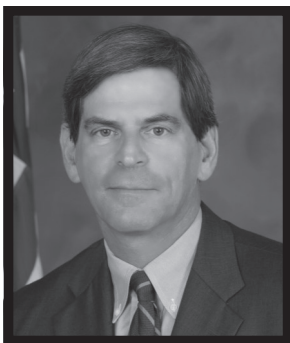


Q&A with the Hon. William D. Claster
By Shane Criqui

[Editorial Note: Judge Claster obtained his bachelor's degree from Stanford University and J.D. from UCLA School of Law. He was a partner at Gibson, Dunn & Crutcher until Governor Schwarzenegger appointed him to the Orange County Superior Court in 2010. Judge Claster is also a past presenter at an ABTL Annual Seminar.]

Q: I understand that you were a partner with Gibson Dunn prior to taking the bench. What was that transition like for you, moving to the bench from private practice?

A: It was fairly dramatic in that I went from a busy litigation practice, mostly centered on employment labor matters, but all civil, to a totally criminal law practice involving misdemeanors and an occasional felony. It was a whole new area of law, a whole new set of lawyers, mostly District Attorneys and Public Defenders. It was a large transition. It was also quite refreshing to learn a whole new area of law, to see a whole different

-Continued on page 4-

Warger v. Shauers: Jury Deliberations Off-Limits in Seeking to Prove Voir Dire Dishonesty
By Katie A. Richardson

When it comes to jury selection, trial lawyers go to great lengths to weed out juror biases and prejudices, identify jurors like-minded to their client's interests, and ensure that a fair and impartial jury is empaneled. Some of those efforts are procedural and occur inside the courtroom—utilizing juror questionnaires, conducting *voir dire*, invoking challenges for cause, and exercising peremptory challenges. Others are equally strategic and occur outside the courtroom—hiring jury consultants and conducting mock jury trials, for example. But the purpose of all those efforts is the same: to determine with as much clarity as possible a jury most likely to decide in their client's favor. Yet when it comes time for the jurors to reach a decision, their deliberations are often shrouded in mystery.



Although some lawyers, and even some disgruntled jurors, might seek to expose what took place during the jury's deliberations in an attempt to invalidate the verdict and obtain a new trial, their attempts are often in vain. With limited exceptions, courts have consistently held that, in order to avoid the widespread upsetting of jury verdicts, jury deliberations are off-limits as evidence supporting a motion for new trial. And the United States Supreme Court has reiterated that holding as it applies under the Federal Rules of Evidence.

In its recent opinion addressing juror dishonesty during *voir dire*, the Supreme Court in *Warger v. Shauers*, 135 S. Ct. 521 (2014), revisited the issue of whether Federal Rule of Evidence 606(b) bars jury deliberations evidence when used to support a motion for new trial. In holding that it does, and that none of the Rule's three exceptions applied, a unanimous court relied on both basic principles of statutory construction and common law that predated Congress's enactment of Rule 606(b).

In *Warger*, Petitioner Warger's counsel conducted lengthy
-Continued on page 5-

- IN THIS ISSUE -

- ◆ Q&A with the Hon. William D. Claster Pg. 1
- ◆ *Warger v. Shauers: Jury Deliberations Off-Limits in Seeking to Prove Voir Dire Dishonesty* Pg. 1
- ◆ President's Message Pg. 2
- ◆ Will California Like Social Media Tombstone Announcements or Will Employees Have to Unfriend Their Social Media Client Contact? Pg. 3
- ◆ Brown Bag Lunch Update..... Pg. 3
- ◆ Young Lawyers Division Update..... Pg. 4
- ◆ *ABTL Gives Back* Pg. 11

The President's Message

By Michele D. Johnson



In the year 2000, then-president of our Chapter, the beloved Robert E. Palmer, descended on Hi-Times Wine Cellars in Costa Mesa and made off with a dozen cases of fine wine so that that evening, the ABTL-OC could host its first annual wine tasting fundraiser in support of the Public Law Center. Robert's event became a tradition, and every June since, our Chapter has raised thousands and then tens of thousands of dollars for PLC, the only legal services organization in Orange County that provides pro bono representation to the indigent in our community.

This month, we continued the tradition of supporting PLC with our 16th annual fundraiser, renamed the Robert E. Palmer Wine Tasting Dinner for PLC in honor of Robert's innumerable contributions to the ABTL-OC and PLC and in commemoration of his wonderful life. We felt Robert's unmistakable enthusiasm at our event on June 3 as we raised our glasses together in tribute to our dear friend. While final totals are still being tallied, the ABTL-OC raised a tremendous amount for PLC this year, thanks to the generosity of you, our members, and that of our board members and their law firms.

Robert Palmer himself wrote about his efforts to launch the first ABTL fundraiser for PLC in an article he penned for the *ABTL* Report published in Summer 2007. We reprint his article here, in loving memory and with undying gratitude for all that he did for all of us.

Appropriately, our dinner program on June 3 highlighted PLC's work and afforded an inside look into the many lives made better by the efforts of volunteer lawyers in our community who partner with PLC to represent those most in need. In a panel presentation entitled, "The Good Fight: Stories from the Front Lines of the Battle for Access to Justice," past PLC attorneys of the year John B. Hurlbut, Jr. and Deborah S. Mallgrave, PLC board member Mark Erickson, and PLC past-president Deborah Arbabi regaled us with real-life success stories of deserving pro bono clients.

