ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO

abtl REPORT

Volume MMXIX No. 2 *August 2019*

Don't Forget The Jury: Some Observations

The Honorable John. S. Meyer

Jurors are not volunteer jurists. They are summoned by the government from all areas of the county to appear on a given day at a courthouse at 8:00 a.m., with the prospect of serving for an undetermined time. After sitting through a 2 ½ hour jury orientation, they might be summoned to serve in a trial that could last from three days to a month and require their attendance all day for four days a week.

Judges and attorneys involved in a civil trial are rightfully focused on trial preparation. It is easy to overlook the fact that the 40 or so jurors who have been summoned to the trial department are ordinary people with jobs and families who have and will undergo significant inconvenience in order to serve. Indeed, some attorneys (and judges) seem to be oblivious to this fact.

In addition to ensuring a fair trial to all litigants, the trial judge has an obligation to the jurors. That obligation is to minimize the inconvenience to jurors and to make their service satisfying to them. Put another way, don't waste their time.

For many years, at the end of the trial between the time the verdict is reached and the time the verdict is announced, I have provided a questionnaire for the jurors to set forth their impressions of the judge, trial counsel and their jury experience, excluding any reference whatsoever to issues in the trial itself. I am gratified to learn that the vast majority of jurors comment that the trial judge "didn't waste our time" and "moved the case along." Believe me, jurors know when and why their jury time was wasted.

In this non-scholarly article, I have attempted to discuss briefly certain areas where a trial judge and counsel can move a trial along, avoid wasted time and make jury service a bit more palatable. It is not my purpose to present a treatise on trial practice or evidence. I just want to present some observations formed after 20 years of presiding over jury trials. Although some of my judicial colleagues (and some attorneys) might take issue with certain of my protocols and recognize that sometimes circumstances require exception, all I can say is that in general, it works for me.

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Inside

abtl SD | 2nd Annual Fundraiser
Benfitting Mock Trial Competition

Join ABTL for a charitable evening at Stone Brewery in Liberty Station.

Enjoy modern cuisine paired with wine and beer tastings while you network and chat with friends. We'll have an exciting raffle with fantastic items graciously donated by the ABTL Board of Governors. Each of the three law school trial program leaders will take a moment to address the crowd and thank everyone for taking part in this event that their students benefit so much from.

Thomas Jefferson School of Law San Diego • California

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EVENT DETAILS

WHEN: Thursday, September 12 | 6:00 to 8:30 PM
WHERE: Stone Brewery in Liberty Station
2816 Historic Decatur Road | San Diego | CA | 92016
COST: Member $125 | Non-Member $150 | Jud./Pub. Sector $75
REGISTER: www.abtl.org/sandiego.htm

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President's Letter

By Randy Grossman

The San Diego Chapter has enjoyed a busy and productive first half of the year. I am pleased to report on our progress and plan for the remainder of 2019.

We kicked off our programming in February with an informative and entertaining dinner with the trial counsel for Uber. The dinner in May featured our new United States Attorney for the Southern District of California. ABTL hosted the annual Joint Board Retreat on April 26-28 at Terranea Resort and was well attended by our judicial and attorney board members. On July 9, we had a great turn out of judges and attorneys at our annual Judicial Mixer, one of the best ABTL events of the year. Special thanks to our Judicial Advisory Board, the Leadership Development Committee, Specialty Requirements Committee, our Dinner Program Committee, and our sponsors for contributing to such a successful line up of events and CLE programs.

Our Chapter continues to lead by promoting professionalism and civility. On May 29, 2019, the Board of Governors unanimously voted in favor of adopting the San Diego County Bar Association's revised civility guidelines. As you may recall, our Chapter helped lead the revision process for those guidelines. The Board also unanimously approved a resolution requiring our attorney members agree to adhere to those guidelines as a condition of joining and renewing membership. I am proud that our Chapter is doing its part to keep San Diego a special place to live and practice law.

The second half of the year promises to be just as productive and interesting. Our annual fundraiser is on September 12, 2019 at the Stone Brewing and World Bistro & Gardens at Liberty Station; the 46th Annual Seminar is scheduled to take place from October 2nd through the 6th at the La Quinta Resort; we will hold our final dinner program on October 28th, featuring the Chief of the Enforcement Division of the SEC; and our local law schools will again compete during the ABTL Mock Trial Competition on November 1, 2 and 4. Please check our website and be on the look-out for notices from our Executive Director Lori McElroy for more details.

I look forward to seeing as many of you as possible at our upcoming events, and hope that you enjoy the rest of your summer!

Randy Grossman

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Don't Forget The Jury...

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Start On The Right Track

Roaming the courthouse hallways, it is common to see many jurors hanging out on the benches and in the hallways in front of many departments. These jurors are waiting. After sitting through orientation, they arrive at a trial department and continue waiting. Sometimes they wait … and wait.

My bailiff usually accepts the jury panel into the courtroom as soon as they arrive.

It is my practice to receive *in limine* motions and opposition along with a statement of the case, witness list, jury instructions and a special verdict form on Friday at trial call. I review the joint trial binder over the weekend. On Monday morning, I expect counsel to be present at 9:00 a.m. and to conclude addressing pre-trial matters including *in limine* motions as soon as the jury panel arrives. Electronic exhibit projection and laptops will have been set up and counsel have been reminded to ensure that everything works. Then selection can begin without delay.

Unless the trial is more than 5 days, I request that prospective jurors be prescreened to cover the length of the trial—and I have been fortunate that the jury panel usually has gone through that screening. I require that counsel meet and confer regarding certain trial matters and trial issues will have been discussed and decided pre-trial, along with the *in limine* motions.

