ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO

abtl REPORT

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Lawyers Beware: Deciding Your Adversary's Privilege Issue is Risky Business

Kenneth M. Fitzgerald

By Kenneth M. Fitzgerald
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A potential gift from the litigation Gods falls into your lap. Your client provides you with an email that appears to contain an attorney-client communication between your client's litigation adversary and the adversary's lawyer. While obviously privileged, the email is helpful to your case. Moreover, the email shows third parties were copied on the communication between your opposing counsel and his client. It seems likely to you that the privilege was waived, because the adverse party disclosed the communication to third parties, one of whom eventually provided it to your client.

What do you do? Option 1: Make use of the email in the litigation? Option 2: Promptly alert your opposing counsel that you received what appears to be a privileged communication, so that you can discuss it, and seek the court's guidance in the event you cannot agree as to whether there was a privilege waiver?

The Fourth District Court of Appeal recently made it clear that Option 2 is your only sensible option, at least if you don't want to be disqualified in the event you are wrong about whether the privilege remains intact.

In *McDermott Will & Emery LLP, et al. v. Superior Court, et al.,* 2017 WL 1382132 (Cal. Ct. App. Apr. 18, 2017), the Court of Appeal upheld the trial court's disqualification of Gibson

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How to Pick a Jury in 30 minutes

Mark Mazarella

By Mark Mazarella

I have many fond memories of my youth. Among them are: playing sports as hard as I could without getting hurt; closing down local drinking establishments and feeling just fine in the morning; and actually having the opportunity to ask every single one of my prospective jurors as many questions as I wanted. I've had to adjust with the passage of time. Sports are now best watched from a comfortable chair. Lights are out by 11:00 p.m.. And I'm lucky if I get to ask every one of my prospective jurors even one question. As jury selection has gone the way of the ice caps, I've been given 30 minutes to examine not just the 12 jurors seated "in the box," or even the usual 18 that are examined initially, but as many as 35 jurors—in 30 minutes. Do the math, that's not even a minute a juror. I've had jurors seated to whom I did not ask a single question. Now that is scary!

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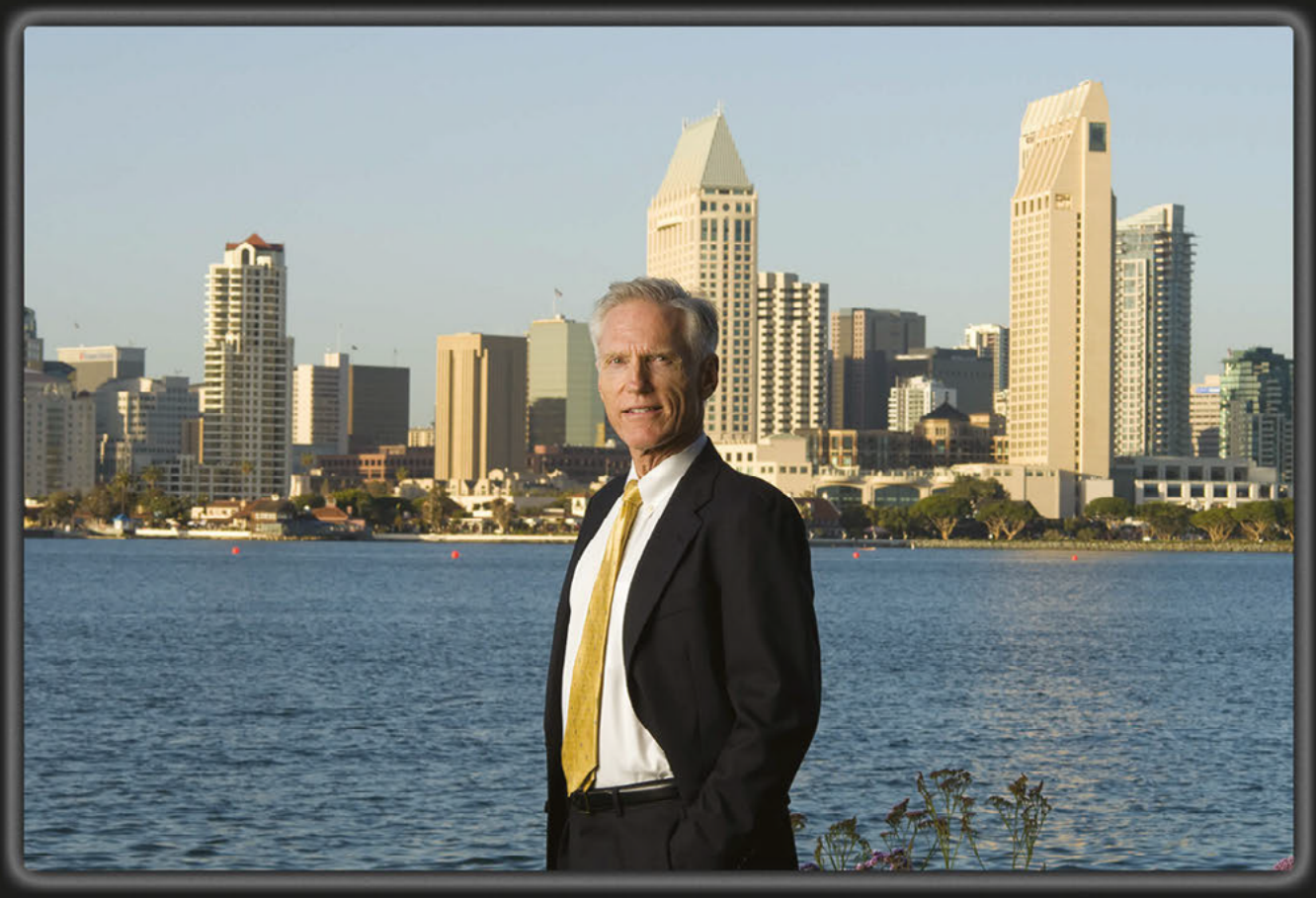