Our previous dinner program on April 1 featured Kathryn Ruemmler, former White House Counsel to President Barack Obama, speaking on "Counseling in a Complex, Fast-Moving Environment: Lessons from the White House." The ABTL board in LA sent a scout to attend our

-Continued on page 7-

ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl

ORANGE COUNTY

8502 E. Chapman Avenue, #443

Orange, CA 92869

Phone: 714.516.8106 E-mail: abtloc@abtl.org

www.abtl.org

MICHELE D. JOHNSON, President

SCOTT B. GARNER, Vice President

MARK A. FINKELSTEIN, Treasurer

DANIEL A. SASSE, Secretary

BOARD OF GOVERNORS:

Hon. Andrew P. Banks ▪ James P. Carter

Hon. James Di Cesare ▪ Todd G. Friedland

Hon. Richard D. Fybel ▪ Paul L. Gale

Alan A. Greenberg ▪ John W. Holcomb

Karla J. Kraft ▪ Todd Lundell

Thomas S. McConville ▪ Elizabeth C. McKeen

William C. O'Neill ▪ Michael A. Penn

Hon. Steven L. Perk ▪ Hon. Glenda Sanders

Hon. James V. Selna ▪ Matthew M. Sonne

Maria Z. Stearns ▪ Adina W. Stowell

Thomas L. Vincent

JUDICIAL ADVISORY COUNCIL:

Hon. Gail A. Andler ▪ Hon. Richard M. Aronson

Hon. Thomas J. Borris ▪ Hon. Thierry P. Colaw

Hon. David O. Carter ▪ Hon. Kim G. Dunning ▪

Hon. John Gastelum ▪ Hon. Andrew J. Guilford

Hon. Charles Margines ▪ Hon. Linda S. Marks

Hon. Kirk H. Nakamura ▪ Hon. Kathleen E. O'Leary

Hon. Josephine L. Staton

PAST PRESIDENTS:

Donald L. Morrow ▪ Thomas R. Malcolm

Robert E. Palmer ▪ Hon. Andrew J. Guilford

Jeffrey W. Shields ▪ Michael G. Yoder ▪ Dean J. Zipser

Hon. Sheila B. Fell ▪ Gary A. Waldron

James G. Bohm ▪ Hon. Martha K. Gooding

Richard J. Grabowski ▪ Sean P. O'Connor

Darren O. Aitken ▪ Melissa R. McCormick

Mark D. Erickson ▪ Jeffrey H. Reeves

EXECUTIVE DIRECTOR

Linda A. Sampson

ABTL EDITORIAL COMMITTEE

Editor — William C. O'Neill

Assistant Editor — Atticus N. Wegman

Assistant Editor — Jemma Dunn

The statements and opinions in the ABTL-Orange County Report are those of the contributors and not necessarily those of the editors or the Association of Business Trial Lawyers of Orange County. All rights reserved.

Will California Like Social Media Tombstone Announcements or Will Employees Have to Unfriend Their Social Media Client Contacts?

By Benjamin A. Nix and David A. Grant



motion for summary judgment in *Cellular Accessories for Less, Inc. v. Trinitas LLC*, 2014 WL 4627090 (C.D. Cal. Sept. 16, 2014). The court did so because there existed a genuine issue of material fact as to whether the former



Social media is ubiquitous in both our personal and professional lives. It was only a matter of time before an employer accused a former employee of misappropriating trade secrets in the form of a social-media contact list. What result? Recently a United States District Court for the Central District of California took up this issue. On September 16, 2014, the Honorable Dean Pregerson denied a former employee and defendant's motion for summary judgment in *Cellular Accessories for Less, Inc. v. Trinitas LLC*, 2014 WL 4627090 (C.D. Cal. Sept. 16, 2014). The court did so because there existed a genuine issue of material fact as to whether the former employee's LinkedIn contact list constituted a protectable trade secret of his former employer. The court did not rule that such lists are protectable trade secrets, only that, under the existing framework under California law, they might be. No California court has addressed this question. Nor has a California court addressed what would constitute an act of misappropriation in this context. But such decisions cannot be far off.

Several out-of-state decisions discussed below may inform how California courts will attempt to fit these new considerations into the existing framework.

The Framework for Trade Secret Protection of Customer Lists

Companies that invest time and money in developing confidential information from which they derive an economic advantage due to the information not being generally known acquire a recognizable property right in that information. CAL. CIV. CODE § 3426.1(d). A company's customer list may be protected as a trade secret provided it meets the statutory definition. *See, e.g., Courtesy Temporary Service, Inc. v. Camacho*, 222 Cal. App. 3d 1278 (1990) ("work effort" needed to compile customer list rendered the information a trade secret); *Morelife, Inc. v. Perry*, 56 Cal. App. 4th 1514 (1997) (customer list was trade secret because it was developed through expenditure of time and effort, gave plaintiff a competitive advantage, and gave defendant the ability to solicit business "more selectively and more effectively"). At the same time, em-

-Continued on page 7-

ABTL Brown Bag Lunch with Hon. Gail A. Andler and Hon. Kim G. Dunning

By Matthew E. Costello

ABTL's Brown-Bag Lunch series invites ABTL members with less than 10 years in practice to interact with distinguished members of the local bench in a relaxed, laid-back setting—usually in a judge's chambers or a courtroom gallery. On March 18, 2015, nearly 20 members of the ABTL Young Lawyers Division members met with Orange County Superior Court Judges Gail A. Andler and Kim G. Dunning of the Civil Complex Panel for a lively and informative brown-bag lunch discussion and question-and-answer session.

The lunch, held in the Judges' chambers, began with the Judges providing general advice for practitioners. Judge Andler appreciates when a party provides courtesy copies in chambers and when lawyers consecutively number their exhibits—from declaration to declaration and even across filings pertaining to the same motion. Judge Dunning stressed that excessively long attachments to declarations will likely not be read by most judges. To help ensure that attachments are reviewed, Judge Dunning suggests bracketing and underscoring critical sections to focus on the relevant parts.

