ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO

abtl REPORT

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Effective Litigation Strategies with the Honorable Marilyn Huff

By: Austin James Marsh and Brittany Lynn Scheinok

Hon. Marilyn Huff

United States District Judge Marilyn Huff recently shared her insights on effective litigation strategies at an ABTL-sponsored brown bag luncheon in her courtroom. Judge Huff provided advice on every stage of litigation, from pleadings to post-trial motions, and spoke about some of her general practices and rules.

Throughout the event, Judge Huff highlighted the importance of theme, setting, characters, tone, tempo, time, and professionalism in litigation. She particularly focused on theme and tempo. Formulating a tailored theme is vital to any litigation. Before parties determine the theme of their case, Judge Huff recommends consulting the relevant jury instructions and verdict forms. These are critical to the success of a case, yet many attorneys fail to review these documents until the very end of trial.

Setting the tempo is similarly important in litigation. Although presenting witnesses in chronological order often makes sense, Judge Huff suggested that parties consider presenting witnesses out of chronological order if certain witnesses are not effective story tellers. She also advised that parties should start and end each day of trial with a good witness or a "wow" moment to keep the jury involved. In line with her advice, Judge Huff started and finished the luncheon by playing "Park Avenue Beat" by Fred Steiner, also known as the theme song of one of the most famous law television shows of all time, *Perry Mason*.

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Strategic Uses of Early Depositions and Motion Practice

By Kelly V. O'Donnell

Kelly V. O'Donnell

Conventional litigation wisdom seems to view depositions and dispositive motion practice as expensive and risky. As a result, these events often occur at the very end of the case management schedule. Litigators know the drill all too well, with a flurry of depositions scheduled to happen on (or, by agreement, after) the date set for the close of discovery. This is sometimes unavoidable, as discovery negotiations and disputes have a tendency to consume all of the time available for resolving them, with all involved lacking a sense of urgency until some court-imposed deadline looms.

Zealous lawyers should buck this conventional wisdom in appropriate cases. While the protracted slog of party discovery may sometimes

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President's Letter

By Brian Foster

Brian Foster

As I write this President's Letter, the calendar pages have flipped past July 4th, and we are now into the summer months. If you are like me, you will start to notice that many of your friends and colleagues are absent, off on their summer vacations and other activities, relaxing and rejuvenating for the fall litigation season. If you are like me, you may also be wondering "how come I'm not smart enough to be away on vacation? Somewhere? Anywhere?"

For ABTL, July also brings a pause in our evening programming. We will continue to put on our "Nuts and Bolts" and MCLE specialty lunches, but we will resume our dinner programming with our annual Judicial Roundtable event in September. To date we have enjoyed three dinner programs, featuring the candidates for City Attorney, master storyteller and television writer Jonathan Shapiro, and a spirited exchange on the Supreme Court between Erwin Chemerinsky and Miguel Estrada. Most recently, on June 28th, we hosted our seventh annual Judicial Mixer.

In my first President's Letter earlier this year, I referred to ABTL's mission statement, which includes the goal of "frequent informal interaction with other members of the bar and bench" who embrace "the highest ideals of the legal profession." Of all its events, the Judicial Mixer and the upcoming Judicial Roundtable best exemplify ABTL's commitment to promoting this "informal interaction." The Judicial Mixer is becoming one of ABTL's most popular events, and it gets bigger and better every year. This year we had 138 members attend to enjoy one another's company in a casual setting, with ample servings of beer, wine and hors d'oeuvres. Most important, the evening was highlighted by the attendance of 38 federal court, state court, and retired judges. With the helpful prodding of Judge Randa Trapp, our Judicial Advisory Board chairperson, we were also treated to some unusual revelations by some of the judges, including tidbits about skydiving, Bruce Springsteen, and professional football cheerleading. Our Leadership Development Committee members Sara McClain, Jess Booth, and David Lichtenstein are to be congratulated for organizing this event, along with our executive director Maggie Shoecraft.

Our next dinner program, the September Judicial Roundtable, will provide a similar opportunity to get to know some of our local judges. This dinner program will again feature a "roundtable" format, in which judges seated at each dinner table will lead an exchange on litigation and trial practice topics that are chosen for discussion. This program is also becoming one ABTL's most popular recurring events, as there are few comparable opportunities to exchange ideas with, and receive practical advice from our local judges about their preferences, and the way we practice before them.

The common thread between the Judicial Mixer and the Judicial Roundtable dinner program is hardly a secret. These recurring programs are thriving because of the active participation of our judicial members. ABTL is blessed to have strong support from all of San Diego's courts, not only state and federal judges, but retired judges in private dispute resolution as well. It is the commitment of our judicial members that is cited by ABTL members, here and in other chapters across the State, as the principal contributing factor to ABTL's success. That commitment enables ABTL—as much as or more than any other organization—to bring together judges and lawyers for social and educational programs, and provide a meaningful opportunity for the exchange of ideas, and to foster collegiality among and between bench

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President's Letter

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and bar. The willingness of our local judges to contribute their time to this kind of participation is crucial to the success of ABTL, and the executive committee thanks them for their ongoing support and commitment to ABTL. Members reading this can thank them as well by attending the Judicial Roundtable in September.

Now, as I find myself again staring out my window and ruminating on the different vacation options I passed up this summer, I'm reminded of one last thought. If you, like me, are one of the why-didn't-I-plan-a-better-vacation crowd, you still have a chance. ABTL will be hosting its 43rd Annual Seminar this fall beginning October 5th in Kapalua, Maui. The theme of the seminar will be "The Technology Enigma -- a 21st Century Trial." So it's not too late to grab your swimsuits and start thinking about flower leis and Mai-Tais. The Annual Seminars are uniformly informative and entertaining, and – did I mention it's on Maui? Hope you can make it. See you there!

