ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO

abtl REPORT

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California Supreme Court Broadens Review of Arbitration Awards

By Anthony M. Stiegler and Sarah R. Boot, Cooley Godward Kronish, LLP, © 2008

I. Introduction

In a significant opinion affecting all parties who arbitrate cases in California and who expect certainty and finality from the arbitral process, the California Supreme Court recently changed the rules by considerably broadening the grounds upon which a court may review the validity of an arbitration award. Under the California Supreme Court opinion in *Cable Connection, Inc. v. Direct TV, Inc.*, 44 Cal.4th 1334 (decided Aug. 25, 2008), an aggrieved party may now ask a court to review an arbitration award for errors of law and legal analysis where the parties agree in their contract that an arbitral panel does not have the power to commit errors of law or legal reasoning.

Anthony M. Stiegler

Sarah R. Boot

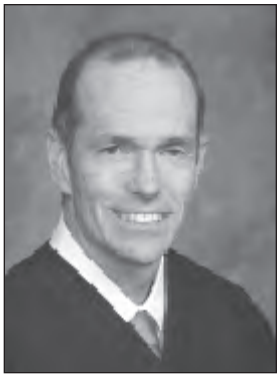
Although parties electing arbitration generally expect an efficient, expedited, and abbreviated litigation process that is unburdened by lengthy appeals, the Court's opinion in *Cable Connection* authorizes a lengthy *de novo* review of legal issues.

(see "Arbitration Awards" on page 7)

A Conversation with the Honorable William Q. Hayes

By Aaron Winn and Tanis Leuhold, Luce, Forward, Hamilton & Scripps LLP

On June 25, 2008, the Honorable William Q. Hayes opened his courtroom for an ABTL brown bag luncheon and explained how he runs his courtroom, what he expects from counsel, and what counsel can expect from him.



Hon. William Q. Hayes

Background

Judge Hayes received both his J.D. and M.B.A. from Syracuse University in 1983. Immediately following law school, Judge Hayes went into private practice in Colorado, focusing

(see "Hayes" on page 5)

Inside

President's Letter: Pay It Forward

By Robin A. Wofford, Esq., President ABTL

Did you ever see the Movie "Pay it Forward" starring Kevin Spacey, Helen Hunt and Haley Joel Osment? It came out in 2000 and the story line was simple yet inspiring. As part of a social studies assignment students were asked to think of something to change the world and put it into action. In his attempt to change mankind, a young boy (Haley Joel Osment) decides that if he can do three good deeds for someone and they in turn can "pay it forward" and so forth, positive changes can occur. What appears to initially be a failure is indeed a success that is not immediately known but is traced backwards by a reporter who is a benefactor. Ultimately the movie leaves the viewer knowing they can make a difference in other people's lives by a simple act of kindness.

Robin A. Wofford

I bring up this movie because having had the privilege of serving as the President of ABTL this year, I see the success of our organization and indeed our entire profession is based on each lawyer's commitment to "pay it forward". Attorneys as a profession make a difference in the lives of their clients' everyday, but what seems to go unheralded is the difference we make and can make in each others lives. For example, on October 28th, 2008 ABTL and the San Diego County Bar sponsored a trial practice workshop. The local attorneys and judiciary that volunteered their time and day for the betterment of our profession were a virtual "Who's Who" of San Diego's finest. On that day, as I made a fool of myself on stage purporting do have been duped into buying a home with no money down or interest payments for three years, I was so proud to be a part of such an incredible legal community. Every person who participated in the event learned something new and hopefully improved their skills. ABTL is truly grateful for the commitment of Judge Richard Haden for organizing the program, to the tireless efforts of San Diego's finest attorneys and Judges and to Shannon Petersen for his hard work behind the scenes and on stage.

As I write my last column for ABTL I want to leave each of you with one challenge. If you want to see San Diego continue to be one of the best communities in America to practice law then "pay it forward". If you are a seasoned trial lawyer volunteer your time to share your wisdom and experiences with other lawyers as have the numerous ABTL regulars. If you have an opportunity, mentor someone in your firm or a new law student you might meet at a professional event. If you are new to the practice get involved, whether by joining ABTL, an Inn of Court or the numerous other legal organizations thriving in San Diego. If we want to keep up with the change that is sweeping this country after a historic election I suggest we each commit to doing three good things for the legal community next year. Having had the privilege of serving as ABTL's President this year confirms a belief I have had all my life, it is better to serve and make a difference than stand on the sideline and hope someone does it for you. Thank you to my fellow officers and board members for a great year and remember "pay it forward". ▲

Increasing Your Chances of Reversing an Unfavorable Trial Court Result

By Robert M. Dato, Buchalter Nemer

When you're preparing a case for trial – or actually trying it – it's often difficult to see how someone else might view it on appeal in a year or two. Or in a writ proceeding a few months later. But if things turn sour for your client in the trial court, you'll want to raise and preserve as many issues as you can that might convince an appellate court to reverse the trial judge. Here are a few particularly "hot" issues to look for in business litigation and suggestions for how to raise them.