Counsel are obviously expected to respect the jury from the time they enter the courtroom. They should be respectful of the court staff and each other, adhering to the local rules of civility. They should stay away from the jury rail during voir dire and the trial. They shouldn't refer to the jury as "you guys" and introduce their clients or anyone else by their first names.

I tell the jury that I cannot guarantee exactly when the trial will end but I indicate that I have confirmed with counsel that the trial will end on a specific future date. I have counsel acknowledge that date to the jury so that the trial estimate is an interactive process between the court and counsel. I emphasize that the trial will commence promptly at 9:00 o'clock and will end no later than 4:30. I reiterate that trial will proceed Monday through Thursday and that the jury will not have to be here on any Friday unless the trial is over and the jury is deliberating. I remind jurors of this fact during a longer trial. I make sure that the jury has an understanding of their workplace jury service rules so that we don't lose a juror during trial who discovers, after being sworn, that he or she gets paid for only three days. I usually have a jury, including alternates, sworn and ready to go by mid-afternoon on the first day of trial.

After the jury is sworn, I give them preliminary instructions. Many years ago, I determined that hearing a judge read a script was not the best way to begin a trial. Furthermore, the CACI 100 series preliminary instructions are virtually word-for-word with the CACI 5000 concluding instructions. Accordingly, I don't read the CACI 100 series but have developed a 30-40 minute presentation -which outlines what I believe the jury needs to know in my own words. I tell counsel that if they wish me to read any of the 100s, I will do so but I have never had this request made.

I will not go sidebar during opening statements. Accordingly, counsel must meet and confer and let each other know what, if any, documents or other things are going to be shown to the jury during opening statements. I also have counsel indicate to the jury how long they estimate their opening statements will be.

I am usually able to conclude both opening statements by the end of the first day or, at worst, midmorning on the following day.

I tell the jury that they all have to be here no later than 9:00 o'clock for trial. I promise them that once the bailiff counts to the requisite number, we will start. Jurors have complained that in a prior jury service, they arrived for trial at 9:00 o'clock per the court's order, only to be met by the bailiff who tells them "it will be a while, the attorneys are talking to the judge." I tell the jury that that won't happen in my department, that if the attorneys need to talk to me, they will do it before the jury gets here or after the jury leaves.

Many jurors conduct personal matters or business during the luncheon recess. Also, many jurors rely on public transportation and have to tend to family and work matters after

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Don't Forget The Jury...

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court, so I strictly enforce a luncheon recess from noon to 1:30 and will never extend the trial day past 4:30. Also, clerks have tasks to do during lunch and after 4:30 and rightfully resent having their work envelope pushed.

I require counsel to share which witness is up, on deck, and in the hole during each trial day.

Trial Binders – A Monument to Paralegal Diligence

For the past several years, it is routine prior to trial to have several Bekins boxes full of trial binders delivered to the trial department. By the middle of trial, it is not uncommon to see these binders strewn around the courtroom, particularly around the witness chair. Oftentimes, counsel seem oblivious to exactly what is in each binder.

CONSIDER:

Counsel: "Mr. Witness, please turn to Exhibit 123."
Witness: "I can't find it."
Counsel: "It's in binder 5."
Witness: "Is that the one on the floor?"
Counsel: "Your Honor, may I approach the witness?"

The jury is usually oblivious to what is going on and, having sat through the "binder game" for a few days, doesn't really care. At the very least, have exhibits that are really going to be used in Binder No. 1 or a single binder.

This Is Not Moot Court

There's got to be a better way of organizing and presenting evidence in a long trial. Jurors have been sworn to hear and consider evidence and not learn the rules of evidence. Accordingly, the most expeditious way to present evidence is the objective. Most formal rules of evidence, while appropriate, are unnecessary, confuse the jury and waste time.

CONSIDER:

Counsel: "Your Honor, may I approach the witness?"
The Court: "Why?"
Counsel: "I want to show him Exhibit 3 for identification."
Counsel: "Mr. Witness, do you recognize Exhibit 3 for identification?"
Witness: "Yes, I do."
Counsel: "What is it?"
Witness: "A picture."
Counsel: "What does it depict?"
Witness: "Me."

OR CONSIDER:

Counsel: "Your Honor, I'd like to offer three pictures of the plaintiff which opposing counsel has reviewed as Exhibits 1-3 for identification."
The Court: "Any objection?"
Counsel: "No."
The Court: "They will be received as Exhibits 1-3. You can publish them on the Elmo."

Trial in the Hallway

In my preliminary instructions, I explain to the jury what a "sidebar" is. I explain that sometimes things that are unexpected come up and require the court and counsel and the court reporter to discuss something outside the presence of the jury. I apologize in advance if that occurs and try my best to avoid sidebar conferences during trial hours if at all possible. Oftentimes the need for sidebar conferences can be eliminated by meeting and conferring and ruling pretrial. Three of the biggest needs for sidebar conferences and time-wasters are "objection Kennemur," "objection violates *in limine*" and video depositions.

Keep in mind that the trial judge was not present at any expert depositions. If a Kennemur issue is remotely suspected, counsel should provide the trial judge with a copy of the expert deposition so that the ruling can be made on the spot without delay.