Judge Dunning then discussed common mistakes and best practices in brief writing. Judge Dunning advocates for using plain language in motions and briefs. Vitriol and overuse of adjectives and adverbs will not persuade Judge Dunning. Rather, sound argument and legal reasoning rule the day. Judge Dunning has a simple rule regarding footnotes: use them sparingly. Footnotes are a distraction, should never contain legal argument, and are not a means to get around page limits. In other words, an attorney who employs footnotes for legal argument due to page limit constraints is better off asking for leave to file additional pages.

Judge Andler echoed a critical piece of advice to young lawyers: be respectful and courteous toward court staff. Word of an attorney's failure to show appropriate levels of respect and courtesy ultimately filter up to the judge, who will not tolerate such disregard for civility during court appearances. Remember, too, that any rudeness or impoliteness from your legal assistants also reflects poorly on you and your firm.

Judge Andler and Judge Dunning ended the lunch by discussing best tips for oral advocacy. Judge Dunning emphasized that if you do not know the answer to a question from the bench, that is perfectly okay, so long as you explain to the judge how you will go about finding the answer. For instance, a lawyer could say, "Your honor, I don't know, but do you mind if I research that question and have an answer for you at the next status conference?"

-Continued on page 10-

Young Lawyers Division in 2015

By Shiry Tannenbaum, 2015 YLD Chair

I am happy to report that 2015 is another year full of productive events geared to help maximize YLD attorneys' formative years in the trenches. We kicked off the season with a Brown Bag Lunch featuring the Honorable Gail A. Andler and the Honorable Kim G. Dunning of the OCSC Civil Complex Division. They graciously hosted fourteen young lawyers in chambers and offered guidance for success in their departments. Examples? The court appreciates when lawyers have creative strategies to help boost efficiency in a heavily-impacted complex matter, but they should first run those ideas by the judge's clerks before implementing any clever plans. Do not argue in footnotes, or cheat page limits by loading footnotes with single-spaced factual or legal recitations – the court knows what you are up to! Also, pass on asking the court to referee counsel's e-bickering. The court – like your parents – is not interested in who started it. Many thanks again to Judge Andler and Judge Dunning for sharing their time with our YLD members.

On May 20, YLD held the year's first evening educational seminar, *From the Inside Looking Out: What In-House Counsel Needs from Outside Litigators*, which featured advice from counsel at Armored Wolf, Western Digital, and Taco Bell. Attendees learned not only the needs and preferences of in-house counsel (Communicate! Don't take our work for granted! Know your corporate client!), but that, in fact, in-house counsel does care about the litigators on the team beside the partners. Mohan Phansalkar of Armored Wolf, for example, knows who on the outside litigation team bills his company (he reads the bills, after all). If he notices an associate is spending the bulk of the time on his matter, he might take that associate to lunch to get to know the person really working his case. Lennis Collins at Western Digital, a young lawyer himself, would enjoy getting to know his young lawyer counterparts. The greatest lesson of the evening was to take advantage of *any* opportunity to interface with your in-house counterpart to demonstrate not only your subject matter competence, but also your skill in client service.

What's next in the pipeline? Brown Bag Lunches! The Honorable Geoffrey T. Glass will host on June 25, and on August 19, the Honorable James J. Di Cesare will host lunch with a focused discussion on law and motion. Expect an educational seminar in mid-October, and our final event, the YLD Member (and Bench) Mixer, will be on November 19 at Andrei's in Irvine. Look out for e-mail announcements and be sure to RSVP early!

♦ Shiry Tannenbaum is a litigation associate at Kohut & Kohut.

-Q&A: Continued from page 1-

group of lawyers, and to learn something new both in terms of subject matter and procedure. So I found it very refreshing and stimulating. It was a great experience and I did for about three years.

Q: Has your idea of effective advocacy changed at all now that you're ruling on law and motion as opposed to drafting law and motion as a private attorney?

A: A couple of things come to mind. First of all, good lawyers – whether we're talking about oral advocacy or written advocacy – are good communicators. It always struck me that ones who are really good lawyers happen to be really good communicators. Second, I placed a high premium on civility when I practiced, and I place an even higher premium now. It gives attorneys credibility with both a judge and their client. To the extent I see lawyers not being so civil now, it strikes me that it takes away from whatever they're advocating.

I also had a philosophy when I was practicing to avoid as much as possible discovery motions. My experience was they were time consuming and expensive and the results weren't worth all that much at the end of the day. I really feel that way even more now. I see a lot of discovery motions. People file a ton of papers and argue passionately about sets of interrogatories and other things that, at the end of the day, are of relatively little significance in their cases.

Q: Following up on that point, what are your tips for lawyers with respect to motions to compel?

A: You can't completely eliminate discovery motions because there are times when critical evidence exists that one side is playing hardball on and won't give that they are supposed to give. I'm certainly not saying that there shouldn't be discovery motions. But I do think discovery motions should be reserved for that critical type of discovery you really need where the other side is stonewalling and really feel that there's going to be a return on filing the motion. And I would just simply say that a lot of the motions I see don't meet that standard. A lot of discovery motions I see involve issues that the attorneys fight tooth and nail over, but go unused at trial. It's oftentimes not a very good on investment in my opinion.

Q: Can you describe what you find particularly effective about the use of technology at trial?

A: I'll start with this. The screen in my courtroom is about 25 feet from the front row of the jury box. So I'm a big advocate of attorneys showing the exhibits to the jurors as they're having witnesses testify about them. But not just showing it to them, showing it to them in a way that the juror can actually read the exhibits. I've had a number of cas-

-Continued on page 5-

-Q&A: Continued from page 4-

es in which the attorneys have come in and they project a spreadsheet on the screen and I can't see it and I'm half-way closer than the jurors are. So I tell lawyers before we start trial that whatever they want to project is going to be fine with me subject to certain rules. But make sure that the exhibits are projected in a way that the jury can actually see them, read them, and understand them.