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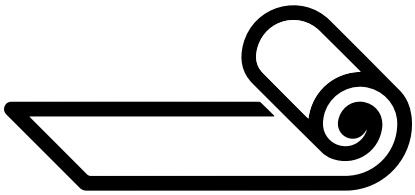
April 4th dinner program recap: TrialPad vs. Trial Director vs. Butcher Paper

By Sara A. McClain, Esq., Shoecraft Burton, LLP

There's no question that today's world of advanced technology and fast-paced information sharing is changing courtroom landscapes. But is faster always better? To help answer that question, the ABTL's April 4th dinner program put three common methods of trial presentation to the test: Trial Director, Trial Pad, and Butcher Paper. All three had pros and cons but which won out? The answer might surprise you.



Butcher Paper: Bob Shoecraft of Shoecraft Burton, LLP was tasked with making the paper method of trial presentation relevant in today's modern courtroom. The most obvious advantage of using butcher paper is cost. For less than $100, Shoecraft was able to purchase all the necessary equipment, including multi-color pleasant smelling markers. And like technology, butcher paper has also made its own advancements as it now comes with adhesive backing similar to a giant post-it note. This makes it easier to post your images and use multiple pages at one time, giving you longevity and staying power in the presentation of evidence. It also gives you significant mobility and allows you to display the information where you want to, rather than where the monitors are. Butcher paper can be particularly effective for presenting chronologies, timelines and sequences. And it allows your witness to personally interact with an exhibit, One of the cons is the requisite good penmanship, because what good is it if the jury can't read it. Similarly, typos and mistakes can only be fixed by starting over with a new page. As such, it is better to have your presentation prepared in advance to ensure smooth transition between pages and minimize the inherent distractions of human error.

Trial Director: Rebecca Fortune of Kimball, Tirey & St. John, LLP used Trial Director like a pro because when it comes to Trial Director, she is one. Rebecca is an expert when it comes to Trial Director and it showed as she kept pace with her witness and kept the audience's attention without any hiccups. One of Trial Director's many features is the split-screen function which allows you to display a witness' videotaped deposition concurrent with another piece of evidence, such as a document prepared by the witness. This is particularly useful when the witness' testimony contradicts the content of the document. The feature allows for extremely effective use of evidence to point out contradictions and holes in the opposing party's case. This feature is best used when attempting to impeach a witness or in closing argument. Similarly, the "call out" feature allows for you to highlight portions of an exhibit, either literally, with a highlight tool, or many other tools, such as enlarging particular text. This feature directs focuses the audience attention to where you want it. This too is quite useful during closing. The most obvious drawback to Trial Director is the cost. It requires a $700 upfront licensing fee per computer, and an annual maintenance fee. However, for trials where images and custom graphics are an integral part of your case, the $700 may not be a con when you consider the cost of foam board blow-ups. Additionally, using any computer-based trial presentation method requires a mastery of the program so unless you are sufficiently comfortable with the software, you might want to consider butcher paper.

