

The In-House Counsel Interview: Cheryl Tobin of Pacific Life

By Jonathan D. Guynn



This installment features Cheryl Tobin, Vice President, Insurance Counsel at Pacific Life Insurance Company.

Q: Can you describe your career path?

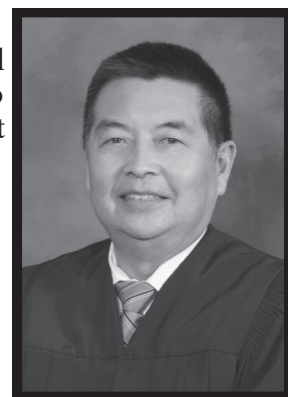
A: My career path has been non-traditional, but it has continually exceeded my expectations. Out of college, I took a position as an analyst at a software development firm in Kansas City. I enjoyed my time there, but after five years working in that industry, I wanted to try something new and decided to pursue a law degree.

I soon found myself as a law student at Washington University in St. Louis. Because I had law school bills to pay, I went to work as a business analyst for one of my former software customers, General American Insurance Company, which was headquar-

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Effectively Running A Court In A Challenging And Changing Legal And Budgetary Environment

By Hon. Kirk Nakamura, Assistant Presiding Judge, Orange County Superior Court



I read with great interest the article by the Hon. Kimberly Knill (written before her appointment to the Orange County Superior Court ("OCSC")) relating how the additional burdens Proposition 66 places on the Orange County trial courts could affect the courts' ability to expeditiously hear civil trials. Specifically, the Proposition assigns the responsibility of ruling on habeas petitions to the trial courts, which could require an additional full time judge to handle such petitions.

Shortly after reading the article, Judge Knill and I discussed the fact that Proposition 66 is just one of many recent legislative changes which could (and have) affected the ability of the OCSC to comply with the civil expedited trial rules. Insufficient court funding also creates similar problems. This article attempts to highlight some of the most important challenges that the court presently faces.

Funding Challenges

Any person who has attended a State of the Court speech given by a recent Presiding Judge or Assistant Presiding Judge is aware of the funding challenges the Judicial branch and more specifically, the OCSC, now faces.

Under Governor Brown, the judicial branch has faced essentially modest increases in funding. These modest increases have not kept pace with general cost increases experienced by all public entities, and have required steps

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The President's Message

By Daniel A. Sasse



I am honored to serve as President for the Orange County chapter of ABTL in 2018. I look forward to continuing to move this great organization forward. The bar, however, has been set particularly high by our past President, Mark Finkelstein. Please join me in thanking Mark for his many contributions to ABTL, and for his commitment to Orange

County. Under Mark's steady leadership, this organization stayed true to its mission to "promote competence, ethics, professionalism, and civility in the legal profession and to encourage and facilitate communication between members of the Orange County bar and the County's federal and state judges on matters affecting business litigation and the civil justice system."

Fortunately, I have an incredibly dedicated Executive Committee to help me strive to measure up to the high standards set by Mark. Karla Kraft is our vice-president; and Maria Stearns is our secretary. Until this past month, Tom McConville has served as our Treasurer. As most of you know, Tom has recently been appointed to the Orange County Superior Court bench by Governor Brown. Please join me and the ABTL Board in congratulating Tom. Although he is stepping down as Treasurer, we look forward to Tom continuing to serve on the ABTL Board. Stay tuned here for updates about our new Treasurer. Finally, Linda Sampson is a vital part of this organization, and she will continue to serve as our Executive Director.

I also would like to particularly acknowledge the many state and federal judges who actively support this organization by serving on our Board of Governors and our Judicial Advisory Council. Orange County is very fortunate to have such a distinguished and talented judiciary.

Before discussing plans for 2018, let me welcome the newest member of our Judicial Advisory Council and Board of Governors, Judge Douglas McCormick – United States District Court. We also welcome five new Board members: Charity Gilbreth (Schilling

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Will You Accept Bitcoin?

By Robert T. Matsuishi and Thomas L. Vincent



The proper use of social media, blogging, cloud computing, and crowdfunding are just a few of the ever-growing tech-related issues that have ethical implications for attorneys. We must add to the list the cryptocurrency craze influencing the investment markets. Regardless of your personal feelings towards Bitcoin, Ethereum, Ripple, *etc.*, clearly something big is happening, and attorneys need to pay attention—particularly because attorney ethics panels are starting to take notice and significant ethical implications exist for any attorney who accepts fees in cryptocurrency.



What is Cryptocurrency?

If you ask a typical attorney to explain cryptocurrency, they will probably understand that: (1) it is a form of digital currency that makes it easier to transfer funds between two parties; (2) it is not “issued” or “backed” by any central bank or authority, rendering it

less prone to government interference and protection; and (3) the nature of the transactions makes them private and confidential. But the understanding typically ends there because of cryptocurrency’s novelty and overwhelming technology. Having a basic understanding of how this new technology works is important to understand why so many people across industries consider it revolutionary.