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Strategic Uses of Early Depositions and Motion Practice

(continued from cover)

be unavoidable, be on the lookout for cases where aggressive early discovery and motion practice may pay off by allowing you to either win the case or favorably resolve it at an early stage or—if the case does not resolve—to fend off expensive fishing expeditions in discovery by leveraging the new "proportionality" focus of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 26(b)(1) (eff. Dec. 1, 2015) (permitting discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case . . . ."). This opportunity is particularly ripe where key discovery can be taken from a third party, and can be done early enough to incorporate into conferences, such as Early Neutral Evaluations, in front of the Magistrate Judge who will control discovery if the case proceeds.

By way of example, in a recent case defended by the author, a key aspect of the plaintiff's claims depended on what a lender, who was not a party to the case, did with the plaintiff's loan application. Defense counsel had dealt with a similar case in the past, and therefore knew the issues presented on this particular set of facts better than plaintiff's counsel. Following the conventional wisdom about litigation tactics and sequencing, defense counsel could have started by propounding written discovery to the plaintiff, seeking all relevant documents along with a litany of interrogatory answers and responses to requests for admission. Both sides likely would then have spent significant time and attorneys' fees debating or litigating disputes over written discovery or document production issues, but with little to show for it except for copious lawyer-drafted objections and discovery responses and some, but not all, of the relevant documents.

The lender, on the other hand, was a non party with no agenda other than to produce relevant materials with a minimum of effort, cost or risk. Accordingly, the lender's file was easily obtainable through third party discovery—the documents were obviously relevant to the litigation, they could be easily located through reasonable diligence, they were not privileged, and the court had entered a protective order safeguarding the confidentiality of such materials produced in discovery. Accordingly, the documents were produced with a minimum of attorney time and with only a few days needed for the lender to pull the file, rather than the 30 days required for document requests to parties (not to mention time consuming back-and-forth regarding objections by one's adversary).

Armed with the relevant documents, and a better understanding of the key facts and possible theories, defense counsel deposed a loan officer and elicited favorable testimony that undercut a key premise of the plaintiff's complaint. Some travel was required but, all told, the total attorney time was well below what likely would have been incurred engaging in written discovery with the plaintiff. More importantly, the testimony by a disinterested non party was clean and straightforward, with neither the witness nor his lawyer providing argumentative or otherwise improper testimony and objections. The end result: a strong factual record with approximately one day's work and a small handful of key documents.

"...in a recent case defended by the author, a key aspect of the plaintiff's claims depended on what a lender, who was not a party to the case, did with the plaintiff's loan application."

This strategy can and did pay immediate dividends. In the best circumstances, an early deposition may succeed in resolving the case. In the example at hand, armed with the key facts at an early conference set by the Magistrate Judge, the defense was able to put heavy pressure on the plaintiff to simply dismiss the plaintiff's claims. When plaintiff ultimately declined to do so, the defense was able to efficiently prepare a motion for summary judgment. Rather than oppose the motion, the plaintiff simply dismissed all claims.

Such a result may be something of an outlier, but early depositions and motion practice can still pay valuable dividends even when they do not produce an immediate resolution. Particularly with the Federal Rules of Civil Procedure's new focus on "proportionality," strategic early discovery can be invaluable in fending off

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Strategic Uses of Early Depositions and Motion Practice

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wasteful, fishing expedition-type discovery tactics by one's adversary as discovery progresses. By taking early control of the narrative and narrowing/focusing the issues on which the case is likely to turn, counsel can lay the groundwork for making specific, well-founded objections to overbroad written discovery or "all document" requests for production that all too often become the burdensome, expensive tail that wags the dog. By the same token, armed with specific key facts and issues from one or two well targeted depositions taken early in the case, counsel's own discovery can be more targeted and specific, and therefore more likely to overcome any objections by the other side. Although it is easy, and often necessary, to follow the more conventional discovery sequencing that sees depositions and motion practice occur late in the case, the Federal Rules and counsel's own obligations support and encourage the opposite approach in appropriate cases. *See* Fed. R. Civ. P. 1 (focusing on "secur[ing] the just, speedy, and inexpensive determination of every action and proceeding); *see also* ABA Model Rules of Prof. Conduct, preamble.

So next time you are about to commence discovery by propounding a stack of written discovery requests to your adversary, pause and consider whether your client and case may be better served by simply taking a deposition or two and using the facts to your advantage early and often. You may find such an approach to be surprisingly efficient and effective.

Honorable Marilyn Huff

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With respect to motion practice, Judge Huff noted that she generally holds hearings for dispositive motions. However, she will usually decide non-dispositive motions on the papers unless the motion involves a unique issue. Judge Huff stressed that parties should not simply repeat the arguments in the written motion in the event that she does hold a hearing.

In the small fraction of cases that go to trial, evidentiary issues take on particular importance. Judge Huff generally limits parties to five motions *in limine*. She also encourages parties to use discovery at trial selectively, and to highlight critically important documents so as not to overwhelm the jury. Judge Huff usually allows attorneys to utilize screening questionnaires in jury selection. She will then allow each party twenty to thirty minutes of voir dire, and three strikes per side in selecting a jury in a civil trial.