Trial Pad: Michael McCloskey of Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, made a valiant effort to highlight the advantages of Trial Pad, a less expensive program similar to Trial Director. For those who already have an iPad, Trial Pad may be your go-to trial software. Available as an "app" in the iTunes store, it can be downloaded for $130 and tends to be more

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TrialPad vs. Trial Director vs. Butcher Paper

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user-friendly than Trial Director, especially for those already familiar with Apple's interface. It has many of the same popular features as Trial Director, including the "call out" feature. Another desirable feature is mobility. Because you are not tied to a laptop, you are free to move around the courtroom which allows for more personal interaction with the jury and witnesses. This can be particularly important when gaining a rapport with your jury. The Trial Pad presentation also highlighted the drawback of any computer-based trial presentation method: technical difficulties. Fortunately, being the trial pro that he is, McCloskey was able to adapt and keep moving. The lesson to be learned there is not to become so dependent on courtroom technology that your case falls apart without it.

The Verdict: After each panel member presented their opening statement, witness examination, and closing argument, the audience was polled to determine which method was the favorite. At the end of the evening, one thing was clear: our panel members each did a fantastic job as there was no clear winner. Team Butcher Paper achieved just a slight edge over Trial Director and Trial Pad. The best trial presentation method depends on a variety of factors including the litigation budget, the central disputed issues in the case, the number and nature of exhibits you intend to use, and your own familiarity with the presentation method.

How to Pick a Jury in 30 minutes

(continued from cover)

I could whine and complain about it, and sometimes do. But, it rarely does me any good. These days I usually only get 30 minutes for *voir dire,* 45 if the judge is feeling generous, or just wants me to quit whining. Of course the judge asks each juror the 6 to 8 questions on the cards left on each juror's seat. "What part of the city do you live in?" "Are you married?" "What do you and your spouse do for a living?" "Have you ever been a juror?" "Did the jury reach a verdict?"

That helps. But usually it is more important to know how jurors feel about what they do than it is to know what they do. A nurse who always dreamed of being a nurse is likely to have a very different perspective of life than a nurse who wanted to be a doctor but couldn't get into med school and had to "settle." In most cases, whether a juror is happy with his life, or bitter, will tend to make the juror look more favorably towards one side or the other. And there are students who live in La Jolla, along with millionaires. While Sam Walton's son, John, lived for years in an old Victorian house in National City. I never have found any significance in whether or not a previous jury reached a verdict. However, I would like to know if a juror was, or wanted to be, the foreperson in a prior jury. Did she believe the jurors focused on the right issues? How much talking did she do during the deliberations? Did she form any close friendships during the trial? Those are the important questions, because they are going to indicate whether she is likely to be a leader.

In the next 1000 words, I have no intention to discuss the usual list of do's and don'ts of jury selection. "You don't pick the good jurors, you just get rid of the bad ones." "Ask open ended questions, not leading ones that will just get you the answer the jurors think you want to hear." "Get the jurors talking." You've probably heard all of that a dozen times before anyway. And the reality is, you won't have time to utilize all the great ideas you will have after reading a few of those "how to" articles, because you are only going to have 30 minutes to *voir dire* the jury anyway. After all, how much "talking" can a juror do in less than 60 seconds. Instead, I am going to suggest a few things you can do before trial that will allow you to milk as much as possible out the limited time you have to pick your next jury.

I always find it enlightening to discuss my cases with friends (legal and lay), family and others who are willing to hear me out. The good, bad and the ugly aspects of my cases always come into clearer focus as I get more and more input.

ASK EVERYONE YOU KNOW WHO THEY THINK WILL BE GOOD OR BAD JURORS FOR YOUR CASE

I always find it enlightening to discuss my cases with friends (legal and lay), family and others who are willing to hear me out. The good, bad and the ugly aspects of my cases always come into clearer focus as I get more and more input. The same is true of my effort to identify the traits, qualities, backgrounds and other features of jurors that most likely will view my case

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How to Pick a Jury in 30 minutes

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with a favorable or critical bias. You can hire a jury consultant who will conduct surveys and give you an analysis identifying which characteristics of prospective jurors have a statistical probability of being predictive of their decision. Or, if you can't afford that, you can ask everyone you know. Do you think we want old or young jurors? Poor or wealthy? Married or single. Professional or blue collar? Formally dressed or casual? And why? As you go through the process make a list of positive or negative traits you will be looking for during jury selection. If you have identified the characteristics or qualities you think may be important in advance, it will allow you to assess each juror more quickly and meaningfully.

