ASSOCIATION OF BUSINESS TRIAL LAWYERS
abtl
SAN DIEGO

PMB #386
4653 Carmel Mountain Road, Suite 308-211
San Diego, CA 92130

PRSRT STD
U.S. POSTAGE
PAID
PERMIT 2325
SAN DIEGO, CA

ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO
abtl REPORT

Volume XXII No. 1 *Spring 2015*

Tameny Claims May Provide Employees Relief Even Where the Applicable Statute Does Not


Frank Tobin

By Frank Tobin

Generally, employment without a specified term "may be terminated at the will of either party." (Labor Code section 2922.) This is known as at-will employment. However, at-will employment is not without limits. "[W]hile an at-will employee may be terminated for no reason, or for an arbitrary reason, there can be no right to terminate for an unlawful reason or a purpose that contravenes fundamental public policy.[1] "[A]n employer's traditional broad authority to discharge an at-will employee may be limited … by considerations of public policy."[2]

Tameny Claims

A cause of action for wrongful termination in violation of public policy is known as a *Tameny* claim after the case of *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 172. The elements of a *Tameny* claim are: (1) the employee was employed by the employer; (2) the employer discharged him or her; (3) a violation of public policy substantially motivated the discharge; and (4) the discharge caused harm to the employee.[3]

If a public policy has been found to be violated, a *Tameny* claim may be stated even where there would be no claim for violation of an applicable statute or where the statute of limitations on applicable statutory claims has expired. *Tameny* claims may be available to employees even when their termination violates no statute on point. The recent cases of *Ferrick v. Santa Clara University* (2014) 231 Cal.App.4th 1337 and *Diego v. Pilgrim United Church of Christ*

(see "Tameny Claims" on page 4)

Technology-Assisted Review: an Effective Way to Tackle the Mountains of Electronic Data


Mindy Morton

By Mindy Morton

"Not every litigated case involves e-discovery. Yet, in today's technological world, almost every litigation matter *potentially* does."[1] Relevant documents are increasingly stored electronically: one study estimated that 93% of all information generated in 1999 was digital.[2] It is estimated that by 2020 "the digital universe [will contain] nearly as many digital bits as there are stars in the universe. It is doubling in size every two years."[3] Given this exponential growth of electronically-stored information ("ESI"), lawyers need tools that can tackle the mountains of data in a cost-efficient and reliable manner.

Key-Word Searches and Manual Review Are Often Ineffective in Today's Document Intensive Litigation

Not so many years ago, each potentially relevant document would be reviewed by an attorney (usually a junior member of the team),

(see "Technology-Assisted Review" on page 16)

Inside

EXTRA! EXTRA!

Get the Inside Scoop on the Most Sensational Trials in US History

ABTL is proud to present: A Conversation with Linda Deutsch by Judge Connor and Judge Ito

Linda Deutsch, Associated Press Special Correspondent

In nearly a half century with The Associated Press, Linda Deutsch established herself as the nation's leading expert in coverage of high profile trials. From Charles Manson to O.J. Simpson, Michael Jackson, Phil Spector, Patty Hearst and many others in between, she has become known for her fair and unbiased coverage.

A recent issue of "Current Biography," summing up her career said, "She has been ranked among the foremost American courtroom journalists of modern times….She is best known for her detailed, objective reporting on some of the most sensational, newsworthy and influential trials of recent decades."

In conversation with Los Angeles County Superior Court judges, the Honorable Jacqueline Connor (ret.) and the Honorable Lance Ito (ret.), Ms. Deutsch will regale us with stories of her favorite experiences covering the most sensational trials in US history.

EVENT DETAILS

Date: April 7, 2015
Time: 5:30 pm cocktails
6:00 pm dinner
6:45 - 7:45 pm program
Place: The US Grant
326 Broadway,
San Diego, CA 92101
Parking-$10
Cost: ABTL Members $65
Non-Members $85
Judicial/Public Sector $40
Information: Contact
Maggie Shoecraft at
abtlsd@abtl.org
Register Online at: www.
abtl.org/sandiego.htm

ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO
abtl

Hon. Jacqueline Connor (ret.)

is a full time mediator and arbitrator with extensive experience settling disputes. She tried over 200 jury trials to verdict. Retiring after 25 years as a judge, presiding over trials ranging from death penalty to construction defect to medical malpractice, she has been recognized as a national leader in jury innovations. An expert in the courtroom, she has been able to use her experience to craft creative solutions and assist in realistic assessments of risks, benefits and disadvantages of trial. Judge Connor is committed to keeping people out of court.

Hon. Lance A. Ito (ret.)

has been recognized twice as "Trial Judge of the Year" and has received Lifetime Achievement, Trail Blazer, and Public Service awards. During his more than 25 years on the bench of the Los Angeles Superior Court, he presided over hundreds of trials including that of O.J. Simpson. He served on the L.A. Superior Court's Executive Committee, served as chair of the Judicial Council's Court Interpreters Advisory Panel, and taught at the B.E. Witkin Judicial College over two decades. Judge Ito is an ardent advocate for equal language access to the courts.

design by: www.REDROMANcreative.com

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

Technology-Assisted Review

(continued from page 17)

ate with opposing counsel and to be transparent about the methodology and protocol used. Discuss best methods for finding responsive ESI early in the case, and try to agree on a protocol. The Northern District of California has sample ESI protocols and an ESI Guideline that may be useful.[17] If you cannot obtain agreement about TAR from opposing counsel, find a different method or request court approval *before* undertaking it.

