ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO

abtl REPORT

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San Diego Superior Court Civil Judicial Update – the State of the Court After Four Years of Budget Cuts

By Katherine M. McCray

Katherine M. McCray

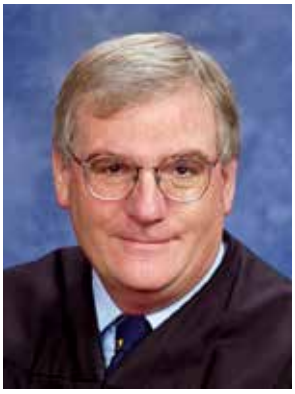
Judge Jeffrey B. Barton and Judge Timothy B. Taylor of the San Diego County Superior Court provided an update on the state of the civil courts on February 19, 2014, at an event sponsored by the Civil Section of the San Diego County Bar Association. Judge Barton is the San Diego Superior Court assistant presiding judge, and Judge Taylor is the supervising judge of the civil department.

The judges provided a brief history of the budget crisis and how the San Diego Superior Court has responded, discussed the ways in which cutbacks have affected civil litigation in San Diego, gave practical advice for negotiating the slimmed-down civil courts, and offered predictions about future developments. The bottom line is the judges believe conditions in the court should slowly begin to improve; they do *not* expect conditions to decline any further. Furthermore, although there are significant delays in law and motion and in processing of documents in the clerk's office, there are no delays in getting trial dates. The judges made clear that they are aware of the frustrations caused by the cutbacks and emphasized that numerous options were considered before court management made the decisions that led to the current cuts. However, they also urged attorneys to contribute to court efficiency by taking simple steps such as utilizing the e-filing system and canceling calendar reservations when the dates

(see "Civil Judicial Update" on page 13)

Brown Bag Luncheon with Chief Judge Barry Moskowitz

By Karen K. Haubrich



Judge Moskowitz

On February 4, 2014, the Association of Business Trial Lawyers, along with the San Diego Chapter of the Federal Bar Association and the State Bar Litigation Section, presented a brown bag luncheon with the Honorable Barry Ted Moskowitz.

Background

Judge Moskowitz received both his bachelor's and law degree from Rutgers. After receiving his law degree in 1975, Judge Moskowitz began his legal career clerking for Judge Leonard I. Garth of the Third Circuit Court of Appeals, and then joined the U.S. Attorney's office in New Jersey. Judge Moskowitz was in private practice for two and a half years in New Jersey, and then he joined the U.S. Attorney's office in San Diego. Judge Moskowitz was appointed to a Magistrate Judge position with the United States District Court for the Southern District of California in 1986, and was appointed District Judge by President Clinton in 1995. Judge Moskowitz became Chief Judge in 2012. Although Judge Moskowitz will soon be

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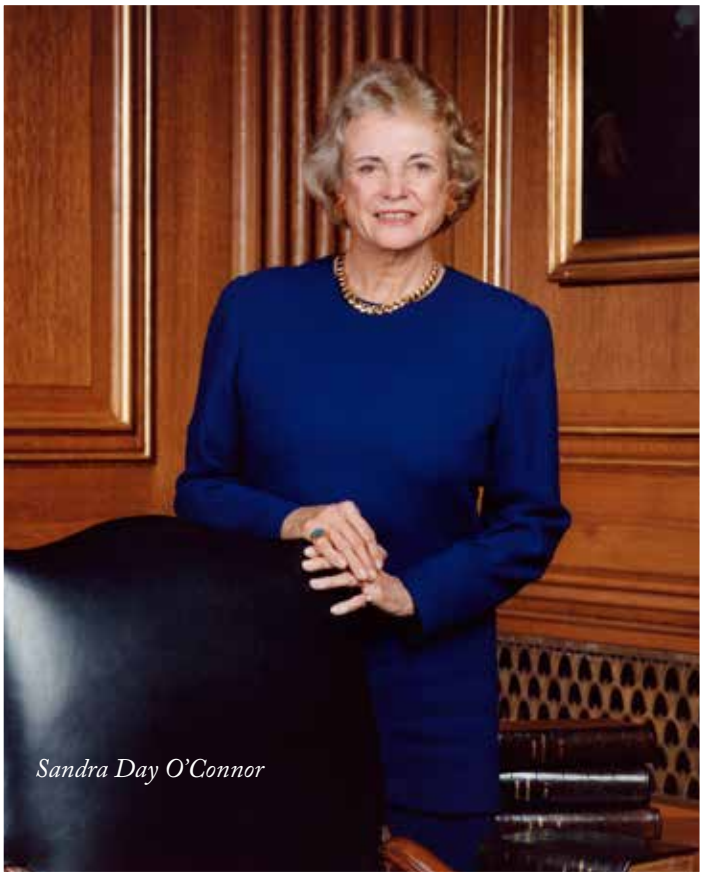
Inside

A Conversation With Sandra Day O'Connor,
Former U.S. Supreme Court Justice

ABTL is proud to present
our May 9th luncheon featuring Sandra Day O'Connor


Sandra Day O'Connor

Born in El Paso, Texas, on March 26, 1930, Sandra Day O'Connor was elected to two terms in the Arizona state senate. In 1981, Ronald Reagan nominated her as a justice of the U.S. Supreme Court and she received unanimous Senate approval. O'Connor made history as the first woman justice to serve on the Supreme Court. As a justice, O'Connor was as a key swing vote in many important cases, including the upholding of Roe v. Wade. She retired in 2006, after serving for 24 years.

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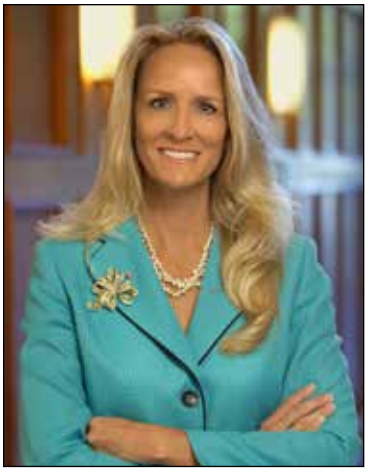
EVENT DETAILS

Date: Friday, May 9, 2014
Time: Registration opens at 11:00 AM, Lunch at Noon
Location: The US Grant | 326 Broadway, San Diego, CA 92021
Cost: ABTL Judicial/Public Sector Member = $50, Current ABTL Members = $70, Non-Members = $90
Information: Contact Maggie Shoecraft at abtlsd@abtl.org
Early registration: for ABTL members only through 3/31/14
Register Online at: www.abtl.org/sandiego.htm

1 HOUR MCLE CREDIT | The ABTL certifies that this activity conforms to the standards of approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education

President's Letter

By Marisa Janine-Page



The first week of 2014 my office called the San Diego Superior Court to schedule a summary judgment hearing in a case assigned to Judge Hayes. Central calendaring offered September 5, 2014, as the first available hearing date. At the courthouse, Judge Lewis takes the bench with four awaiting *ex parte* matters – each one seeking an order shortening time to be heard because their motion hearings are calendared six or more months out. "Our summary judgment motion is scheduled in August but our trial is scheduled in May, your Honor!" exclaimed the first *ex parte* applicant, the next three observing attentively as if into a crystal ball.