I. Discovery Issues

Most appellate review of discovery issues occurs via writ proceedings. Traditionally, such review has been difficult to obtain. But there are at least two areas concerning discovery that have recently generated considerable appellate activity:

A. Precertification Discovery in Class Actions

In class actions, under what circumstances should discovery be allowed before the class is certified? This general question produced no less than three published decisions last year. In *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360, our Supreme Court held that class counsel could obtain personal information of consumers from Pioneer where those consumers had complained to Pioneer about the product was at issue in the class action. In *First American Title Ins. Co. v. Superior* Court (2007) 146 Cal.App.4th 1564 and *Cryoport Systems v. CNA Ins. Cos*. (2007) 149 Cal.App.4th 62, the Courts of Appeal held that a class representative with no individual standing could not use precertification discovery to identify a more appropriate class representative. In each of these cases, the defendant challenged precertification discovery early and often, fleshing out the issues not only for the trial court but for the reviewing court as well.

Robert M. Dato

B. Inadvertent Disclosure

Two matters before the California Supreme Court deal with fundamental questions about inadvertent disclosure during discovery. In *Rico v. Mitsubishi Motors Corp*. (2007) 42 Cal.4th 807, one of plaintiff's attorneys inadvertently received a document prepared by defense counsel that included confidential work product, then extensively reviewed the document with the attorneys representing other plaintiffs and with plaintiffs' expert witnesses. The trial court disqualified the attorney and our Supreme Court affirmed: "[A]n attorney who receives privileged documents through inadvertence . . . may not read a document any more closely than is necessary to ascertain that it is privileged. Once it becomes apparent that the content is privileged, counsel must immediately notify opposing counsel and try to resolve the situation." *Id*. at 810.

In a related case, *Jasmine Networks, Inc. v. Marvell Semiconductor, Inc.* (2008) 318 P.3d 513, Jasmine obtained a transcript of a conversation among Marvell's lawyers and officers that was recorded on Marvell's voicemail system. It showed that Marvell did not intend to abide by the terms of its contract. The recording was made by accident; the lawyers and officers called

(see "Reversing" on page 9)

Tips from the Trenches:

An Interview with e. robert "Bob" wallach on Trial Themes

by Mark C. Mazzarella of Mazzarella Caldarelli LLP

In a recent edition of the *ABTL Report*, I described the purpose of this column as an attempt to fill a small portion of the void created by the absence of an experienced mentor for many of those just learning to ply our trade. While nothing takes the place of the one-on-one, real time, shoulder-to-shoulder, in the trenches, education mentorship provides, picking the brains of the masters is a step in the right direction, as I hope this and future articles demonstrate.

Mark C. Mazzarella

For this issue of the *Report*, I interviewed e. bob wallach, the legendary San Francisco trial lawyer who became just the 16th lawyer ever inducted into the California State Bar Litigation Section's Trial Lawyer Hall of Fame. As one of the co-founders of the Hastings College of Trial Advocacy, Mr. wallach has devoted his career not just to the service of his clients, but also to the service of the profession. In the 51 years during which Mr. wallach has been trying cases, he has won 228 and lost only 12. Two of those wins were in San Diego: the wrongful death verdict for a passenger in the infamous PSA crash, which was the largest verdict in a wrongful death case in California until the O.J. Simpson civil verdict,

(see "wallach" on page 13)

continued from page 1

on general civil litigation, including legal malpractice defense and some plaintiffs' work. In 1987, Judge Hayes left private practice to become an Assistant United States Attorney in the Southern District of California. After 12 years at the U.S. Attorneys' Office, Judge Hayes was appointed Chief of the Criminal Division, a position he held until he was appointed to the bench in 2003.

Judge Hayes has also served as an adjunct professor at National College, the University of Colorado, the Thomas Jefferson School of Law, and the University of San Diego Law School.

Judge Hayes participates in the ABTL and Enright Inn of Court.

Courtroom Organization

Judge Hayes has three law clerks to help ensure that his courtroom runs smoothly. Although the clerks review motions and may propose potential questions for oral argument, Judge Hayes emphasized that he reads all of the motions and briefs he receives.

While noting that most of the briefs he receives are outstanding, Judge Hayes provided the following tips for lawyers submitting briefs in his court:

• Avoid sarcasm and personal attacks.

• Avoid rhetorical questions.

• Address each argument opposing counsel makes.

