights, duties or responsibilities applicable to the preparation and issuance of an abstract of title applicable to the issuance of any report." (Ins. Code § 12340.11.) That section also provides that a preliminary report "shall not be construed as, nor constitute, a representation as to the condition of title to real property." (*Id.*)

In contrast to an abstract of title, "[t]itle insurance is an acknowledgment that errors may have been made." (*Siegel*, *supra*, 46 Cal. App. 4th at 1191-92.) By enacting Insurance Code Sections 12340.10 and 12340.11, "the Legislature recognized that ***no reliance should ever be placed on a preliminary report or a policy of title insurance to show the condition of title***" because "'any title search or examination is performed by the insurer solely for the purpose of seeking to evaluate its underwriting decision in issuing the policy, not for the benefit of the insured.'" (*Id.*; citing *Fid. Nat'l Title Ins. Co. v. Miller*, 215 Cal. App. 3d 1163 (1989); emphasis added.)

Siegel illustrates the nature and limited scope of a title insurer's obligations. (46 Cal. App. 4th 1181.) There, the defendant title insurance company, Fidelity, issued only a *lender's* policy, and not an owner's policy, in connection with a real estate sale. The homeowner plaintiffs alleged that Fidelity "negligently failed to locate and disclose" a judgment lien in a preliminary title report. (*Id*. at 1189.) Emphasizing the distinction between abstracts of title and preliminary reports, the *Siegel* court held the plaintiffs could not rely on the preliminary title report or the title insurance policy as a representation of the state of title. (*Id*. at 1193.) The court also held that a title insurer is under no duty of care when searching records and issuing title insurance:

> In short, a title insurer prepares a preliminary report to limit its own risk—by locating and excluding items from coverage—and not on behalf of any party to a real estate transaction. A party who does not purchase title insurance may not rely on the title insurer to protect his or her interests or to disclose all detrimental information contained in the recorded files. Parties who desire protection against the possibility that negative information exists that was not revealed in the title insurer's search of the records must obtain [their own] title insurance. ***Sections 12340.10 and 12340.11 leave no room for the existence of a duty of care based on the title company's search of records and issuance of a preliminary report and title insurance policy.***

(*Id.* at 1190; emphasis added.) Accordingly, "a party who fails to obtain [its own] title insurance and instead relies on [someone else's] preliminary report or title insurance policy showing no encumbrances does so at his own peril and cannot thereafter maintain an action against the insurer when an undisclosed lien comes to light." (*Id.* at 1185.)

In *Soifer*, the court reached the same result under different circumstances. (187 Cal. App. 4th 365.) There, a real estate investor sued a title insurer, alleging breach of contract, negligence, and negligent misrepresentation in connection with a title insurer's agent's provision of short "yes" or "no" e-mail answers about the priority of certain deeds of trust recorded against a property in foreclosure. (*Id*. at 368.) The plaintiff obtained neither a preliminary title report nor a title insurance policy. Citing *Siegel,* the court explained that a title insurer owes no duty to disclose recorded liens or other clouds on title. (*Id.* at 373.) The court therefore concluded that the plaintiff, who failed to purchase title insurance, could not rely on the

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JW Marriott Ihilani, Oahu, Hawaii

November 5, 2014
Dinner Program — The Westin South Coast Plaza
Holiday Gift Giving Opportunity

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title insurer's informal statements about the state of title. (*Id.* at 374.) The court explained that if the plaintiff wanted protection against encumbrances on the title, he should have purchased title insurance from the defendant. (*Id.*)

In sum, a title insurer owes no duty of care to its own insured, much less to a non-client, when performing record searches or issuing a title insurance policy.

Similarly, an Escrow Agent Generally Owes No Duty to Third Parties.