Central to cryptocurrencies like Bitcoin is the blockchain it uses to store an online ledger of all the transactions that have ever been conducted using the currency. The best way to imagine the system in place is to think of a highly encrypted, publicly available “spreadsheet” that is not stored in any single location, but is shared and duplicated by millions of computers. As transactions take place, the spreadsheet is regularly updated and continually reconciled. The completed transaction is recorded into blocks and eventually into the blockchain. The cryptocurrency’s users themselves validate the transactions whenever one person pays another for goods or services. The clear benefit of the technology is that the transactions eliminate the need for a third party to process or store payments. Consequently, cryptocurrency transactions are done with minimal processing fees and avoid the fees charged by most banks.

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Sayta v. Chu: Are You Following the Requirements to Invoke the Protections of Code of Civil Procedure Section 664.6?

By Christopher T. Kim

In settlement agreements, attorneys often include a provision saying the court shall maintain jurisdiction over the settling parties to enforce the terms of the settlement agreement pursuant to California Code of Civil Procedure section 664.6 (“Section 664.6”). Typically, attorneys pull this stock language from a template. That practice should change following *Sayta v. Chu*, 17 Cal. App. 5th 960 (2017). *Sayta* highlights the requirements settling parties must satisfy before the trial court can retain jurisdiction to enforce a settlement agreement. And *Sayta* gives us a sobering reminder of what happens when settling parties fail to comply with those requirements.



Section 664.6 says, “If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. ***If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement.***” Cal. Civ. P. Code § 664.6 (emphasis added).

This statute was enacted to permit a court, by a summary procedure, to finally dispose of an action when the existence of the agreement or the terms of the settlement are subject to reasonable dispute—something that was not permissible before the statute’s enactment. *Wackeen v. Malis*, 97 Cal. App. 4th 429, 432 n.1 (2002). Before the statute’s enactment, a party who sought to enforce a settlement agreement would typically have to file a new lawsuit. *Id.* But under Section 664.6, a motion for summary judgment is no longer required and thus, the court could decide disputed facts, either solely on declarations or with oral testimony, to determine a motion seeking to enforce a settlement agreement. *Id.* The Legislature created this statutory procedure to benefit the parties and trial courts, relieving them of the burden of more time-consuming and expensive procedures. *Provost*

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Young Lawyers Division Update

This year's Young Lawyers Division has a new format. Instead of a chair, YLD is now a committee of three individuals dedicated to planning exciting and educational events for young lawyers. The committee is made up of Katie Beaudin from Stradling Yocca Carlson & Rauth, Sheila Chen from Crowell & Mooring and Ric Fukushima from Orrick.

On April 17, we had a brown bag lunch with Judge Martha Gooding. Judge Gooding discussed pitfalls to avoid as young attorneys based on her experience on the civil panel. She provided sound advice on how to present arguments in court, effective briefing tactics, and answered many questions from the young attorneys present on summary judgment motions and trial preparation.

There will be two other brown bag lunch events in the summer and fall, as well as a judicial mixer at the end of the year. We are also putting together a social event in the fall so be on the lookout for more details on those events in the coming months.

The YLD Committee is looking forward to a fun and educational year. We hope to see you at our events!

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tered in St. Louis. Over time, I was phased into a legal role and when I graduated from law school, I was hired as an attorney by General American's new reinsurance subsidiary, RGA, which they had taken public six months prior. During my seven-year tenure, RGA experienced rapid international growth. My responsibilities ran the gamut – for instance, I set up the company's HR department, opened an office in Japan, formed a company in Australia, served as a Board Member and the equivalent of a Chief Operating Officer for a life insurance subsidiary in Argentina, served as Secretary of the Board for RGA's Canadian company, and supported the CFO with investor relations. These were incredible opportunities for someone right out of law school, and they helped set the tone for my entire career.

I eventually decided to leave St. Louis and moved to Orange County, where I joined Pacific Life in a compliance role. After approximately two years, I moved into the law department where I grew into my current role managing a team of attorneys, paralegals, and

analysts responsible for providing the day-to-day legal support for our insurance and annuity operations, intellectual property matters, litigation management, legislative and regulatory tracking, and contract review.

Q: Will you describe a typical day as the Vice President, Insurance Counsel for Pacific Life?

A: A typical day includes keeping up on industry events as well as legal and regulatory activities that may impact the company, supporting our internal clients in addressing whatever issue may arise, including help with developing solutions to business problems, negotiating agreements, and providing counsel with regard to compliance with shifting state and federal law and regulation. I also work on longer term strategic projects. For example, I recently spearheaded a project to address the need for a harmonized enterprise approach to managing the lifecycle of vendor management. I also participate in internal discussions to modernize the products and services that we offer to our customers.

I also have the opportunity to participate at an industry level representing Pacific Life on several industry committees. Committee work includes formulating industry policy to inform advocacy efforts in reaction to state and federal legislation and regulation. For instance, I am currently working with others in the industry to respond to state regulatory actions being taken in response to the EU-US Covered Agreement.

Q: What do you enjoy most about your role as in-house counsel?