Judge Huff is receptive to technology in the courtroom, and she will allow parties to utilize PowerPoint presentations at hearings and in trial. If the visual information in a PowerPoint will assist in deciding the issues, Judge Huff encourages such presentations at hearings. Judge Huff also allows the use of media and demonstrative exhibits at trial. She encourages using technology that makes trial more interesting. However, she also cautioned that attorneys should know their environment and be prepared for any technology limitations posed by the courtroom they are litigating in.

Judge Huff's words of wisdom were taken in by a nearly full gallery of attendees. The ABTL-sponsored event was a great opportunity for lawyers to get some insightful, off-the-record, interaction with one of our most accomplished judges in the Southern District.

By Austin James Marsh
and Brittany Lynn Scheinok

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Trials May Be Vanishing, But Post-Trial Appellate Issues Still Abound

Rupa G. Singh

Rupa G. Singh

Much has been written about the vanishing trial in the last decade.[1] But even if infrequent, trials are one of the most fertile birthplaces for appellate issues. In the last of this series on the four stages of a case when appellate issues arise—the pleading stage, the discovery stage, the dispositive motion stage, and at trial—I discuss key appellate issues that arise at and after trial, and the successful litigator's resulting "do's and don'ts" list to preserve those issues for appeal.

Jury Instructions. One of the most frequent and promising appellate issues arising from a trial relates to jury instructions. A claim of instructional error on the ground that the trial judge gave an erroneous instruction or improperly refused to give a particular instruction is reviewed for an abuse of discretion. But, appellate courts view the evidence in the light most favorable to the appellant, assuming that the jury might have believed the tendered evidence if the correct instruction had been given. In other words, a lower showing of prejudice can be made—unless the evidence at issue was cumulative—where the appellant establishes error. But, an appellant cannot challenge an instruction that it requested, even if the claim is that the jury misunderstood or misapplied it. Moreover, appellant must preserve its claim of error clearly. This provides the key takeaway for trial counsel—proposing an alternative instruction is not sufficient to preserve the claim that the trial judge erred in giving the original instruction; rather, trial counsel must object to the erroneous instruction in addition to or separate from proposing an alternative one.

"One of the most frequent and promising appellate issues arising from a trial relates to jury instructions."

Evidentiary Rulings. Another significant area of trial-related appeals is the admission or exclusion of evidence, including through motions in limine—the claim that the trial judge erred in excluding or admitting documentary or testimonial evidence at trial, including by evaluating a proposed expert's skill, experience, or training. Such rulings are reviewed for an abuse of discretion, and reversal is only possible with a showing that it is reasonably probable that the appealing party would have secured a more favorable result absent the evidentiary error. Trial counsel's most important task here is to secure a ruling, especially where the trial judge takes motions in limine under submission or defers a ruling until a certain stage of the trial. Even if no reasons are given, an actual ruling to exclude or admit certain evidence is a prerequisite to an appeal.

Rulings Regarding The Verdicts. The trial judge's rulings on a motion for directed verdict, for judgment notwithstanding the verdict, and for a new trial are all reviewed for substantial evidence. That is to say, viewing the evidence in the light most favorable to appellant, the appel-

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late court evaluates whether or not the verdict is supported by substantial evidence. This necessarily anticipates the existence of some contradictory evidence, and requires a showing that the weight of the evidence does or does not support the verdict. Trial counsel's most important contribution to a successful appeal in this arena is to preserve and obtain rulings on objections to evidence, and to document thoroughly in the motion or opposition the properly admitted evidence that supports or contradicts the verdict.

Awards. Where a party decides—for strategic, practical, or other reasons—not to challenge the entire verdict but only the relief, such as a damages award, they face a heavy burden. Damages awards can be overturned as excessive only if they shock conscience and suggest that, instead of relying on actual evidence in awarding relief, the jury was driven by passion, prejudice, or corruption. Similarly, a damages award may be deemed inadequate if it is unconscionable and without evidentiary justification. In the punitive damages arena, the award must also be consistent with federal due process concerns based on the defendant's degree of reprehensibility, the ratio between compensatory and punitive damages, and the relationship between punitive damages and defendant's financial condition. In this regard, trial counsel should be mindful of the verdict form, providing step-by-step directions for the calculation of damages based on fact-finding, or opposing a much-too detailed verdict form, depending on which side they represent.

Notwithstanding the growing concern that they are an endangered species, trials—and errors in the course of trial—appear to be as much a certainty in the law as death and taxes are said to be in life.[2] Given this, trial counsel must be pro-active in objecting to jury instructions, persistent in securing evidentiary and other rulings, timely in moving for post-judgment relief, and discriminating in identifying claims of error for appeal. Otherwise, trials may well be here to stay, but post-trial appeals may become what we lament as all but extinct.

(ENDNOTES)

[1] Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts,* 1 J. EMPIRICAL LEGAL STUD. 459 (2004); Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases;* Robert P. Burns, *What Will We Lose If the Trial Vanishes?* (Faculty Working Paper 5, 2011), available at http://scholarly-commons.law.northwestern.edu/cgi/viewcontent.cgi?article=1004&context=facultyworkingpapers.

[2] John M. Lande, *Shifting the Focus From the Myth of "The Vanishing Trial" to Complex Conflict Management Systems, or I Learned Almost Everything I Need to Know About Conflict Resolution From Marc Galanter,"* 6 Cardozo J. Conflict Resolution 191 (2005), available at http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1267&context=facpubs.