Mindy Morton is Senior Counsel at Procopio, Cory, Hargreaves, & Savitch LLP. Her practice focuses on First Amendment litigation and intellectual property litigation in state and federal courts, including trade secret, patent, trademark, copyright, computer fraud and non-compete agreement litigation.

(Endnotes)

1 State Bar Standing Committee on Professional Responsibility and Conduct Proposed Formal Opinion Interim No. 11-0004, 3 (currently open for public comment).

2 Peter Lyman & Hal R. Varian, How Much Information, University of California at Berkeley, School of Information Management and Systems (Oct. 27, 2003), found at http://www.sims.berkeley.edu/how-much-info-2003.

3 EMC Digital Universe, The Digital Universe of Opportunities: Rich Data and the Increasing Value of the Internet of Things, (April 2014), found at http://www.emc.com/leadership/digital-universe/2014iview/executive-summary.htm.

4 *Da Silva Moore v. Publicis Groupe,* 287 F.R.D. 182, 189-191 (S.D.N.Y. 2012) (summarizing studies).

5 Predictive coding, although the most prevalent method of TAR currently used, is only a subset of the larger universe of TAR, and for this reason, the term "Technology-assisted review" is used in this article. *See* Maura R. Grossman and Gordon V. Cormack, The Grossman-Cormack Glossary of Technology-Assisted Review, 7 Fed. Courts L. Rev. 1 (2013), 7 Fed. Courts L. Rev. 1, 26 ("TAR Glossary").

6 *Da Silva Moore,* 287 F.R.D. 182 (S.D.N.Y. 2012); *see also Gabriel Technologies Corp. v. Qualcomm Inc.,* 2013 WL 410103, No. 08cv1992 AJB (MDD), *10 (S.D. Cal., Feb. 1, 2013) (finding that Defendants' use of TAR "reduced the overall fees and attorney hours required.").

7 *William A. Gross Constr. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co.,* 256 F.R.D. 134, 134, 126 (S.D.N.Y. 2009).

8 TAR Glossary, 7 Fed. Courts L. Rev. at 32.

9 *Da Silva Moore,* 287 F.R.D. at 183-184 (citation omitted).

10 *Id.* at 184 (citation omitted).

11 *Id.*

12 *Id.* at 188-189. The court found there was no requirement that document responses be "complete," nor did the use of TAR violate Federal Rule of Evidence 702, as the method of discovery review and production had nothing to do with admissibility at trial.

13 *Id.*

14 *Id.* at 191.

15 *See, e.g., Gabriel Technologies Corp. v. Qualcomm Inc.,* 2013 WL 410103, No. 08cv1992 AJB (MDD), *10 (S.D. Cal., Feb. 1, 2013); *National Day Laborer Organizing Network v. U.S. Immigration and Customs Enforcement Agency, et al.,* 877 F. Supp. 2d 87 (S.D.N.Y. 2012); E*ORHB, Inc. v. HOA Holdings LLC*, 2012 WL 4896670, No. 7409-VCL (Del. Ch., Oct. 15, 2012).

16 Rules of Professional Conduct of the State Bar of California, 3-110; *see also* Cal. State Bar. Formal Opinion No. 2010-179.

17 *See* http://www.cand.uscourts.gov/eDiscoveryGuidelines.

ASSOCIATION OF BUSINESS TRIAL LAWYERS
abtl
SAN DIEGO

Editor: Mathieu Blackston | mathieu.blackston@dot.ca.gov

Editorial Board: Eric Bliss, Richard Gluck, Lois M. Kosch, Alan Mansfield, Olga May and Shannon Petersen

President's Letter

By Jack Leer

As I write my first President's Letter for the ABTL Report, it is only the beginning of 2015 and the San Diego Chapter of ABTL is off to a great year! We held the annual Board of Governors dinner on January 13 at Mary Pappas' Athens Market Taverna, where we welcomed our new Board members and thanked our outgoing Board members and officers. It was wonderful to see so many of our judges and attorneys come out for some post-holiday cheer and a chance to catch up with old friends and colleagues.

On Saturday January 24, we hosted our semi-annual Teaching the Art of Trial Skills Seminar, which was a tremendous success. Seminar Chairs Alan Mansfield and Rich Gluck switched up the format this year, which featured younger attorneys putting on demonstrations of their considerable trial skills while taking feedback from our participating judges and panel of senior attorneys. The turn-out for the new format was fantastic, and the performance of our younger members was absolutely amazing. Thanks to all who attended and participated, and a special thanks to Robbins Geller Rudman & Dowd, LLP for hosting.

January also saw the first *sidebar!* of 2015, which was held at Ballast Point's tasting room in Little Italy. For those of you who don't know, *sidebar!* is a happy hour for our younger members hosted by our Leadership Development Committee. It was my first time attending, and it was great to see so many of our younger members in attendance. I think the connections our younger members are making at these purely social events are going to strengthen the organization for years to come.

Our membership numbers are already well ahead of what they were in 2014 thanks in large part to the fact that our Executive Director Maggie Shoecraft is now entering her second full year in the position and has whipped things into shape! She has done a great job of getting the word out on all the great benefits and programs that come with membership in ABTL, and has worked cheerfully and tirelessly to make sure things are running smoothly.