Judge Lewis has heard this argument before. In fact, she, like every other IC judge, hears it just about every morning these days. Knowing her motion calendar is overbooked but desperately wanting to keep the IC system working and help litigants move cases along, Judge Lewis gets creative. Pensively she peers into the audience at the awaiting attorneys, looks at the files on her bench, then asks one of the attorneys the status of a pending discovery dispute in hopes it might offer a solution to the quandary. She is pleased to learn that the discovery attorneys were able to resolve the issue by meeting face to face. That frees up an earlier hearing date on her docket, and the *ex parte* application is able to be granted. Every IC courtroom is doing this creative juggling act.

Upstairs in his courtroom Judge Taylor is working his way through his case management conference and motion calendar. Two attorneys stand before him on a case that presumably is about six months old (that's about how long it takes to get to a CMC now) and confess that although the court could try the matter in June the litigants will not be ready by then because the parties are just starting discovery. Even without the benefit of that discovery, one attorney forecasts that he will likely bring a summary judgment motion. … "They'll be back on my *ex parte* calendar seeking an OST," Judge Taylor muses to himself.

Meanwhile, down the hall Judge Prager sits in his chambers mediating an *ex parte* discovery dispute between two parties – his third with these folks this month. Fastidiously he tries to move the discussion towards an amicable resolution without formal motion briefing, lengthy delays, and another trial continuance. He listens to the two bickering attorneys while politely telegraphing through his facial expressions that their subtle yet crafted innuendo and punches at each other are trifling. He's heard enough and offers a solution to the discovery dispute – which each attorney accepts. As they exit his chambers, Judge Prager wonders why the two professionals could not have accomplished the same resolution themselves; and just how much of that discovery the attorneys fought so hard over will ever show up in the trial evidence.

Upstairs in another courtroom, a tenured court clerk who has always been wonderful to me tears up, "I can't do the job I love. I can't help people anymore. I can't take your call and go find the stipulation you submitted and walk it to the judge for his signature. I can't return your call to let you know the judge signed your default judgment. I cannot call a pro per to tell him he has not filed his CMC statement. I work for three judges now. Everyone has been laid off. Those who are lucky enough to still be here, we do all we can but it's not enough …" she's overcome with her emotions and excuses herself.

This is a typical day in San Diego Superior Court IC now. One billion dollars in state court funding has been cut over the past six years. As a result of these cuts, San Diego Superior Court has had to eliminate more than 300 court employees, discontinue courtroom reporters, close or restructure more than 20 courtrooms, close

(see "President's Letter" on page 4)

President's Message

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South Bay and El Cajon Civil, and reduce public access hours. Yet, most attorneys keep practicing as if nothing has happened – or worse – use the courts' crisis as a procedural strategy.

"At some point, the Bar is going to have to decide if it wants a court that tries cases or a court of law and motion," advises Judge Taylor. The budget crisis has happened and while, the foresights of the San Diego Superior Court enabled it to fare better than some of its northern counterparts, there's no influx of money coming to the courts anytime soon. San Diego Superior Court has made difficult changes with a hope of preserving the Independent Calendar department but, if the law and motion drain on the court does not resolve soon, that IC system may give and once that infrastructure is gone, "it will be extremely difficult, if not prohibitive, to re-establish," warns Judge Barton.

The ABTL is dedicated to an open dialogue between the Bench and Bar. The Bench is talking. Are we listening? Are we educating our clients on the problems with non-dispositive demurrers? Are we using the courts' reduced resources and delays as strategic tools to impose prohibitive costs and deferred resolution on our opponents? Are we making every effort to informally resolve discovery disputes? Where does client advocacy end and participation in injustice begin?

I don't profess to have the answers but I firmly believe we, as officers of the court and legal counselors to our clients, must pursue those answers quickly. I propose we start that quest in three ways:

First, **PARTICIPATE IN THE OPEN DIALOGUE**. ABTL's stated mission is to facilitate an open dialogue between the Bench and Bar. I am dedicating my presidential year to that open dialogue. On April 22, the ABTL will host a Bench Bar Summit of leaders from the State and Federal courts and every local Bar organization aimed at opening such a dialogue to exchange ideas, formulate action plans, and inspire our members to take appropriate action. To ensure that all ABTL members may contribute to this dialogue, I invite and encourage you to share your thoughts, comments, and ideas on the ABTL San Diego Open Dialogue Blog, which can be accessed by ***members only*** at www.abtl.org/sandiego.

Second, **ADVOCATE FOR YOUR CLIENTS**. The courts are not the only ones affected by the budget cuts. After reviewing the Governor's proposed budget for the coming fiscal year, Chief Justice Tani Cantil-Sakauye warned, "We are rationing justice, and it has become more than a fiscal problem … it is now a civil rights problem. … We know we are denying the protections of an American democracy." The insufficient court funding impacts our abilities to advocate for our clients and our clients' access to justice. Court delays result in increased litigation costs, holding-pattern business losses for our clients, and prohibitive access to judicial resolution of legitimate legal disputes for many. According to Chief Justice Tani Cantil-Sakauye, the Governor's proposed budget allocation for the judicial branch falls far short of the $266 million needed by the courts "just to tread water." The proposed budget would require more court closures, longer litigation delays, and even further reductions in access to court services. Most concerning is that while the Chief Justice continues to try to persuade the Governor for the necessary funding, his Department of Finance is telegraphing that such efforts might be futile. California has a budget surplus of $4.2 billion and the Governor's proposal sets aside another $1.6 billion for a "rainy-day" fund. The Assembly and Senate must okay such a rainy day plan by the end of June for it to make the November ballot so now is the time to take action and get heard. Now is the time to write, e-mail, and visit your senator, assemblyman, and their staff. The evidence proves it works! (After the ABTL and other organizations sent formal letters to the Governor and Legislature, $60 million in additional funding was allocated to the courts. That's a start, but not enough.)

Finally, **BE PROFESSIONAL**. Review and practice the **Ethics, Professionalism and Civility Guidelines** adopted by the ABTL San Diego (http://www.abtl.org/sd_guidelines.htm) and adhere to the **Attorney Code of Conduct** in the San Diego County Superior Court Rules (http://www.sdcourt.ca.gov).

Outside Counsel Dos and Don'ts from the Corporate Client's Perspective

By Robert E. Kaufman

On November 12, the Association of Business Trial Lawyers of San Diego hosted a panel discussion of in-house attorneys representing some of San Diego's largest corporations. Moderated by Robert Borthwick (Sempra Energy), the panel included Ron Wasinger (Sony Electronics), Phil Rudolph (Jack in the Box), Darragh Davis (Petco), Bob Sloss (Oracle), and Christian Waage (Websense, Inc.). The discussion covered a range of topics, including hiring outside counsel, litigation in the corporate context, alternative fee arrangements and arbitration clauses.

While billable hours are a thing of the past for most in-house attorneys, they face a number of other pressures caused by the proximity of their clients and the expectation of immediate answers to their legal questions. Working in-house also requires the ability to work across various fields. The only way to effectively do this is to be able to make judgments, even in areas where you are not an expert.