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Magistrate Judge Selection in the Southern District of California

By: Jack Leer

Frederick W. Kosmo

Earlier this year, the U.S. District Court for the Southern District of California announced that the Judicial Conference of the United States had authorized the appointment of a new Magistrate Judge to fill Judge Ruben B. Brooks office when he retires in August. ABTL's Past President Fred Kosmo chaired the Merit Selection Panel charged with screening and recommending five potential candidates for the District Court Judges to consider. Fred was kind enough to sit down and provide some information on how the Magistrate Judge appointment process works.

Jack Leer: First, tell me how you came to be the chair of this panel.

Fred Kosmo: I first served as a member of the panel when Danny Eaton was the chair. After serving on a couple of panels, Presiding Judge Gonzalez asked me to chair the panel. I had come to know Judge Gonzalez through ABTL, where I was programs chair, on the Board, and ultimately went on to be President. After that, I served as a 9th Circuit lawyer representative working with Judge Gonzalez. So when Judge Gonzalez asked me to chair the panel, I was happy to do so. When Judge Moskowitz became Presiding Judge, he asked me to stay on as chair to provide continuity in the panel. I think serving on the panel is an important public service.

JL: Who else is on the panel?

FK: The panel is made up of 10-11 members, appointed by the Presiding Judge. Most of the members are lawyers, both criminal and civil, but at least two members are appointed from the public at large. The Court issues a General Order identifying all of the members of the panel.

JL: So how does the process work?

FK: It is a three-step process. Candidates have to make it through all three steps to be appointed. The first step is the application process. The second step is the interview process, in which the panel conducts interviews of the candidates and narrows it down to the top five candidates that are recommended to the Court. The final step is the District Court' own review and interview of the five recommended candidates to select the next Magistrate Judge. We try to send over a diverse list of five excellent candidates to the District Court.

JL: How many applications does the panel receive?

FK: Usually around 75 for a vacant Magistrate Judge position.

JL: And how do you narrow those down to five?

FK: The applications are really important to narrowing down the candidates. How well they fill out the application is a huge factor in determining whether they will go on to the interview stage. It is not unlike a college application. Applicants need to

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take the time to make the application as good as they can. That means some simple things like checking grammar and punctuation. But more substantively, it means highlighting what makes that candidate special, what makes them stand out from the other candidates. Why should they be the one applicant among all the others who should be appointed?

JL: What types of things are you looking for in an applicant?

FK: We look for well-qualified candidates. That means expertise in their field, and a good judicial demeanor. We look for well-rounded candidates, who demonstrate community involvement and activities, both legal and in the community. Usually the applicants are either criminal or civil attorneys, but not both. So we want to know if they are enthusiastic about learning new areas of law on the bench that they might not have known in their practice. And, of course, we look for diversity. Both the Court and the panel are committed to promoting diversity to ensure we have a good mix of Magistrate Judges on the bench.

JL: How many of the applicants will make it through to the interview stage?

FK: Usually we select about 10-15 applicants for interviews based on the applications submitted. Then before we conduct the interviews, we do our due diligence on those 10-15 applicants. We call their references, we investigate their prior cases, and we talk to former co-counsel and opposing counsel. Then the interview.

JL: What happens at the interviews?

FK: The entire panel spends about 30 minutes interviewing the applicant. Generally we are following up on information developed from the application and investigation. All panel members get a chance to question the applicant, so that we can narrow the field down to the five top applicants to recommend to the District Court.

JL: Do you rank the applicants for the District Court?

FK: No. We send them on in alphabetical order.

JL: And the District Court Judges take it from there?

FK: Yes. Once the panel has narrowed it down, the District Judges will conduct their own due diligence of the five recommended applicants. Then they will conduct their own interviews of each of the candidates, and appoint the one they feel is best qualified.

"My best advice is to really understand the process. Look closely at your application and make sure it is as good as it can possibly be. Plan ahead. Be thinking about your community involvement several years before you plan to apply. The key is really to focus on what makes you special..."

JL: That sounds like a pretty rigorous process. Any advice you can give applicants based on your experience?

FK: My best advice is to really understand the process. Look closely at your application and make sure it is as good as it can possibly be. Plan ahead. Be thinking about your community involvement several years before you plan to apply. The key is really to focus on what makes you special as an applicant, and what sets you apart from all of the other well-qualified applicants.

By Jack Leer

The California Supreme Court Addresses Application of the Hearsay Rule to Expert Testimony - *People v. Sanchez,* 2016 WL 3557001.

By: James D. Crosby

James D. Crosby

In a significant new decision, *People v. Sanchez,* 2016 WL 3557001, the California Supreme Court considered application of the hearsay rule to out-of-court statements offered as expert "basis" testimony. The case is essential reading for California trial attorneys. If you try cases – read it!

People V. Sanchez was a criminal case concerning gang-related crimes. At issue was admission of a prosecution expert's description of the defendant's past contacts with police offered as a basis for the expert's opinion testimony. The expert had never met the defendant, had not been present during such past contacts with the police, and had no personal knowledge of same. The question posed was whether the expert's description of the defendant's past contacts with police was inadmissible hearsay or non-hearsay simply because it was offered as a basis for the expert's opinion.

In a lengthy opinion, the Court in *People v. Sanchez* addressed in considerable detail application of the hearsay rule to expert testimony and established a bright line rule that where an expert relates to the jury case-specific out-of-statements and treats the content of those statements as true and accurate, those statements are hearsay. And, like all hearsay, such statements are inadmissible unless rendered admissible through applicable hearsay exception. In so ruling, the Court concluded that it "cannot logically be maintained" that such statements are not being offered for their truth. The Court explicitly disapproved its prior decisions concluding that an expert's basis testimony is not offered for its truth, or that a limiting instruction, coupled with a trial court's evaluation of the potential prejudicial impact of the evidence under Evidence Code section 352, sufficiently addresses hearsay concerns and, in the context of criminal cases, Confrontation Clause concerns.