Failing to address an argument altogether—even an argument that seems obviously misplaced—is not helpful to the Court. Nor is it persuasive. If an argument is irrelevant, counsel should explain why.

Tentative Rulings and Telephonic Appearances

Judge Hayes does not issue tentative rulings and rarely drafts a tentative opinion prior to oral argument. Rather, Judge Hayes prepares specific questions for oral argument and uses those questions to direct the attorneys to the issues Judge Hayes believes are most relevant for oral argument. Judge Hayes also indicated that he may considering offering tentative rulings in the future.

Although Judge Hayes will permit telephonic appearances for certain scheduling and status conferences, he is not inclined to permit telephonic appearances for substantive motions.

Oral Argument

Judge Hayes holds oral argument on all dispositive motions. Whether oral argument is permitted on non-dispositive motions depends upon the nature of the motion, the facts of the case, and specific requests for oral argument by the parties. If requesting oral argument on a non-dispositive motion, if the request is granted avoid seeking to reschedule the hearing unless absolutely necessary.

Judge Hayes offered the following tips regarding effective oral argument:

• Avoid sarcasm and personal attacks. Hostility between counsel is unprofessional and distracting. Do not refer to opposing counsel as "he" or "she." Rather, when referencing opposing counsel, use "opposing counsel," "defense counsel," or similarly appropriate references.

• Direct all arguments to the Court. Arguing between counsel is unproductive. Also, do not interrupt counsel. Both sides will be given an opportunity to speak; arguing back-and-forth is not helpful.

• Respect should not be limited to the judge. Attorneys should demonstrate the same high level of respect for opposing counsel and court clerks and staff as they do for the judge. Judge Hayes noted that he recognizes that some attorneys unfortunately act unprofessionally toward opposing counsel outside the courtroom. But he has observed that the best attorneys do not allow this to affect them.

• Do not introduce new arguments or case authority. If a new case or argument must be raised at oral argument, provide advance notice to opposing counsel to permit them adequate time to review and respond to the new information.

• Directly answer all questions from the judge. Counsel who deflect questions or are reluc-

(see "Hayes" on page 6)

Hayes

continued from page 5

tant to directly answer a question is not merely ineffective, it is frustrating for the judge. Avoiding a question suggests that counsel has no adequate answer and is thus conceding the point, which may be the case. If you must concede a point, do so and explain why that concession does not matter. But don't avoid the question altogether.

Judge Hayes recognizes that "as a general rule, Δ3 don't age like fine wine." Thus, Judge Hayes makes an honest effort to issue decisions as soon as possible.

Civil Trials

Judge Hayes stated that he has an unwavering appreciation for the high quality of lawyering that he sees in the courtroom. Judge Hayes handles approximately 4-5 civil trials per year and an ever-increasing number of criminal trials each year.

Generally, Judge Hayes reserves Monday for law and motion and Tuesday through Friday for trials. In order to avoid delays, Judge Hayes sets specific time limits on each of the parties' trial presentations, including opening statements, direct examination, cross examination, and closing arguments. This approach has proven very effective. Given the strict time limits on the parties, Judge Hayes will typically not tell counsel to "move along" absent some appropriate objection.

Judge Hayes stressed that the jury's time must be respected and used wisely. Jurors must know that their time is important. Judge Hayes emphasized that attorneys should never run out of witnesses. Because he recognizes that scheduling witnesses can be difficult, Judge Hayes is willing to take witnesses out of order, but he stressed that there cannot be gaps in the presentation. ▲

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continued from page 1

Such a review may ultimately defeat the parties' original goal of prompt, inexpensive, and final closure to their disputes as the losing party drags out the appellate process while seeking to correct or vacate an award. Accordingly, parties drafting contracts with arbitration clauses must be aware of *Cable Connection* and make a deliberate and reasoned choice regarding their desired scope of review.

II. The Traditional Limited Grounds for Judicial Review of Arbitration Awards

Under both the Federal Arbitration Act ("FAA") and the California Arbitration Act ("CAA"), a party may seek to vacate an arbitration award only on very limited grounds, including that the award was (1) procured by corruption, fraud, or undue means; (2) issued by corrupt arbitrators; (3) affected by prejudicial misconduct on the part of the arbitrators; or (4) in excess of the arbitrators' powers. Cal.Code Civ. Proc. § 1286.2(a); 9 U.S.C. § 10(a). An award may only be corrected for (1) evident miscalculation or mistake; (2) excess of the arbitrators' powers; or (3) imperfection in form. Cal. Code Civ. Proc. § 1286.6; 9 U.S.C. § 11.

Parties have relied on these limited grounds to ensure the prompt, cost-effective, and efficient resolution of their disputes, without significant concern about protracted, post-arbitral proceedings.