Objection Kennemur's cousin, objection violates *in limine*, is another troublesome need for a sidebar conference. Usually *in limine* motions were decided long before the objection is made and the trial judge has no uncorroborated recollection of which *in limine* is allegedly violated. Without rearguing an *in limine* motion before the jury, counsel should try at least to identify the number of the *in limine* motion so that the trial judge can refer to his or her notes and make a ruling without running out into the hall. Sometimes I require counsel to prepare a chart of *in limine* rulings to refresh my recollection of a certain ruling that I might have made two weeks before.

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Counsel are expected to exchange and meet and confer and edit all video depositions that are expected to be shown to the jury. After that, the court can rule on a transcript during *in limine* motions and the video can be edited appropriately. It is absurd for any counsel to think that the trial judge is going to make evidentiary rulings while the video is being played to the jury. It is also absurd to believe that the trial judge is going to excuse the jury while he or she reviews the deposition outside the jury's presence and makes rulings. Accordingly, an unedited video will either be shown or not shown at all in its entirety.

"I'll Brief That Issue"

Oftentimes, a legal issue will arise during trial and counsel will tell the court "I'll brief that issue." The next morning, the trial judge will usually have ex parte matters from 8:30 a.m. until the jury arrives at 9 o'clock. When ex parte matters are concluded, the clerk will come into the judge's chambers with a trial brief for the judge to read. I loath having the jury wait and will usually peruse the brief on the bench and do my best to rule.

It is my strong preference to avoid briefing and simply rely on copies of one or two seminal cases with highlights. That practice is a much easier and more persuasive approach than presenting a brief that might or might not even accurately answer the legal issue.

Well into the plaintiff's case, most judges will anticipate a non-suit motion. There are occasions, however, when at the conclusion of plaintiff's case, defense counsel will pull an extensive written non-suit motion out of a briefcase for the court's consideration and serve it on opposing counsel.

Any expectation that the judge will recess the jury to read, consider, and have argument on the motion is clearly misplaced. Furthermore, opposition needs to be considered. If I can't make a proper ruling on the spot, I will have the motion filed, defer ruling, take it home in the evening and suggest that counsel appear before the jury arrives the next morning to consider the motion. Otherwise, I will simply defer ruling on the motion and consider it some later time during the defense case.

The better and more realistic practice is to give the trial judge and opposing counsel a heads-up before the plaintiff rests that the defense will be making a non-suit motion and, if necessary, provide the court and counsel with a brief or copy of a seminal case. Any defense attorney who thinks that lying in the weeds is a productive tactic is mistaken.

Hanging Out Downtown

Trial management is a tough job for any attorney. It is not uncommon for experts in particular to be slated to testify at 1:30 on the last afternoon of the evidentiary portion of a trial. What often happens is that trial proceeds at a faster than anticipated pace and the expert cannot be called earlier than scheduled.

The jury arrives Thursday morning at 9 o'clock. Evidence concludes at 10 o'clock and counsel advises that he or she is out of witnesses for the morning. Do you think that the jurors really appreciate being told by the trial judge, "Sorry ladies and gentlemen, we're out of witnesses. Why don't you all hang out for the next three and a half hours. We'll resume at 1:30."

At the very least, counsel should advise the court of those situations on the preceding day so the judge can advise the jury to come in an hour or so later on the following day.

I will never release a jury during trial to prepare a special verdict and instructions. Instead, a joint ("ours" and "theirs" won't cut it) set must be submitted at trial call. If necessary, these documents may be released and finalized at the end of any trial day when the jury is released early.

Fortunately, I have never carried out a threat to go with a general verdict.

At the end of the trial, when the jury begins deliberations, I don't require counsel to be present at the courthouse between deliberation and verdict. Attorneys need to catch up on other matters. My practice is to allow any jury questions to be addressed by counsel either in person or by telephone. Unfortunately, however, I have been burned a few times when my clerk indicates that she got a voice mail on counsel's phone.

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Don't Forget The Jury...

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The end of the day presents a particular challenge. If a verdict is rendered at or after 4:00 o'clock, I will not have the jury come back the next day to accommodate counsel whose office is in North County or some equally distant location. Counsel should proceed accordingly.

Most good trial attorneys share the court's desire to move the case along, present evidence expeditiously and not waste time. Trying cases is difficult and expensive. Dragging a trial out and wasting time is not in anyone's best interest and it is human nature for jurors to take out their frustration on counsel who they may believe has done so.

I am always pleased at the end of a trial when counsel express appreciation to me for a trial that proceeded smoothly and ended on or before the anticipated date. Although the primary focus of any good attorney is to obtain a favorable verdict, it is a fact that good trial attorneys who properly present their case and don't waste time, usually prevail. Attorneys who don't have a game plan, don't know how to ask questions, are unprepared, drag things out and generally irritate the trial judge and the jury, usually don't prevail.

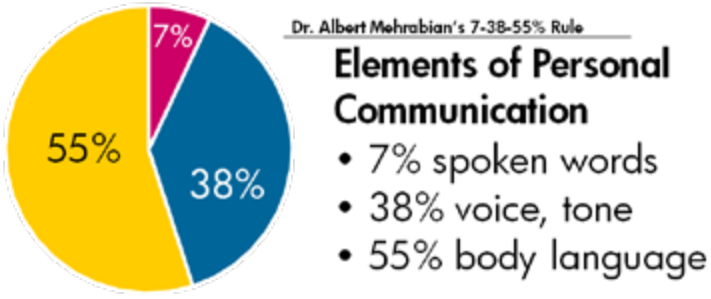
The Honorable John. S. Meyer,
San Diego Superior Court.