ASK THE JUDGE HOW HE OR SHE HANDLES JURY SELECTION, AND THEN BEG

At the Trial Readiness Conference, if not before, ask the judge how he or she handles *voir dire.* Does he allow Jury Questionnaires? If so, how much time is given to review them? Will she ask questions submitted to the court by the parties? If so, how many? How much time will each lawyer have to ask questions? Now is the time to start your whining. But, make it informed whining. Be prepared to point out why it is particularly important given the facts of your case that extra time is allowed for attorney *voir dire.* Give specific examples of the lines of examination that you think are needed, and why they will take some time, even if asked as efficiently as possible. Remind the judge that most trial advocacy teachers and texts correctly claim that jury selection is as important to the outcome as preparation or presentation, and deserves more than a few minutes. Aim high (ask for an hour) and maybe you'll get 45 minutes. That extra 15 minutes may not seem like much, but it could make all the difference in the world. And, even if you don't get any more time, maybe the judge will be persuaded to ask a few more of the questions you submit.

ASK TO USE JUROR QUESTIONNAIRES

It doesn't hurt to ask. But, in reality, most judges won't entertain the use of jury questionnaires for the same reason they don't give lawyers a reasonable amount of time to question jurors—they don't want to spend a lot of time picking the jury. It also won't do much good if the judge says you can use a questionnaire, but doesn't give you enough time to carefully review them. Typically, if allowed, the lawyers will have just the lunch hour to review the questionnaires, usually 55 in Superior Court cases. If you make the questionnaires too long, you will never get through them. So, pick your questions carefully. If you are going to get the maximum benefit from the questionnaires, you will need to line up several people to help with the review. Everyone should be very familiar with the questions. You should discuss what answers will have particular significance—good or bad. Everyone should be trained to separate the wheat from the chaff quickly; and should be prepared to give a 10-15 second summary of most significant responses for each juror whose questionnaire he reviewed.

SUBMIT QUESTIONS TO THE COURT TO ASK

The single best way you can learn more about your jurors is to prepare questions for the court to ask. Most judges will ask appropriate questions if requested. But most won't ask a lot of them. If you submit 50 questions, don't

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How to Pick a Jury in 30 minutes

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expect the judge to ask them. And, unless you review them with the judge in advance, you may not know which of the 50 she will ask until jury selection is underway. Keep your questions to a minimum. Make sure they are very carefully drafted to get the most from them. Ask the judge in advance to go over your questions and indicate which will be asked. Take this opportunity to advocate for the questions the judge would otherwise omit. Not only will the judge asking questions save some of your precious minutes of *voir dire,* it generally will result in more candid answers, since jurors are much more inclined to open up to the judge than to the attorneys whom jurors view with suspicion.

MAKE THE MOST OF THE ANSWERS THE JURORS GIVE TO THE JUDGE'S QUESTIONS

Get a copy of the standard questions the judge asks every juror. Sit down with your trial team, or if you are the team, recruit some temporary teammates, and talk about how the traits and qualities you have identified as predictive of good or bad jurors may be revealed by the jurors' answers to the judge's stock questions. Don't try to assess this for the first time during jury selection. What type of jobs do you think would predispose jurors to your view of the facts? Do you want jurors who have been married forever or those who are recently divorced? Questions like this will come easily in your pretrial discussions. It takes time to consider the implications of potential answers. You won't have that time at trial.

RECRUIT SOMEONE TO SIT IN THE HALLWAY AND WATCH THE JURORS BEFORE THEY COME INTO THE COURT ROOM

I assumed this role once in a toxic mold case. We represented the defendant apartment owner. While sitting quietly in the hallway I saw a normal looking middle aged well-dressed woman sit down on the bench across from me. She took a small bottle of water from her purse. Before drinking it, she pulled out a tissue and wiped the lid of the bottle carefully. I never would have suspected that she was as concerned about cleanliness as that behavior indicated. Nothing in her appearance or the answers to the questions asked of her during jury selection would have tipped me off. But we challenged her; and I believe for very good reason. A lot can be learned by observing the jury in the hallway. Who are the talkative ones who are more likely to be leaders? Nothing is more important than identifying the shepherds and the sheep. What are they reading? What are they talking about? Are they the "smiling happy type?" Once they enter the courtroom the jurors know their every move is being watched and evaluated. If you want to get a more accurate picture of them, start looking and listening in the hallway.

If you do everything you can before jury selection begins to get the most out of the process, you will substantially improve your chances of making good decisions regarding which jurors to accept and which to excuse. It won't replace the opportunity to talk with the jurors like we did in the old days. But, like old age, you just need to learn to deal with it the best you can.

