ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO
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ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO
abtl REPORT

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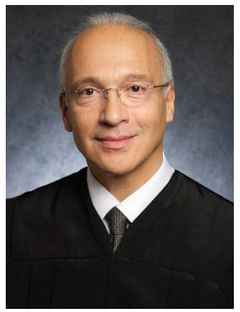
Brown Bag Luncheon with Judge Gonzalo P. Curiel

By: Carolina Bravo-Karimi and Morgan Suder



Judge Gonzalo P. Curiel

On November 6, 2013, the Association of Business Trial Lawyers, along with the San Diego Chapter of the Federal Bar Association and the State Bar Litigation Section, presented a brown bag luncheon with the Honorable Gonzalo P. Curiel to discuss practice and procedure in his courtroom, as well as his role as a newly-appointed member of the bench.

Background

After earning his Juris Doctorate from the Indiana University School of Law, Judge Curiel began his career in private practice, doing both plaintiff and defense work for ten years. In 1989, he joined the United States Attorney's Office for the Southern District of California, and eventually became Chief of the Narcotics Enforcement Division. In 2002, he moved to the Central District of California and continued working as an Assistant U.S. Attorney. Four years later, Judge Curiel was appointed to the San Diego Superior Court, a position he held until 2012, when he was appointed to the federal bench for the Southern District of California.

Oral Argument

As a recently-appointed judge, Judge Curiel's schedule is demanding. Accordingly, Judge Curiel typically only holds oral argument in civil cases for dispositive motions, such as motions to dismiss with prejudice, motions for summary judgment, or motions for preliminary injunctions. Nevertheless, oral argument for non-dispositive motions may be granted on a case-by-case basis. As for criminal cases, Judge Curiel

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A Valid 998 Offer Does Not Require an Acceptance Line

By: Michelle L. Burton

In October 2013 the Fourth District Court of Appeal further clarified the requirements for a valid Code of Civil Procedure section 998 offer in *Rouland v. Pacific Specialty Insurance Company*.[1]

During extremely heavy rains of 2005, a portion of Lars and Lisa Rouland's (Plaintiffs) home, which is located close to Bluebird Canyon in Laguna, California, suffered damage when the ground slid away from underneath the right corner of the home and dislodged a footing. The support of the home was compromised and it was in danger of collapsing. Pacific Specialty Insurance Company (PSIC) insured Plaintiffs' home at the time of the loss. The homeowner's policy contained the standard exclusions for subsidence, earth movement, wear and tear and damage resulting from slow leaking pipes. The policy also did not cover land or repairs made to land, including repairs made to stabilize land beneath the home. When PSIC denied their claim, Plaintiffs filed an insurance bad faith case against PSIC. The Roulands alleged PSIC

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Inside

President's Letter

By Richard D. Gluck

Lately I have been bombarded with ads for all manner of seminars, webinars, books, and programs on how lawyers can use social media to market themselves and build relationships. One recent article I saw, entitled *Marketing Your Practice Today: How to use Social Media to Network and Build Relationships*, claimed that social media is "ideally suited for networking and building relationships." While I don't pretend to be an expert on marketing for lawyers (although I did stay at a Holiday Inn Express once), my gut tells me that the authors of that article have got it wrong.

In my view, Facebook, LinkedIn, Twitter, and other social media sites are poor substitutes for good old-fashioned human interaction when it comes to building relationships. E-mailing, texting, and "tweeting" are no match for sharing a cup of coffee with someone. And spending hours with someone on the golf course, at a ball game, or breaking bread seems far superior to any mode of electronic communication I can think of. After all, are you more likely to develop a meaningful, lasting relationship with someone by exchanging "friend" or "connection" requests, or by sharing a meal or a beautiful bottle of wine? The answer to me is obvious. And apparently I am not alone in my thinking.

Recent studies conducted by sociologists suggest that social media may actually be doing more harm than good. One such study from the University of Michigan showed how online social media, rather than making us feel connected, actually contributes to loneliness and reduces overall life satisfaction. That same study concluded that technology is having a fundamentally negative effect on the way we interact with others. Other studies have shown that social relationships – both the quantity and quality – affect mental and physical health, and mortality risk. People with the lowest level of involvement in social relationships are twice as likely to die as those with greater involvement. And people with higher levels of social relationships tend to have lower incidence of heart disease and other health problems.

While I have no empirical evidence to support my thesis, I am convinced that the advent of the digital age and the increased use of electronic communication it has brought have also led to the rampant incivility that plagues our profession. It is much easier to be a jerk to opposing counsel in an e-mail than it is by phone. Conversely, it is more difficult to mistreat a person we have a relationship with than one we have only "met" through e-mail or LinkedIn. It stands to reason, then, that having more personal contact and building more and better relationships with our colleagues and opponents can't help but lead to more civility and less stress and professional dissatisfaction.