One benefit of working in-house is that you get to see your client's business and know it inside and out. The more you understand the business, the more effective you are as an attorney and the more value you can add to your company. At the end of the day, the in-house attorney is a business partner with the client and the goal is to help the corporation find the best path to achieve its goals while minimizing the risk. Below are some of the factors that in-house attorneys weigh when deciding which outside counsel to hire.

Choosing Outside Counsel

Often the general counsel doesn't hire the outside litigation attorneys. Instead, the in-house litigation counsel makes the decision since she will often be the one working with and overseeing the outside firm. Generally, as in most situations, the in-house litigation attorney is looking for the best attorney who does the best work at the lowest price.

Most in-house counsel said they hire the attorney, not the firm. The president and board don't want to see the general counsel running up huge legal bills, but the bigger the potential risk that a case poses, the more the corporation will spend on legal fees to defend it. In these situations, in-house attorneys are sometimes tempted to go with brand name firms which may provide a stronger argument to the board that they did all that they could do if a lawsuit doesn't go as expected.

Know Your Client's Business

Don't bring your MacBook to a meeting with Sony counsel and executives. One thing that all of the panelists agreed on was they wanted counsel who understand their businesses. Outside counsel should keep up with their client's products and know who their competitors are. "Pragmatism" is a word that came up multiple times in the discussion. Corporate clients want an attorney who can make important decisions with both the legal and business implications in mind. In-house counsel value attorneys who take an interest in the business and are not just interested in dollar signs. One way to do this is to be involved in community service projects that the client sponsors.

Often the unique aspects of the corporation's business require attorneys with specialized skills. This might entail being able to communicate with the executives as well as the lower level employees who may need to testify, understanding the terminology and operations of the business, or appreciating the emotional issues unique to a business, such as pet owners' attachment to their pets in the case of Petco. As a result, corporate clients tend to come back to the same firms who understand their business

(see "Outside Counsel Dos and Don'ts" on page 6)

Outside Counsel Dos and Dont's

(continued from page 5)

and in-house counsel are willing to fight with their insurance carriers to make sure they get the right attorney for the case.

Take Security Seriously

Corporations today take their data security extremely seriously, and they expect their outside counsel to do the same. The headaches for in-house counsel are immense when Anonymous takes down their server to make a political statement or hackers steal customers' credit card or other personal information. The corporate espionage that occurs today can put intellectual property and valuable trade secrets at risk. Outside counsel need to have in place appropriate security measures, such as encrypted e-mail and file-sharing systems to handle sensitive data from the client. Counsel also need to appreciate the problems large corporations face with e-discovery, and the heavy burden caused by the need to preserve, secure, and produce enormous amounts of data, especially with the ever increasing use of mobile devices in the workplace.

> Ultimately, in-house counsel are looking for the right attorney to best protect and represent their company. Knowing and understanding their business will go a long way to winning the corporate client's trust and business.

Corporate Decision-Making in Litigation

One difference with litigation in the corporate context is that the board and officers of the corporation may be involved in many of the litigation decisions. The make up of the board can significantly affect the path of the litigation. Some boards might never settle while others are quicker to avoid litigation or negative publicity at all costs. Also, the litigation decisions take longer in the corporate setting as they often have to be approved up the chain of command, making fast settlement or litigation decisions a rarity.

Avoid Surprises

CFOs, CEOs, and boards want certainty when they put together their budget projections and investor materials. Understanding that expectation and cooperating with the corporate clients to minimize surprises will go a long way to keep the board and executives happy. While corporate clients often have the power to command discounted rates from law firms, the in-house legal departments tend to have much more limited budgets than you would expect. As a result, underbidding a case then coming back to the client with higher bills, overstaffing, or nickel and diming them are all quick ways to lose the corporate client's trust.

Alternative Fee Arrangements are the Way of the Future

One way to help achieve the level of certainty that corporate clients want is through alternative fee arrangements. Fixed fees and task-based fees are becoming more popular, such as a deposition flat fee. This may relieve some of the built-in conflict between outside counsel's pressure to meet billable hour requirements and in-house counsel's pressure to keep the legal expenses within a predictable range. These fixed-fee arrangements may also lead to a more cost-effective handling of the case. Another alternative is to present the corporate client with both a blended bill and an hourly bill, and then allow the client to pay the lower bill. The panel agreed that we are likely to see more and more alternative fee arrangements in the future.

While in-house attorneys are under pressure to keep their external legal costs down, what is important is achieving the right outcome. Litigation is unpredictable and in-house counsel note that they are fair to the outside attorneys when costs unexpectedly overrun their projections. Corporate clients don't want their litigation counsel to lose money because that does not result in a good outcome for the corporation or the outside firm.

Arbitration Clauses

The panelists have mixed views of arbitration clauses. Some find that arbitration clauses do not result in much cost savings but rather provide a potential benefit to smaller parties against large defendants because of the reduced discovery and looser evidentiary rules. There is also a concern about the changing enforceability of arbitration clauses over time and among different states.

(see "Outside Counsel Dos and Don'ts"" on page 7)

Outside Counsel Dos and Dont's

(continued from page 6)

On the other hand, some in-house attorneys favor arbitration clauses because of the reduced discovery burden, confidentiality, and the ability to prevent simultaneous costly suits in different states. Arbitration can also help to avoid the emotional appeal of a small plaintiff against a big corporation in a jury trial in state court. There is also a sense among in-house counsel that arbitration clauses provide something of an obstacle to plaintiffs in many situations.

Ultimately, in-house counsel are looking for the right attorney to best protect and represent their company. Knowing and understanding their business will go a long way to winning the corporate client's trust and business. Having both business and legal sense is also important trait for outside counsel. Finally, corporate clients want attorneys who can provide sound judgment and are willing to make difficult decision on the complex issues that they face in the course of their business.

Robert E. Kaufman is an attorney with Procopio, Cory, Hargreaves & Savitch LLP where he practices in the construction litigation group.

New and Noteworthy

Did You Know Federal Civil Subpoena Practice Has Changed?

By: Robert D. Rose

Major changes to civil subpoena practice under FRCP 45 became **effective December 1, 2013.**

What Has Changed

1. **Issuing Court**. Beginning December 1, 2013 subpoenas must be issued in the name of the district court presiding over the case and not in the name of the district court in which the subpoena is served, under amended Rule 45(a)(2).

2. **Nationwide Service**. Amended Rule 45(b)(2) permits a subpoena to "be served any place within the United States." Thus, a subpoena issued in the name of the federal court in Los Angeles may be served in New York, Chicago or Seattle. Any lawyer authorized to practice in the issuing court may issue and sign the subpoena and have it served anywhere in the country, per Rule 45(a)(3).

3. **Nonparty Witnesses Subject to 100-Mile Limit, Except for Trial**. If the subpoena is for a deposition or a hearing (not a trial), a nonparty witness can be compelled to travel only within a 100 miles of where he or she resides, is employed, or regularly transacts business in person. See Rule 45(c)(A). If a nonparty is subpoenaed for **trial**, that person can be compelled to travel anywhere within his or her state of residence or employment, as long as doing so does not entail "substantial expense." Amended Rule 45(c)(1)(b)(ii). However, if the subpoena seeks to compel travel that will be expensive, the advisory committee notes suggest the subpoenaing party should offer to pay the expenses and "the court can condition enforcement of the subpoena on such payment."