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Lawyers Beware: Deciding Your Adversary's Privilege Issue is Risky Business

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Dunn, after a Gibson Dunn attorney made use of a privileged email in litigation. The email originated with an attorney, consisted of obvious legal advice, and was sent to a client and copied to the client's administrative assistant. The client then forwarded it to various third parties before it ultimately went to Gibson Dunn. The specifics of this journey are complicated, but the salient fact is that the Gibson Dunn attorney should have recognized that the email was privileged, at least in its original transmission from attorney to client. Rather than alerting the other side that an apparently privileged email had been obtained, and instead of conferring with opposing counsel or seeking a court determination of the privilege issue as required by *State Comp. Ins. Fund v. WPS, Inc.,* 70 Cal. App. 4th 644 (1999), the Gibson Dunn lawyer decided that the privilege holder had waived the privilege by disclosing it to third parties. The lawyer made use of the email as a deposition exhibit in litigation against the privilege holder, reading substantial portions of it into the record.

... the Gibson Dunn attorney should have recognized that the email was privileged, at least in its original transmission from attorney to client.

The Gibson Dunn lawyer ended up being wrong about the privilege waiver. The facts bearing on whether the privilege was waived are also complicated, but the trial court ultimately determined -- based on conflicting evidence about the privilege holder's intention – that the email remained privileged notwithstanding its dissemination to third parties. Because Gibson Dunn had retained and made use of the privileged email in the litigation, the trial court disqualified Gibson Dunn, reasoning that disqualification was necessary to prevent future prejudice or harm resulting from the firm's exploitation of the email for its client's advantage in the litigation.

The Court of Appeal affirmed. Even if the lawyer's belief that the privileged had been reasonable, "[t]he receiving attorney assumes the risk of disqualification when that attorney elects to use the documents before the parties or the trial court has resolved the dispute over their privileged nature and the documents ultimately are found to be privileged." *McDermott Will & Emery LLP, et al. v. Superior Court,* 2017 WL 1382132 at *2.

"Allowing opposing counsel to avoid their *State Fund* obligations any time they can fashion a colorable argument for overcoming the privilege would create an exception that would swallow the *State Fund* rule." *Id.* at *16. As the Court explained, opposing counsel should confer and seek guidance from the trial court if they disagree. "The attorney receiving the material, however, is not permitted to act as judge and unilaterally make that determination." *Id.* In reaching this conclusion relied on the persuasive authority of State Bar Formal Opinion No. 2013-188, which concludes that an attorney's *State Fund* duties are triggered when the attorney receives a presumptively privileged communication, even if the attorney reasonably believes the communication may not be privileged because of the crime-fraud exception to the attorney-client privilege.

For the *State Fund* rule to apply, "the materials at issue must obviously or clearly appear privileged." *Id.* at *16. Moreover, "the recipient of apparently privilege materials may expedite resolution of any dispute by bringing its own motion and seeking the court's guidance. The trial court then may impose sanctions and issue other appropriate orders to address the privilege holder's alleged abuse of the *State Fund* rule." *Id.*

Importantly, the Court clarified that the *State Fund* rule is not limited to situations involving inadvertent production by opposing counsel during litigation. No matter how a lawyer receives an obviously privileged email between an opposing party and his or her attorney, the receiving lawyer must follow the *State Fund* rule, or face potentially severe consequences if it turns out the privilege remains intact. As the Court explained, "an attorney's *State Fund* duties are not limited to inadvertently disclosed, privileged

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Lawyers Beware: Deciding Your Adversary's Privilege Issue is Risky Business

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documents the attorney receives from opposing counsel, but also may apply to documents the attorney receives from the attorney's client. Indeed, regardless of how the attorney obtained the documents, whenever a reasonably competent attorney would conclude the documents obviously or clearly appear to be privileged and it is reasonably apparent they were inadvertently disclosed, the *State Fund* rule requires the attorney to review the documents no more than necessary to determine whether they are privileged, notify the privilege holder the attorney has documents that appear to be privileged, and refrain from using the documents until the parties or the court resolve any dispute about their privileged nature. The receiving attorney's reasonable belief the privilege holder waived the privilege or an exception to the privilege applies does not vitiate the attorney's *State Fund* duties." *Id.* at *2.