Q: How do you see attorneys using the *ex parte* process either effectively or ineffectively?

A: The ineffective part is sometimes easier to see. I see *ex parte* applications made for things that are not absolutely urgent that could otherwise be heard on a noticed motion. I think that if an attorney wants to come in *ex parte*, this issue needs to be something that has to be decided as quickly as possible and that attorney needs to make a showing to the Court of that urgency. Keeping in mind that the other side, although sometimes they'll walk in with some opposition papers, really hasn't had a fair chance to reply. I see a number of people coming in *ex parte* where that urgency standard really isn't met. Now, if it's something really straightforward like the need to continue a date and the other side is in agreement with it, it doesn't necessarily mean I'm going to grant it, but I'm okay with those coming in *ex parte*. I don't think people need to go through the time and expense of a full-blown motion on that.

Q: California court budgets have been cut significantly in the last several years. How have the budget cuts affected your role as judge?

A: The one thing that's clear to any civil litigator in the county is we no longer have assigned court reporters for any purpose. The court reporters now are part of a pool, so we don't have a fixed court reporter. We also don't have court reporters now assigned to motions unless a party brings a court reporter. The court reporter change is the most significant thing that's happened while I have been in a civil assignment.

Q: Santa Ana is going through a bit of a culinary renaissance. Do you have any restaurant recommendations with respect to places to grab a bite to eat in Santa Ana?

A: I like to go with some of my fellow judges to Crave, which is on 4th Street. It's a very good place for lunch. The then there's the 4th Street Market, which has maybe 10 or 12 different vendors of different kinds of foods. And then another favorite of a number of us is Panini over in Main Place in Santa Ana. Those are some of our favorites.

Q: What advice you would give to young attorneys appearing in your courtroom for the first time.

A: Really be prepared. And when I say be prepared, I mean not only know what is in the motion papers, but also what the case is about and where the case is in terms of upcoming hearings and settlement discussions and so forth. I take every appearance as an opportunity to see where the case is and possibly move it along. One of my pet peeves is when a lawyer who is handling a case sends an attorney to make a special appearance and the response of the specially appearing attorney is: "Judge, I'm just here for a special appearance, I really don't know anything about the case." To me that's a complete waste of time. If you send someone who doesn't know anything about the case, why do we even have a hearing, why even show up? I understand the need for special appearances, but if someone is going to make an appearance, they need to know about the case and be prepared to discuss it.

The ABTL thanks Judge Claster for his time.

-Voir Dire Dishonesty: Continued from page 1-

voir dire at trial and asked, among other questions, whether any jurors would be unable to award damages for pain and suffering or for future medical expenses, or whether there was any juror who thought she could not be fair and impartial. *Warger*, 135 S. Ct. at 524. Prospective juror Regina Whipple answered no to each of the questions. *Id.* Following a verdict in favor of Respondent Shauers, one of the jurors contacted *Warger's* counsel to express concern about statements Whipple had made during jury deliberations that suggested her inability to be impartial and to award damages. *Id.* The complaining juror also signed an affidavit regarding the substance of Whipple's statements. *Id.* Relying on that affidavit, *Warger's* counsel moved for a new trial, contending that Whipple had deliberately lied during *voir dire*. *Id.*

In pertinent part, Rule 606(b) provides that "[d]uring an inquiry into the validity of a verdict," evidence "about any statement made or incident that occurred during the jury's deliberations" is inadmissible. Fed. R. Evid. 606(b) (1). The Rule contains three exceptions that allow testimony "about whether (A) extraneous prejudicial information was improperly brought to the jury's attention; (B) an outside influence was improperly brought to bear on any juror; or (C) a mistake was made in entering the verdict on the verdict form." Fed. R. Evid. 606(b)(2).

Rejecting Petitioner's argument to the contrary, the Court first held that the plain meaning of Rule 606(b) supported a reading that barred admissibility of the subject affidavit because "[a] postverdict motion for a new trial on the ground of *voir dire* dishonesty plainly entails 'an in-

-Continued on page 6-

-Voir Dire Dishonesty: Continued from page 5-

quiry into the validity of [the] verdict.” *Warger*, 135 S. Ct. at 525. As the Court explained, “[i]f a juror was dishonest during *voir dire* and an honest response would have provided a valid basis to challenge that juror for cause, the verdict must be invalidated.” *Id.*

The Court also concluded that “the text of Rule 606 (b) is consistent with the underlying common-law rule on which it was based.” *Warger*, 135 S. Ct. at 525. That common-law rule (known as the “federal rule”) made jury deliberations evidence inadmissible even if used to demonstrate dishonesty during *voir dire*. *Id.* at 526. Acknowledging that some common-law courts would have permitted evidence of jury deliberations to demonstrate juror dishonesty during *voir dire* (known as the “Iowa rule”), the Court determined that “the majority [of courts] would not, and the language of Rule 606(b) reflects Congress’ enactment of the more restrictive version of the common-law rule”—i.e., the federal rule. *Id.* at 525–26.

The Iowa rule derived from *Wright v. Illinois & Miss. Tel. Co.*, 20 Iowa 195 (1866), in which the Iowa Supreme Court held that a trial court considering a motion for new trial should have accepted the affidavits of four jurors who claimed that their damages verdict was a “quotient” verdict—that is, the average of the sums each juror thought proper. *Id.* at 212–13; see *Warger*, 135 S. Ct. 521, 526 n.1. The court in *Wright* reasoned that, unlike evidence of a juror’s subjective intentions in reaching a verdict, whether the verdict had been obtained in this fashion was an “independent fact” that could and should be proved by any available evidence. *Wright*, 20 Iowa at 211.