While this is a criminal case which also addresses Confrontation Clause concerns in admission of such out-of-court statements in expert "basis" testimony, the Court's discussion of the hearsay rule as it applies to expert testimony, and its bright line rule for application of the rule to case-specific out-of-statements offered as expert "basis" testimony, applies equally in the civil and criminal contexts.

People v. Sanchez provides a lengthy primer on the hearsay rule and application of the rule to expert testimony. The court addresses the difference between an expert's testimony regarding her knowledge in her field of expertise, which is traditionally not barred by the hearsay rule, and testimony by an expert relating case-specific facts about which the expert has no personal knowledge, which has been traditionally precluded. The Court noted that this distinction between generally-accepted background information and the supplying of case-specific facts is customarily handled through the use of hypothetical questions.

Going back to the common law, this distinction between generally accepted background information and the supplying of case-specific facts is honored by the use of hypothetical questions. "Using this technique, other witnesses supplied admissible evidence of the facts, the attorney asked the expert witness to hypothetically assume the truth of those facts, and the expert testified to an opinion based on the assumed facts…." *(Imwinkelried, The Gordian Knot of the Treatment of Secondhand Facts Under Federal Rule of Evidence 703 Governing the Ad-*

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missibility of Expert Opinions: Another Conflict Between Logic and Law (2013) 3 U.Den.Crim. L.Rev. 1, 5; see Simons, Cal. Evidence Manual, supra, § 4:32, pp. 326–327; 2 Wigmore, Evidence (Chadbourn ed.1978) § 672, p. 933, italics omitted.) An examiner may ask an expert to assume a certain set of case-specific facts for which there is independent competent evidence, then ask the expert what conclusions the expert would draw from those assumed facts. If no competent evidence of a case-specific fact has been, or will be, admitted, the expert cannot be asked to assume it. The expert is permitted to give his opinion because the significance of certain facts may not be clear to a lay juror lacking the expert's specialized knowledge and experience.

But, the Court stated that the line between an expert's testimony as to general background information and case-specific fact testimony has become "blurred," noting that case-specific facts in an expert's testimony is often handled with an inquiry into reliability, admission of the case-specific facts, and a limiting instruction to the jury. Setting a new bright-line test, the Court held this "paradigm" is no longer tenable.

Accordingly, in support of his opinion, an expert is entitled to explain to the jury the "matter" upon which he relied, even if that matter would ordinarily be inadmissible. When that matter is hearsay, there is a question as to how much substantive detail may be given by the expert and how the jury may consider the evidence in evaluating the expert's opinion. It has long been the rule that an expert may not " 'under the guise of reasons [for an opinion] bring before the jury incompetent hearsay evidence.' " *(Coleman, supra, 38 Cal.3d at p. 92, 211 Cal. Rptr. 102, 695 P.2d 189.) Courts created a two-pronged approach to balancing "an expert's need to consider extrajudicial matters, and a jury's need for information sufficient to evaluate an expert opinion" so as not to "conflict with an accused's interest in avoiding substantive use of unreliable hearsay." (People v. Montiel (1993) 5 Cal.4th 877, 919, 21 Cal.Rptr.2d 705, 855 P.2d 1277 (Montiel).)* The Montiel court opined that "[m]ost often, hearsay problems will be cured by an instruction that matters admitted through an expert go only to the basis of his opinion and should not be considered for their truth. *[Citation.]*

Sometimes a limiting instruction may not be enough. In such cases, Evidence Code section 352 authorizes the court to exclude from an expert's testimony any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value. *[Citation.]" (Ibid., citing Coleman, supra, 38 Cal.3d at pp. 91–93, 211 Cal.Rptr. 102, 695 P.2d 189.)* Thus, under this paradigm, there was no longer a need to carefully distinguish between an expert's testimony regarding background information and case-specific facts. The inquiry instead turned on whether the jury could properly follow the court's limiting instruction in light of the nature and amount of the out-of-court statements admitted. For the reasons discussed below, we conclude this paradigm is no longer tenable because an expert's testimony regarding the basis for an opinion must be considered for its truth by the jury.

. . . . . .

Once we recognize that the jury must consider expert basis testimony for its truth in order to evaluate the expert's opinion, hearsay and confrontation problems cannot be avoided by giving a limiting instruction that such testimony should not be considered for its truth. If an expert testifies to case-specific out-of-court statements to explain the bases for his opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay. Like any other hearsay evidence, it must be properly admitted through an applicable hearsay exception. Alternatively, the evidence can be admitted through an appropriate witness and the expert may assume its truth in a properly worded hypothetical question in the traditional manner.

In conclusion,
the Court adopted the following rule:

When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth.

In a footnote following this rule statement, the Court explicitly disapproved its prior deci-

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sions concluding that an expert's basis testimony is not offered for its truth or that a limiting instruction, coupled with a trial court's evaluation of the potential prejudicial impact of the evidence under Evidence Code section 352, sufficiently addresses hearsay and, in the context of criminal cases, Confrontation Clause concerns.

Takeaways

People v. Sanchez seems less a recasting of the traditional distinction between an expert's testimony regarding background information and his testimony as to case-specific facts than it is a reassessment and realignment of the rules to be applied by trial courts to maintain the sanctity of that distinction. It is stiffening of the rules to be applied by trial courts to maintain that traditional distinction.