This year is off to a great start, but it is only the beginning. We are going to have some fantastic dinner programs in 2015, there will be free specialty CLE credit lunches both downtown and in Carmel Valley, and we will continue to put on periodic "Nuts and Bolts" seminars. In furtherance of our commitment to promoting dialogue between the bench and bar, we will continue to host the always-popular Judicial Mixer in July and brown bag lunches with judges throughout the year. It should be a great year, and I look forward to seeing you all at an ABTL event soon!

100% COMMITTED
abtl
An open dialogue between Bench & Bar since 1973

The ABTL is grateful for the support of the following firms who have signed up all of their litigators as members of the ABTL San Diego

Ballard Spahr
Bernstein Litowitz Berger & Grossmann
Caldarelli Hejmanowski Page & Leer
Chapin Fitzgerald Knaier
DLA Piper
Duane Morris
Gomez Trial Attorneys
Greco Traficante Schulz & Brick
Kirby Noonan Lance and Hoge
Latham & Watkins
Procopio Cory Hargreaves & Savitch
Sheppard Mullin
Shoecraft Burton
White Oliver & Amundson
Wilson Turner Kosmo

(2014) 231 Cal.App.4th 913 are both cases that deal with California's whistleblower statute and provide illustrations of when this can occur. Both cases were decided late last year.

The *Ferrick* and *Diego* Decisions

In *Ferrick*, the former employee filed a *Tameny* claim alleging that she had been fired for reporting illegal conduct of her supervisor.[4] The trial court dismissed the case, finding that the employee's allegations regarding her supervisor's conduct involved injury only related to the interests of a private university, not the public.[5] The employee appealed. The appellate court held that not only did the alleged misconduct by the supervisor affect the employer's private interests, it also "implicated the public policy embodied in [Labor Code] section 1102.5."[6] The court allowed the case to proceed, even though the report had only been made internally, and the version of Labor Code section 1102.5 ("section 1102.5") in effect at the time did not cover employees who only reported internally.[7]

In *Diego*, the former employee filed a *Tameny* claim alleging that she was fired because the employer *suspected* that she had filed a complaint with the Community Care Licensing Division of the California Department of Social Services. In reality, she had not filed a complaint.[8]

The version of section 1102.5 then in effect required employees to disclose a violation of a state regulation to a government agency. The employer argued that because the employee did not actually file a complaint, she was not considered a protected employee under the whistleblower statute. As she had not stated a claim under the statute, the employer argued she should not be able to pursue a *Tameny* claim based on the public policy behind the statute. The trial court granted summary judgment "... on the basis that, because Diego in fact had not made a complaint to Licensing (or otherwise engaged in activity associated with protected disclosure of alleged wrongdoing), her termination of employment did not violate public policy as a matter of law." [9]

The Court of Appeal disagreed. It held that the public policy behind former section 1102.5 was not limited to employees who disclose a violation to a public agency. It found the public policy also applied to employees *suspected* of disclosing such violations.[10] The court found that a *Tameny* claim had been stated. "This policy applies to preclude retaliation by an employer not only against employees who actually notify the agent of suspected violations but also against employees whom the employer suspects of such notifications (Citations omitted)." "Otherwise, the policy to encourage the reporting of alleged violations will be frustrated (Footnote omitted)."[11]

Even though a claim based on the statute itself could not be stated, a *Tameny* claim based on the public policy underlying the statute could proceed.

Tameny Claims May Provide Relief When an Applicable Statute May Not

These two cases illustrate that in the context of the whistleblower statute, courts are allowing the public policy behind the statute to be construed broadly to let *Tameny* claims go forward when employees are otherwise not covered by the express statutory terms. *Tameny* claims may provide a basis for recovery pursuant to the public policy of a statute in the whistleblower context even when the statute would not otherwise provide a basis for recovery. Employers would be well advised to instruct their managers on the policies behind the whistleblower statutes and the recent amendments to section 1102.5 so as to avoid *Tameny* claims premised upon public policy rather than well delineated statutory violations.

Frank Tobin is a Shareholder at the firm of Ogletree Deakins. He represents management in all types of labor and employment disputes, including discrimination, retaliation, harassment, wrongful discharge, wage and hour, and trade secret cases. Mr. Tobin also represents employers in class action disputes and ERISA breach of fiduciary duty litigation.

(see "Tameny Clamins" on page 5)

how to utilize it. If your case involves millions of electronic documents, TAR may be a cost-effective and superior alternative to manual review and key-word searches. Magistrate Judge Peck, author of the *Da Silva Moore* opinion, said it best in an earlier opinion addressing electronic discovery:

> Electronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI....[T]he proposed methodology must be quality control tested to assure accuracy in retrieval and elimination of 'false positives.' It is time that the Bar—even those lawyers who did not come of age in the computer era—understand this.[7]

More specifically, TAR is a method of extrapolating a human review to a larger set of documents by using a computerized algorithm, set of rules, or other methods involving machine analysis.[8] The *Da Silva Moore* court described TAR in the following manner:

> Tools (different vendors use different names) that use sophisticated algorithms to enable the computer to determine relevance, based on interaction with (i.e., training by) a human reviewer. Unlike manual review, where the review is done by the most junior staff, computer-assisted coding involves a senior partner (or [small] team) who review and code a "seed set" of documents. The computer identifies properties of those documents that it uses to code other documents. As the senior reviewer continues to code more sample documents, the computer predicts the reviewer's coding. (Or, the computer codes some documents and asks the senior reviewer for feedback.) When the system's predictions and the reviewer's coding sufficiently coincide, the system has learned enough to make confident predictions for the remaining documents. Typically, the senior lawyer (or team) needs to review only a few thousand documents to train the computer.[9]