An escrow agent's duties run *only to the parties to the escrow* and are limited to following the specific escrow instructions of those parties. (*Summit*, *supra*, 27 Cal. 4th at 711; *Markowitz, supra*, 142 Cal. App. 4th at 508. Absent fraud, an escrow holder generally owes no duty to a nonparty to the escrow. *Id.*

In the seminal case of *Summit*¸ the California Supreme Court delineated the narrow duties owed by an escrow agent. *Summit* involved a refinance transaction in which the escrow holder, per its escrow instructions, paid off a note to the original lender despite ***knowing*** that the original lender had assigned the note to another party who actually should have received the payment. (*Summit, supra*, 27 Cal. 4th at 709.) Neither the assignor nor the assignee was party to the escrow. (*Id.*)

Rejecting the notion that the escrow agent acted improperly, the *Summit* court held that an escrow agent owes neither a fiduciary duty nor a tort duty of care to a non-party to the escrow: "An escrow holder is an agent and fiduciary of the parties to the escrow. The agency created by the escrow is limited—limited to the obligation of the escrow holder to carry out the instructions of each of the parties to the escrow." (*Id.* at p. 711.) The court explained that "an escrow holder has no general duty to police the affairs of its depositors; rather, an escrow holder's obligations are limited to the faithful compliance with [the depositor's] instructions." (*Id.*) The court concluded that *despite its knowledge of the assignment*, the escrow holder did not owe a "duty of care to a nonparty to the escrow based on an assignment to that nonparty by another nonparty." (*Id.* at 707-708.)

The *Summit* court also rejected the plaintiff's claim that the escrow agent was liable under the general negligence statute, Civil Code section 1714, subdivision (a). In reaching this conclusion, the court addressed the threshold issue of whether an escrow agent owes a duty of care to a person not in privity with the transaction. (27 Cal. 4th at 715-716.) The court considered *Biakanja v. Irving*, 49 Cal. 2d 647(1958), which set forth a six-factor balancing test for assessing whether defendant in a specific case may be liable to a third party who is not in privity of contract. The court concluded that application of the *Biakanja* six-factor test did not justify departing "from 'the general rule that an escrow holder incurs no liability for failing to do something not required by the terms of the escrow or for a loss caused by following the escrow instructions.' [citation]." (*Id.*)

Thus, "[u]nder ordinary circumstances, an escrow holder owes duties only to the parties to the escrow, not to third parties." (3 MILLER & STARR § 6:18 at 84 (citing *Summit*).)

Similarly, in *Markowitz,* the Court of Appeal found that a title company acting as a sub-escrow owed no duty to a homeowner for failing to record a reconveyance of a deed of trust on the owner's home. (142 Cal. App. 4th at 508.) There, a bank agreed to give Markowitz a line of credit secured by a second trust deed on his home. (*Id.* at 513.) The transaction required that a loan secured by an existing second trust deed be paid off and a deed of reconveyance recorded. (*Id.*) The bank opened escrow with Fidelity and so instructed it. (*Id.*) Fidelity paid off the original second trust deed with proceeds from the line of credit, but it failed to record a proper reconveyance. (*Id.* at 514.) Despite having received payment from Fidelity, the beneficiaries of the original second trust deed recorded a notice of default against Markowitz. (*Id.* at 515.) In turn, Markowitz sued Fidelity for breach of fiduciary duty and negligence. (*Id.*)

In affirming a nonsuit, the *Markowitz* court cited *Summit* and reiterated that an escrow agent owes no duties to a non-party to the escrow instructions. The court stated: "[Markowitz] was not a party to the es-

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This year should be no exception. Our February 5 program entitled "The Cutting Edge: Experts Report on Their Specialty Areas of Practice", featured high-profile litigators Mark Finkelstein, Michele Johnson, Dan Sasse, Dan Robinson, and Anne Brafford, all partners at top law firms, each commenting on the latest developments in his or her areas of expertise. This panel delivered rich, educational content that was useful to all business litigators.

Next up, on April 9 we are fortunate to have "powerhouse corporate litigator" and "pressure junkie" Roberta (Robbie) Kaplan, a partner in the Litigation Department of Paul, Weiss LLP, who will present a program entitled "Defending Equality: Overturning the Defense of Marriage Act." Robbie was selected as one of The 100 Most Influential Lawyers and one of the top "40 Under 40" lawyers in the United States, as well as a 2013 Litigator of the Year by The American Lawyer. She successfully argued before the United States Supreme Court on behalf of Edith Windsor in *United States v. Windsor*, the landmark DOMA case, and we look forward to hearing her stories about that case and oral argument.

This year the O.C. Chapter has the privilege of hosting the ABTL's 41st Annual Seminar in Hawaii. Scheduled for October 15-19, 2014, the seminar will be held at the historic and recently renovated JW Marriott Ihilani on Oahu. This will be the first ABTL annual seminar ever held on Oahu, and we are looking forward to putting on a first class event for all comers. As I mentioned above, Dan Sasse is chairing the statewide committee organizing the event. We expect the seminar to provide valuable educational programming in a breathtakingly beautiful setting, and I look forward to seeing you all there.