In light of *People v. Sanchez*, trial courts, upon proper objection, will more closely police expert testimony to ensure case-specific facts presented by an expert as a basis for opinion are otherwise admissible under applicable hearsay exceptions. When opposing counsel objects to case-specific facts offered by an expert as hearsay, the trial court can no longer overrule that objection simply because those facts are a basis for the expert opinion testimony. Absent applicable hearsay exception, that objection will be sustained. This new rule gives well-prepared trial counsel a significant tool to challenge and preclude opposing party expert testimony which is not supported by admissible evidence.

Trial counsel presenting expert testimony will need to more closely scrutinize, and be well-prepared to address, the admissibility of case-specific facts relied upon by an expert, or risk having such testimony precluded or rendered ineffective in the eyes of the jury.

While *People v. Sanchez* does not directly concern the use of hypotheticals and assumed facts to elicit opinion testimony, the same rationales apply. Trial counsel may ask an expert to assume a certain set of case-specific facts for which there is independent competent evidence and then ask the expert what conclusions the expert would draw from those assumed facts. But, if no competent evidence of such case-specific facts has been, or will be, admitted, the expert cannot be asked to assume them.

The sloppiness with which many trial courts have policed the use of case-specific hearsay in expert testimony will be subject to more-strenuous appellate examination. Admission and a limiting instruction is no longer a viable option for the trial court. Trial counsel will be well-served to recognize this new reality and place greater attention on establishing an evidentiary basis for admission of case-specific facts which provide the basis for offered opinion testimony.

People v. Sanchez is an excellent primer on hearsay and application of the hearsay rule to expert testimony. Great language for in limine options and pocket briefs addressing hearsay issues at trial.

People v. Sanchez is **required reading** for California civil and criminal trial attorneys!

The New Era of Trade Secret Protection: The Defend Trade Secrets Act of 2016

By William P. Keith

William P. Keith

I. Introduction

On May 11, 2016 President Obama signed into law the Defend Trade Secrets Act of 2016 ("DTSA"),[1] which amends the Economic Espionage Act of 1996 ("EEA").[2] DTSA provides new and stronger civil and criminal penalties for misappropriation of trade secrets, including a private right of action for misappropriation in federal district court.

The legislation was propelled through Congress with strong bi-partisan support, based in large measure on the desire to more effectively combat trade secret theft.[3] Congress determined that American companies are increasingly at risk of trade secret theft by "ever-more sophisticated means of attack," resulting in losses estimated in the range of hundreds of billions of dollars annually.[4]

Currently, 47 U.S. states have enacted some form of the Uniform Trade Secrets Act.[5] California's version ("CUTSA") first passed in 1984.[6] Congress, however, found these state remedies "not wholly effective in a national and global economy."[7] Reasons cited include the variance between states' adopted versions of the Uniform Trade Secrets Act, which while subtle, can prove case dispositive—they vary on issues such as what party has the burden to prove a trade secret is not readily ascertainable, what is necessary to show the owner employed "reasonable measures" to maintain the secrecy of the information, among others.[8] These differences require companies to tailor compliance programs on a state-by-state basis.[9] Trade secrets are also often stolen and moved across state lines, requiring more effective mechanisms to perform discovery, preserve evidence, and prevent their dissemination. Congress believed federal courts are better situated to address these concerns.[10]

This article focuses on the new tools available to the California business litigator prosecuting trade secret misappropriation claims.

II. Trade Secret Misappropriation Under DTSA Largely Aligns with CUTSA

DTSA does not preempt state law remedies, and is worded in a manner consistent with CUTSA.[11] The definition of "trade secret," while lengthier and more explicit than CUTSA's, it is essentially the same. EEA defines a "trade secret" as "all forms and types of financial, business, scientific, technical, economic, or engineering information," examples of which are provided in the definition, if

(A) the owner thereof has taken reasonable measures to keep such information secret; and

(B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information[12]

DTSA's definition of misappropriation is modeled on the Uniform Trade Secret Act, and is nearly identical to CUTSA.[13] DTSA defines misappropriation as acquisition of a trade secret by improper means, disclosure or use of a trade secret by a person who had reason to know that the trade secret was acquired by improper means or under circumstances giving rise to a duty of secrecy, or disclosure or use of a trade secret by a person who had reason to

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know it was disclosed by accident or mistake.[14]

DTSA's remedies are also modeled after the Uniform Trade Secret Act.[15] Both DTSA and CUTSA authorize injunctions to prevent actual or threatened misappropriation,[16] and have nearly identical damages provisions, permitting a plaintiff to recover for actual loss, or if that does not suffice, unjust enrichment or a reasonable royalty.[17] Like CUTSA, DTSA also permits a party claiming misappropriation to recover up to double damages for willful and malicious misappropriation, as well as attorneys' fees.[18] Both statutes have a three year statute of limitations.[19]

There are a handful of differences worth noting. While CUTSA authorizes the prevailing party to recover expert fees for willful and malicious misappropriation, DTSA does not.[20] The definition of acquiring a trade secret by "improper means" also differs slightly. DTSA provides that reverse engineering or independent derivation simply do not constitute improper means.[21] CUTSA, on the other hand, states reverse engineering or independent derivation "alone shall not be considered improper means," leaving open the possibility that such facts could be relevant and admissible as long as they are not the only evidence of acquisition.[22]

In addition, the new federal law has no analogue to California Code of Civil Procedure § 2019.210, which requires a party alleging a claim for misappropriation under CUTSA to identify the trade secret "with reasonable particularity," before commencing discovery related to the trade secret.[23]

III. DTSA's Key Provisions

A. Private Right of Action

Arguably the most notable feature of DTSA is the addition of a private right of action for trade secret misappropriation.[24] DTSA provides that federal district courts shall have original jurisdiction over claims for misappropriation "if the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce."[25] The option of a federal forum may prove appealing to a plaintiff for a variety of reasons, including the ability to perform nationwide discovery more efficiently.