4. **Parties and Party Officers Strictly Confined to 100-Miles or Statewide Limit**. If the subpoena is for the testimony of a party or a party's officer, that person may be compelled to travel anywhere within the 100-mile limit or within his or her state of residence or employment, subject to the same "substantial expense" limitation. See Rule 45(c)(1)(B). The amendment reverses decisions that have compelled senior corporate officers to travel across the country to testify at trial.

5. **Disputes Presumptively Resolved in Witnesses' Jurisdiction**. The amendment is intended to spare nonparty witnesses needless burden and expense, with a presumption that the district court where compliance is required (the "Compliance Court") should hear and decide any motion to quash or modify a subpoena – and not the issuing court. See Rule 45(d)(3)(B).

6. **Transfer to Issuing Court Requires Consent or "Exceptional Circumstances"**. The Compliance Court retains the discretion to transfer a motion to quash or modify back to the issuing court, but only in two circumstances: (1) if the nonparty witness consents or (2) the Compliance Court finds "exceptional circumstances." See Rule 45(f). "Exceptional Circumstances" is a difficult threshold to satisfy. The standard appears four times in FRCP. It is the showing that must be made

- by a law firm to escape sanction for misconduct of its lawyers (Rule 11(c)(1))
- to take discovery of a consulting expert (Rule 26(b)(4)(D))
- to use the deposition of an available witness at trial (Rule 32(a)(4)(E))
- to obtain sanctions for a party's loss of electronically stored information as a result of the routine, good faith operation of an electronic information system (Rule 37(e))

The advisory committee note to Rule 45(f) states that it is expected to be "truly rare" for a Compliance Court to transfer a motion to the issuing court and, notwithstanding all conventional wisdom, that "it should not be assumed that the issuing court is in a superior position to resolve subpoena-related motions." However, the note makes clear the transfer may sometimes be warranted if, for example, the issues have previously been de-

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cided by the issuing court or are likely to arise in multiple districts.

7. **Judges Are Urged to Consult**. The advisory committee note

encourages the judge in a Compliance Court "to consult with a judge in the issuing court… while addressing subpoena-related motions." Consultation among judges is expressly permitted by the canons of the Code of Conduct for United States judges and the ABA Model Code of Judicial Conduct. The latter requires that "the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter." However, the note is silent as to whether the parties and nonparty witness may be present for such a conversation. If they do not participate, their positions would not be directly heard by the issuing court judge, who may have substantial influence on the outcome.

8. **On Transfer, Witness' Lawyer May Be Heard In Issuing Court**. If a Compliance Court finds that exceptional circumstances exist and transfers the motion to quash to the issuing court, the lawyer for the nonparty witnesses is automatically admitted to the issuing court for the purposes of filing papers and appearing on the motion. See Rule 45(f). While this obviates a requirement to obtain local counsel and incur the associated expense, it does not relieve the nonparty witness of the cost of getting its counsel before the issuing court.

9. **On Transfer, Telephonic Hearings Are Encouraged**. The advisory committee note urges that "[i]f the motion is transferred, judges are encouraged to permit telecommunication methods" to "minimize the burden a transfer imposes on nonparties."

10. **Contempt of Two Courts**. A miscreant witness may be held in contempt under Rule 45(g) in both the Compliance Court and, after transfer, the issuing court. In civil litigation, it would be rare for a court to use contempt sanctions without first ordering compliance with a subpoena, and the order might not require all that was sought by the subpoena. Often contempt proceedings will be initiated by an order to show cause, and an order to comply or be held in contempt may modify the subpoena's command. Disobedience of such an order may be treated as contempt. Under a related change to Rule 37(b)(1), it "may be treated as contempt of either court" if the issuing court orders compliance and the witness in the compliance jurisdiction is noncompliant. If necessary for effective enforcement, Rule 45(f) authorizes the issuing court to transfer its order after the motion is resolved.

What Has Not Changed

1. **Parties and Officers Subject to Deposition Without Subpoena**. The limitations on subpoenaing parties and officers relate only to trial, not to deposition, testimony. The advisory committee note reminds that "depositions of parties, and officers, directors and managing agents of parties need not involve use of a subpoena." Litigants can continue to pursue party-related depositions under Rule 30. In light of the sanctions available under Rule 37, a party that fails to appear or produce its senior personnel for deposition will act at its peril.

2. **Documents Received Pursuant to Subpoena**. Nothing in the new Rule 45 requires a party to make available to any other party the materials it receives in response to a document subpoena. The only requirement, in Rule 45(a)(4), is that advance notice must be given that a document subpoena is going to be served. Upon receipt of a notice, it is incumbent on counsel for all other parties to make arrangements with the lawyers serving the subpoena to obtain access to what is produced. Failing that, you may serve a document request on that party or even a copy of the initial subpoena. Otherwise, you may never see anything favorable to you that is produced pursuant to your adversary's subpoena.

Bob Rose is a partner in the San Diego office of Sheppard Mullin, trying cases in federal and state courts. He is a member of ABTL's Board of Governors.

(see "New and Noteworthy" on page 20)

Don't Let the Employee Agreement Smack You on the Way Out

By Jason Kirby

In the past couple of years I have handled an increasing number of cases for high-level corporate officers, usually the CEO, that have either been fired unexpectedly or have left their employment in accord with that old country song: "Take This Job and Shove It." In either situation, tensions are usually high and each side finds itself clamoring to gain the perceived "upper hand" as soon after the separation as possible. Employers are quick to turn to their self-drafted employment agreements to make use of the covenants therein.

Some employers have good reason to aggressively protect their trade secret or confidential information. Other employers have prepared overreaching employment agreements or related agreements (e.g. confidentiality agreement or NDA) that far overstate the existence of trade secret or confidential information.

From a transactional drafting perspective, this overstating may eventually expand the property interests of the employer, but from a litigation perspective, the employer may begin litigation mistakenly believing that its own descriptive terms are a foregone conclusion because the parties so agreed.

The Employer's Trade Secrets

While California's Uniform Trade Secret Act (UTSA)(Civ. Code, § 3426 et seq.) provides employers with what at first glance appear to be a number of desirable remedies (e.g. injunctive relief, attorneys fees, punitive dates, etc.), the employer better be sure it has a trade secret before aggressively litigating to protect one, or the effort can quickly backfire.

The UTSA defines a trade secret as information, including a formula, pattern, compilation, program, device, method, technique, or process that (1) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use, and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[1]

Even an employer created client or customer list taken by an employee still has to satisfy the requirements of this section before being afforded protection under the UTSA. As such, the employer that comes on fast out of the gate seeking a temporary restraining order against its former employee better have solid declarations establishing not only the two prongs of Civ. Code § 3426.1(d), but also credible evidence that the employee actually misappropriated the trade secret itself. Otherwise, this expensive endeavor and client expectations will soon be squandered away.