Da Silva Moore was a gender discrimination case, and the defendant estimated that it had "approximately three million electronic documents from the agreed-upon custodians."[10] The parties tentatively agreed to use TAR and put together an ESI protocol, although the plaintiff reserved its right to object.[11] Shortly after the court approved the protocol, the plaintiff filed objections. The court ruled against plaintiff and allowed defendant's proposed TAR protocol to proceed.[12] In allowing defendant's TAR protocol to proceed, the court, "recognize[d] that [TAR] is not a magic, Staples-Easy-Button, solution appropriate for all cases. The technology exists and should be used where appropriate, but it is not a case of machine replacing humans; it is the process used and the interaction of man and machine that the courts need to examine."[13] The court further stated that TAR "appears to be better than the available alternatives, and thus should be used in appropriate cases. While this Court recognizes that computer-assisted review is not perfect, the Federal Rules of Civil Procedure do not require perfection."[14]

Guidelines for When TAR May Be Appropriate for Your Case

A number of courts around the country have followed *Da Silva Moore* in approving TAR, and as the mountains of data increase, the use of TAR will become more commonplace.[15] Here are some guidelines to consider when deciding whether technology-assisted review is the best way to tackle your mountain of data:

Understand how TAR works. All California attorneys have a duty of competence. If you do not have sufficient knowledge of TAR, associate with another attorney who has such knowledge, acquire the requisite knowledge yourself in a timely fashion, or consult with a non-lawyer technical expert.[16]

Evaluate. Discuss the universe of ESI with your client at the outset of the case. If the universe of potentially responsive emails (or other items) exceeds 50,000, TAR might make sense. TAR can be more cost-effective than traditional searches, but it will involve investment in software and ediscovery counsel and/or vendors. It works best if senior litigation counsel is involved in identifying the relevant issues and reviewing the seed set.

Cooperate with opposing counsel. So far, most courts that have approved the use of TAR have required the producing counsel to cooper-

(see "Technology-Assisted Review" on page 18)

Technology-Assisted Review

(continued from cover)

and this attorney would make judgment calls as to the relevance, responsiveness, and privilege status of each document. As electronic discovery became more prevalent, attorneys turned to tools such as key-word searching to reduce the amount of documents reviewed. Key-word searches, however, are often over- or under-inclusive, and the attorneys involved must have sufficient knowledge of the documents at issue to craft accurate and specific searches. Today, given the amount of ESI involved in many cases, manual review and key-word searching are too expensive and too time-consuming. Further, a number of studies have found that neither method is incredibly accurate.[4]

"Today, given the amount of ESI involved in many cases, manual review and key-word searching are too expensive and too time-consuming."

Fortunately, legal technology tools are keeping up with this explosion of data, and attorneys can use technology-assisted review, or "TAR," to efficiently process data and find relevant documents.[5] In February 2012, TAR was first recognized and approved by a federal court in the landmark case *Da Silva Moore v. Publicis Groupe,* and since then, courts across the country (including the Southern District of California) have recognized the value of TAR in reducing discovery costs and in increasing the responsiveness of productions.[6] This article will discuss TAR, the *Da Silva Moore* case, and offer some best practices when dealing with large amounts of ESI.

TAR Uses Computerized Algorithms to Extrapolate Human Review to a Larger Set of Documents

TAR is a judicially-approved method of reviewing and producing documents, and it is important for attorneys to understand when and

(see "Technology-Assisted Review" on page 17)

Tameny Claims

(continued from page 4)

(Endnotes)

[1] *Gantt v. Sentry Ins.* (1992) 1 Cal.4th 1083, 1094.

[2] *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 172 (internal quotes omitted).

[3] Jud. Council of Cal. Civ. Jury Instns. (2014) CACI No. 2430.

[4] *Ferrick,* 231 Cal.App.4th at 1342-1343.

[5] *Id.* at 1343.

[6] *Id.* at 1357.

[7] Section 1102.5 was amended effective 2014 to protect perceived whistleblowers from adverse action.

[8] *Diego*, 231 Cal.App.4th at 917.

[9] *Ibid.*

[10] *Id.* at 929.

[11] *Ibid.*

Please Note Our Address!

Association of Business Trial Lawyers of San Diego
4653 Carmel Mountain Road
Suite 308-211
San Diego, CA 92130

Maggie Shoecraft, *Executive Director*
619.948.9570
abtlsd@abtl.org | www.abtl.org

Much Ado About Something: Appellate Issues at the Pleading Stage

Rupa G. Singh

By: Rupa G. Singh

Skepticism being a litigator's calling card, an appellate lawyer who claims that appellate issues lurk at every stage of a civil action may well be accused of trying to justify her existence. But, does that mean she is wrong? No, it turns out.

This exercise means first accepting the modest premise that the four stages of a civil litigation are generally (i) the pleadings, (ii) discovery, (iii) summary judgment or other dispositive motion practice, and (iv) trial. Next, consider that only a fraction of civil appeals follow judgment after a bench or a jury trial. It follows, then, that the majority of civil appeals raise issues arising over the course of the litigation, such as the sufficiency of the claims, discovery and other pre-trial disputes, and dispositive motions

In the first of this four-part series, I focus on the key appellate issues at the pleading stage, and how they can inform a litigator's efforts in first drafting or challenging a pleading before the trial court, and then defending or challenging the sufficiency of that pleading on appeal.