A: I am a "generalist" in the truest sense of the word and am tasked with providing advice and solutions to a large range of business and legal issues. As a result, I don't really think of myself as a pure "lawyer"; rather, I am a business person who has the perspective and skillset of someone with legal training and experience. Because success in business requires good judgment and the ability to analyze situations from different angles, someone with a J.D. can have certain advantages over those with an M.B.A. I think legal training equips one to anticipate and evaluate risks, find creative solutions to problems, understand the terms of a deal and negotiate contracts that address the "what ifs", and make certain strategic decisions with the big picture in view. In some companies, the legal department is viewed as the "Sales Prevention Unit". But at Pacific Life, I have seen attorneys deliver tremendous results and innovative business solutions for their in-

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ternal clients, which can require skills that an M.B.A. may not have had an opportunity to develop. As a result, I, along with members of my legal team, work to be totally integrated in the business of Pacific Life and create value in all aspects of its activities.

I also enjoy the opportunity that I have as in-house counsel to be part of the business, to really know the company and our industry. The more I understand the context within which my clients operate and their business objectives, the more effective I can be as a legal counselor and business partner to them. It also makes the job more fun.

I have been with Pacific Life for approximately 15 years. During that time, I have forged deep, productive professional relationships with my colleagues across the company, many of whom have been here longer than me. And because they are not being charged by the hour, my clients are much more apt to include the lawyers at the beginning of projects and to discuss business opportunities, not just come to us when there's a problem to solve. This allows my team and me to play a more proactive role at the company and enjoy positive relationships with our clients as we help them achieve their business objectives.

Q: What do you look for when hiring someone to join your in-house team?

A: I look to onboard talented individuals who can grow within the environment we have created at Pacific Life. Thus, while we value candidates with subject matter expertise, we place a greater emphasis on the cultural fit. This means that we put a premium on flexible thinking, independent drive, intellectual curiosity, and the interpersonal skills that enable candidates to consult and collaborate effectively with other members of the in-house team and our internal clients.

Q: What do you look for when hiring outside litigation counsel?

A: Although our primary consideration is the result that outside litigation counsel can offer to us, what we look for when hiring outside counsel is highly dependent on the nature of each matter. In general, for "bet the company" litigation, we are likely to engage a law firm with a strong reputation and a history of successfully defending similar companies in similar actions. We prefer to work with firms we know and who are familiar with Pacific Life and with our business. For

the more common litigation matters, we tend to hire local counsel, preferably someone we have worked with before or who comes highly recommended.

If a lawyer or law firm would like to join the panoply of outside counsel that we consider when new matters arise, I highly recommend that they find ways to signal an interest in our industry and an expertise in the issues that we face. I have hired law firms before who got on my radar by publishing excellent articles or making compelling presentations at conferences I attended.

Q: What sets apart those outside counsel with whom you have been most impressed?

A: I want to work with outside counsel who possess excellent communication skills and is interested in understanding our issues and how we operate. Because Pacific Life's litigation matters are intertwined with its business decisions, it is essential that outside counsel collaborate with me and members of my team. I expect outside counsel to take the lead on drafting motions, taking depositions, making jury presentations, etc., but Pacific Life's legal team typically participates at every juncture. We understand the industry and company's big picture objectives better than outside counsel, so our input is invaluable.

I also appreciate outside counsel who make efforts to align their interests with ours by responsibly managing the resources that I give them. For instance, I understand that law firms are running a business and need to give opportunities to develop their attorneys, but outside counsel must strike an appropriate balance – Pacific Life shouldn't be paying to train junior associates and, more fundamentally, I don't want our matters to be a training exercise for my outside counsel.

♦*Ms. Tobin was interviewed by Jonathan Guynn, a litigation associate with Hueston & Hennigan in Newport Beach, CA.*

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taken within the Judicial Branch to equalize funding among the various counties.¹ The OCSC and certain other County Superior Courts that were previously funded above the statewide average became part of this effort to equalize funding among the various counties in the State. The methodology used for this equalization process was WAFM (Workload Assessment Funding Methodology) which employed a complex formula that assigned values to certain types of cases filed in each county and counted these filings in each County in order to determine the workload each County Court had to process. Under this methodology, the OCSC was determined to be less underfunded relative to other courts based on its workload. Hence, the OCSC, and other relatively less underfunded county courts (such as San Diego and Santa Clara Counties) sustained reductions to their base allocations relative to other county courts (such as Los Angeles and Riverside Counties) in order to achieve a more equalized state court system. The impact was that the OCSC, which once enjoyed 8% of the State Court funding under historical measures, now receives only 7%. In absolute dollars, this has equated to a loss of \$16 million dollars to the OCSC over the last 5 years.²

In 2008, the OCSC's base allocation was \$152 million. In 2008 the court had \$48 million in reserves. In 2016 the OCSC's base allocation was \$142 million. In 2016 the Court had only \$9 million in reserves.

In order to balance its budget, the Court has been forced to pare its workforce. The Court has deliberately not filled numerous positions that have become vacant due to retirement or other separations in order to overcome a deficit. The net impact has been a loss of over 425 full time employees over the last 8 years. These unfilled positions include line staff and court commissioner positions as well. The loss of employees and staff with considerable institutional knowledge gives rise to considerable challenges in itself.