Finally, the ABTL could not come close to fulfilling its mission without the support of its many generous sponsors. Please take an extra few minutes at the next event you attend to say hello to the sponsor representatives in attendance and thank them for their generosity.

Thank you all for your support.

♦ *Jeffrey H. Reeves is managing partner at Gibson, Dunn & Crutcher LLP*

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cles to settlement in your room and in your opponents'.

Good mediators puzzle these things out in every case. They must do so to do their job. But making the mediator wait until the date of the mediation to discover the impediments to settlement always takes time and momentum away from the mediation. Waiting until the mediation to share information with the mediator wastes time and causes the parties to head down unproductive rabbit trails requiring a change of course later. You may not know all of the issues or problems on the other side, but if you share early with the mediator whatever you do know, it always helps the process.

If you can't trust the mediator with such information (provided confidentially, of course), you have selected the wrong mediator for the case.

In addition, strive to limit the amount of confidential information. Negotiation works faster, easier and more productively in proportion to the amount of shared information. The reverse is also true. Negotiation is more difficult and less productive in proportion to the amount of information known to one side but not shared with the other.

It has unfortunately become typical in business and commercial cases for advocates to submit strictly confidential briefs as a matter of course. Consider that when you submit a confidential brief, you are requiring the mediator to spend valuable time reviewing with you what can and cannot be disclosed in what you have said. When you attach a copy of pleadings, MSJ or MSA paperwork, depo selections, other discovery responses to a "confidential" brief, for example, you cloud the authority of the mediator to share information already known by the other side.

In business and commercial mediations, both sides should consider sharing with the other their damage calculations, especially where the opening demand(s) will be large or difficult to explain. If insurance is involved, remember that insurers will round-table the case in advance to determine settlement authority to the claims representative or counsel. Even absent in-

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surance, there are typically a number of people who will be involved in decisions to use corporate funds to resolve litigation. A well-supported demand, even if not accepted by the opponent, gives the responding team (and its insurance carrier) time and opportunity to prepare better in advance and thus make the session more productive.

While confidential information is legitimate and even critical in managing information, confidential information is inevitably more harmful than helpful in negotiation. There is a delicate balance, since "secrets" may be much more advantageous in litigation than in mediation. Although that balance must be maintained in a unique way in every case, remember that confidential information itself presents an obstacle to settlement in virtually every case. It may be necessary, but an obstacle nonetheless.

Conclusion

It is our hope that these few thoughts will be of assistance to you in re-examining some of your own pre-suppositions and practices in selection of an alternative dispute resolution provider, mediator, and approach to the mediation process in a complex case. We hope these observations will help you bring special and greater reward to your clients in future negotiations.

♦*Hon. David C. Velasquez (Ret.) is a neutral with Judicate West with 23 years of judicial experience including his tenure as Supervising Judge of the Complex Civil Panel, Orange County Superior Court. Dave Rudy has been a full-time neutral for 23 years and is a full-time neutral with Judicate West statewide.*

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crow instructions on which he relies. Fidelity's duties arising out of those instructions were defined, and limited, by the terms of those instructions. … [T]he duty arising from the instruction authorizing recordation of the Bank's deed of trust . . . was owed to the Bank, not to [Markowitz]." (*Id.* at 527.) The court also held that Fidelity owed no statutory duty in its capacity as an escrow agent under Civil Code section 2941, which codifies the procedure for obtaining and recording a trust deed reconveyance. (*Id.* at 524-525.)

The *Markowitz* court also rejected Markowitz's claim for breach of contract under a third party beneficiary theory. The court found that the objective of the escrow instructions was to protect *the Bank* from unknown encumbrances to title, not to benefit Markowitz, and that Markowitz was at best an incidental beneficiary. (*Id.* at 527-28.)

In sum, *Summit* and *Markowitz* broadly protect escrow agents by confirming that an escrow agent's duties run only to the parties to the escrow, not to third parties.

Conclusion

California law limits the duties and liabilities of title insurers and escrow agents in real estate transactions, particularly vis-à-vis non-parties to their title insurance policies and escrow instructions. Counsel should explore these limitations when representing title insurers or escrow agents, who have become common but often improper targets in the recent boom of mortgage-related litigation.

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