To begin, let's brush up on a few basic principles of appellate review at the pleading stage. First, review from the dismissal of a pleading (in federal court), or a demurrer to it (in California court), is under the "de novo" standard. This means that the appellate court does not defer to the trial court's legal conclusions, but analyzes the sufficiency of a pleading independently. Second, while California courts still embrace the notice pleading standard, the United States Supreme Court has decreed that all but pro se federal litigants must plead a claim that is "plausible" on its face. Third, while leave to amend is to be freely granted, it is hard to salvage claims dismissed with prejudice by introducing new facts for the first time on appeal, particularly in federal court. Finally, as with appellate review at any stage, issues not raised before the trial court are generally deemed forfeited, barring a few limited exceptions, such as a purely legal issue that both parties have briefed or an issue affected by a change in the law after an appeal is filed.

So, what lessons can the savvy litigator learn from these principles?

The fact that appellate review is de novo gives the impression that a party will have two distinct opportunities to advance the same arguments in defense of or in opposition to the pleading at issue—once before the trial court, and again before the appellate panel. But this is misleading. The reversal rate for civil appeals is very low, less than 20 percent. So, notwithstanding the de novo standard, if a party fails to convince the trial court of its position, chances are slim that it will see a complete reversal of fortune with an appellate tribunal. In other words, the best way to win an appeal at the pleading stage remains by succeeding in the trial court.

"So, notwithstanding the de novo standard, if a party fails to convince the trial court of its position, chances are slim that it will see a complete reversal of fortune with an appellate tribunal."

The fact that notice pleading remains the pleading standard in state court might lead state practitioners to proceed with business as usual. But, because of the possibility of a successful removal of a civil case under a variety of circumstances, plaintiffs in both state and federal court should allege sufficient facts to make the alleged wrong not just conceivable, but plausible. Whatever else this relatively new plausibility standard comes down to, the appellate practitioner in me knows that it at

(see "Much Ado About Something" on page 7)

Real-Time Jury Mediation

(continued from page 14)

Real time Jury mediation

As a trial judge, I settled many of my own cases because I wanted to be pro-active. My observations of jurors always played a role in my opinion as to which direction the case was going. I recall a sexual harassment case brought by a female police officer against a city. I observed that the jurors had stopped taking notes during the defense's presentation – always a bad sign. During recess, I suggested to defense counsel that the city council consider settlement. Afterwards, I met privately with all the jurors to get their views on the case: The city made the right decision.

During trial, each side usually has a completely different view of how things are progressing and how the jury is receiving the evidence. Mediators are well served in such cases by spending time observing in court. This is especially true where the potential for damages would justify the expense incurred. Obviously, care must be taken in selecting the mediator and delineating his or her role in the process. If the case has been mediated previously, the parties may wish to use that mediator who is familiar with the issues. On the other hand, a new mediator will bring a new perspective.

The decision to use a mediator during a jury trial should, if possible, be made before the trial starts. This allows parties to select a mediator, plan what portions of trial the mediator will observe, and plan how settlement discussions will take place. Arrangements can be made with the trial Judge for a half or full day recess to conduct the mediation.

If the parties decide to use a mediator during trial, protocol must be outlined in advance. For example, the mediator should have no contact with the parties, lawyers or judge during court sessions to preserve neutrality. The mediation sessions should be conducted outside of court - on the weekends or on the phone. Most independent calendar judges are dark on Fridays, an additional alternative.

Consideration must be given to how, if reached, a binding settlement can be effectuated. Assuming that the jury is still deliberating, the settlement must be finalized before a verdict is reached and recorded by the judge. This might require coordination with the trial judge and use of a court reporter. (There was a case a few years ago where a $300,000 settlement was apparently reached during deliberations, and then jury announced its $3 million verdict. The plaintiff's lawyer then disputed the settlement and protracted litigation continued, resulting in a new trial and an unhappy judge.)

Some people may object to taking the case away from the jury after they have invested their time and effort at trial. However, most jurors experience relief when informed of a settlement. If still open to settlement, lawyers for both the plaintiff and the defense should consider using a mediator during trial. Personally, I would welcome the opportunity to return to the courtroom and work with lawyers and parties who are considering "real time jury mediation."

Herbert B. Hoffman *is a retired Judge of the California Superior Court and is a private mediator and arbitrator affiliated with Judicate West.*

Real-Time Jury Mediation

By Judge Herbert Hoffman (Retired)

Judge Herbert Hoffman (Retired)

The mediation process is firmly solidified in our civil legal system because it works. It's no longer whether the parties want to mediate, rather (1) when are we going to mediate and (2) with what mediator. The process is a refinement of the civil settlement conference, variations of which have grown into present forms of mediation. In a jury mediation, the attorneys and the mediator identify the particular issues that are a roadblock to settlement. Both sides present their case to a focus group while the parties and the mediator observe the jurors reactions. The case is then mediated using the focus group's comments and findings.