Court retirement benefits given to court employees when the Court was well funded now place a continued financial burden upon the Court.³ This is not the fault of any person; the Court has excellent management and staff who deserve the raises and retirement they earn. However, the dramatic decrease in

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Mark Your Calendars



May 23, 2018

19th Annual Robert E. Palmer
Wine Tasting Dinner for PLC
*The Waymo-Uber Trial and the
Future of Trade Secrets Law*
Westin South Coast Plaza



September 12, 2018

Dinner Program
Westin South Coast Plaza



October 10–14, 2018

45th Annual Seminar
Wailea Beach Resort
Maui, Hawaii



November 7, 2018

Dinner Program
Holiday Gift Giving Opportunity
Westin South Coast Plaza

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funding coupled with this reality adds significant strain on the Court's resources. Because of these benefits, the wages of the 1,475 current Court employees combined with the retirement benefits enjoyed by those who have retired from court service are the essentially the same as the cost to pay 1,900 employees that were employed in 2008 as well as the Court's retirement obligations at that time.

The latest funding challenge to the Court relates to security funding. Monies for security are given to the Sheriff's department according to a formula that is based upon percentage of sales tax revenue collected by the state. That funding has been flat for several years. The Court has been informed by the Sheriff's Department that due to an accounting error it has expended more than \$6 million over its budgeted amount. The Court and the Sheriff's department will have to work diligently to assure that sufficient security is provided to court users with the remaining depleted funds; the Court has recently been advised by the Sheriff's office that there may be a budget shortfall in the area of \$10 million.

Lastly, the Court's reliance on fines and fees as a source of funding has also had a negative effect on the Court's resources. A significant amount of the Court's funding is through its collection of criminal/traffic fines and fees. The numbers of issued citations for traffic violations has dropped dramatically, which further impacts the court's resources. Moreover, amnesty bills (SB 881) which exonerated the fines of defendants who did not pay or did not appear in connection with their citations also negatively affects the court's income. The latest legislative enactment which will impeded the Court's ability of collect is SB 185, which prohibits the Court from using DMV driver's license holds to collect outstanding fines.

Initiative/Legislative/Decisional Directives

Proposition 66 is just the latest initiative that imposes costly duties and obligations on the California trial court. The Court was required to adjust its practices to conform with Proposition 57, which allowed for parole consideration for nonviolent felons, changed policies on juvenile prosecution, and authorized sentence credits for rehabilitation, good behavior, and education. The Court did, however, receive some funding for the additional burdens of this voter initiative.

However, legislative initiatives consistently surface that do and could impose significant additional burdens on the Court without additional funding. These include:

Bail Initiatives: SB 10, which is now a two-year bill, could have imposed significant additional burdens on the Court in the form of increasing the number of hearings on bail.

Proposition 63: the so called "Background Checks for Ammunition Purchases and Large-Capacity Ammunition Magazine Ban" Initiative which requires, upon conviction of any felony, misdemeanor or defendant addicted to narcotics, that the Court immediately assign the matter to a probation officer to investigate whether the automated Firearms System of other credible information reveal that the defendant owns, possess or has under his or her custody any firearms. Upon conviction the Court must inform these defendants to turn over firearms to law enforcement, sell the firearms or relinquish the firearms, assign a probation officer to ensure compliance, order that firearms be removed if probable cause exists that an offender still has firearms, and make a finding that firearms has been relinquished. These procedures will delay the ultimate dispositions of such cases and impose further burdens on the Court in terms of additional hearings to comply with this initiative.

Changes to the Voir Dire statutes: The initial version of the new voir dire bill imposed a duty on the Court to provide questionnaires to jurors in all cases. This would have extended the length of all trials considerably. Fortunately, the Court lobbied against this provision and it was deleted.

Probable Cause determinations in misdemeanor cases (AB 2013): This bill would have required a hearing and findings of probable cause in misdemeanor cases upon a defendant's demand. It has been scaled back to a pilot project in three counties.

Juvenile custody with court order (AB 1401): This bill allows social services to obtain a court order allowing juveniles to stay in social services custody (requires access to a judicial officer 24/7).

Preservation of body worn camera evidence: The court is required to preserve evidence, and in certain criminal cases this requirement continues indefinitely. The massive amount of electronic storage space required to store body worn camera evidence presents

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financial and technological challenges.

“Blanket” papering of judges under CCP section 170.6: The repeated use of preemptory challenges in criminal cases can dramatically affect a court’s ability to efficiently and effectively process its criminal cases. The District Attorney and the Public Defender’s office can effectively render a judge unproductive to the Court by the repeated use of preemptory challenges. The Court now has little recourse in such situations under the current law.

Judicial Enactments/Rulings

In addition to legislative initiatives and directives, the following judicial enactments and rulings have further burdened trial court resources.

“McNeely” warrants for blood testing: In the Supreme Court case of *Missouri v. McNeely*, 569 U.S. 141 (2013) the U.S. Supreme court held that an involuntary blood test for blood alcohol content required a search warrant. This seemingly innocuous case placed substantial burdens on the Court. Prior to *McNeely*, night time magistrate search warrant duty was generally not so demanding so as to require a judge to take time away from his/her daytime duties. This is no longer the case. The *McNeely* decision assures that a judge having night time duty will now be awakened at least 3-9 times a night. Night time duty is now a full time judicial assignment.