Now the purpose of this column is not to bash social media; there undoubtedly is utility in social media, and its place in modern society seems secure. Rather, the purpose of this column is simply to urge us all not to forsake human interaction in favor of electronic communication. Being able to play SongPop on Facebook with people scattered all over the place is fun, but it does little to build real relationships. And we are in the relationship business. We are not selling widgets; we are selling our skills, our experience, and our judgment. No amount of electronic "pinging" will ever be as effective as looking someone in the eye and making a real human connection.

So please put down your iPhone, step away from your computer, and get out of your office. Have lunch with a colleague, coffee with opposing counsel, or dinner with a client. Take a prospective client to a ballgame, the theater, or the symphony. Even better, go to the next ABTL dinner program, Brown Bag Lunch, or Annual

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President's Letter

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Seminar and make real connections and build real relationships with the real people with whom you practice in this community. Your heart will thank you. And you may just live longer and enjoy life more.

This is my last column as President of this great organization. It has been an honor and privilege to serve you. I have loved every minute of my tenure. On my way out the door, I want to thank a few of the many people who made my job easier and made this a great year for ABTL San Diego.

First, I want to thank Paul Tyrell, our Program Chair, for all of his hard work organizing the many outstanding programs we had this year. It was a great year, thanks in large part to Paul's efforts. Thank you, Paul.

Next I want to thank Lois Kosch, our ABTL Report Editor, for all of her hard work putting out four great issues this year. Editing the Report is a thankless job, and Lois spends more hours doing it than I'm sure she cares to count. So thank you, Lois.

I also want to thank Diane McCloskey, our new Executive Director, for taking care of the hundreds of little (and some not so little) things that allow us to provide our members with the services and programs we offer. We could not do it without her. Thanks, Diane.

And finally, I want to thank our judicial and attorney members who donated their time and talents this year serving on our Board and on various committees, attending dinner and lunch programs, attending the Annual Seminar and Joint Board Retreat, and organizing and participating in programs and seminars. It is the active involvement of our members, especially our judicial members, that makes this organization so special. So thank you all. And thank you for the opportunity to serve as your President. I'll see you at the next dinner program.

Rich

New and Noteworthy

In Time for Holiday Parties, a Cautionary Tale of Employer Liability for Accidents Caused By Off Duty Employees

By Wilson Turner Kosmo LLP

In the second half of 2012 two California appellate courts found employers potentially liable for injuries arising from motor vehicle accidents involving employees that, at first, would appear to have occurred well outside the course and scope of work duties.

The first of these cases is *Purton v. Marriott Int'l, Inc.* (2013) 218 Cal.App.4th 499(4th App. Dist., Div.1). There, the employer held an annual holiday party where, in an apparent attempt to limit consumption of alcoholic beverages, it provided only two drink tickets per person and served only beer and wine. An employee had a couple drinks before he arrived at the party, and while at the party drank hard liquor from his flask and whiskey provided by a supervisor. Somehow he managed to make it home safely. He did not consume any alcohol after leaving the party. Shortly after he arrived at home he decided to drive home a coworker. While doing so, and driving 100 miles an hour, he rear-ended another car, killing the driver. He had a 0.16 blood-alcohol level and pleaded guilty to gross vehicular manslaughter while under the influence of alcohol. He received a six-year prison sentence. The driver's family sued Marriott, which employed the driver of the car, for wrongful death.

The trial court granted Marriott's motion for summary judgment finding the employer's liability for its employee's actions in driving drunk after the work party ended once the employee arrived home. The appellate court disagreed, finding "the modern justification for respondeat superior is a deliberate policy allocation of risk." The court found a reasonable trier of fact could find the employee acted negligently by becoming intoxicated at the party, that this act was within the scope of employment and proximately caused the accident. Moreover the trier of fact could consider the disputed evidence regarding whether it was foreseeable the employee would drive later in the evening while still intoxicated. In addition the court said a trier of fact could conclude that the employee's negligent act occurred within the scope of employment because

the party and drinking of alcoholic beverages were a conceivable benefit to the employer or were a customary incident to the employment relationship so as to render the employee's act of drinking to be within the scope of employment. Finally, the ultimate question of whether it was the employee's ingestion of alcohol at the employment function that caused the accident was also for the trier of fact to decide.

This case highlights the potential liability an employer faces when it provides alcohol at a company function. If an employer provides alcohol, it must ensure that measures are in place and followed to ensure that employees do not drive while intoxicated after the event. The troubling issue presented by this case is whether it is even possible for an employer to protect itself from liability if takes steps to ensure the employee is returned safely home, but unbeknownst to the employer, the employee decides to leave home while still intoxicated and causes an accident for which the employer may bear liability.