Today's full-time mediators are more committed than the civil settlement judges of days past, who may have read the briefs the morning of the settlement conference. Follow-up after the mediation is now the rule, not the exception. In the past, single day mediations would go on until midnight to obtain a settlement. Today, many cases are mediated in two to three sessions. The sophistication of the lawyers has changed too, as they are well versed in mediation practices. This progression has allowed for further expansion of the mediation process. Real time jury mediation is just another step in that direction.

Lessons From Experience

As a superior court judge, I was once asked to settle a trial with over 100 separate plaintiffs. I spent three days observing the trial, taking notes, watching the jurors. While I did not settle that case, I had never been more prepared for a settlement conference. After the verdict, the lawyers asked me to try again. I did. I even continued to work on the case after I left the bench, while the case was on appeal. Though the case was never resolved, the point is that by watching the trial, I became fully committed to resolving the case. Being present in the courtroom stimulated me to a higher level.

On another occasion, I acted as one of three arbitrators in a two week arbitration. Early on, it was apparent that the parties were open to settlement. It was decided in joint conference with the lawyers that I would be designated as a mediator while continuing to serve as a co-arbitrator. The only caveat was that I could not discuss the settlement process with my co-arbitrators. In the second week of arbitration, I presented the final offer from the defendant to the plaintiff's counsel. Later that day, the defense called its final medical expert - one of the finest I had ever observed. At the conclusion of the direct examination I wrote a note on my legal pad and slipped it to plaintiffs counsel: "*close the deal promptly*." At recess, he asked to speak with me in private. I told him my views and asked, "There are only a handful of lawyers in America who could cross-examine this witness, are you one of them?" The case settled before cross-examination. Though this is unusual, the point is that firsthand observations are of greater assistance than reading an expert's report, deposition transcript or mediation brief.

Finally, I once mediated a case in which the parties had significantly different views on both liability and value. I felt the defendant had significant exposure after reviewing a videotape of the underlying incident. The case never resolved in mediation and went to a jury, but the trial judge bifurcated the case on liability and damages. The jury found for the plaintiff on liability. At the damages phase, portions of the final arguments were played on local television. Plaintiff's counsel asked the jury for $26 million in damages; defense counsel suggested that $100,000 would fair. It was reported that the case settled before the jury returned its verdict. The jury foreperson stated the jurors were prepared to award more than $10 million. The point is, a mediator was not utilized at any point during the trial.

(see "Real-Time Jury Mediation" on page 15)

Much Ado About Something

(continued from page 6)

least starts with good, old-fashioned storytelling. Does the pleading narrate the "who, what, where, why, and when" of a satisfying story? Do the gaps in plot filled "upon information and belief" seem credible? Does the request for relief sound like the natural end to a compelling tale? If so, the pleading will likely pass muster at the trial court, and withstand review on appeal.By contrast, in deciding whether to challenge, or in challenging the sufficiency of a pleading, defense counsel should ask corresponding questions, under both the notice pleading and the plausibility standard. Do plaintiff's claims hang together based on a series of unrelated events or characters, the proverbial spokes of a wheel without a hub to connect them? Do the consequences of an alleged wrong seem hyperbolic, or strain credulity? Does the desired relief seem like the contrived finale to a fanciful yarn? Because human beings can instinctively differentiate a bad story from a good one, and judges tend to be human, a "yes" to one or more of these questions could be fatal to a pleading at the trial or appellate stage.

Next, to avoid raising it for the first time on appeal (even in state court, where the rules are more liberal), a plaintiff facing a challenge to a complaint should offer to amend the defects in it with, or in lieu of, an opposition. What's more, plaintiff should also concurrently submit a proposed amended complaint, even if the local rules do not require as much, including to rebut arguments regarding undue delay and bad faith. Plaintiff should note, though, that filing an amended complaint waives appellate review of an order sustaining a demurrer to, or dismissing, the earlier complaint. By contrast, to foreclose the possibility of successive amendments, a defendant could try to portray, if credible, the requests for leave to amend in a negative light, even in the trial court. For example, a defendant can argue that the request to amend is an attempt to offer additional facts previously omitted yet already known to plaintiff, to propose an alternative theory of the claim to keep defendant guessing, or to seek, in bad faith, unwarranted inferences in plaintiff's favor that defendant has undermined through plausible, alternative explanations.

Finally, to avoid forfeiture of issues on appeal at the pleading stage, both parties must generally assert their legal theories and all supporting facts in their pleadings in the first instance. Thus, a plaintiff should set forth all facts in support of a claim in the original complaint because a request to propose a new theory of the claim is more likely to be granted if at least the underlying facts have been previously alleged. This is true even in state court, where leave to amend is freely granted even if a new theory of the claims is raised for the first time on appeal. To the extent that supplemental factual allegations are necessary, note that an amended complaint cannot contradict the allegations of the original complaint, except in limited exceptional circumstances. Forfeiture also preys on the unwary defendant. Thus, for example, defendant must assert even purely legal defenses, such as claim or issue preclusion, as affirmative defenses in their answer to employ these defenses in the trial court, and to preserve them for appeal.

Pleadings and appeal, much like objects in the mirror, are closer than they appear. Happily, discerning litigators don't need to rely on hindsight to learn from the relationship between the two.

Rupa G. Singh is Partner and Co-Chair, Appellate Practice at the San Diego office of Hahn Loeser & Parks LLP, where her practice focuses on complex commercial litigation and appeals.