III. The Facts in *Cable Connection v. DIRECTV*

In *Cable Connection,* defendant DirectTV, Inc. contracted with its retail dealers to provide end-user customers with the equipment required to view DIRECTV's nationwide satellite television broadcasts. *Cable Connection*, at 44Cal.4th at 1341. The contract included an arbitration clause that provided for judicial review of legal errors in the issuance of arbitral awards, but it did not mention class-wide arbitration. *Id*.

In 2001, retail dealers from four states sued DIRECTV asserting that it had "wrongfully withheld commissions and assessed improper charges." *Id*. DIRECTV moved to compel arbitration and that motion was granted. Under the U.S. Supreme Court decision, *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), it became the arbitrators' decision as to whether class-wide arbitration was authorized under the parties' contract. *Id*. The arbitration panel found that arbitration on a class-wide basis was authorized notwithstanding that the contract was silent as to the class action issue. *Id*. at 1342

DIRECTV petitioned the California Superior Court in Los Angeles (Judge Chirlin) to vacate the award arguing, among other things, that "even if the majority of the panel had not exceeded the authority generally granted to arbitrators, the award reflected errors of law." The trial court vacated the arbitral award on the ground that the arbitrators exceeded their powers by rewriting the parties' agreements to allow for class-wide arbitration. *Id.* at 1342-47

The Court of Appeal reversed, holding that the trial court exceeded its jurisdiction by reviewing the *merits* of the arbitrators' decision. *Id*. at 1342-42.

> "Although in the trial court [plaintiffs] did not question whether a contract may provide for an expanded scope of judicial review, the Court of Appeal deemed it an important matter of public policy, suitable for consideration for the first time on appeal." *Id.*

The Court of Appeal found the arbitration clause unenforceable, and DIRECTV then appealed to the California Supreme Court. *Id*.

IV. The California Supreme Court Opinion

A. The Logic Behind The General Rule Of Arbitral Finality

The California Supreme Court began by noting that the CAA and FAA "provide only limited grounds for judicial review of an arbitration award." *Id*. These limited grounds for judicial review were enacted partly to overcome what used to be perceived as "an anachronistic judicial hostility to agreements to arbitrate," and partly to ensure compliance with the parties' contractual intentions. *Id*.

(see "Arbitration Awards" on page 8)

continued from page 7

Parties contractually agree to arbitrate in order to save time and money. "Because the decision to arbitrate grievances evinces the parties' intent to bypass the judicial system and thus avoid potential delays at the trial and appellate levels, arbitral finality is a core component of the parties' agreement to submit to arbitration." *Id*. at 1355. "Thus, an arbitration decision is final and conclusive *because the parties have agreed that it be so*." *Id*. (emphasis in original). The Court explained that "[b]y ensuring that an arbitrator's decision is final and binding, courts simply assure that the parties receive the benefit of their bargain." *Id*. citing *Moncharsch v. Heile & Blaise*, 3 Cal. 4th 8-10 (1982).

The Court noted that another reason courts are typically not permitted to review the merits of arbitral awards is that arbitrators are not required to adjudicate according to the rule of law. "[A]rbitrators, unless specifically required to act in conformity with rules of law, may base their decision upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action." *Id*. at 1359. According to the Court,

> "[a]rbitrators do not ordinarily exceed their contractually created powers simply by reaching an erroneous conclusion on a contested issue of law or fact, and arbitral awards may not ordinarily be vacated because of such error, for 'the arbitrator's resolution of these issues is what the parties bargained for in the arbitration agreement.'" *Id*. at 1360-61 (citing *Moncharsch, supra*, 3 Cal. 4th at 28); *Gueyffiel v. Arial Services Ltd.*, 43Cal. 4th 1179-1184 (2008).

B. The Court Analyzed And Then Bypassed The U.S. Supreme Court Opinion in *Hall Street Associates, LLC v. Mattel, Inc.*

Prior to *Cable Connection*, the U.S. Supreme Court, in *Hall Street Associates, LLC v. Mattel, Inc.*, -U.S.-, 128 S. Ct. 1396 (2008), re-affirmed the general rule of arbitral finality and settled a federal circuit split by holding that the FAA "does not permit parties to expand the scope of review by agreement." *Cable Connection, supra*, 44 Cal. 4th at 1341. (citing *Hall Street*, 128 S. Ct. at 1404-05). The *Hall Street* Court found that an arbitration agreement permitting a court to vacate an award based on unsupported findings of fact or erroneous conclusions of law was unenforceable.