Courts applying the Iowa rule have thus held testimony concerning jury deliberations admissible when used to challenge juror conduct during *voir dire*. For example, in *Mathisen v. Norton*, 187 Wash. 240, 242–46 (1936) (en banc), the Washington Supreme Court upheld the trial court’s grant of a motion for new trial where the defendants established by way of competing juror declarations and subsequent in-court testimony that one of the two jurors was biased against the defendant officers despite contrary representations during *voir dire*.

Similarly, in *Williams v. Bridges*, 140 Cal. App. 537, 538–41 (1934), which *Warger* cites in its discussion of the Iowa rule, the California court of appeal reversed a judgment entered on a jury verdict for the plaintiff based on evidence that a juror had lied during *voir dire* that she knew “[a]bsolutely nothing” about the facts of the case and could remain fair and impartial. In support of his motion for new trial, the defendant offered the affidavits of three jurors who attested to statements the subject juror made during deliberations that she had witnessed the accident at issue and formed an opinion that the defendant

was liable. *Id.* at 538–40. The court held that the juror affidavits did not impeach the verdict because they concerned words or acts that occurred before the jury was empaneled (i.e., during *voir dire*) and continued until the jury had been discharged. *Id.* at 540. Though not addressed by the Court in *Warger*, it should be noted that California’s Evidence Code section 1150, under which *Williams* was decided, differs substantively from Rule 606 and will result in different legal application and appellate authority.

By contrast, courts applying the so-called federal rule have prohibited litigants from using evidence of jury deliberations unless offered to show that an “extraneous matter” had influenced the jury. See, e.g., *Willis v. Davis*, 333 P.2d 311, 314 (Okla. 1958) (upholding denial of motion for new trial where plaintiff submitted a supporting declaration concerning statements made by one juror during *voir dire* which were contrary to statements she made to other jurors during deliberations). The court in *Willis* held “[t]he rule is well established in this jurisdiction that jurors will not be heard by affidavit, deposition, or other sworn statements to impeach or explain their verdict, or show on what grounds it was rendered.” *Id.*; see *Turner v. Hall’s Adm’x*, 252 S.W.2d 30, 34 (Ky. 1952) (“We are committed to the rule that a jury’s verdict may not be impeached by a juror’s testimony concerning conduct in the jury room.”)

In considering the two lines of decision, the Court in *Warger* noted that the Iowa rule is directly contrary to Supreme Court precedent. *Warger*, 135 S. Ct. at 526–27; see *McDonald v. Pless*, 238 U.S. 264, 265, 268 (1915) (holding that juror affidavits were not admissible to show that jurors had entered a “quotient” verdict). And it reasoned that the Iowa rule should be rejected “because permitting such evidence ‘would open the door to the most pernicious arts and tampering with jurors.’” *Warger*, 135 S. Ct. at 527 (citing *McDonald*, 238 U.S. at 268).

The Court also rejected *Warger*’s remaining arguments to invoke the canon of constitutional avoidance and to find that the affidavit at issue fell within Rule 606(b)(2)(A)’s exception for evidence of “extraneous prejudicial information.” With respect to the constitutional avoidance argument, the Court held that, in light of “the clarity of both the text and history of Rule 606(b),” “the canon of constitutional avoidance ha[d] no role to play” in the case. *Warger*, 135 S. Ct. at 529. The Court reasoned that because “[t]he canon is a tool for choosing between competing plausible interpretations of a provision,” it was inapplicable because Rule 606(b)’s language is unambiguous. *Id.* (internal quotation marks omitted.)

Finally, the Court held that the subject affidavit did not fall within the Rule’s exception for evidence of “extraneous prejudicial information” because, “[g]enerally speaking, information is deemed ‘extraneous’ if it derives from a source ‘external’ to the jury.” *Warger*, 135

-Continued on page 7-

-Voor Dire Dishonesty: Continued from page 6-

S. Ct. at 529. By way of example, the Court noted that “[e]xternal” matters include publicity and information related specifically to the case the jurors are meant to decide,” whereas “internal” matters include the general body of experiences that jurors are understood to bring with them to the jury room.” *Id.*

Warger thus provides greater clarity regarding the limited scope and application of Federal Rule of Evidence 606 to invalidate a jury verdict.

♦ *Katie A. Richardson is an associate in the Orange County office of Snell & Wilmer where she practices on complex civil litigation, with an emphasis on products liability.*

-President's Message: Continued from page 2-

dinner, and he promptly booked Kathy to speak to the Los Angeles Chapter as well.

Looking ahead, ABTL will continue its annual tradition of supporting Habitat for Humanity by staffing two Build Days in Santa Ana on July 15 and 22. Volunteers from Crowell & Moring, Gibson Dunn, Haynes Boone, Latham & Watkins, and Rutan & Tucker are lined up to help build homes for needy families.

Please mark your calendar for our remaining dinner programs this year, to be held on September 15 and November 4.

Finally, the ABTL's 42nd Annual Seminar is scheduled for October 1-4, 2015, at the picturesque Ojai Valley Inn & Spa. The theme for this year's seminar is "Countdown: The Digital World Confronts an Analog Profession."

I hope to see you all there, and in the meantime, thank you for your continued support. We look forward to an engaging second half of the year for the Orange County Chapter of ABTL.