B. Immunity and New Notification Requirements in Employee Contracts

DTSA provides immunity in limited, specific contexts. In conjunction with this immunity is a new disclosure provision that is noteworthy for businesses.

Generally, DTSA grants immunity from criminal and civil liability if a person falls in either of two categories: The person discloses the trade secret (1) "in confidence to a Federal, State, or local government official, either directly or indirectly, or to an attorney; and [] solely for the purpose of reporting or investigating a suspected violation of law;" or (2) "in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal."[26] The statute contains a specific provision permitting disclosure by an individual filing a retaliation lawsuit against an employer for reporting a suspected violation of law. In such a case, the individual may disclose the trade secret to the attorney and use it in the court proceeding so long as any filed document containing the trade secret is filed under seal, and the person does not disclose the trade secret except pursuant to a court order.[27]

DTSA requires an employer to provide notice of the immunity described above "in any contract or agreement with an employee that governs the use of a trade secret or other confidential information."[28] The term "employee" is broadly defined—it "includes any individual performing work as a contractor or consultant for an employer."[29]

The notice requirement applies to all contracts and agreements entered into or updated after the date of the law's enactment, which was May 11, 2016.[30] DTSA states that an employer complies with the notice requirement by providing a "cross-reference" in the contract or agreement to a "policy document provided to the employee that sets forth the employer's reporting policy for a suspected violation of law."[31]

Noncompliance can be costly, and may effectively take the teeth out of the DTSA. An employer failing to adequately notify the employee

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is not allowed to recover exemplary damages or attorneys' fees for willful and malicious misappropriation.[32]

C. Heightened Protections During Litigation

While state and federal courts have always had authority to issue protective orders to preserve confidentiality of a trade secret during litigation, DTSA provides more specific safeguards. In addition to requiring the court enter appropriate orders and take other action to preserve the confidentiality of a trade secret, the statute prohibits the court from authorizing its disclosure unless the owner has had an opportunity to file a submission under seal describing the owner's interest in keeping the information confidential. DTSA specifically authorizes an interlocutory appeal from an order authorizing disclosure of a trade secret.[33]

D. Civil Seizure of Trade Secrets on Ex Parte Basis

In "extraordinary circumstances" the district court may issue an order providing for the seizure of property necessary to prevent a trade secret from being disseminated.[34] This remedy is only available when a temporary restraining order or preliminary injunction under Fed. R. Civ. P. 65 or other equitable relief would be inadequate.[35] Therefore, only in the rare case will ex parte seizure be an option.

E. New Predicate Acts for RICO Claims

The Racketeer Influenced and Corrupt Organizations Act ("RICO") authorizes criminal penalties and a private right of action for conduct qualifying as "racketeering activity."[36] DTSA amends RICO to add economic espionage and criminal theft of trade secrets as predicate acts on which a RICO claim or prosecution may be based.[37] In bringing a claim under RICO, a plaintiff must establish a "pattern of racketeering activity," which requires proof of at least two predicate acts committed within 10 years of each other.[38] Due to the treble damages and attorneys' fees and costs available to a plaintiff under RICO, this addition provides another effective tool for prosecuting trade secret claims.[39]

F. Increase in Criminal Penalties for Organizations

DTSA increases the maximum criminal penalties for an organization convicted of a criminal violation from $5 million to "the greater of $5,000,000 or 3 times the value of the stolen trade secret to the organization, including expenses for research and design and other costs of reproducing the trade secret that the organization has thereby avoided."[40]

IV. Choosing Wisely: Considerations in Litigating Misappropriation Claims Under DTSA

Due to the similarities in the statutory schemes, the decision whether to file a claim under DTSA in federal court or a CUTSA claim in state court (or if diversity jurisdiction exists, in federal court) will involve typical considerations—the favorability of the forum in terms of jury issues, speed, and expense of the litigation. Other factors that should be addressed include the following:

Is The Nature of the Trade Secret Sufficient for Federal Jurisdiction? There is only a claim under DTSA "if the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce."[41] Depending on the nature of the trade secret, this may not be obvious at the outset. Realistically determine whether the trade secret meets this threshold to avoid the possibility of dismissal for lack of federal jurisdiction after time and money are been spent litigating the case in federal court.

Where Did the Misappropriation Occur? If the misappropriation occurred in California and all critical witnesses and evidence are located in the state, CUTSA may be perfectly adequate. But if the misappropriator is located in another jurisdiction, took the trade secret to another jurisdiction, or if evidence is located outside the state, DTSA will likely provide a more efficient tool for conducting interstate discovery and avoiding any debate over what state's misappropriation laws under which the acts should be judged.

Did the Employer Comply with the Notice Provisions in the Employee's Contract? Compliance with DTSA's notice requirements in employee contracts is a critical consideration. If the employer did not meet the new notice requirements, there would be a strong incentive to proceed under state law, where double damages and attorneys' fees are still available.

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Is There Need for Stronger Protection During Litigation? DTSA may provide an incentive to select federal court if there is any doubt as to whether the state court protective order would provide adequate protection of the trade secret.