As the courts and the State Bar have made clear, the *State Fund* rule is one to be followed, no matter how convinced you are that a once-privileged communication has lost its privileged status, based on waiver, the crime-fraud exception, or some other theory. If you have what is clearly a privileged communication – no matter how it came to you – alert your opposing counsel and try to work it out, and let a court decide the privilege issue if you can't agree. Otherwise, the court may make another decision with far more serious consequences, namely, the decision to disqualify you for taking privilege law into your own hands.

The California Supreme Court Rules That Public Injunctive Relief Cannot Be Waived In Consumer Arbitration Agreements

By Courtney L. Baird and Elizabeth R. Favret

On April 6, 2017, the California Supreme Court issued its decision in *McGill v. Citibank*, Case No. S224086, holding that a consumer arbitration agreement which purportedly waives a plaintiff's statutory right to seek public injunctive relief under the Consumer Legal Remedies Act, Civ. Code § 1750, *et seq.* ("CLRA"), the unfair competition law, Bus. & Prof. Code § 17200, *et seq.* ("UCL"), and the false advertising law, Bus. & Prof. Code § 17500 *et seq.* ("FAL") in any forum (court or arbitration) is invalid and unenforceable under California law.

Case Background

The arbitration agreement at issue in *McGill* was part of a "credit protector" plan that the plaintiff, Sharon McGill, purchased when opening a credit card account with Citibank. After McGill entered into the agreement, Citibank sent a "Notice of Change in Terms Regarding Binding Arbitration to Your Citibank Card Agreement," which added an arbitration provision to the agreement. The arbitration provision did not explicitly waive the right to seek public injunctive relief; but the provision stated that all of McGill's claims must be asserted in arbitration, the arbitration proceedings must proceed on an individual basis, and claims asserted as a class action, private attorney general action, or other representative are prohibited. The agreement, in part, stated: "If you or we require arbitration of a Claim, neither you, we, nor any other person may pursue the Claim in arbitration as a class action, private attorney general action or other representative action, nor may such Claim be pursued on your or our behalf in any litigation in any court." More than three years later, Citibank sent a second notice of change of terms to the agreement. Although both notices contained an opt-out provision, McGill did not opt out, and continued to use her credit card.

In 2011, McGill filed a class action against Citibank. Her claims, which related to the "credit protector" plan, included claims under the UCL, the CRLA, the FAL. As part of her request for relief, McGill sought an injunction prohibiting Citibank from continuing to engage in its allegedly illegal and deceptive practices. Pursuant to the arbitration agreement, Citibank moved to compel all the claims to arbitration. The trial court granted Citibank's motion to compel arbitration as to McGill's claims for monetary damages, but applying the *Broughton-Cruz*" rule, denied it as to her claims for public injunctive relief under the UCL, the CLRA, and the FAL. Under the *Broughton-Cruz* rule, arbitration provisions are unenforceable as against public policy if they require arbitration of injunctive relief claims brought for the public's benefit under the CLRA, UCL or FAL.

Citibank appealed the decision. The Court of Appeal (Fourth Appellate District) reversed the trial court's decision on the ground that the *Broughton-Cruz* rule was preempted by FAA, as construed in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333. The Court of Appeal did not address McGill's argument that the arbitration agreement was unenforceable because it purported to prohibit her from seeking public injunctive relief not just in arbitration, but in any forum.

The California Supreme Court granted McGill's petition for review to consider the Court of Appeal's conclusion that the *Broughton-Cruz* rule was preempted by the FAA. The Court subsequently determined, however, that the *Broughton-Cruz* rule was not applicable because the parties had not agreed to *arbitrate* requests for public injunctive relief. Rather, the parties were in agreement that the terms of the arbitration agreement prohibited McGill from seeking public injunctive relief *in any forum.*

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The California Supreme Court Rules...

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Accordingly, the California Supreme Court changed course, and addressed McGill's second argument that the arbitration provision's waiver of the right to seek public injunctive relief in any forum is unenforceable under California law. The court considered whether a private plaintiff, like McGill, could seek public injunctive relief under the UCL and FAL in light amendments to the statutes (Proposition 64) following the *Cruz* decision. The court concluded that a private person with standing (*i.e.*, someone who has "suffered injury in fact and has lost money or property as a result" of a UCL or FAL violation) has a substantive statutory remedy to seek an injunction to prohibit conduct that is injurious to the general public without meeting the requirements of class certification. The court concluded that an arbitration provision which purports to waive a party's substantive statutory remedy to seek public injunctive relief is invalid and unenforceable under California law, citing to Civil Code section 3513. The court rejected Citibank's claim that such a rule is preempted by the FAA.