♦ *Michele D. Johnson is a partner in the Orange County office of Latham & Watkins LLP.*

-Social Media: Continued from page 3-

employees have a right to freely compete with their former employers provided such competition is lawful. CAL. BUS. & PROF. CODE § 16600. However, where a former employee competes by misappropriating his former employee's trade secrets, those actions can be enjoined. *See, e.g., Readylink Healthcare v. Cotton*, 126 Cal. App. 4th 1006 (2005) (affirming injunction because plaintiff's customer list was a protectable trade secret due to the substantial time, effort, and expense in compiling it).

As such, while an employee may not solicit his former employer's trade-secret customers, he has a right to inform the customers that he and his employer are severing their relationship and that he will be engaging in business himself. *Aetna Bldg. Maintenance Co. v. West*, 39 Cal. 2d 198 (1952). The line between a permissible "tombstone" announcement and improper solicitation depends on whether the former employee asks for business. *See, e.g., American Credit Indemnity Co. v. Sacks*, 213 Cal. App. 3d 622 (1989) (announcement was solicitation because it encouraged clients to contact the defendant for information about the alternative services offered by her new employer); *Reeves v. Hanlon*, 22 Cal. 4th 1140 (2004) (misappropriation where announcement is used to directly solicit clients for the former employee's own pecuniary gain to the detriment of the former employer).

**Trade Secrets and Unfair Competition
in Social Media**

So how does this play out in the context of a social media client list? The first question is whether such a list can qualify for trade secret protections. As the District Court ruled in *Cellular Accessories for Less, Inc. v. Trinitas LLC*, it might. Second, as California does not recognize the "inevitable disclosure" doctrine, there would need to be some act of solicitation to trigger liability. *See FLIR Sys., Inc. v. Parrish*, 174 Cal. App. 4th 1270 (2009). But what does that look like in the social media context? Where is the line between a permissible "tombstone" announcement and trade secret misappropriation? While California courts have not addressed the issue, several out-of-state decisions are informative.

In *Invidia, LLC v. DiFonzo*, 30 Mass. L. Rptr. 390 (Mass. Sup. Ct. 2012), the Massachusetts Superior Court addressed the intersection of social media, trade secrets, customer lists, and covenant's not to compete. A hair salon employed Ms. DiFonzo as a hair stylist. She was a novice and without clients when she began her employment with the company. As part of her employment agreement, she covenanted not to compete with the salon and not to solicit any of the salon's customers with the intent to provide the same services. When DiFonzo left

-Continued on page 8-

-Social Media: Continued from page 7-

the salon, she almost immediately began working for a competitor hair salon. The former employer sued to enjoin her from doing so. Applying Massachusetts law, the court concluded that the covenant not to compete was likely unenforceable. It could only be enforceable if it was necessary to protect the employer's good will. Here, due to the personal nature of the services provided and a customer's loyalty to an individual hair dresser, rather than the brand, the covenant not to compete was likely not necessary to protect the hair salon's good will. Instead, it functioned to deprive the employee of her own "good will" and prevent her from pursuing a profession. The court then turned its attention to the subject of a Facebook post. Immediately after the employee resigned from the hair salon, her new employer posted on her Facebook page a "public announcement" of her changed employment. The Court found that this did not constitute solicitation. Despite the fact that the employee was Facebook friends with at least eight of the former employer's clients, there was no evidence that the employee in any way encouraged these clients to leave for her new employer. So long as her client Facebook friends reached out to DiFonzo, as opposed to vice versa, there was no solicitation simply by posting the change of employment on Facebook.

The following year, in *KNF&T Staffing, Inc. v. Muller*, 31 Mass. L. Rptr. 561 (Mass. Sup. Ct. 2013), the Massachusetts Superior Court again addressed the intersection of social media, trade secrets, customer lists, and covenant's not to compete. In that case, Muller went to work for a staffing agency, having never had any previous experience in the field. Over the course of seven years, she was promoted to vice president and was put in charge of the plaintiff's most profitable business unit and largest account. She later left the staffing agency and went to work for a competitor. Her employment agreement with the staffing agency provided that, for a period of two years after her employment, she would not engage in the staffing business in the same fields as the staffing agency, i.e. administrative and office support. After her departure, Muller contacted one of the staffing agency's clients and offered her new employer's IT staffing services. The court primarily analyzed Muller's actions in the context of the covenant not to compete. The court found that Muller had not solicited the staffing agency's client in the same fields as those in which her prior employer operated because it did not provide IT staffing services. The court noted that Muller's offered services "comes closer" to a solicitation in violation of her covenant not to compete, but since it was not overtly directed at a field in which the staffing agency recruits, it would not preliminarily enjoin her conduct. The court held that this same reasoning also applied to updates to her LinkedIn profile which reflected various areas of expertise but not in directly-competitive fields.

Previously, in *Enhanced Network Solutions Group, Inc. v. Hypersonic Technologies, Corp.*, 951 N.E.2d 265 (Ind. App. 2011), the Indiana Court of Appeal addressed social media in an *employee* non-solicitation context. A company retained a subcontractor to provide computer software services. As part of the subcontractor agreement, the subcontractor agreed not to solicit the company's employees to leave their employment with the company and work for the subcontractor. During the contractual relationship, the subcontractor posted a notice for an open position on LinkedIn, which attracted the attention of one of the company's employees who then inquired about the job and, later, accepted employment with the subcontractor. The company sued alleging that the subcontractor violated the non-solicitation agreement. The court found that the subcontractor had not improperly solicited the employee to leave, because it was the employee who made the inquiry after discovering it on a "publicly available portal," and the subcontractor merely responded to his requests.