Court Reporters for litigants with fee waivers (possible): The Court is moving towards all civil departments having the attorneys bring their own reporters if there is a desire for a record. The California Supreme Court has granted certiorari to the case of *Jameson v. Desta*, S230899. (D066793; 241 Cal.App.4th 491; San Diego County Superior Court; GIS9465) in which the appellant is contending that he should have been provided a court reporter in his trial because he had been given a fee waiver under Gov. Code section 68632. The OCSC has filed an amicus brief in this case taking no position on the merits of the case, but indicating that should the Supreme Court find that the court has a duty to provide reporters to all litigants with fee waivers, the cost to an already cash-strapped Court would be considerable.

Changes to the hearsay rule under Sanchez: The

recent case of *People v. Sanchez* (2016) 63 Cal.4th 665 held that experts cannot relate case specific out of court statements in their opinions as a violation of the confrontation clause in criminal matters. At least five subsequent Court of Appeal cases have applied *Sanchez* to civil matters. At a minimum, if *Sanchez* is applied to Civil matters the requirements for admissibility of an expert’s opinion as well as the evidence relied upon by the expert, would be raised considerably. This would not only lengthen trials because of the requirement of providing admissible foundational evidence for the expert, but also generate more hearings under Evidence Code section 402 relating to the admissibility of the expert’s opinion and what the expert can testify he/she relied upon. SB 1276 (Moorlach) proposes to overrule *Sanchez* in civil cases.

Conclusion

The Court faces considerable challenges to provide meaningful access to justice to all of the residents of Orange County. The 800,000 residents in southern Orange County are not effectively served due to the lack of readily accessible court locations in that part of the County. The additional burdens placed upon a court which is already underfunded impairs its ability to provide access to all of its citizens in all types of courts, regardless of economic ability to pay or familiarity to the court process.

The workload saved by the reduction in filings at the Court is more than offset by the complexity of the cases filed, the decrease in court personnel available to handle cases and the repeated and varied demands of the public, legislature, initiative and the mandates issued by higher courts.

Efficiencies gained by technologies such as e-filing can provide only marginal relief. The importance of the courts to our county, our citizens and a truly democratic society based upon the rule of law must be recognized. This county is blessed with outstanding jurists, court administration and a court staff which by necessity is decreasing in size and experience but is still providing exemplary service.

The civil courts have been probably the most affected by the demands of these changes, as criminal defendants must be provided speedy trials or the cases must be dismissed. The typical civil courtroom now has no bailiff and usually no court-provided re-

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porter. The increasing demands of the criminal courts have and will affect the ability of the Court to provide needed civil courtrooms to resolve these important cases. The Court struggles to maintain and find funding for self-help services needed to assist self-represented litigants.

California's state legislature has fewer lawyers than that of any other state. Many of our representatives in California have very little idea of how the court system works, its functions and responsibilities. It is up to the bar to not only run for these offices and support candidates who have an understanding of the value of the court system, but to act as teachers and educators to those with less knowledge and experience.

Endnotes

¹ On January 10, 2018 Governor Brown released his initial proposal for the fiscal year 2018-2019 budget. The governor's latest proposed budget provides a significant increase in funding to the trial courts. The highlights include \$47.8 million earmarked for courts that are funded below the statewide average (this does not include Orange County.) But also \$75 million in discretionary fund for the trial court statewide to fund priorities set for by the Judicial Council. Orange County will get a share of this funding.

² The Judicial Council recently approved a significant change in the WAFM methodology which will assure trial courts of more stable funding. As for contributing courts, there will be no reallocation of funds unless there are two successive years of flat funding. Hopefully, this will prevent the dramatic decrease in funding from year to year which has made budget planning so challenging for this Court.

³ The Court recently settled with Orange County Employees Association on a 2 year deal which projects a \$5 to \$6 million budget deficit. If the governor's budget is approved the Court projects a balanced budget next year.

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Law Group), Andrew Gray (Latham & Watkins), Adam Karr (O'Melveny & Myers), Peter Villar (Troutman Sanders), and Mark Wilson (Klein & Wilson).

As we look ahead to 2018, this promises to be a great year for ABTL. Matt Sonne is serving as Program Chair, and he is already working hard to make sure we continue our tradition of having interesting and educational dinner programs. Our last program, which took place on March 21st, was entitled "*Cannabis As An Emerging Industry: The Medical, Legal, and Political Challenges*," and featured Dr. Daniele Piomelli, Professor Robert Solomon, Judge James Gray and AUSA Joseph McNally, with Senator Joseph Dunn moderating what was a lively and insightful discussion.

Our next program is the 19th Annual Robert E. Palmer Wine Tasting Dinner for PLC on May 23rd. We will hear from attorneys in the high-profile Waymo-Uber trade secret trial. Please come support a great cause, and don't miss our biggest event of the year!