"The Pyramid and the Art of Persuasion"

By Mark C. Mazzarella, Mazzarella & Mazzarella LLP

"Sometimes to learn, you have to unlearn what you already learned." If Forrest Gump's mama didn't say that, she could have. Whether it is a bad golf swing, improper grammar or the way we dress, we humans often have more trouble "unlearning" something than we did learning it in the first place.

The list of bad habits most of us learned in law school doesn't begin with the irresistible urge to say "prior to," rather than "before," or the compulsion to use 10 words when 3 would do. No, outpacing every other warped way of viewing the universe that is instilled in law school is the belief that real people, in real life, make decisions rationally. That simply isn't borne out by real life experience.



Aristotle wrote: "The law is reason without passion." In an ideal world I suppose he was correct. Maybe that is the way it would be in an ideal world. But in the real world, there is no such thing as reason without passion. There is no such thing as anything without passion. Our conscious minds are incapable of winning battles with our emotions when the two go head to head. If you doubt that, ask yourself, can you watch a really scary movie without getting tense? You know the girl walking backwards into a dark room with an axe murderer on the loose is really a high-priced actress who is going to have a half caf no foam almond latte in the studio café with the villian as soon as the scene is in the can. But your palms sweat. Your pulse speeds up. You feel tense. If you pay careful attention, you'll probably even notice that your mouth is dry. A sudden "boo" by the person sitting next to you at just the right time will lift you off your seat. Tell yourself: "It is just a movie." It doesn't matter. We are wired to go into a defensive fight or flight mode when we visualize events which send the right messages to our brains. The best movie directors know that on the way to our rational brain everything we see, feel, taste, hear and smell has to pass through the filters and files of our emotional brain.

Have you ever cried during a sad movie? Now that isn't rational is it? Or how about your reaction to whatever insect or other creepy crawly creature gives you the willies? Does it make sense that you are terrified by a 2 once mouse, or a garden snake, or a harmless spider, or the Michelin Man for that matter? Do you get weak-kneed when you look down from the top of a tall building—no matter how well guarded the edge may be? The illustrations of our emotion's ability to emerge the victor when pitted against our rational brain are almost endless.

One of the most successful advertising campaigns ever was Sanka's promotion of its decaffeinated instant coffee in the mid-'70s. Actor Robert Young, famous for his role as beloved Marcus Welby, M.D., would enter the kitchen of a caffeine-crazed housewife, a cup of Sanka in hand, and encourage her to relax and have a cup of Sanka. Instantly, all was right with the world; and with Sanka's bottom line. It seems the audience did not see an actor selling a product. They saw a trusted doctor making a house call and dispensing badly needed and spot-on advice. Was that rational?

If you think it was Kramer of Seinfeld fame who coined the phrase, "Don't sell the steak, sell the sizzle," you're wrong. Elmer Wheeler, perhaps the best known salesman of all time, coined that phrase more than 50 years before the first episode of *The Seinfeld Show* aired. Sorry Joe Friday, "just the facts" won't take you very far when it comes to sales to anyone, including judges and juries.

If you think those examples do not apply when people evaluate more sophisticated or complex matters, such as those confronted by clients, lawyers, judges and jurors, consider this: During the three Gore/Bush Presidential debates 95% of the Democrats watching thought Gore won, while 95% of the Republicans thought Bush won. The explanation is simple, try as we might, most of us could not overcome our biases, especially when we did not even recognize we had them. Some of that bias could be explained by the fundamen-

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The Pyramid...

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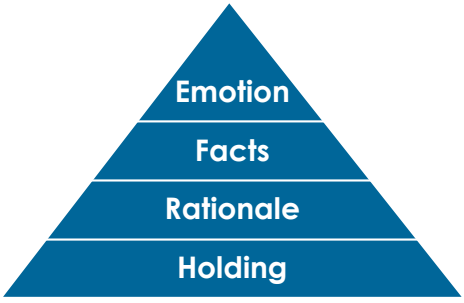
tal differences in the candidates' platforms. But when asked why they felt either Bush or Gore won the debates, most members of the audience did not describe the differences expressed by the candidates on the issues. They talked about personal appearance, mannerisms and other characteristics that influence the emotional brain much more than the rational brain. The result has been the same since the first televised debate in 1960 in which the television audience found Kennedy's good looks, calm, confident manner and charm overcame a much more knowledgeable presentation by a haggard looking Nixon whose facial makeup was washed away in streams of sweat running down his forehead; while the radio audience strongly favored Nixon. Two research papers published by UCLA 's Alber Mehrabian in 1967 led to the often-cited "7%-38%-55% rule." Dr. Mehrabian concluded that our impression of others is influenced 7% by content of our speech, 38% by our vocal characteristics and 55% by our facial expressions and body language.

It is not surprising that our rational brain cannot overcome our emotional brain when they go head to head. The cerebrum, or "rational brain," where all cognation (attention, perception, memory, language, learning and higher reasoning) occurs, amounts to about 10% of the brain's mass. The other 90% is split between what is often called the reptilian brain, where life support systems and instinct are maintained much as they are in "lower" forms of life, or in the limbic system, or "emotional brain," which houses emotion and memory.

Unfortunately, virtually all of this is ignored during the 3 or 4 years we spend in law school. In the first day in Real Property class, we may struggle to figure out whether Pierson killed the fox, or was it Post? But when it comes time to be tested on what "really matters," the critical part of every case is "the holding." Next in priority is "the rationale." That is followed by "the facts." And the influence of human emotion usually doesn't even make it into the picture.