What Alternative State Law is Applicable? DTSA and CUTSA have very similar provisions. But in the event the law of another state may provide the rule of decision, it is critical to evaluate how the scope of the trade secret protection, the applicable burdens, and the statute of limitations compare to DTSA.

V. Conclusion

The Defend Trade Secrets Act of 2016 provides a new set of tools to combat the theft of trade secret misappropriation. While the decision to utilize DTSA over state law trade secret remedies will depend on the specific facts of the case, the potential benefits are apparent even at this early stage.

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(ENDNOTES)

1 Pub. L. No. 114-153 (May 11, 2016); see Remarks by the president at Signing of S. 1890—Defend Trade Secrets Act of 2016 (May 11, 2016), 2016 WL 2731986, available at https://www.whitehouse.gov/the-press-office/2016/05/11/remarks-president-signing-s-1890-defend-trade-secretsact-

2016.

2 Pub. L. No. 104-294, 110 Stat. 3488 (Oct. 11, 1996) (codified as amended 18 U.S.C. §§ 1831-1839).

3 DTSA passed in the Senate on April 4, 2016 by a vote of 87-0. See http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=114&session=2&vote=00039#top. DTSA passed in the House of Representatives on April 27, 2016 by a vote of 410-2. See http://clerk.house.gov/evs/2016/roll172.xml

4 H.R. Rep. 114-529, 114th Cong., 2d Sess. 3 (Apr. 26, 2016) [hereinafter "House Report"], 3-4; Sen. Rep. No. 114-220, 114th Cong., 2d Sess. 2 (Mar. 7, 2016) [hereinafter "Senate Report"], 2; 162 Cong. Rec. S1631-02, 162 Cong. Rec. S1631-02 (Monday, April 4, 2016) (comments of Sen. Chuck Grassley).

5 Uniform Law Commission, Legislative Fact Sheet – Trade Secrets Act, available at http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Trade Secrets Act.

6 Stats. 1984, c. 1724, § 1 (codified as amended Cal. Civil Code §§ 3426-3426.11).

7 House Report, at 4.

8 Senate Report, at 2-3.

9 House Report, at 4.

10 Id.

11 18 U.S.C. § 1838.

12 Id. § 1839(3).

13 House Report, at 5.

14 18 U.S.C. § 1839(5); Cal. Civ. Code § 3426.1(b).

15 House Report, at 12-13.

16 18 U.S.C. § 1836(b)(3)(A); Cal. Civ. Code § 3426.2.

17 18 U.S.C. § 1836(b)(3)(B); Cal. Civ. Code § 3426.3.

18 18 U.S.C. § 1836(b)(3)(C) and (D); Cal. Civ. Code §§ 3426.3(c), 3426.4.

19 18 U.S.C. § 1836(d); Cal. Civ. Code § 3426.6.

20 18 U.S.C. § 1836(b)(3)(D); Cal. Civ. Code § 3426.4.

21 18 U.S.C. § 1839(6).

22 Cal. Civ. Code § 3426.1(a).

23 Cal. Code Civ. Proc. § 2019.210. Federal courts have disagreed on whether § 2019.210 applies in federal court. Compare Computer Econ., Inc. v. Gartner Grp., Inc., 50 F.Supp.2d 980, 992 (S.D. Cal. 1999) (concluding, after an extensive Erie analysis, that § 2019.210 (then § 2019(d)) applies in federal court); with Funcat Leisure Craft, Inc. v. Johnson Outdoors, Inc., No. S–06–0533 GEB GGH, 2007 WL 273949, at *2–3 (E.D. Cal. Jan. 29, 2007) (concluding that § 2019.210 is a rule of procedure that conflicts with the Federal Rules, and thus it does not apply in federal court). However, it has been held to be within the district court's broad discretion to manage discovery to fashion orders requiring a party to define trade secrets before discovery commences. Jardin v. DATAllegro, Inc., No. 10-CV-2552-IEG WVG, 2011 WL 3299395, at *4-*5 (S.D. Cal. July 29, 2011). Under DTSA and CUTSA claims brought in federal court, perhaps the only real difference is that the party defending the trade secret claim would need to specifically request the plaintiff define the trade secret before discovery begins.

24 18 U.S.C. § 1836(b)(1).

25 Id. § 1836(b)(1) and (c).

26 Id. § 1833(b)(1).

(see "The New Era of Trade Secret Protection..." on page 21)

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27 Id. § 1833(b)(2).

28 Id. § 1833(b)(3)(A).

29 Id. § 1833(b)(4).

30 Id. § 1833(b)(3)(D).

31 Id. § 1833(b)(3)(B).

32 Id. §§ 1833(b)(3)(C), 1836(b)(3)(C) and (D).

33 Id. § 1835.

34 Id. § 1836(b)(2).

35 Id. § 1836(b)(2)(A)(ii)(I).

36 Id. §§ 1961 (definition of "racketeering activity"), 1963 (criminal penalties), 1964 (civil penalties and private right of action).

37 Pub. L. 114-153, § 3(b), May 11, 2016, 130 Stat. 382; 18 U.S.C. § 1961(1) (definition of "racketeering activity").

38 18 U.S.C. §§ 1961(5) (definition of "pattern of racketeering activity"), 1962, 1964(c); Living Designs, Inc. v. E.I. Dupont de Nemours and Co., 431 F.3d 353, 361 (9th Cir. 2005) (The elements of a civil RICO claim are: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as predicate acts) (5) causing injury to plaintiff's business or property.")

39 18 U.S.C. § 1964(c).

40 Id. § 1832(b).

41 Id. § 1836(b)(1) and (c).

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