In *Hall Street*, the parties negotiated an arbitration agreement that provided as follows: "The Court shall vacate, modify, or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous." *Hall Street*, *supra* 128 S. Ct. at 1400-1401. According to the Court in *Cable Connection*, the federal statutory grounds for review are only "remedies for 'egregious departures from the parties' agreed-upon arbitration,' such as corruption and fraud." *Id*. 1349 (quoting *Hall Street*, 128 S. Ct. at 1404). The Court reasoned that, "[a]ny other reading opens the door to the full-bore legal and evidentiary appeals that can render informal arbitration merely a prelude to a more cumbersome and time consuming judicial review process. . ." *Id*. (quoting *Hall Street*, 128 S. Ct. at 1405).

Despite the U.S. Supreme Court's "strict reading of the FAA," the California Supreme Court noted "the *Hall Street* majority left the door ajar for alternate routes to an expanded scope of review." *Id*. at 1349. The Court observed that "*Hall Street* was a federal case governed by federal law" and that "the court considered no question of competing state law." *Id*. at 1353-54. The California Supreme Court then found that *Hall Street* does not preclude "other avenues for judicial review, including those provided by state statutory or common law." *Id*. Thus, the Court concluded "that the *Hall Street* holding is restricted to proceedings to review arbitration awards under the FAA, and does not require state law to conform with its limitations." *Id*. at 1354.

(see "Arbitration Awards" on page 9)

Arbitration Awards

continued from page 8

C. The Court Created An Exception To The General Rule Of Arbitral Finality.

The California Supreme Court's primary focus centered on "the parties' intent and the powers of the arbitrators as defined in the agreement." *Id*. at 1355. "If the parties constrain the arbitrators' authority by requiring a dispute to be decided according to the rule of law, *and* make plain their intention that the award is reviewable for legal error, the general rule of limited review has been displaced by the parties' agreement." *Id*. (emphasis in original). The Court explained that the parties' "expectation is not that the result of the arbitration will be final and conclusive, but rather that it will be reviewed on the merits at the request of either party." *Id*. The Court then interpreted the CAA to permit this contractual expansion of judicial review by stating that the parties' contractual "expectation has a foundation in the statutes governing judicial review, which include the ground that "[t]he arbitrators exceeded their powers.'" *Id*. at 1355-56. (quoting Cal. Code Civ. Proc. §§ 1286.2(a)(4), 1286.6(b)).

The Court described many advantages to be gained by upholding parties' agreement to submit arbitral awards to judicial review on their merits, such as: (1) relieving pressure on court dockets by sparing courts the burden of trial, pretrial proceedings, and discovery disputes; (2) developing the common law; and (3) developing alternative dispute resolution "by enabling private parties to choose procedures with which they are comfortable." *Id*. at 1363-64. Ultimately the Court held that "[t]he Court of Appeal erred by refusing to enforce the parties' clearly expressed agreement in this case." *Id*. at 1364.

V. Conclusion

Parties entering into contracts with arbitration clauses need to understand the consequences of agreeing to judicial review on the merits and they must be clear in expressing their intentions in the arbitration clause.

The Court was clear in its respect for the arbitral process, and noted that the outcome on this issue was exclusively in the parties' control at the time the agreement was drafted and signed. The Court held that "to take themselves out of the general rule that the merits of the award are not subject to judicial review, the parties must clearly agree that legal errors are an excess of arbitral authority that is reviewable by the courts." *Id*. at 1361. In *Cable Connection*, "the parties expressly so agreed, depriving the arbitrators of the power to commit legal error." *Id*. The *Cable Connection* parties "also specifically provided for judicial review of such error." *Id*.

The Court made it clear that its decision leaves for another day "whether one or the other of these clauses alone, or some different formulation, would be sufficient to confer an expanded scope of review." *Id*. The Court thus "emphasize[d] that parties seeking to allow judicial review of the merits, and to avoid additional dispute over the scope of review, would be well advised to provide for that review explicitly and unambiguously." *Id*.

It is incumbent on the lawyers advising clients about the arbitral process to explain the Court's holding and the practical ramifications of agreeing to a review on the merits. That judicial review could encompass *any* legal issue and ruling, whether it be the admissibility of evidence, the interpretation of a statute or case, or an ultimate dispositive conclusion of law. Such a review of the legal merits of an arbitral award could realistically last for years and cost the parties resources rivaling that which they would have spent on actual judicial litigation. That kind of review has the potential to practically and fundamentally defeat the primary arbitral objective of a speedy, cost-effective, final and efficient resolution to disputes. ▲

Reversing

continued from page 3

one of the corporation's employees, left a message, then continued their conversation without hanging up the speakerphone. While the Court of Appeal affirmed the decision of the trial court not to disqualify counsel and the Supreme Court accepted review, it remanded to the Court of Appeal to reconsider in light of *Rico*. The Court of Appeal has not yet ruled on the issue.