The California Supreme Court declined to decide whether the remainder of the arbitration provision was enforceable. The Court noted that the first change of terms included a severance clause; but the subsequent change of terms stated that the agreement "shall not remain in force" if any provision is deemed unenforceable. Because the parties had not addressed the varying language, the Court left the issue for the Court of Appeal to decide on remand.

What are the key takeaways rom the *McGill* decision?

The *McGill* has several important takeaways. First, the 2004 Proposition 64 amendments to the UCL and FAL do not preclude a private individual, with standing, from requesting public injunctive relief in an individual action (*i.e.*, the action does not need to brought as a class action). Second, under California law, the right to seek public injunctive relief under the CLRA, the UCL, and the FAL is a substantive statutory remedy that cannot be waived. Third, a consumer arbitration provision that prevents – either through a class action ban or otherwise – an individual's right to seek public injunctive relief under the CLRA, UCL, or FAL is invalid and unenforceable under California law; and such a rule is not preempted by the FAA.

Courtney L. Baird, Partner, Duane Morris LLP. *Baird serves as outside counsel to businesses handling their compliance and risk management issues and prosecution and defense of litigation. She has extensive experience in complex litigation, including class actions, consumer (Consumer Legal Remedies Act, Unfair Competition and False Advertising Law), food and beverage, contract, tort and franchise claims. Her strategic approach, substantive experience and ability to cost-effectively optimize her clients' business and legal objectives has led to her representation of companies across the United States and internationally.*

Elizabeth Favret, Associate, Duane Morris LLP. *Elizabeth Favret practices in the area of litigation. Ms. Favret has experience with employee and consumer class action litigation. Prior to entering private practice, Ms. Favret served as law clerk to the Hon. Michael J. Newman of the U.S. District Court for the Southern District of Ohio.*

An Ounce of Preparation: How Due Diligence at the Outset of a Case Can Help Avoid Common Pitfalls

By Alejandra Mendez, Kimball, Tirey & St. John

On April 18, 2017, ABTL kicked off its Nuts & Bolts season with the first lunch of the year sponsored by D4 and Special Counsel. The focus for this year's Nuts & Bolts lunches will be pre-trial litigation issues, so it is only fitting that the first lunch focused on common pitfalls at the beginning of a case.

A. Michael Nalu of the Nalu Law Firm, provided insight from his experience in legal malpractice and business disputes. He cautioned that "falling in love with your clients" can distract even the best attorneys from potential or actual conflicts of interest. Therefore, it is important to step back and consider the new potential case thoroughly before taking it on.

When representing a client with a potential or actual conflict, attorneys should make sure to have an informed, meaningful and written consent to the ongoing representation.

The case of *Sheppard v. JM Manufacturing* (2016) 244 Cal.App.4th 590, currently pending before the California Supreme Court, serves as a very relevant cautionary tale that even an initial waiver may be insufficient. In *Sheppard,* an advance conflict waiver was insufficient to protect the law firm when a later actual conflict appeared, despite the fact that this conflict was listed as a potential conflict in the waiver.

Heather U. Guerena, a partner with Duane Morris, continued our discussion with another common pitfall: document preservation. Given the current climate of auto-deletion, it is possible to lose information inadvertently.

Ms. Guerena suggested the following strategy with clients:

1. Discuss the information needed to prove and/or defend the case.
2. Determine where the information is stored and how it is stored.
3. Determine who is in charge of maintaining that information.
4. Communicate with key employees by preparing a memo or email regarding the important information that should be maintained.

With opposing parties, attorneys should send out a letter reminding about the duty to preserve documents. This can be as simple as a general reminder regarding the duty to preserve or a more detailed outline of the types of documents and/or information you are requiring them to preserve.

AUSA Christopher M. Alexander extolled the benefits of thorough evaluation of a case's merits at the beginning of representation. A formal litigation memorandum is a great tool for preparing the case, getting other's opinions on your case and ensuring that you can properly prepare your client for what lies ahead. In evaluating the case, an attorney should not only consider the factual and legal issues but also the goals and budget of the client. While ABTL members may love litigation, most people (and clients) do not. Therefore, in many cases, an ounce of preparation for the client regarding the financial and emotional cost of litigation at the beginning, can result in a more successful process and happier client.

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Moment of Truth: Objections to Statements of Decision in California

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Every lawyer likely cringes while watching the scene in A Few Good Men, when Lieutenant Jo Galloway (Demi Moore) tried to prevent a witness from testifying, but ended up bolstering his credibility instead:

Galloway: "Your Honor, we renew our objection to Commander Stone's testimony, and ask that it be stricken from the record. And we further ask that the Court instruct the jury to lend no weight to this witness's testimony."