Aristotle's conclusion that "the law is reason without passion," is pounded into our minds in a multitude of subtle and not so subtle ways, while any significance of human emotion in our decisions and actions is minimized, ignored or demeaned. If we think of the factors that contribute to our decision-making and actions as layers of a pyramid, with the most important factor represented by the base, and the least important by the tip, this is how we are taught in law school.



In real life, however, the pyramid would have emotion as its base, and rules/law as the tip.

I have not intended anything I've written to suggest that facts are not important. As Herman Wheeler so aptly noted: "The sizzle has sold more steaks than any cow ever has, although the cow is, of course, mighty important."

Like the cow, the facts are mighty important--but only if they are prepared in a way that produces the desired emotion, and presented in way that leads to the desired action. Have you ever tried to put your finger on why during one movie you became emotionally invested in the characters, your eyes tearing up as something tragic happened to them, and a joyful feeling consuming you when the story ends well, while in another movie nothing that happened to the hero or heroine moved you to more than a yawn? It won't be "just the facts" that made the difference: it will be the ability of the story-teller, the actors, the editor, and everyone else involved in the production to turn those facts into emotion, and that emotion into success at the box office.

The recipe for creating a winning presentation at trial isn't that different. But that is for another day....

"The sizzle has sold more steaks than the cow ever has, although the cow is, of course, mighty important."

Mark C. Mazzarella is Co-Founder and Senior Partner at Mazzarella & Mazzarella LLP

The Benefits of Recommitting to Pro Bono

Christian G. Andreu-von Euw & Mark Zebrowski

While most people set resolutions in January, there's no better time than August to readjust your yearly goals. That is especially the case for pro bono. Our state bar "urges" us to devote 50 hours a year to pro bono work,[1] and many lawyers do that and more. Others have every intention of giving back to their communities through pro bono, but the challenges to doing so get in the way.

We write to offer two perspectives designed to encourage you and your colleagues to make a renewed commitment to pro bono. Pro bono work can be personally fulfilling and, as Mark Zebrowski describes, a tradition of pro bono can also strengthen a firm. Christian Andreu-von Euw describes how pro bono provides enriching career development opportunities.

Mark Zebrowski:
Pro Bono Can Help Your Firm

Pro bono work is one of Morrison & Foerster's core values, and lawyers in our offices around the world live out that tradition every day. Each of our offices has made a commitment to pro bono, which in 2018 resulted in providing over 78,000 hours of free legal services.

There are many reasons for our strong commitment to pro bono work. First, it is the right thing to do. There are many people in our communities who cannot afford counsel and thus are left to tackle legal issues alone. This not only affects their chances of achieving a positive outcome, but also puts a tremendous strain on our judicial system, which was not designed for *pro se* litigants. Second, it is our duty in exchange for the privilege we have to practice law in our state and our country. As lawyers, we have a monopoly on the practice of law; not everyone can be a legal advocate. Third, pro bono allows us to use our skills and training in areas in which we have personal interests, such as the environment, youth, education, poverty, and the like. Fourth, it gives us the opportunity to accomplish truly life-changing outcomes for individuals, organizations, and society at large. It is some of the most personally rewarding work a lawyer can do.

Pro bono work provides many benefits for our firm as well. Pro bono provides a cultural bond that resonates in different parts of the world and with both staff and attorneys. It creates a justifiable pride in our institution. It is also a great recruiting tool, and it cannot be overlooked that individuals who are interested in doing pro bono work are the types of people who make great members of any team.

As one aspect of our commitment to pro bono work, each year one of our lawyers who has made an extraordinary commitment to pro bono work is recognized with the Kathi Pugh Award for Pro Bono Service, named for our firm's first full-time pro bono counsel. Our San Diego office is particularly proud of past award recipient Christian Andreu-von Euw. As Christian explains below, pro bono gives young lawyers great opportunities to gain valuable experience in all aspects of client representation and to develop their skills under partner supervision. This is just one more reason to support pro bono.

Christian Andreu-von Euw:
Pro Bono For Professional Development

One of the reasons I decided to leave engineering and become a lawyer was the legal profession's long tradition of pro bono work.[2] I got what I wanted: I have been able to use my professional training to help people in need, while simultaneously building an IP litigation practice. I also think that doing pro bono work has made me a better lawyer.

I brought my first pro bono cases with me from law school. I had worked in a law school immigration clinic, and I asked my firm if I could bring my clients with me. They said yes, and I was able to try a case in my first few months of practice. It was not a hard case, but it was a big deal for my client and for me. My client was allowed to stay in the country, and I got first-chair trial experience. Trials are hard to come by for junior associates in large law firms, especially during their first year.

Over and over again, my pro bono practice offered me early opportunities. I was the first person in my cohort to take or defend a deposition, to argue a summary judgment motion, to mediate a case, to cross-examine a witness, and to

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The Benefits of Recommitting to Pro Bono

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pick a jury. These experiences accelerated my career. When similar opportunities came up in non-pro bono cases, I could often raise my hand and say, "Pick me, I've done that before."

My pro bono cases have also presented me with the opportunity to overcome big challenges. One example occurred in a case that I accepted only a week before trial. The deadline to serve discovery had passed, and I was forced to go to trial based only on the complaint and on what my witnesses had told me. On the morning of trial, I saw a police officer in the hallway and asked if he would be willing to talk to me. He was, and he even offered to show me the video interrogation that proved that my intended "star" witness was not credible. Fifteen minutes before opening statements, I dropped that witness and changed my entire theory of the case. Thankfully, my other witnesses were well-prepared, and my back-up theory prevailed. Not only did this experience reinforce for me the importance of discovery, but it also reminded me of the need to be able to think on my feet. I hope I never need to recast my entire case on the morning of trial again. But, having had to do it once, I am now better prepared to tackle the unexpected.