In both matters, the discovery was seen as "making or breaking" the case. Often times, however, the importance of such evidence isn't all

(see "Reversing" on page 11)

Juvenile Delinquency and Dependency Incentive Program Holiday Donations

ABTL San Diego is pleased and excited to participate in the Juvenile Court's Juvenile Delinquency and Dependency Incentive Program. Gift cards are given to program participants upon successful completion of the program's phases.

Gift cards for the following, and in the following amounts, have been requested: movies and I-Tunes, $10 to $20, fast food chains - $5 to $10; Target and Wal-Mart - $10 to $20.

Let's make this first-time venture a great success! Please bring your gift cards to the ABTL dinner program on December 1. If you're strapped for time, we'll be happy to do your gift card shopping for you. Just drop your check or cash, along with your business card, in the collection basket.

Questions

Please contact Susan Christison at (619) 521-9570
or abtlsandiego@cox.net.

Reversing

continued from page 9

that clear at the time. Objecting to production is necessary to preserve appellate review.

II. *JNOV vs. JMOL*

Both state and federal practice allow a losing party to file a post-trial motion seeking to enter judgment in its favor. But they are critically different in at least one respect. In state practice, "[a] party does not have to move for a directed verdict or nonsuit and have the judge deny that motion before moving for JNOV." (Cal. Judges Benchbook: Civil Proceedings – After Trial (CJER 1997) § 2.59, citing *Rollenhagen v. County of Orange* (1981) 116 Cal.App.3d 414, 417.) But not so with a JMOL motion in federal court; a party must make that motion under Fed. R. Civ. Proc. 50(a) at the close of evidence before it can "renew" the motion under Fed. R. Civ. Proc. 50(b) after trial. The failure to make the Rule 50(a) motion means that judgment in favor of the losing party cannot be entered; a new trial is the only relief available. *See, e.g.*, *Cummings v. General Motors Corp*. (10th Cir. 2004) 365 F.3d 944, 951; *Rice v. Community Health Ass'n* (4th Cir. 2000) 203 F.3d 283, 285. The converse is also true: Failure to make a Rule 50(b) motion following denial of a Rule 50(a) motion precludes a Court of Appeals from entering judgment in the losing party's favor. *Fuesting v. Zimmer, Inc.* (7th Cir. 2006) 448 F.3d 936, 938.

However, it has long been held that the form of the motion is not crucial. *See, e.g.*, *Ryan Distributing Corp. v. Caley* (3d Cir. 1945) 147 F.2d 138, 140. Thus, even an oral motion referencing a previously-denied motion has been deemed sufficient, so long as the grounds for

(see "Reversing" on page 12)

Reversing

continued from page 11

the motion are accurately stated. *See, e.g.*, *Maine Rubber Int'l v. Envtl. Mgmt. Group*, (D. Me. 2004) 324 F.Supp.2d 32, 34. So particularly in federal court, make challenges to the sufficiency of your adversary's case early and often.

III. New Trial Motions; Not Always Required, But . . . .

"Generally speaking, . . . an error may be raised on appeal although it could have been made the basis for a motion for new trial." 9 Witkin, *Cal. Procedure* (9th ed. 1995) Appeal, § 397, p. 449. But there are at least two important exceptions to this rule. The first is that a challenge to the excessiveness or adequacy of damages must be raised in a new trial motion. *See, e.g.*, *City of Los Angeles v. Southern California Edison Co.* (2003) 112 Cal.App.4th 1108, 1121. This includes the always-popular topic of punitive damages. A proper motion for new trial allowed our Supreme Court to reduce a $1.7 million punitive damages award to $50,000. *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1170, 1189.

The second is juror misconduct, assuming that you don't find out about it until after the verdict is rendered. See *Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 103 [right to new trial waived where party was aware of misconduct at earlier stage of trial but failed to move for mistrial or admonition]. Thus, if juror misconduct is uncovered for the first time in a post-trial investigation, it must be asserted in a

(see "Reversing" on page 13)

wallach

continued from page 4

and an insurance bad faith case on behalf of San Diego real estate developers, which remains the largest verdict in such a case. His .950 batting average was achieved notwithstanding his well-deserved reputation for trying seemingly impossible cases. I hope you learn as much from his "tips" on developing a winning trial theme as I have.

Mazzarella: What's the first step in developing a winning trial theme?

wallach: Before anyone can decide upon a theme that will lead to the desired result in any particular case, he or she must first understand what makes a theme persuasive. Persuasion is a matter of appealing to that which a person already believes to be true. When jurors hear what you have to say, it either rings true, and likely becomes persuasive, or it doesn't, in which case the playing field tips against you.