JURY TIP: When NOT to Waste Time Educating Your Jurors

by Harry Plotkin

Harry Plotkin

One of the great misconceptions in trying complex cases is thinking that you always have to thoroughly educate your jurors about the issues during trial. I understand why you might feel that way. Yes, trials often involve advanced, complex issues. And yes, the vast majority of jurors won't know much if anything about issues like prior art in patents, what the heck a fiduciary duty really means, the difference between material and non-material breaches in contracts, or any of the host of advanced issues that a trial can involve. But never lose sight of your goal, which should be to persuade and win. Remember that you're a lawyer, not a professor, and teaching doesn't always help you win trials.

"What I am suggesting is that spending time and effort educating your jurors in trial is not automatically a good idea, and in many cases could be counter-productive."

My point is simple but not always intuitive: you should only spend time teaching your jury if you need to change your jurors' assumptions about the issues. For some, this may sound wrong: how can I possibly win if the jurors don't properly understand the issues involved in the case?

I absolutely understand and agree that jurors rarely arrive at the courthouse with an understanding of the issues in complex cases, from patents to architecture to business and finance and medicine. But the reality is that no matter how clueless they may be, jurors will always have expectations, and those expectations are hugely important. When I say "expectations," I mean that every juror has their own understanding of the issues involved in a case. It's true that these expectations may be completely wrong or oversimplified or misinformed. But for

(see "Jury Tip" on page 9)

One Day Workshop with World-Renowned Public Speaking Trainer, RICHARD GREENE and Award Winning Coach, ANKHA MARZA

Event Information

The Art & Science of Charisma: The 7 Secrets of Public Speaking

A full day designed to take each participant to the next level of their communication expertise. The day will consist of lecture, demonstrations and individual exercises with interactive one-on-one and group instruction

9:00 – 12:30

Establishing a Baseline: The 60 Metrics Communication Evaluation
Secret One: How to Master the Use of Words and Storytelling
Secret Two: How to Master the Use of Voice Tone
Secret Three: How to Master Reading and Using Body Language

12:30 – 1:00

Lunch Provided by Aptus

1:30 – 4:30

Secret Four: Creating "Lasered, Compelling Messaging" for Judges, Juries and to Market your Business
Secret Five: How to Create a Memorable "Conversation" (Instead of a "Performance" or "Presentation") with Every Juror/Audience Member
Secret Six: How to Speak "The 4 Languages of Human Communication" (Visual, Auditory, Auditory Digital and Kinesthetic to Connect with Every Juror/Audience Member
Secret Seven: How to Create An Authentic, Passionate and Impactful Conversation with your audience

Materials

- ***The 60 Metrics Communication Evaluation***
- ***Words That Shook The World: 100 Years of Unforgettable Speeches and Events - eBook***
- ***The 4 Languages Evaluation***
- ***Training DVD and Workbook***

Follow-Up

On-line one hour follow-up web session with all participants

MCLE CREDIT 6.5

EVENT DETAILS

Date: Saturday, May 2, 2015
Location: Procopio, 525 B St #2200, San Diego, CA (619) 238-1900
Cost: ABTL members and guests: $495 (each additional attorney from same firm $295)
Students: $295
Information: Contact Maggie Shoecraft at abtlsd@abtl.org
Register Online at: www.abtl.org/sandiego.htm

* Must meet minimum of 30 registrants

Proudly presented by: ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO abtl

Lunch compliments of: aptus COURT REPORTING

Jury Tip

(continued from page 8)

one of the sides in trial, these oversimplified or misguided assumptions work in your favor and make the juror receptive to your case.

For example, some jurors assume that every complicated-sounding medical condition sounds serious and scary and should be treated as an emergency. As a plaintiff attorney in a medical malpractice case, these jurors will already be on-board when you argue that the defendants should have treated the plaintiff with more urgency, without you having to spend time teaching them about the science. And in fact, the more you teach them about the science, the more these jurors may get the sense that this particular condition was actually less serious than they first imagined. Sometimes your jurors' assumptions and expectations are better than the reality. I've seen it often: jurors often assume that "trade secrets" are highly confidential and valuable, but in some cases they are surprised at how pedestrian the actual trade secrets seem.

Just to clarify, I am not advocating the idea of misleading or somehow tricking your jurors. I am not suggesting that you intentionally cause confusion or encourage your jurors to misunderstand. What I am suggesting is that spending time and effort educating your jurors in trial is not automatically a good idea, and in many cases could be counter-productive.

To begin with, educating your jurors about complex issues is a difficult and sometimes impossible task. I've worked on trials with incredibly complex issues that would take an engineer months to learn, yet the court gave each side just a few days to put on their cases. Good luck educating the jury about the issues, while somehow finding the time to also put on your evidence and persuade your jury in just a few court days. Every minute you spend trying to educate the jury, especially in your precious opening statement, is one less minute spent persuading the jury on the important themes and evidence in your case. Even when you must educate the jury to change their expectations about the issues, you'll usually have to oversimplify the lesson for them.

Lawyers simply don't have enough time in trial to give jurors a complete and thorough education on any topic, so you'll have to accept that your jurors will always be somewhat confused and ignorant about the issues. Instead, you'll need to make three critical choices at the outset of every trial: do I want to strike or keep the jurors who are informed about the issues, who have experience and training and understanding in the issues? What will the baseline expectations of my uninformed jurors be? And do I need to change those expectations by educating the jury, or leave those expectations alone if those assumptions pre-dispose the jurors to be receptive to my case?