In another case, I learned that my client had significantly embellished his case before I started representing him. Not only that, he had done so under oath. Unwilling to allow him to make the same mistake again, I prepared him to tell the truth and to apologize to the Court. I then explained that his prior testimony had been rooted in a very real fear, and presented an expert witness who showed that, despite my client's previous lack of candor, his claim was valid. This is another situation that I hope to never encounter again—but it prepared me to deal with tough issues. Every case has its problems, and this case reminded me that I need to face those problems head-on and find a way to deal with them.

My pro bono practice also has made me a better lawyer because my pro bono cases are so different from my other cases. The fact that I always have one open pro bono case means that I always have one case that is outside of my comfort zone. Over and over again, I have had to learn new areas of law and to deal with wholly new environments. This reminds me to try to look at every case with fresh eyes, and gives me experience I can draw on in other cases. It also makes my work more interesting and allows me to practice an adaptability that I try to bring to all my cases.

Some of my pro bono cases have been short and easy, and others have lasted years and gone through multiple appeals. What they all have in common is that someone needed a lawyer. And, whether the cases were easy or hard, I am confident that these people would have lost if they had not found someone willing to speak up for them.

That is the real reason I do pro bono work. It has been good for my career, but it has been better for my soul. I have stopped an unjustified eviction; helped women who stood up to their abusers; and helped people fleeing threats to their lives in Algeria, Haiti, Mexico, and Zambia find safety here in the United States. I am immensely proud of that. When it comes down to it, I do pro bono because it makes me happy.

I am confident you will find the same satisfaction in taking up a pro bono case or two. If you would like to take on a pro bono case, but don't know where to start, here is a list of some of the local organizations that are always looking for volunteers. They provide opportunities, training, and mentorship.

- Legal Aid Society of San Diego (https://www.lassd.org/)
- San Diego Volunteer Lawyer Program (https://www.sdvlp.org/)
- Casa Cornelia (http://www.casacornelia.org/)
- Veterans Legal Institute (https://www.vetslegal.com/)

FOOTNOTES

[1] June 22, 2002 Pro Bono Resolution.

[2] *See* 11 Hen. VII. C. 12 (1495) (appointment of free counsel for unrepresented civil litigants).

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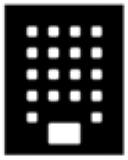

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Navigating Code of Civil Procedure Section 664.6

By: Jessica S. Doidge and Sarah M. Shekhter

You settled a case and agreed to continuing jurisdiction of the court pursuant to Code of Civil Procedure section 664.6. You're thinking you're all set. If one of the parties fails to abide by the settlement agreement, you can file a motion to enforce and get a judgment entered. However, instead of enforcing the settlement agreement, the judge has found your settlement agreement unenforceable and ordered the parties back to square one in the case. How did you get here? How can you avoid this scenario?

Code of Civil Procedure Section 664.6

Code of Civil Procedure section 664.6 states:

> 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.

(Code Civ. Proc., § 664.6 ("Section 664.6").)

The purpose of Section 664.6 is to provide an expedited procedure that allows a party to enforce a settlement agreement by entering a judgment upon the terms of the parties' settlement agreement. The enforcing party can then avail itself of the benefits provided by the judicial system to enforce a judgment without initiating a separate action. However, the trial court's authority under Section 664.6 is limited. *(Leeman v. Adams Extract & Spice, LLC* (2015) 236 Cal. App.4th 1367, 1374.)

When Enforcing a Settlement Agreement Pursuant to Section 664.6 the Trial Court May Not Add to or Modify the Terms of the Parties' Settlement Agreement.

The trial court may interpret the terms of the parties' settlement agreement to "give effect to the mutual intent of the parties . . ." but "'nothing in section 664.6 authorizes a judge to create the material terms of a settlement. . . .'" *(Leeman, supra,* 236 Cal.App.4th at p. 1374, quoting *Weddington Prod., Inc. v. Flick* (1998) 60 Cal. App.4th 793, 810.) "While the court has the authority to refuse to issue the requested consent judgment, what the court could not do in considering approval of a settlement under Code of Civil Procedure section 664.6 was to add to or modify an express term of the settlement." *(Id.* at p. 1375.) The court is not permitted to modify an existing settlement agreement without the mutual consent of the parties. *(Ibid.)*

In *Leeman*, the First District Court of Appeal reversed the trial court's decision to modify an existing settlement by reducing the award of attorney fees and costs without the parties' mutual consent. *(Leeman, supra,* 236 Cal.App.4th at p. 1369.) The parties reached a settlement agreement after Leeman filed a complaint seeking civil penalties and injunctive relief against the other party for using a carcinogenic chemical in its food extracts without proper warning as required by Proposition 65. *(Id.* at p. 1369.) The parties also agreed to a stipulated amount of attorney fees and costs that was substantially less than the actual fees Leeman incurred. *(Id.* at p. 1371.) The court approved the settlement agreement, but unilaterally reduced the amount of fees and costs without explanation. *(Id.* at p. 1373.) The appellate court found the trial court exceeded its authority under Code of Civil Procedure 664.6 to approve or disapprove a settlement agreement but not modify its terms. *(Id.* at p. 1375.) The appellate court remanded the decision for the court to either approve or reject the settlement agreement and encouraged the trial court to state reasons if it chooses to reject the agreement. *(Id.* at p. 1377, fn. 3.)