Mazzarella: How important is presentation to persuasion?

wallach: Someone who can speak in simple terms that the jury can understand, who can engage the jury and keep its attention, and otherwise demonstrate good technique, has an advantage over someone who doesn't, given an equally persuasive theme. The better your delivery, the easier it is for you to communicate your theme and thus persuade. But, with that said, the best delivery in the world is not going to overcome a losing theme, and a winning theme usually will compensate for a mediocre delivery. As a result, for the young or inexperienced trial lawyer, the ability to identify a winning theme is, to a large extent, a great equalizer.

Mazzarella: What's the first step in the process of arriving at the best trial theme possible, given the facts of a particular case?

wallach: Simplicity is always the ultimate goal. One of the first questions I ask myself when I'm first introduced to a case is, "Who should win?" Clarence Darrow correctly observed, "Jurors want to do the right thing." After each of the 228 cases I've tried to verdict before a jury I have done as extensive an interview with the jurors as possible, I have found that jurors have a simplified, not simple, view about how a case should turn out. And they have almost always found a way to make it so.

Mazzarella: But how do you determine how one of several possible themes will most impact how the jurors think the case should be resolved?

wallach: First, the trial lawyer has to understand that jurors' minds are untainted and unfettered by all the legal principles that we have been taught in law school to apply to the process. The more we ascend in the profession, the further we drift from those who sit before us in the jury box. Facts and the jurors' initial reaction to them are what controls. But with that said, the trial lawyer has to remember that jurors rarely look at just the narrow prism of facts in isolation. They look at the players, what they did, what has happened, and, most importantly, what should have happened.

Mazzarella: How can you change the jurors' perception of the facts and players through your trial theme?

wallach: As a young lawyer, and mentee of the very well-known San Francisco trial lawyer Bruce Walkup, I cut my teeth representing plaintiffs who were not in the most highly regarded occupations, and who did not have the ability to articulate very well - people like longshoreman, who were then viewed as unreliable. The

(see "wallach" on page 14)

Reversing

continued from page 12

new trial motion so that the trial court has an opportunity to correct the error.

Final Thoughts

It is often a good idea to "embed" an appellate attorney – or at least someone not involved with the day-to-day litigation – in order to help define and present potential issues that may arise on appeal. It may increase your chances of reversing an unfavorable trial court result. ▲

The author thanks Harry Chamberlain and Efrat Cogan, the other two appellate specialists at Buchalter Nemer, for their assistance with the section on discovery issues.

wallach

continued from page 13

jurors in San Francisco were reluctant to give away money to people that did not have a certain air of respectability about them, who the jurors thought might be trying to use the system just to get money that they didn't deserve, or would just squander it even if they did.. The trial theme "everyone has a right to a safe work place" might be modified by a juror adding: ". . . if they are a respectable member of the community." Recognizing that this might be the standard the jurors will impose upon our thematic statement, we needed to wrap our case with respectability. In cases like that, I often put the doctor on first as a witness, or the police officer. They were respectable members of society, people of authority. If they had told the facts first, when it came time to put on the injured longshoreman, who didn't enjoy that reputation, his version of the facts would ring true to the jury. And it was that quality of truth which led to persuasiveness, which made the overall theme work.

Mazzarella: Isn't that always true – that if you don't have credibility, it doesn't matter what your story is; nobody will buy it?

wallach: To be persuasive, your trial theme has to have the core element of credibility, likeability, and worthiness. Your position must have some nobility to it.

Mazzarella: Is there always some reservation on the jury's part about awarding plaintiffs money damages that has to be overcome by the plaintiff's" theme, and can be utilized effectively by the defense?

wallach: Of course. Remember, jurors want to do the right thing, the just thing. More importantly, they want to avoid an injustice. After interviewing thousands of jurors, I believe that jurors will award substantial damages, but only

(see "wallach" on page 15)

continued from page 14

when they believe they are warranted, and also when they will not be squandered. So, for example, consider a case in which a young child is injured. Your theme is that the defendant risked such injury in its myopic drive for profits and, therefore, the burden of providing for the child for the rest of his life should be imposed on the defendant, not the parents. To make that theme appeal to the jurors, they have to be comfortable that the money they award will be well used. If the parents seem to be irresponsible, the goal sought to be achieved by your theme, to take care of the injured child, may not occur, even with a huge verdict. Your theme will be enhanced in such a case if you have a respectable adult guardian appointed, or perhaps even appoint a banker as co-guardian. The jurors will be much more likely to accept your theme if they don't question the fact that whatever money they award will be well spent.