At the same time it enacted the UTSA, the California Legislature also enacted a counterbalance to protect a defendant against a plaintiff's misuse of the UTSA. The California Legislature enacted a separate statutory provision (now found at Code Civ. Proc. § 2019.210), that requires a plaintiff, upon the request of the defendant, to identify the trade secret with reasonable particularity before commencing discovery relating to the alleged misappropriation of the trade secret. This counterbalance was intended to protect a defendant from having to submit to costly litigation and discovery before he or she is provided with sufficient particularity as to the boundaries within which the trade secret lies.

A trade secret is supposed to be distinguishable from matters of general knowledge in a particular trade and even from specialized knowledge of those persons who are skilled within that trade. If the employer fails to provide adequate disclosures following an employee's request pursuant to Code Civ. Proc. § 2019.210, the employee has the right to effectively stay discovery into the trade secret issue until the employer adequately distinguishes the boundaries of the trade secret. This procedural device effectively allows the employee to call an employer's bluff or significantly narrow the scope of the dispute.

(see "Employment Agreement" on page 11)

Employment Agreement

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The Employer's Confidential Information

The far easier route for the employer is to set up a straight breach of contract claim arising out of the employment agreement or related agreements. Unlike the statutorily defined trade secret, the definition of confidential information is far more amorphous and often defined broadly by the employment agreement or related agreements. Moreover, most employment agreements or related agreements concerning confidential information contain employer-friendly clauses whereby the employee agrees in advance that the employer's confidential information is special and that injunctive relief would be appropriate in the event of any future breach by the employee.

Given the ever-expanding technological workspace, the former employee is far more likely today to have left his or her employment possessing what the employer thinks is confidential information. This becomes even more likely when the termination was unexpected or the employee's resignation was emotionally inspired. Even the employee that thinks he or she left cleanly is likely to admit upon further examination that some employment information *may still* be accessible via their smart phones, personal e-mails, or file sharing applications.

For many people that are not lawyers, these types of agreements are usually signed as a matter of course, and the terms are soon forgotten.

When the employer's confidential information is broadly defined, the employee's task (or more likely the attorney's task) of going through employment-related documents and classifying them as confidential or not can often prove difficult. This difficulty is then compounded tenfold if the confidential information is defined to include information "relating to" or "derived from" confidential information. Under such circumstances, the task can quickly become so cost prohibitive that the employee may be better off making sure that he or she returns anything whatsoever that is employment related.

The bottom line is that a formalized written agreement of any type between the employer and employee may create a continuing duty of confidentiality by the employee to the employer. The law is usually uncertain as to when these continuing obligations end.

Attorney's Fees

If simply possessing the employer's confidential information after the date of termination constitutes a breach of the employment agreement or related agreements, that is often times a low evidentiary threshold for the employer. As many employment agreements or related agreements contain an attorney's fees clause, employees and their counsel need to be vigilant in correcting any such technical breaches before the element of recovering the attorney's fees becomes a motivating factor for continued litigation.

Because the employer usually does the employee "the favor" of having its attorney first send a letter demanding the return of all confidential information before filing an action, it has been my experience that the best course of action is to fully exhaust discovery into the issue with your client immediately to prevent it from being an issue slowly developed through discovery by the employer. This is especially true where attorneys' fees are at stake. This way a technical breach remains easy to cure through a modest Code Civ. Proc. § 998 offer or under the provisions of Civil Code § 1717. It is not nearly as easy to fix a breach after intense litigation efforts have already taken place to reveal the issue.

Conclusion

In light of the difficulty presented by an employer's broad description of confidential information, the California Legislature's rationale for requiring a plaintiff to clearly define the boundaries of a protectable trade secret makes perfect sense. Still, many of the leading authoritative cases in this area discuss an employer's right to seek damages against employees that depart having "trade secret or confidential information" belonging to the employer. While both theories are often at play in a single litigation and there are similarities between the proof and defenses, there are differences that require careful consideration.

(Endnotes)

1 Civ. Code § 3426.1(d).

Kirby is a partner at Kirby, Noonan, Lance & Hoge LLC in San Diego. His practice areas include employment, intellectual property, real estate and personal injury litigation.

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are no longer necessary.

History of the Budget Crisis and Downsizing in San Diego Superior Court

Between 2008 and 2012, the California state courts experienced four straight years of budget cuts. Today, the San Diego Superior Court is operating with approximately $33 million less than it would have if the cuts had not occurred. Because 85 percent of the court's budget is allocated to staff costs, the loss of $33 million has impacted staffing. The court's management began planning for the fiscal downturn and began cutbacks in 2008. The court's first step was to refrain from filling open positions, primarily among clerks and operations staff. For five years, the court did not fill vacant positions. Although the court is now beginning to do some hiring, the operations staff is short 300 individuals. Judge Barton explained that the court needs 1500 staff members to run efficiently, but currently has a staff of 1200.

Over the past several years, the court eliminated court reporters in civil matters and closed one third of its Independent Calendar (IC) departments (a loss of seven departments), including the departments in the South Bay and East County. Judge Taylor opined that we will not see civil courts in the South Bay or East County in the foreseeable future.

There have been several recent changes to judicial assignments. Judge Eddie Sturgeon moved downtown from East County, into Department 67. He brought his entire caseload. Judge William Dato left downtown to become assistant supervising judge in North County. His caseload was taken over by Judge Katherine Bacal. Judge Bacal has a background in civil litigation practice, although she has been in the family and criminal courts since coming to the bench. Judge Tamila Ipema is now in Department 64, handling the caseload of civil harassment restraining orders. Judge Richard Whitney has taken over the limited civil caseload in Department 6, and Judge Gary Kreep has taken over unlawful detainer case load in Department 7.

Half of the IC clerk positions have been eliminated. Prior to the cuts, each civil IC judge had a staff consisting of a courtroom clerk, an IC clerk (who handled calendaring, among other things), and a staff attorney. Now, there is a two-to-one ratio of IC judges to IC clerks. Moreover, each judge's caseload has increased substantially; at the end of 2012, each IC judge typically had 500 to 600 open cases. Today, there are 900 to 1200 open cases per department. The judges stated that this caseload is untenable. Furthermore, the closing of the civil departments in South Bay and East County brought all of the paper related to those cases downtown. There is 40 percent more paper to be processed, with a reduced number of people handling it.

Judge Taylor noted another source of increased pressure on the slimmed-down clerk staff. The number of pro per cases has skyrocketed in the wake of the economic downturn. These are typically unlawful detainer and collection cases, but include some more complex cases. The IC clerks (whose numbers have recently been halved) are the staff members who interface with the public. Although these clerks do not provide legal advice to pro pers, the clerks help them navigate the system. Judge Taylor stated that a scheduling call that would take two minutes with a trained legal assistant takes 30 minutes with a pro per.

The judges explained that many options were considered before these changes were made. The court's management considered reverting to the pre-fast track master calendar system. However, they thought the IC system was successful. The judges believed it provided a better quality product to practitioners and litigants. They decided to save the structure of the IC system, so that when budget conditions improve, it should be easy to add departments. This was preferable to reverting to a master calendar system and then having to rebuild an IC system when conditions improve.