In the event you believe the trial court has exceeded its authority under Section 664.6 by entering a judgment that adds to or modifies the parties' settlement agreement, counsel could move to set aside the judgment as void. *(Jones v. World Life Research Institute* (1976) 60 Cal. App.3d 836; Code Civ. Proc., § 473, subd. (d).)

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Navigating Code...

(continued from page 16)

In Order to Satisfy the Requirements of Section 664.6 the *Parties* Must Agree to the Settlement Agreement.

In order for the court to retain jurisdiction under Section 664.6, the parties themselves must agree rather than the parties' attorneys. The Supreme Court in *Levy v. Superior Court* (1995) 10 Cal.4th 578, 586, found the parties' settlement agreement unenforceable because the parties' attorneys of record approved the settlement rather than the parties as required by Section 664.6. The court interpreted the phrase "If parties to pending litigation stipulate" under Section 664.6 to refer to the parties themselves, not the parties' attorneys of record. *(Ibid.)*

The Parties Must Agree to All Material Terms of the Settlement Agreement.

The parties' settlement agreement must contain the material terms of the parties' agreement and the parties must agree to all material terms of the settlement agreement in order to have a meeting of the minds necessary for contract formation. In *Weddington, supra,* 60 Cal.App.4th 793, the parties agreed to a written "Deal Point Memorandum" summarizing the "deal points" of the parties' settlement reached at mediation. The memorandum stated that the parties "will formalize a Licensing Agreement," however the Deal Point Memorandum failed to further define the material terms of the licensing agreement. *(Weddington, supra,* 60 Cal.App.4th at p. 799.) Subsequently in an ADR proceeding, a private judge drafted what he purported to be the material terms of the license agreement pursuant to the Deal Point Memorandum. *(Id.* at pp. 806-807.) The court then entered a judgment upon the plaintiff's motion to enforce pursuant to Section 664.6, which included the private judge's license agreement. *(Id.* at p. 809.)

The Court of Appeal reversed the judgment, finding that there was no substantial evidence that the parties reached an agreement as to the material terms of the license agreement. *(Id.* at p. 818.) The court opined that, "[a] settlement agreement which incorporates other documents can be enforced pursuant to section 664.6, but only if there was a meeting of the minds regarding the terms of the incorporated documents." *(Id.* at p. 814.)

As such, if you are going to incorporate additional documents into your settlement agreement, be sure to negotiate and memorialize all of the material terms of the additional documents into your settlement agreement. Otherwise, you run the risk of the court finding your settlement agreement unenforceable.

Conclusion

In summary, when drafting a settlement agreement and agreeing to continuing jurisdiction of the court pursuant to Section 664.6, keep the following in mind to increase your likelihood of successful enforcement of the judgment pursuant to Section 664.6: (1) the settlement agreement must be approved by *the parties of record,* not just their attorneys; (2) the settlement agreement should incorporate *all material terms* of the parties' settlement agreement; and (3) the court does not have the authority under Section 664.6 to enter a judgment that adds to, or modifies, the terms of the parties' settlement agreement without the parties' approval.

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California Case Summaries ADR™ February 2019

By Monty A. McIntyre, ADR Services, Inc.

CALIFORNIA SUPREME COURT

Taxes

City and County of S.F. v. The Regents of the University of Cal. (2019) _ Cal.5th _ , 2019 WL 2529253: The California Supreme Court reversed the Court of Appeal decision that had affirmed the trial court's denial of a writ petition seeking to compel respondents to collect and pay to petitioner a tax on drivers who park their cars in paid parking lots. The California Supreme Court ruled that the California Constitution allows petitioner to apply this tax collection requirement to state universities that operate paid parking lots in the city of San Francisco. (June 20, 2019.)

CALIFORNIA COURTS OF APPEAL

Attorney Fees

Hanna v. Mercedes-Benz USA (2019) _ Cal. App.5th _ , 2019 WL 2511940: The Court of Appeal affirmed the trial court's order, following a settlement for $60,000 of a Song-Beverly Consumer Warranty Act (Civil Code, section 1790 et seq.) action, awarding plaintiff costs of $13,409.21. However, it reversed the trial court's order awarding plaintiff attorney fees of only $60,869 instead of the fees requested of $259,068.75 using the lodestar method. The Court of Appeal ruled that plaintiff was entitled to recover attorney fees after a January 2016 CCP 998 offer from defendant, the trial court erred in failing to use the lodestar method to determine fees after the January 2016 998 offer, and a fee award under the Song-Beverly Act may not be based on a percentage of plaintiff's recovery. (C.A. 2nd, June 18, 2019.)

Attorneys

Doe v. Superior Court (2019) 36 Cal.App.5th 199: The Court of Appeal granted a petition for writ of mandate directing the trial court to vacate its order granting defendant's motion to disqualify plaintiff's attorney and enter a new order denying the motion. Plaintiff brought claims for sexual harassment and sexual assault against defendants Southwestern Community College District (District) and three District employees. The complaint also alleged sexual harassment of two other female District employees which presumably showed that defendant had notice of other similar misconduct. The trial court granted a motion to disqualify plaintiff's counsel because he spoke with a District employee before her deposition was taken. There was no evidence that the employee had accepted the District's offer to represent her or had otherwise retained counsel at the time of the contact. The Court of Appeal ruled that the purpose of California State Bar Rules of Professional Conduct Rule 4.2 is to prevent ex parte contact with employees who engaged in acts or conduct for which the employer might be liable. It is not designed to prevent a plaintiff's lawyer from talking to employees of an organizational defendant who might provide relevant evidence of actionable misconduct by another employee for which the employer may be liable. (C.A. 4th, June 13, 2019.)