John Holcomb and Will O'Neill are the co-chairs of the Annual Seminar, and this year's event will be held on October 10-14 at the beautiful Marriott Wailea Beach Resort in Maui, Hawaii. The title of this year's event is *#thisis2018: When #metoo Becomes A Business Dispute*.

If you haven't had a chance to renew your ABTL membership yet, now is the time. Tom Vincent is our Membership Chair this year, and he knows how to find you. Membership provides many benefits, including access to our Annual Seminar. In addition, this summer we are going to have our second annual members only rooftop cocktail event with our judiciary.

I also would like to thank our other 2018 Board committee chairs: Carol Zaist (Sponsorship Chair); Todd Lundell (Public Service Chair); Justin Owens (ABTL Report Editor); and Katie Beaudin, Sheila Chen and Ric Fukushima (Young Lawyers Division Co-Chairs).

I look forward to seeing everyone at the 2018 events!

♦*Daniel A. Sasse is a partner at Crowell & Moring, and is the 2018 ABTL Orange County Chapter President.*

-Bitcoin: Continued from page 3-

While everyday speculators may invest in cryptocurrency, it is the proliferation of blockchain technology that has led to the boom in this industry. Apart from its use in cryptocurrency transactions, other industries and governments are finding many potential uses for blockchain's conceptual framework as a secure, digital alternative to more expensive, bureaucratic, time-consuming processes. In healthcare, for example, blockchain infrastructure is now being used for clinical trial data, regulatory compliance, and electronic medical records.

What Are the Risks and Benefits Associated with Cryptocurrency Transactions?

There are, of course, a litany of reasons why attorneys should avoid cryptocurrency transactions with clients. For starters, the market (where growth is based almost entirely on speculation) is prone to wild price swings. In January 2017 alone, the price of one Bitcoin fluctuated between highs of \$17,101 and lows of \$9,477. From December 16, 2017 to February 6, 2018, Bitcoin tumbled again from \$19,343 to \$6,914. Volatility remains one of its defining characteristics as an investment.

Fueling this volatility is the hack-prone history of the industry. While the cryptocurrency industry is not alone in its exposure to hacking, unlike with hacks involving traditional financial institutions, it is often impossible to recover stolen cryptocurrency because blockchain transactions are irreversible.

Just this past January, the Japan-based crypto exchange Coincheck was the target of hackers who stole ¥58 billion (\$534 million) in customer deposits of NEM, a less well known digital currency launched in early 2015. The hack, reportedly the largest cryptocurrency security breach in history, affected 260,000 exchange customers and accounted for roughly 6% of NEM's entire market capitalization.

The risks can be multiplied with newer cryptocurrencies. In fact, a recent report by Ernst & Young suggests that over 10 percent of the funds generated by initial coin offerings (approximately \$400 million) are either misplaced or seized by hackers. *See* Press Release, Ernst & Young, Big Risks in ICO Market: Flawed Token Valuations, Unclear Regulations, Heightened Hacker Attention and Congested Networks (Jan. 22, 2018). These attacks exploit coding flaws in new cryptocurrencies, which can be rushed to market without meaningful review. While law firms will typically not have significant amounts in an exchange and can protect themselves from being directly targeted by hackers, no one is immune from the effects of a large hack, which as NEM's pricing after the hacking incident shows, can result in wild price swings. Wide-scale hacking can also indirectly create doubt in the viability

of the targeted cryptocurrency or even the crypto market as a whole.

Notwithstanding all this, a growing number of law firms are willing to look past these potential risks and accept payment in Bitcoin and other cryptocurrency. Most firms do so as a client-driven business decision and not as an investment. Among them are firms who may have a large client base in the growing blockchain industry and want to show their clients that they have a vested interest in the industry or believe in the potential of the technology. Law firms with high-net-worth clients in the tech industry may increasingly find themselves with clients who are cryptocurrency proponents with the majority of their net worth consisting of Bitcoin. Law firms may also have international clients who find it more efficient to transact in cryptocurrency. Other firms may want to delve into Bitcoin for political reasons and to show their support for the unregulated nature of cryptocurrency.

Are There Ethical Implications for Attorneys When Dealing with Cryptocurrency Transactions?

Yes. California Rule of Professional Conduct 3-300 prohibits attorneys from entering into a business transaction with a client or knowingly acquiring an ownership, possessory, security, or other pecuniary interest adverse to a client unless the transaction or acquisition is fair and fully disclosed in writing with the client's written consent. Rule of Professional Conduct 3-110 also requires attorneys to have "sufficient learning and skill" before taking on an engagement. Cryptocurrency implicates both rules and cryptocurrency is now coming to the attention of attorney ethics panels.

Last September, the Nebraska Supreme Court's ethics committee issued an advisory opinion that discussed in detail how attorney ethics rules may apply to transactions in digital currency. *See* Nebraska Supreme Court Ass'n Advisory Comm., Op. 17-03, 9/11/17. While the brief, 10-page opinion can at times be lacking in details, it provides commonsense advice that all attorneys can easily follow.

Before the Nebraska committee were three questions:

- May an attorney receive digital currencies such as bitcoin as payment for legal services?
- May an attorney receive digital currencies from third parties as payment for the benefit of a client's account?
- May an attorney hold digital currencies in trust or escrow for clients?