Judge: "The objection's overruled, counsel."

Galloway: "Sir, the defense ***strenuously*** objects and requests a meeting in chambers so that his Honor might have an opportunity to hear discussion before ruling on the objection."

Judge: "Noted. The witness is an ***expert*** and the court ***will*** hear his opinion!"

A Few Good Men (1992). There is no easier way to deliver your opponent a win than overplaying your hand, and no better antidote than thoughtful execution. While this is true for every stage of a case, below are tips for such effective execution at the end of a litigation—objecting to a statement of decision following the trial of a question of fact by the court.

Purpose of Statement of Decision. Before objecting to a statement of decision, counsel must understand its purpose. A statement of decision—which is available if a party requests it and which the court, or the prevailing party at the court's request, may prepare—explains the legal and factual basis of the decision "as to each of the principal controverted issues" at trial. See Cal. Code Civ. Proc. § 632. A "principal" controverted issue is one that is essential to the court's ultimate decision. Because, the statement of decision must disclose the court's determination on factual issues decided at trial, objections must be directed at conclusory or ambiguous statements or omissions on ultimate facts, not absent details on various evidentiary facts or minute rulings on each piece of evidence.

Default Presumptions. On appeal, the statement of decision, like a jury verdict, is presumed to be correct. Thus, the Court of Appeal infers that facts and evidence support the conclusions in the statement of decision. For example, if the trial court concludes that "a contract existed between the parties" or that "coverage existed under an insurance policy," it is supposed to have implicitly made supporting factual findings. The only way to overcome this presumption is when a party brings to the trial court's attention an ambiguity regarding a legal issue or its failure to make a material finding of fact, and the trial court fails to cure the deficit. This is where artful objections to a statement of decision come in.

Purpose of Objections. As with all artful advocacy, it is easier to list what to avoid than to describe how to succeed. For example, the losing party must not reargue the merits of the case because objections are not a second bite at the trial or a motion for reconsideration. Similarly, the losing party must not identify a kitchen sink of ambiguities or omissions because statements of decisions need only address principal controverted issues and material facts, not exhaustively reach every argument, issue, or minute piece evidence. Nor is merely proposing an alternative statement of decision sufficient. Rather, to be effective, the losing party must identify ambiguities or omissions with

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respect to material issues and facts, as well as any alternative theories that the trial court may not have reached. Relentless brevity in both the number of objections and their discussion is also critical.

Strategic Considerations. Drafting effective objections is further complicated by a tricky balancing act—they should either be so persuasive as to secure reversal of challenged conclusion, or just good enough to highlight an omitted material finding or ambiguous legal conclusion without providing the trial court a road map to bolster its position. While the losing party cannot control what the trial court does with its objections, this strategic consideration can at least guide the selection of issues to be raised, add nuance to the accompanying discussion, and inform the clarity of the request for relief. Moreover, where the prevailing party's counsel prepares the statement of decision at the court's request—as is most likely—it may be more fruitful to forcefully challenge vague and conclusory statements or legal conclusions, and request determinations of ultimate facts. At the very least, trial counsel should consult with someone not involved in the trial, whether another litigator or appellate lawyer, to assist with the objections process.

Procedural Hurdles. Once a statement of decision is requested, the other parties have ten days to request additional issues to be addressed, and a proposed statement must be prepared within fifteen days after this deadline to propose changes expires. Cal. Rules of Court, Rule 232, subd. (c). If a requested statement of decision is not served and submitted within the specified time, any party can either prepare and submit its own proposed statement of decision or move that the statement of decision be considered waived. Id. But, if a statement of decision is issued, it becomes the court's judgment unless the losing party serves and files objections within ten days. See Cal. Rules of Ct., 3.1590, subd. (g). Thus, counsel must be diligent in requesting a statement of decision, proposing all issues to be addressed, and filing timely objections.

Imagine the scene in A Few Good Men going differently—after making a record of her renewed objections to the witness, what if the good Lieutenant (Demi Moore) had accepted that the trial court overruled it, allowed the witness to testify, and tried to impeach him, all the while preserving her objection for appeal without a damning judicial determination that the witness was a bona fide "expert?" For starts, it would be a much less cringe-worthy (and not-so-dramatic) scene.

Of course, preserving an objection is key, but having it win the day on appeal is the real moment of truth. Paraphrasing Colonel Jessup (Jack Nicholson) in the climactic scene of the movie—can you handle the truth?!

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