The Impact of Cutbacks: Service Reductions

The good news is that, even after these cuts, **trial capacity remains untouched**. There is no real delay in cases that are ready for trial. There are open trial departments, and Judges Kevin Enright, Frederic Link, and William Nevitt are available to try wheel cases and some of the longer and more complex cases. Judge Barton stated that attorneys should feel confident they will get a courtroom rather quickly after the scheduled trial date. He does not believe this will be changing for the worse.

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Civil Judicial Update

(continued from page 13)

However, the cuts certainly have resulted in service reductions. It takes longer to have filings processed. There is a seven month backlog for processing writs (there are nearly 7000 in process), a four-month backlog for abstracts (1100 in process), and a nine-month backlog for judgments (nearly 5000 in process). This directly correlates to practitioners' frustration with having documents processed and IC judges' frustration regarding missing reply briefs and supplemental papers. Judge Barton noted that the clerk's office is closed to the public on Friday afternoons to give the clerks time to process documents to prepare for the next week's proceedings. The court's management has also persuaded the executive office to grant overtime for several extra days of work to address the backlog.

Law and motion delays have grown substantially, which causes delays getting cases to trial. Additionally, IC judges are no longer holding tracking hearings to assist in the progress of cases (i.e., acting as the "nanny state" to get cases to judgment). As a result, although San Diego previously resolved 81 percent of civil unlimited cases within a year, it will no longer be able to meet the "delay reduction" goal.

The judges believe this means practitioners will need to worry about five-year dismissals again. In the past, the court has provided a safeguard by bringing attorneys in for OSCs. That will no longer happen. The judges advised that **practitioners must have a calendaring system that tracks cases to avoid five-year dismissals**. Judge Barton anticipates that a few years from now, the court will start having five-year dismissal calendars; they will set OSCs re: why the cases should not be dismissed.

The court now has just enough staff to run 137 courtrooms on any given day, assuming normal absentee rates. The judges cautioned that if something unusual happens (e.g., an outbreak of flu), the court may need to shut down civil departments to pull clerks into the criminal department, because of the constitutional requirement for speedy trials. They hope to continue to "walk the razor's edge" and retain sufficient staffing to keep all remaining departments open, but management is looking at plans for how to do so if there are unexpected absences.

Ex partes have increased. Judge Taylor said that the two things judges talk about most frequently are: (1) how to get all the law and motion work done, and (2) the expanded extent to which lawyers want judges to conduct major surgery on the ex parte calendar with 24 hours' notice. The most frequently heard ex partes are to shorten time to get law and motion issues on calendar and to continue trial. He said he knows this is frustrating for practitioners, but advised it is very daunting to be in trial, with a jury waiting, and to confront thorny issues each morning on the ex parte calendar. He stated different judges are trying different strategies, with mixed success. Judge Taylor said this is something trial judges are thinking about every day – trying to figure out a way to get law and motion under control and get attorneys the hearing dates they need so cases can be seasonably prepared.

Adaptive Strategies

Judge Barton and Judge Taylor discussed the following strategies for practice in light of the cutbacks:

- **Consider using a settlement judge.** The court now has a full-time settlement judge – the Honorable Thomas Nugent. Judge Nugent was a civil IC judge in Vista. He is now in Department 60 running a full-time settlement conference calendar. He has an affinity for (and success with) complex cases, but he is willing to deal with any kind of case. He requires the parties to have a written demand and counter before they schedule a conference. Judge Enright and Judge Bloom also make themselves available for settlement conferences, primarily on Fridays. They do not have specific requirements regarding offers, but Judge Barton advised the parties should discuss their positions before scheduling settlement conferences. Judicial time is valuable, so the parties should be "within screaming distance" of each other.
- **Treat Law and Motion as a valuable asset – think carefully about filing a demurrer.** There were 4200 demurrers heard downtown in 2012, in fifteen IC departments. There are now only nine or ten departments hearing demurrers; therefore,

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each judge handles approximately seven demurrers every Friday. This is a problem. Different judges are handling this different ways. One judge brings lawyers in for a demurrer status conference, asks plaintiff if she wants to amend around the demurrer, and asks defendant if he is really serious. Another judge will schedule the next demurrer hearing immediately after confirming or sustaining a demurrer with leave to amend. North County is scheduling demurrers 30 days out from filing, but the court does not have the capacity to do so downtown. The judges urged plaintiffs' counsel not to overplead complaints with claims likely to draw a challenge. They urged defense counsel to think about the difference between a "strategic demurrer," which can knock out a claim, party, or the entire case, and a "procedural demurrer," which is not really going to do anything other than get the plaintiff to draft a perfect complaint, and to resist filing the latter.

- **Be judicious about "reserving" law and motion dates, and call to take things of calendar when the reservation is no longer needed.** One reaction to the problem of getting matters on calendar has been an over-scheduling of law and motion into the future. There is often a knee-jerk reaction; a defendant will file and answer and immediately schedule a date for summary judgment before knowing if there is a good motion. Judge Taylor advised that this is *very disruptive* to the court's ability to manage the calendar. In many cases, these dates are not actually needed, and the court never gets a call taking the motion off calendar. This means that the court cannot fill the now-open slot with another matter (which is clamoring for an earlier hearing date). The judges urged all attorneys to **call and take matters off calendar when they no longer need the date.** In these tight times, it is "absolutely essential" that the court have a realistic calendar. The court is looking into

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tweaking this process; for example, they have considered requiring payment of filing fees within three days after reserving a hearing date. However, in response to a question regarding whether the court would cancel phone reservations altogether, Judge Taylor responded that phone reservations provide a valuable tool in managing calendars.

- **Have real, in-person, meet and confer conferences on discovery disputes and demurrers.** In 2012, the court litigated 1000 discovery disputes. In many cases, an effective meet and confer process eliminates the need for litigation of a dispute. In many other cases, discovery disputes can be resolved on the ex parte calendar. However, there are still many discovery-related issues where counsel have not spoken; they have only sent letters back and forth. Although there is case law holding that letters may be sufficient to comply with the requirement to meet and confer, the judges urged practitioners to meet in person. They extolled the benefits of sitting in a room looking at each other, and reminded practitioners that success may require horse trading. If a judge makes himself or herself available to resolve disputes on the ex parte calendar, attorneys should narrow the issues to key, unresolved disputes. If the parties agree to resolve issues on the ex parte calendar, they should advise the judge at the beginning of the hearing; the issues will then be decided based on the ex parte papers and argument .
- **Make use of the e-filing program.** San Diego currently has a permissive e-filing system. In the not-too-distant future, it will be mandatory. The only thing preventing San Diego from making e-filing mandatory is a requirement that the court have two e-filing service providers. This requires the court to go through the government contracting request-for-proposal process, which requires significant staff time that the court simply does not have. Court management has placed this in the IT work stream for 2014; thus, e-filing may be mandatory as early as 2015. Moreover, in some complex cases and class actions, attorneys may be ordered to e-file before e-filing becomes mandatory. E-filing provides convenience to practitioners and significant time savings in the clerk's office. In order to process a new civil complaint, the clerk must conduct 31 separate data entry steps. If the complaint is e-filed, 28 of those steps are eliminated. Similarly, when any document is e-filed, certain information about that filing is automatically populated in the court's computer system, saving valuable clerk time and resources. If the court achieved 50 percent utilization of e-filing, the efficiencies obtained would be equal to saving 20 full-time-equivalent positions. If the court had 20 extra clerks, much of the backlog in processing defaults, abstracts, and other documents would disappear. Additionally, e-filing can lead to quicker results. There is a nine-month backlog for processing paper judgment packets, but if the documents are e-filed, a judgment may be ready in as little as a week. The court is very hopeful about the efficiencies that will be gained with e-filing.