Finally, in a recent Federal District Court decision, *Pre-Paid Legal Services, Inc. v. Cahill*, 924 F. Supp. 2d 1281 (E.D. Okla. 2013), the Eastern District of Oklahoma squarely addressed a former employees' use of social media as a solicitation and trade-secret-misappropriation tool. As in *Enhanced Network Solutions*, the issue was employee solicitation, rather than client-list solicitation. Defendant was a top sales associate of plaintiff, a pre-paid legal services firm. As part of his employment he signed confidentiality and non-solicitation agreements. While still employed with plaintiff, the sales associate had a network of other sales associates below him as part of his sales team. At some point, he left plaintiff's employ for another sales job. Prior to leaving, he solicited other of plaintiff's sales associates in person to leave the company. After his departure he also posted general information about his new employer on private Facebook pages he had created for his sales team at his prior employer – the same sales associates he had previously solicited to leave the company. After his departure, defendant also regularly posted information regarding his new employer on his personal, public Facebook page. The prior employer sued for trade secret misappropriation and sought injunctive relief. The court declined to issue a preliminary injunction barring the former employee's use of the company's confidential, trade secret information on the grounds that he no longer possessed any company trade secrets, and any damage from the in-person solicitation had already been done. Noting that it was a "rather novel issue," the court also rejected the company's claim that the employee breached his non-solicitation obligations by posting to his public, personal Facebook page regarding his new employer. The court found that, just because the employee lauded the benefits of his new employer's products on his Facebook page, which were likely to be viewed by his "friends" who were the former employer's sales associates, he was not engaged in solicitation. Furthermore, there was no evidence that any of his

-Continued on page 9-

posts resulted in any sales associates leaving the company, nor that the employee was targeting any particular sales associates by posting directly on their walls or through private messaging.

How California Courts Might Treat Similar Fact Patterns

What if a California employer sued a former employee for similar communications as those in the cases above? While all of these cases present slightly different fact patterns, a California court would have to start with the basic question of whether the information on the social media platform used to communicate with the customers amounted to a trade secret, i.e., does it derive independent economic value from not being generally known. This inquiry would likely focus on how the social media networks were constructed, who was in the network, and for what purpose it was maintained. For instance in *Cahill*, the defendant created a private Facebook page to communicate with his internal sales team. A California court would likely factor this in favor of finding a protectable trade secret in those employees linked to that page. Conversely, in *DiFonzo* and *Hypersonic Technologies*, the social media accounts were “public,” which might weigh against finding those linked to the page to be a trade secret. Another relevant inquiry would be who was included in the defendant’s social network. For instance, in *Muller*, only eight of the defendant’s Facebook friends were customers, presumably a small percent. California courts would likely require a far greater percentage to find that a client contact list in a social network constitutes a protectable customer list.

Additionally, a court would do well to examine why the social network was developed and maintained. For instance, an employer might require a new hire to create a LinkedIn account to connect with potential customers and others in the industry. An employer might provide content to its employee to post to the account in order to drum up business. If, as in *DiFonzo*, the defendant was a novice, but unlike in *DiFonzo*, the social network was developed as a tool toward growing her business and the company provided or controlled the content, this might convince a court to find that information on the network constitutes a protectable trade secret of the company. This would likely be a highly fact-specific inquiry with other considerations likely arising depending on the circumstances. However, one could imagine a scenario in which a court would find that an employee’s social network constituted a trade secret of her employer if, as hypothesized above, the employer mandated that the employee create the account, it controlled the content, and the network was substantially limited to industry contacts developed in the course of the employment. See *Eagle v. Morgan*, 2011 WL 6739448 (E.D. Pa. Dec. 22, 2011) (employer exercised almost complete control over creation, maintenance, and content of

employee LinkedIn accounts).

Assuming a court were to find that a social network constituted a protectable trade secret, the next step of the analysis would be to determine whether the social-network activity amounted to solicitation. This would hinge on the nature of the activity. In *Muller*, the court examined whether the employee updating her fields of expertise could violate a non-compete, reasoning that it did not because it was not directly competitive with her prior employer. The court implied that, if she had updated her expertise to directly compete, she may be liable.

A California court would likely not find simply posting expertise in areas directly competitive with a prior employer actionable. Even were it in an area directly competitive with a prior employer, this would most likely amount to a benign “tombstone” announcement, without the added element of solicitation necessary to make it actionable misappropriation as described in *American Credit Indemnity Co.* A California court would likely reach a similar conclusion for the kind of announcement in *DiFonzo*. Provided the Facebook post was limited to an announcement in change of employment, and did not include any request that the recipient visit the defendant’s new location or new employer’s website, it would likely be considered a benign tombstone announcement.

However, a California court could very well have ruled differently in a situation such as *Cahill*, where the defendant posted information about his new employer to a private Facebook page, which was maintained specifically for communications with the company’s sales team. A California court would likely find solicitation if there was any request for the recipients to join him or consider his new employer. But what if the announcement only provided a link to the new employer’s website without actively encouraging the recipient to visit it? That would be a closer call. The implied request that the recipient click on the link might be enough for a California court to find that the defendant crossed the line into actionable solicitation.

Conclusion

As is evident from the above, the ease and variety of social media communications, and the overlap between an employer’s customer list and an employee’s social network, will present new and nuanced challenges to California courts. There is likely not a single person reading this article who doesn’t maintain some kind of social network, and the majority likely maintain a professional social network via LinkedIn. There is no doubt that people use these networks in their careers to communicate with clients, obtain business, and announcement changes in employment. It is only a matter of time before a California court is tasked with fitting such activities within the framework of a person’s right to compete and an employer’s right to be free of unfair compe-

-Continued on page 10-

-Social Media: Continued from page 9-

tion and to protect its trade secrets. Any inquiry will be highly fact specific, focusing on arguments for and against a finding that the employee's social network amounts to a protectable trade secret of the employer and whether social media communications cross the line into improper solicitations.