Civil Procedure

Samsky v. State Farm Mutual Automobile Ins. Co. (2019) _ Cal.App.5th _ , 2019 WL 2610898: The Court of Appeal reversed the trial court's order denying claimant's motion for attorney fees under Code of Civil Procedure section 2033.420 for having to prove during an arbitration matters that respondent denied in its response to requests for admissions. The Court of Appeal ruled that the party opposing the motion for attorney fees has the burden of proving that one of the exceptions in section 2033.420(b) applies, and the trial court erred in requiring the moving party to prove that none of the exceptions applied. Because claimant proved he was entitled to costs under section 2033.420(a), and respondent failed to prove that any of the exceptions to a cost award applied to it, the matter was remanded to determine the amount to be awarded to claimant. (C.A. 2nd, June 26, 2019.)

(continued on page 19)

California Civil Case Summaries

(continued from page 18)

Insurance

McMillin Homes Construction v. Natl. Fire & Marine Ins. Co. (2019) _ Cal.App.5th _ , 2019 WL 2366468: The Court of Appeal reversed the trial court's decision, following a bench trial, holding that defendant did not owe a duty to defend a general contractor covered as an additional insured under a commercial general liability policy due to an endorsement exclusion for damage to "property in the care, custody or control of the additional insured." The Court of Appeal held the exclusion did not apply because it required complete control; but the facts indicated only shared control between the general contractor and its roofing subcontractor. (C.A. 4th, June 5, 2019.)

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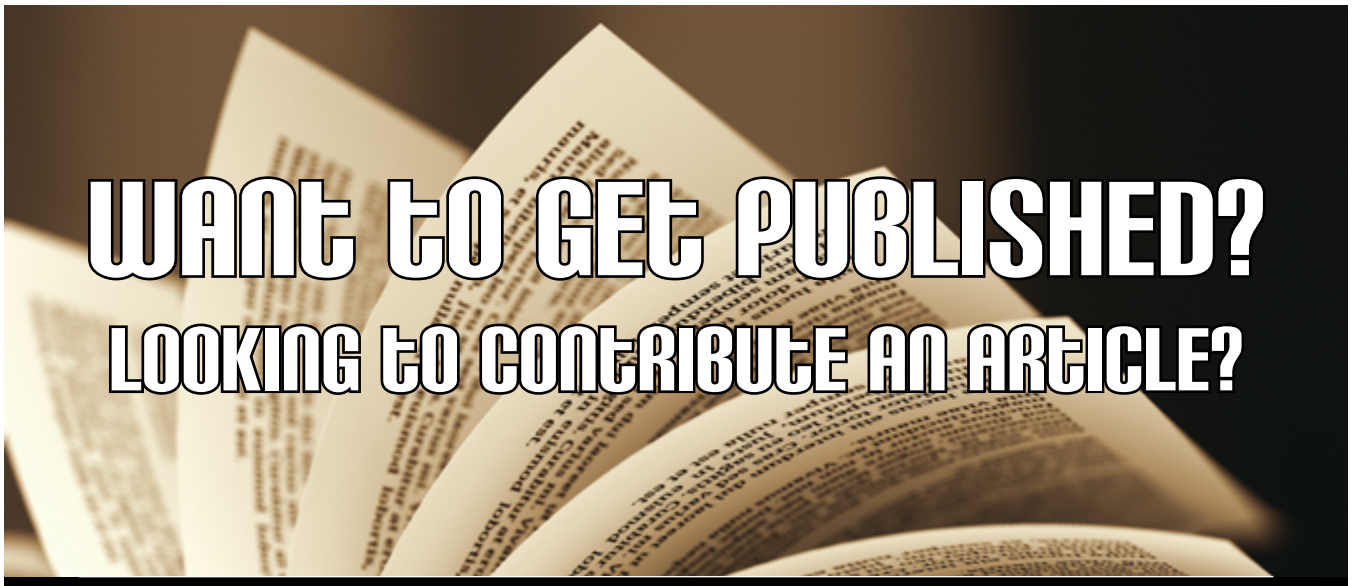

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Volume IX No. 1 January 2002

Representing Hotel Owners Against Their Management Companies: Classic Fiduciary Lawsuits

An Overview of the New Rules Governing the Prosecution and Defense of Class Actions in California State Court

Inside

Cover image from ABTL San Diego Report January 2002

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- ***August 22***
  MCLE Specialty Luncheon
  Robbins Geller Rudman & Dowd LLP
  655 West Broadway, Suite 1900, San Diego, CA 92101
- ***September 12***
  DINNER PROGRAM - 2nd Annual Fundraiser Event
  Stone Brewing World Bistro & Gardens, Liberty Station
  2816 Historic Decatur Rd, San Diego, CA 92106
- ***September***
  Nuts Bolts | Jones Day
- ***October 2-6***
  46th Annual Seminar
  La Quinta Resort, Palm Springs
- ***October***
  MCLE Specialty Lunch | Location-TBD
- ***October 28, 2019***
  DINNER PROGRAM - Steve Peikin from the SEC
  Location-TBD
- ***November 1, 2, 4***
  Mock Trial Tournament
  Federal Courthouse, Courtroom 14a
  333 West Broadway, San Diego, CA 92101
- ***November***
  Nuts Bolts | Date & Location-TBD
- ***November***
  Brown Bag with Judge Medel
  Date & Location-TBD

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