First, the committee noted that attorneys are expressly

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allowed to accept property like cryptocurrency in payment of services. Given the fluctuations in value, the committee instructed attorneys to immediately value or convert cryptocurrency to U.S. dollars upon receipt and to credit the client's account accordingly. The purpose of this requirement is to protect the client against wild fluctuations in value that could result in charging unreasonable fees. Although not directly addressed by the committee, doing so makes clear that market volatility risk is transferred to the attorney upon receipt. Immediately converting the cryptocurrency to U.S. dollars also limits the risk of the cryptocurrency losing significant value; which may otherwise place the attorney in an ethical dilemma of agreeing to work for property that is now worthless.

Critically important is notifying and explaining to the client well in advance the conversion arrangement and its timing. This includes notifying the client that the conversion will be immediate, the market rates used to determine the conversion, and the identity of the payment processor. This extra step helps avoid any later dispute about the conversion since there is no single market price for a cryptocurrency and different payment processors may convert the currency at different prices. One example of an index that processors may use is the New York Stock Exchange Bitcoin Index (NYXBT). Ultimately, it is up to the attorney to educate the client about the conversion process to ensure the client provides informed consent to the arrangement, regardless of the client's familiarity with cryptocurrency.

A second concern addressed by the committee are situations where the client arranges for a third party to pay the client's fees. In those cases, attorneys must keep in mind their professional obligations to accept payment from a third party only if the arrangement would not interfere with the attorney's independence or relationship with the client, nor interfere with the client's confidential information. This is particularly important given the history of cryptocurrency, which has allegedly facilitated easy, anonymous payments for illegal conduct and goods.

The committee correctly noted the challenges that arise with identifying a third party payer. Crypto transactions are pseudonymous in nature. This makes it nearly impossible for an attorney to determine the source of the funds. Attorneys who accept payments from third parties should comply with "Know-Your-Customer" (KYC) procedures that include certain verification steps. For example, while not directly applicable to attorneys who simply receive cryptocurrency payments, the U.S. Treasury Department's FinCEN has issued guidance for exchanges to prevent and report money laundering activities. See FIN-2013-G001, *Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies* (Mar. 18, 2013). At a minimum, attorneys should

consider larger payment processors and exchanges like Coinbase, which require the payer to comply with KYC verification and actively take steps to prevent money laundering.

Many other situations, however, will require the attorney to request sufficient information from the third party payer prior to acceptance of the digital currency payment. At a minimum, it is important for attorneys to ask themselves, why does the client want to pay in crypto and is the client trying to avoid something by doing so? Some firms limit the risks by only agreeing to accept crypto payments from long-term clients or companies and not from individuals. If you cannot perform satisfactory due diligence, the ABA suggests you walk away. See American Bar Association et al., *A Lawyer's Guide to Detecting and Preventing Money Laundering* (Oct. 2014).

A third concern addressed by the committee is holding digital currencies in trust for clients or third parties. If a lawyer receives cryptocurrency intended to reflect a retainer to be drawn upon when fees are earned in the future, the lawyer must immediately convert the cryptocurrency into U.S. dollars. In other trust account transactions, the committee advised lawyers to inform clients that the cryptocurrency is more akin to property and will be held and not converted into U.S. dollars or other currency. Since there is no mechanism to reimburse clients if a hacker steals cryptocurrency, an attorney opting to receive crypto must take reasonable security precautions. In State Bar Opinion No. 2010-179, the California Bar advised attorneys to educate themselves about proper security procedures before transmitting or storing confidential client information. Attorneys likely have similar obligations for holding a client's cryptocurrency.

The future of cryptocurrency remains volatile and uncertain. The Nebraska advisory committee's opinion has been criticized for its failure to provide new solutions for handling cryptocurrency transactions. New ethical rules and guidelines seem inevitable. Attorneys who accept or transact in cryptocurrency must do so well informed, alert to the ethical implications.

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v. Regents of Univ. of Cal., 201 Cal. App. 4th 1289, 1298 (2011). But this statutory procedure is only available if the trial court retains jurisdiction of the settled case.

In *Sayta*, the plaintiff leased a bedroom in an apartment located in San Francisco from the defendants. *Sayta*, 17 Cal. App. 5th at 963. The plaintiff had disputes with the defendants regarding her tenancy and filed suit alleging contract and tort claims. *Id.* Two defendants cross-complained against the plaintiff. *Id.* Ultimately, the parties entered a settlement agreement to resolve all disputes between the parties and the complaint and cross-complaint were dismissed. *Id.*

The settlement agreement included a confidentiality provision stating the terms of the agreement “shall remain confidential.” *Id.* at 963. The provision provided for liquidated damages of \$15,000 for breach of that provision. *Id.* The settlement agreement included a provision regarding the court’s continuing jurisdiction to enforce the settlement agreement. *Id.* That provision said:

All parties shall dismiss their entire claims and causes of action . . . subject to the parties’ express agreement and request that the Court retain jurisdiction pursuant to [section] 664.6 to enforce the remaining terms of this settlement agreement and judgment in the event any party fails to comply with all the obligations set forth herein. In the event the matter is dismissed, and pursuant to the express statement set forth in *Wackeen v. Malis* (2002) 97 [Cal.App.4th] 429 [118 Cal.Rptr.3d 502], the Court may nevertheless retain jurisdiction to enforce the terms of the settlement, until such time as all of its terms have been performed by the parties, **as the parties required this specific retention of jurisdiction.** The parties agree that the Court may set aside dismissal if necessary, upon application by any party, for the purpose of enforcing the terms of this [Agreement] and entering judgment pursuant to its terms.”