♦ *Ben Nix is a partner and David Grant is an associate in the Orange County office of Payne & Fears where they both practice in business litigation, trade secret, and unfair business practices groups.*

-Brown Bag Lunch: Continued from page 3-

Honesty is much better than excuses or passing the blame for one's inability to answer onto someone else. Judge Andler stressed that counsel "not play the incivility game" during oral argument. A judge will surely recognize when your opposing counsel is being rude or launching personal attacks. In response to such behavior, Judge Dunning suggests that a lawyer ask the judge, "Judge, is there any reason for me to respond to this?" The judge will then let you know whether a (more civil) response is necessary to preserve the record and/or to defend your honor or your client's integrity.

Thank you, Judge Andler and Judge Dunning, for an enlightening discussion (and for the cookies and coffee in chambers).

♦ *Matthew E. Costello is a business and employment litigation associate at Haynes and Boone, LLP.*

**Mark Your Calendars
For the Remainder of 2015**

**July 15th and 22nd, 2015
Habitat for Humanity
in Santa Ana**



**June 25, 2015
Brown Bag Lunch
with the Hon. Geoffrey T. Glass**



**August 19, 2015
Brown Bag Lunch
with the Hon. James Di Cesare**



**September 9, 2015
Dinner Program
Westin South Coast Plaza**



**October 1-4, 2015
42nd Annual Seminar
Ojai Valley Inn & Spa**



**November 4, 2015
Dinner Program
Holiday Gift Giving Opportunity
Westin South Coast Plaza**



**November 19, 2015
YLD Mixer
Andrei's in Irvine**

ABTL Gives Back: Our Annual PLC Fundraiser By Robert E. Palmer

[Editor's Note: Robert E. Palmer wrote this article, which originally ran in the ABTL Report in Summer 2007. We are reprinting this article in his memory and also to highlight why ABTL-OC has renamed its annual PLC fundraiser in his name.]

"We make a living by what we get; we make a life by what we give." – Winston Churchill

From day one, the Founding Faithful of the Orange County ABTL sought to create something special:

- *To find a vehicle to more meaningfully bring together the bench and bar in Orange County, including creating a dialogue between a "best of show" Board of Directors from the bench and bar;
- *To provide the finest law-related programs and speakers, including an upgraded base of talent (from around the County and Country), enhanced facilities and audio visual presentations, and programs that would provide value to both the senior litigator and young associate alike; and
- *To become a vital part of and draw from the assets of an already established and successful statewide ABTL group.

Built on these foundations and the leadership of Past Presidents Don Morrow and Tom Malcolm and a dedicated ABTL Board, in only three years our rag tag fleet had grown from 0 to 500 members and was regularly putting on top notch programs many times a year. Upon this backdrop, I and our fellow Board members sought to not only be the top provider of law-related programs in Orange County, but we sought to do more -- namely, to give something back to our community and utilize our group to raise funds for a worthwhile charity and one that all of our members could support. But how to do this? Our plan was quite simple.

First, we wanted to select a law-related charity that not only had broad support in our legal community, but was not affiliated with any particular political party, cause, or belief system. We also hoped that such a charity would be one that provided legal assistance to those in need. We soon decided that The Public Law Center ("PLC") was the perfect fit.

Second, we needed some type of event that would not only fit in well with our existing programs, but one that would hopefully be fun for all of our members to attend and support. We settled upon the idea of a charity wine tasting event that would be held just before one of our normal meetings -- and one that would take the place of our tradi-

tional "meet and confer" cocktail hour.

Third, we needed to determine when to hold the event. The timing seemed perfect for our June meeting -- summer being a more relaxed time of year and a time when most firms would have a number of Summer Associates to take to the event. A summer event would thus provide firms with a good event for their lawyers and Summer Associates where they could not only attend a first rate program, but a part of a great mixer for lawyers, both young and old, to socialize with their "cross-town rivals." Further, the event would hopefully also get the Summer Associates excited about the firms they planned to join and the legal community in Orange County, in general, and the importance of supporting our local charities, in particular.

With this new idea now in place, we only had one remaining hurdle: How do we pull off such an event with virtually no budget, no paid staff, and with little planning time? Simple, I ran to Hi-Time Wine Cellars a few hours before the event (after running out of a longer than expected court hearing), purchased a dozen or so cases of wine on my credit card, called and begged a few associates and assistants to come help out, and we somehow loaded in the wine into an empty ball room, got a number of tables set up, had our volunteers pour the wine and collect tickets for the same, and somehow pulled off a very fun, well attended, and successful first-ever PLC fundraiser -- and one that managed to raise thousands of dollars for the PLC. Indeed, our donation proved to be one of the largest donations to the PLC that year, all with the help of a few hundred ABTL members and guests who came out in force on a June evening to support our request for their help in raising some money for those who could not otherwise afford their own counsel.

Over the years the event somehow took hold and it is now our annual fundraising event. Each year our President and Board somehow find a way to not only carry on the tradition, but improve it. Our last event on June 6th had a fantastic program, great attendance, and once again raised thousands of dollars for the PLC. I am greatly honored to have been a part of this now annual Orange County ABTL tradition and for the support of our members for the fundraiser each year. To all of you who support the ABTL, and in particular our annual PLC Fundraiser, I thank you for helping make the ABTL something truly special.

Cheers!

Robert E. Palmer was a litigation partner at Gibson, Dunn & Crutcher and the ABTL's third president.

ASSOCIATION OF BUSINESS TRIAL LAWYERS



8502 E. CHAPMAN AVENUE
ORANGE, CA 92869

PRESORTED STD
U.S. POSTAGE
PAID
IRVINE, CA
PERMIT NO. 426

Or Current Occupant