Expectations for the Future

The San Diego Superior Court is ahead of the curve in dealing with the budget cuts because it began cutbacks in 2008. Other counties (such as Los Angeles and Orange County) are preparing for a sudden crash as they make cuts now. Thus, for example, although some documents are being processed more quickly in Orange County than San Diego today, Orange County will likely slow down as it makes necessary cuts in the next several months. However, **in San Diego, things should not get worse**, barring an unforeseen budget calamity. Things should slowly get better.

Judge Barton addressed Governor Brown's current proposal to provide a $100 million supplement over last year's allocation to the trial courts. He advised that the legislature and courts have discussed a new funding model for allocating funds to the trial courts based on, *inter alia*, a new workload assessment factor. Under the current allocation, courts receive the percentage of funding commensurate with their workload back when unification occurred. San Diego receives only eight to nine percent of the total. However, certain courts grew significantly (like San Bernardino and Riverside). These courts have not received more money despite the growth. If the funding allocation is changed

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as planned, San Diego will be a "donor court" rather than a "recipient court." Its percentage of the shared pie will decrease. Therefore, if the Governor's proposal goes through, San Diego Superior Court would receive $5.9 million, phased in over time, under the new allocation formula. However, the court's employee benefit costs will be going up about $4.5 million. The net result would be an additional $2 million for the court. Judge Barton cautioned that this plan is not a "done deal," but said he hopes it is the worst case scenario.

Chief Justice Tani Cantil-Sakauye has a more ambitious plan to reinvest in the judicial branch and bring the courts back to where they would have been but for the cuts over the past five years. She has calculated what it would take for the courts to "tread water" for the next year, maintaining funding at this year's level. (Judge Barton pointed out that some courts are in much worse shape than San Diego and have been dipping into reserves.) The Chief Justice has calculated that the courts need $266 million to simply "tread water" next year. If the number is less than that, other courts will be implementing cuts. The Chief Justice's plan calls for $612 million in the following year, and a total of $1.2 billion over the next several years.

Judge Barton discussed the construction of a new courthouse. He noted that funding for courthouse construction and repair comes from filing fees -- a separate funding source than the general fund. Therefore, construction will not have any effect on general fund revenues, and cuts to general fund revenues will not affect the construction. Although filing fees are down and there has been a narrowing of construction projects, the state has approved the San Diego project because the 220 West Broadway court house is built across two active earthquake faults, and there are concerns about safety. Judge Barton acknowledged a "messaging" problem from the construction of an expensive new building during a time of budget cuts, but emphasized that the construction is paid for by court users rather than taxpayers, and that the project has significant safety goals.

Judge Barton believes that San Diego has done all the damage that will be done to the civil departments. The current question is how fast the court can bring services back to pre-cut levels. He believes there will be slow and steady improvement in San Diego, but could not make any representations about when San Diego will be able to add back IC departments. Judge Barton is hopeful that the Chief Justice's funding plan will come to fruition, but appeared not to be confident that it will succeed in full. He encouraged attorneys to contact their legislators to advocate for additional court funding.

Katherine M. McCray is an associate with Wilson Turner Kosmo LLP where she specializes in business and employment litigation.

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eligible for senior judge status, he is not interested in becoming a senior judge as he is enjoying his time as Chief Judge and likely will keep in the position for at least another five years.

Work as Chief Judge

Judge Moskowitz has spent much of his time thus far as Chief Judge working to resolve the difficult issues created by the three fiscal cliffs the government faced over the last year. First, there was the extension of the debt ceiling and looming shutdown in January 2013. Second, there was the budget crisis in April 2013. Third, there was the federal shutdown October 1, 2013. Judge Moskowitz spent much of his time figuring out how to keep the court operating, in conjunction with the federal defenders, US Attorneys, and Marshals. Judge Moskowitz described having to develop an "air traffic control plan" to work on keeping the courts operating during these difficult times. Fortunately, when Judge Moskowitz was appointed chief judge he saw the budget difficulties on the horizon and was able to take steps early to plan for them. He instituted a hiring and promotion freeze which provided significant savings, while allowing the courts to operate. There are about 500 employees at the court, and staffing was brought to about 70% of normal. The employees managed by working together and doing jobs outside their normal duties. Judge Moskowitz does not believe the difficulties are over as the outlook for the 2015 budget is not bright.

The New Courthouse

The new courthouse has 16 floors, but with the high ceilings it is the equivalent of a 22-story building. It is designed to bring light from the front and back of the building. It was originally slated to have 22 courtrooms, but that was cut down to 18, then 16, and finally 14. Not all of the courtrooms have been built out. There are currently three floors with courtrooms and six total completed courtrooms. The new courtrooms are hard wired. The plan is to demolish all of the court rooms on the 1st floor of the Schwartz Courthouse and bring in about half of the probation office from the old Wells Fargo building. The grand jury also will move into the old Schwartz Courthouse. In addition, the Schwartz Courthouse will continue to have a nursing mothers room, a benefit of which Judge Moskowitz is particularly proud.

There is a bill pending before Congress to have the facility named, "James M. Carter Judith N. Keep Courthouse" and the complex of federal office building, the Weinberger Courthouse, the Schwartz Courthouse, and the present Annex will be all be known as the "John S. Rhoades Federal Judicial Center," after important trail-blazing judges in San Diego. Judge Moskowitz understands that this bill is supported by all representatives in Congress from San Diego, but it is stalled in Congress.

Calls into Chambers

Unlike the courts in the Central District of California, which do not want any calls to chambers, Judge Moskowitz wants the Southern District courts to be "user friendly." Judge Moskowitz does not mind calls into his chambers asking about motion dates and other procedural questions. However, it is of course inappropriate for the call to reach into *ex parte* communication territory. For example, a call stating the attorney wants to make a motion for summary judgment because the defendant does not have a case is inappropriate. Also, Judge Moskowitz believes the attorney on the case should make the call and not the secretary because his clerks may need additional information to be responsive, and a secretary may not be privy to the additional information asked by the court. In addition, Judge Moskowitz does not mind if an attorney with a pending motion calls chambers to check on the status of the ruling. It may have fallen through the cracks, so a courteous call checking on the status is fine.