Id. at 964–65 (omission and alterations in original).

But no one requested the trial court to retain jurisdiction. *Id.* at 965.

Less than a year after the action was dismissed, the plaintiff filed a motion in superior court under Section 664.6 to enforce the settlement agreement. *Id.* at 963. The Plaintiff claimed the defendants breached the confidentiality provision and failed to refund her entire security deposit as required by the settlement agreement. *Id.* The trial court heard the motion and by written order denied the plaintiff’s motion, finding that the defendants did not violate the settlement agreement. *Id.* at 964. The plaintiff appealed. *Id.*

The appellate court reversed the trial court’s finding because the trial court lacked jurisdiction to entertain the plaintiff’s motion because the settling parties failed to (a) request, *before* dismissal, that the trial court retain jurisdiction to enforce the settlement, or (b) alternatively seek to set aside the dismissals. *Id.* at 962.

The plaintiff argued that it was sufficient for the parties to merely stipulate to retain jurisdiction without communicating the request to the trial court, so long as the stipulation was entered during the pendency of the action (*i.e.*, after commencement of a lawsuit and before dismissal of that same suit). *Id.* at 967. But the appellate court rejected this argument, saying “[the plaintiff] fails to explain how the court could have fathomed a ‘request’ for retained jurisdiction, much less granted it sub silentio from a secret handshake of the parties.” *Id.*

“‘[S]ettlement language purporting to vest the trial court with retained jurisdiction after the dismissal [is] a nullity: Subject matter jurisdiction cannot be conferred by consent, waiver or estoppel.’” *Id.* at 967 (alterations in original) (quoting *Hagan Eng’g, Inc. v. Mills*, 115 Cal. App. 4th 1004, 1008 (2003)). To properly request retention of jurisdiction by the trial court, “the request must be made (1) during the pendency of the case, not after the case has been dismissed in its entirety, (2) by the parties themselves, and (3) either in a writing signed by the parties or orally before the court.” *Id.* at 966 (quoting *Wackeen v. Malis*, 97 Cal. App. 4th 440 (2002)). Simply incorporating a provision in the settlement agreement which says the court retains jurisdiction (without conveying the request to the court) does not and cannot satisfy the requirements

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of Section 664.6.

Section 664.6 is an effective tool to enforce settlement agreements. It gives settling parties an expedited procedure to enforce a settlement agreement without having to incur the time and costs to file a new lawsuit and move for summary judgment. But counsel must remember that before they can use the summary procedure in Section 664.6, they must ask the trial court to retain jurisdiction and the trial court must agree before the case is dismissed. That stock language in your settlement agreement is not enough.

Below is sample language for you to consider using in a settlement agreement:

Continuing Jurisdiction to Enforce Agreement. The court shall maintain jurisdiction over the Settling Parties to enforce the provisions of this Agreement pursuant to *Code of Civil Procedure* section 664.6. Before filing a request for dismissal in the Action, Plaintiff will obtain a signed court order which states that the court retains jurisdiction under *Code of Civil Procedure* section 664.6 for enforcement of this Agreement. All Settling Parties will cooperate in obtaining this order.

Below is sample language for you to consider using in a proposed stipulation and order:

Subject to the approval of the court, Plaintiff and Defendant (collectively the “Parties”) stipulate to the following:

1. Plaintiff filed this action on [Date] alleging [Cause(s) of Action] against Defendant.
2. The Parties have settled their dispute pursuant to a settlement agreement (the “Settlement Agreement”).
3. Under the Settlement Agreement, the Parties have agreed that this court should retain jurisdiction of the above-entitled action pursuant to *Code of Civil Procedure* section 664.6 in order to enforce the terms of the Settlement Agreement.

4. The Parties have entered into this joint stipulation to ensure the court retains subject matter jurisdiction over the action – (see, *Sayta v. Chu* (2017) 17 Cal.App.5th 960) – should the Parties seek to enforce any provision of the Settlement Agreement.

5. Plaintiff will dismiss this action with prejudice by filing a Request for Dismissal as soon as this joint stipulation is approved and the attached [Proposed] Order is signed by the court.

Based on the foregoing recitals, the Parties respectfully request that the court approve this Joint Stipulation and [Proposed] Order, ensuring that it retains jurisdiction pursuant to *Code of Civil Procedure* section 664.6.

[Insert signature block]

The court, having read the foregoing Joint Stipulation, and good cause appearing therefor, IT IS HEREBY ORDERED that this court shall retain jurisdiction over this action pursuant to *Code of Civil Procedure* section 664.6.

[Insert court signature block]

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