"Lawyers simply don't have enough time in trial to give jurors a complete and thorough education on any topic, so you'll have to accept that your jurors will always be somewhat confused and ignorant about the issues."

Frankly, the best way to learn about the baseline expectations and assumptions the uninformed 95% of the jury pool has is to focus group your case. You need to get a sense *before* trial of whether your jurors' raw assumptions will be helpful or harmful, and whether or not you'll need to change their minds and overcome their wrong expectations.

During voir dire, you can learn about your jurors' expectations by asking some questions that start with phrases like "what is your understanding of..." Only once you have a sense of what most people assume about your case issues, and a sense of what your actual jurors know or think they know about the issues, will you be able to decide whether or not you need to educate your jurors or let their expectations go to work for you. And never forget that your time to persuade – as well as your jurors' focus – is your scarcest commodity in trial, so don't squander your time or the focus of your case on subjects that aren't helpful in persuading your jurors and winning them over.

Harry Plotkin is a jury consultant in Los Angeles but practices nationwide. Mr. Plotkin specializes in jury research, assisting trial attorneys in jury selection, and developing persuasive trial themes and opening statements.

Social Media Lawsuits and the Communications Decency Act

William Small

By William Small

There are a lot of great things about social media. (How did we survive as a civilization without the Selfie?) Social media, however, has a dark side filled with vitriolic and harmful tweets, posts and snapchats. And when the targets of these negative acts file lawsuits, they are increasingly claiming that employers are liable rather than just the user who actually created the harmful post or tweet. How worried should businesses be? And what can they do about it?

In one recent example, two plaintiffs in Indiana sued FedEx and 500 Festival, Inc., for defamation and intentional infliction of emotional distress based solely on the fact that someone using those companies' computers posted allegedly defamatory comments online about the plaintiffs. *Miller et al. v. Federal Express Corp.* (Ind. App. Ct. 2014) 6 N.E.3d 1006. But this past summer an appellate court ruled that such claims were precluded by the federal Communications Decency Act ("CDA"), 47 U.S.C. § 230.

The plaintiffs in that case were a husband and wife. The husband, Jeffery Miller, was a businessperson involved in a project between two nonprofits to construct a culinary school. Construction on the school began, but the financial backers for the project withdrew their funding, allegedly due to defamatory statements by two individual co-defendants in the suit. Following those statements and the loss of funding, a business magazine published an article about the situation on the publication's website. A number of comments were posted in the online comments section of the article, and the Millers claimed that several of them were defamatory.

Through discovery the Millers learned that two of the comments were posted by a vice president for 500 Festival. The V.P. used a 500 Festival computer on 500 Festival property to post those comments. Additionally, the computers used 500 Festival's internet service provider ("ISP"). The Millers discovered that another comment was posted by an unknown person using an IP address that was assigned to FedEx.

After learning these facts, the Millers amended their complaint to add FedEx and 500 Festival as defendants.

FedEx and 500 Festival moved for summary judgment, arguing that the CDA precluded the claims against them.

The CDA provides in part that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). The CDA also states, "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." *Id.* § 230(e)(3).

To establish immunity under the CDA, (1) the defendant must be "a provider or user of an interactive computer service"; (2) the cause of action must treat the defendant as a publisher or speaker of information; and (3) the information at issue must be provided by another "information content provider", which is defined as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet".[1] Courts have consistently held that the protections of the CDA are broad and robust and that the definition of "interactive computer service" is likewise broad.[2]

In *Miller*, the court determined that both FedEx and Festival 500 were both providers of an interactive computer service under the CDA. Furthermore, the court held that the information at issue was provided by another information and content provider, stating "FedEx's unknown user and 500 Festival's known employee, Wilson, easily fall within this definition." Lastly, the court also found that the Millers were seeking to hold FedEx and Festival 500 liable as publishers of the information, since the Millers were suing for defamation and intentional infliction of emotional distress and due to the Millers' allegations in the complaint that FedEx and Festival 500 "published" the allegedly defamatory statements.

Consequently, all three prongs for CDA immunity were established and the appellate court affirmed the trial court's order granting summary judgment in favor of the defendants.

(see "Social Media" on page 11)

Social Media

(continued from page 10)

The *Miller* decision is instructional for California businesses and the attorneys that represent them. Indeed, the *Miller* court relied on *Delfino v. Agilent Techns. Inc.* (2006) 145 Cal. App.4th 790, 806, a California case where an employer was sued for online employee misconduct. *Delfino* held that under the CDA an employer was immune from liability where an employee used the employer's computer network to send threatening messages. When *Delfino* was decided, no case had yet held that a corporate employer was a provider of an "interactive computer service" for providing internet access to its employees.

Although *Miller, Delfino* and other cases support employer immunity under the CDA when online speech is made through their computers, other theories of liability (such as negligent supervision) might be argued in suits against employers if the employer becomes aware of the offending publications. Accordingly, employers and businesses should still consider adopting policies that set forth acceptable online policies and practices for employees.

Will Small is a partner with Small & Schena LLP. His practice focuses on business and commercial disputes, including trade secrets, intellectual property, contracts, and professional malpractice and liability.

(Endnotes)

[1] Gentry v. eBay, Inc., 99 Cal.App.4th 816, 830 (2002).

[2] See, e.g., Batzel v. Smith, 333 F. 3d 1018, 1030 (9th. Cir. 2003).