Mazzarella: I know for most of your career you were a plaintiff's personal injury lawyer, but over the last decade, you have tried primarily business cases on behalf of both plaintiffs and defendants. How does the theme-building process differ in those different areas?

wallach: In many respects it is much easier for a lawyer to decide upon and support a theme in a personal injury case because juries' attitudes are easier to predict when the relevant events are commonplace. If, however, you represent a quadriplegic, the true horror of whose injuries are not known by many, and your theme contains the concept that the plaintiff is now as helpless as a newborn infant, you may need to demonstrate that point with a "day in the life" film, since most jurors won't appreciate the horrors of quadriplegia. In a commercial case, regardless of the context, the goal is to focus upon the human merits of your client, and the absence of them on the other side. Jurors can take the most complicated facts and analogize them to circumstances with which they are familiar, gaining a view of who should prevail even if the complexity of the facts is never fully clear.

Mazzarella: Do you tell the jury what your theory is, or do you let them figure it out by themselves?

wallach: Well, sometimes I tell the jury the theme, in *voir dire* and Opening Statement. Especially in difficult cases, I try to invite the jurors into the investigative process, tempting them to figure out the ending before we reach it, to let them discover the theme themselves. I'll tell them that, as the evidence unfolds, they're going to come to realize what happens and why. This empowers them. Right from the beginning it makes them responsible for the outcome, and gives them a leadership role in attaining it. In essence, I try to enlist the jury in my cause.

Mazzarella: Can you give me an example?

wallach: I handled a case called *Heckler v. Cochran*, in which I sued Cochran for cutting off my client and causing an auto accident in which she was severely injured. Cochran's defense was that a phantom automobile was actually the cause of the accident, not him. Cochran had actually called in to report the accident from a phone which could be identified. The two-lane road where the accident occurred was blocked in both directions after the accident and no vehicle could have gotten through the wreckage for some period of time. Mr. Cochran was a very reputable member of the community where the accident had occurred and an excellent witness. He was convincing in his testimony that it wasn't him that caused the accident. My theme was that Cochran truthfully believed he did not cause the accident, but it must have been, because no other car could have made it through the wreckage to the call phone from which the accident was reported, other than the car that caused the wreck itself. This theme was bolstered by the fact that one of the occupants of the plaintiff's car testified that the other car was white and had funny tail lights. Cochran's 1967 Buick was unique in that it was the only General Motors car at that time that had flared V tail lights. I didn't spell out that my theme was that Mr. Cochran had to have been the one to have caused the accident because of time issues, and that his denials were made in good faith, although inaccurate, until the very end of the case when I called the Sheriff. I learned after the favorable verdict that one of the jurors suddenly realized where I was going as I examined the Sheriff using a map to show

(see "wallach" on page 16)

continued from page 15

where the accident occurred, where the call box was located, and so forth. When he did, he announced his discovery to the rest of the jurors himself.

Mazzarella: What made you arrive at your theme that Mr. Cochran, in good faith, believed that he had not cut off the plaintiff, but nonetheless did, rather than simply claim that he was lying?

wallach: Because he was a great witness and a long-time reputable member of the community which was, at the time, very small. I didn't think calling this man a liar was something "the jurors already believed to be true," which, as I said earlier, is essential for persuasion. I also was concerned that the local jurors might be resistant even to the suggestion that the defendant caused the accident without knowing it, if that suggestion was made by an out-of-town lawyer. I thought, as it turned out correctly, however, that they would be able to accept that theme if they derived it from their own investigative efforts.

Mazzarella: How do you know if you have a theme that is going to strike jurors as true?

wallach: Today there is an entire industry built around answering that question. But if you can't afford a high-priced jury consultant, and all the research he or she can provide, just use ordinary people as sounding boards. Stay away from lawyers and anyone else who works in a law firm. The profession can inexorably move us away from the lifestyles, demands, and life experiences of our jurors. My first "jury consultant"

(see "wallach" on page 17)

continued from page 16

was a retired investigator from the San Diego District Attorney's office that I used in the case of *Johnson v. PSA*, I would talk to friends as we played Yhatzee or Scrabble as couples, or anyone else I ran into whose perspective I thought might be insightful. The famed Chicago lawyer, Phil Corboy, for years ran his themes past the cab driver that drove him around the city.

Mazzarella: If you had one piece of advice for those striving to develop winning themes in their cases, what would it be?

wallach: It would be to spend a little less time papering the opponent with voluminous written interrogatories, taking the depositions of everyone whose name appears on any document in the case, and filing long-shot motions, and spend a lot more time with your feet up, brainstorming not just with your trial team, but with your neighbors, friends and relatives, who think more like jurors and less like lawyers. In the process, keep looking for a theme that rings true from the inception, not only after you have explained why it should ring true. Remember, you don't have to convince someone that your theory of the case is correct. If your theory of the case is correct, it will be convincing and persuasive all by itself.

Mazzarella: I have to ask one last question: How did you come to use no capital letters in your name?

wallach: That's an interesting story, but the short answer is that it honors the high school teacher who insisted I do so and influenced my life, education, career and values. ▲

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