Voir Dire

Different judges have different practices concerning attorney voir dire. Judge Moskowitz basically treats civil and criminal case voir dire the same, although attorneys have longer for questions in civil cases as Judge Moskowitz will ask many of the basic questions in criminal cases. Judge Moskowitz believes that one of the most important parts of a case is the voir dire process. Typically, Judge Moskowitz allows about 10 minutes of voir dire in criminal cases and 20 minutes in civil cases. Judge Moskowitz also does not impose time limits on a trial if the trial is going to be about four to six days long.

Judge Moskowitz was asked whether he allows juror questionnaires. Judge Moskowitz responded that he allows them infrequently.

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He generally does not like them as they are too long and burdensome for the prospective jurors. Judge Moskowitz does not allow questions such as what magazines do jurors read, what associations do they participate in, *etc.* as he believes those questions impose upon the individual's rights to free association. Judge Moskowitz also has the practice of having the attorneys challenge the jurors when the prospective jurors are not present. He tells the prospective jurors that the attorneys and he are going to excuse them while they "pick the jury." Then those on the panel feel they were chosen and don't view it as attorneys excluding certain individuals. Judge Moskowitz believes it is important for the parties to get the fairest possible jury. That is why he takes longer on jury selection than all of the judges. It usually takes about two to three hours to pick a civil jury. A civil trial will have six to 12 jurors and no alternates. He brings prospective jurors in civil cases in 18 at a time, and for criminal cases he will bring in 45-50 prospective jurors. He takes more time on choosing a jury for a criminal case.

Pet Peeves

Judge Moskowitz was asked what his pet peeves were. Judge Moskowitz said if he had to name his top "pet peeve" it would be motions to dismiss. He believes that unless the motion to dismiss is dispositive, they are a waste of client's money and the court's time. Almost all motions to dismiss are granted in part, but then the plaintiff is granted leave to amend. Nevertheless, reading the motion and opposition papers, which can total 60 pages, takes a lot of time. It would be much better to bring as a motion for partial summary judgment or summary judgment. For example, in an employment case, if there is an issue of supervisor liability, bring it up in a motion for summary judgment, not a motion to dismiss. Judge Moskowitz posited if he was "king of the rules" a defendant could not bring a motion to dismiss unless the defendant could demonstrate that bringing the motion would save time in processing the case.

Who Reads the Papers

Judge Moskowitz was asked why the court does not use experienced attorneys to read the papers and prepare bench briefs so his work load would be lighter. Judge Moskowitz, however, takes his responsibilities as a judge very seriously and if he is making a decision in a case, he needs to read the papers. For civil motions, law clerks review the papers and draft proposed orders. Judge Moskowitz will then read the proposed order, read the moving and opposing papers, re-read the proposed order, and then make changes to the proposed order. Judge Moskowitz told the story of going to urgent care and asking the nurse when he could be seen. He was told he could see a nurse practitioner immediately, but if he wanted a doctor, he had to wait. He decided to wait. After waiting some time, he again asked how long it would be, and the nurse told him he could see the physician's assistant in about a half an hour, but if he wanted to see a doctor, he had to wait. He waited. Similarly, he could tell people who wanted to know how long it would take him to rule on a motion that they could have the law clerk's decision immediately, the career clerk's decision in about two weeks, or wait for his decision.

Victim Statements in Criminal Proceedings

Judge Moskowitz feels strongly that victims have a right to be heard and allows them to give a statement. He believes the victims should feel a part of the system. He finds that victims rarely speak, but when they do, they should be heard and part of the process.

Oral Arguments

Regarding oral arguments, Judge Moskowitz finds there are three classes of motions for which he will have oral argument. First, there are the motions which are easy to resolve and the judge can give an opinion from the bench. These motions are rare. Second, he will ask for oral argument if he does not know the answer and wants to explore some questions. He will use oral argument to debate with the attorney and he will want the attorney to point out holes in his analysis. The debate helps clarify areas of questions raised by the motion. Third, if the matter is very complicated, he will ask for oral argument just to be sure he has a grasp of the issue raised.

Some judges have oral argument in every case. The judge may ask whether the attorney has anything to add to their papers. This is a no win question. If the attorney says "no" there is nothing to argue. If the attorney says "yes" the retort is "why didn't you put it in your papers?"

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Barry Moskowitz

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If oral argument is granted, it will take place on a different date from the date of the noticed hearing date. Usually, Judge Moskowitz schedules oral arguments for Tuesdays or Wednesdays when there is more time to hear the arguments.

Judge Moskowitz graciously closed the session by giving the participants a behind the scene tour of the new courtroom to showcase its architectural design.

Karen K. Haubrich is an associate at Wilson Turner Kosmo LLP.

New and Noteworthy

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National Labor Relations Board Deems Arbitration Unlawful because it Required Employees to Waive Right to Bring Class Claims

By: Wilson Turner Kosmo LLP under the headline.

The NLRB found that the employer's arbitration agreement ran afoul of the National Labor Relations Act in requiring that its workers sign an arbitration agreement containing a class action waiver. In the face of the fifth circuit and other courts declining to follow this rule, the NLRB cited to its policy of "nonacquiescence" stating it was bound to follow NLRB precedent (see D.R. Horton D.R. Horton, Inc. v. NLRB, 737 F.3d 344 (5th Cir. Dec. 3, 2013)) until and unless it were overturned by the United States Supreme Court. Although the Supreme Court has weighed in on the enforceability of individual arbitration agreements, it has never directly weighed in on the intersection of the Federal Arbitration Act and the NLRA.

(Sprouts Market, LLC, Case No. 21-CA-099065)

Defending Equality:
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ABTL is proud to present our April 8th dinner program featuring Roberta Kaplan

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6:00 pm dinner
6:45 - 7:45 pm program

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Roberta (Robbie) Kaplan, a graduate of Harvard College and Columbia Law School, is a partner in the Litigation Department of Paul, Weiss LLP.

She has been described as a "powerhouse corporate litigator" and "pressure junkie" who "thrives on looking at the big picture" whether "in the gay-marriage legal fight or high-profile corporate scandals." Robbie has been selected as one of The 100 Most Influential Lawyers and one of the top "40 Under 40" lawyers in the United States as well as a 2013 Litigator of the Year by The American Lawyer.

Robbie successfully argued before the United States Supreme Court on behalf of Edith Windsor in United States v. Windsor, a landmark case that may be the most significant civil rights decision of our time. In Windsor, the nation's highest court ruled that a key provision of the Defense of Marriage Act (DOMA) violated the U.S. Constitution by barring legally married same-sex couples from enjoying the wide-ranging benefits of marriage conferred under federal law. In its majority opinion in Windsor, the Supreme Court explained that the status of being a married gay person is "a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed … worthy of dignity in the community equal with all other marriages." The consequences of the Windsor decision have been both rapid and profound. Lower courts throughout the United States, including in New Jersey, Ohio, New Mexico and Utah, have since held, relying on Windsor, that gay couples in those jurisdictions should be accorded equal rights in marriage. Robbie's representation of Edie Windsor was chronicled by Ariel Levy in her piece in the September 30, 2013 issue of the The New Yorker entitled "A Perfect Wife."

Robbie's work has been honored by many public interest and civic organizations, including the American Constitution Society, Stanford Law School, Columbia Law School, the Family Equality Council, and the Human Rights Campaign.

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