Although the second case involved vastly different facts, it resulted in the same finding of potential liability for an accident that at first seems unconnected to ordinary work activities. In *Moradi v. Marsh USA* (2013) 219 Cal.App.4th 886 (2d App.Dist.,Div. 1), the court held an employer liable for a car accident caused by an employee who stopped for a frozen yogurt on her way home from work.

(see "New and Noteworthy" on page 4)

New and Noteworthy

(continued from page 3)

The court so ruled because it found the employer received an "incidental benefit" from the employee's required use of a personal vehicle. The employee was required to use her own vehicle while working so she could meet with prospective clients and perform other off-site duties. On the day of the accident, she had also transported herself and some of her co-workers to a company-sponsored program in the area. After returning at the end of the work day, she left the office planning to stop for frozen yogurt and, thereafter, attend a 6:00 p.m. yoga class. On her way to the yogurt shop, the employee collided with a motorcyclist—the eventual plaintiff in the case – who sued both the driver and her employer for his injuries.

The trial court granted the company's motion for summary judgment, finding that the employee was not acting within the scope of her employment at the time of the accident. The court of appeal reversed, holding that the company could be liable.

Generally, the "going-and-coming" rule precludes employer liability when an employee is using her own vehicle to commute to and from work. However, an exception to the "going-and-coming rule" arises when the employee's use of her vehicle provides some incidental benefit to the employer (i.e. the "required vehicle exception.") The court's "key inquiry" was whether the employer incurred an "incidental benefit" from its requirement that the employee use her personal vehicle. Because it determined that an incidental benefit was received, the accident on her way home from work was considered within the scope of her employment. The court further held that the employee's planned stops for frozen yogurt and yoga class on her way home are foreseeable minor "deviations" to her commute so they did not change the impact of the "incidental benefit" received by the employer.

Lois M. Kosch, Christina Tapia and Karen Haubrich contributed to this summary. They are attorneys in the employment law department of Wilson Turner Kosmo LLP where they represent employers in all aspects of employment litigation.

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providing parties a financial incentive to make and accept reasonable settlement offers. The appellate court acknowledged that although recent decisions regarding proper 998 offers agree that failing to comply with the acceptance provision requirement invalidates the offer, they do not provide clear guidance on how to satisfy that requirement, holding only that the offer must include "some indication" of the appropriate manner of acceptance. (See, *Puerta v, Torres*[5]; *Perez v. Torres*[6]; *Boeken v. Philp Morris USA Inc.*[7])

Also citing Whatley-Miller v. Cooper,[8] the court noted that nothing in the statute's language requires an offer to include either a line for the party to sign acknowledging its acceptance or any specific language stating the party shall accept the offer by signing an acceptance statement. Strict compliance with statutory mandates of Section 998, or the use of particular "magic language," is not required. (Citing *Berg v. Darden*[9].) Rather, the offer's acceptance provision must simply specify the manner in which the offer is to be accepted and the only statutory requirements for a valid acceptance mandate a written acceptance signed by the accepting party or its counsel. The judiciary may not impose any additional requirements or limitations that do not appear on the face of the statute. (Citing Cadlerock Joint Venture, L.P. v. Lobel[10].) The court concluded that accepting the Roulands' formalistic requirements potentially could invalidate written acceptances of section 998 offers and therefore undermine its statutory purpose.

On its face, it seems using the Judicial Council Form is the easy solution to avoid challenges to a 998 offer. However, as the Judicial Council Form notes, it "is designed to be used only in civil actions involving a single plaintiff and a single defendant…." It is also designed to only be used when a plaintiff makes a 998 offer to a defendant. Therefore, the Judicial Council Form cannot be used for all 998 offers, and *Rouland* confirms this Form is not mandatory, and does not provide the exclusive means of meeting the statute's requirements. This opinion, however, clarifies the required content for a valid specially prepared 998 offer. It will be interesting to see the final resolution of this almost eight year battle once it is remitted to the trial court. At the end of the opinion, in a somewhat troubling statement the court of appeal noted, "the trial court's finding that PSIC's offers were reasonable and that the expert fees PSIC sought were reasonable speak to whether the statue's requirements were satisfied. They do not equate to an exercise of the trial court's judicial discretion that PSIC should recover all or some of its expert witness fees." Thus, it appears compliance with Section 998 does not equate to an automatic award of expert fees.

Michelle L. Burton is the Managing Partner of Shoecraft ♦ Burton, LLP, a boutique civil litigation firm in San Diego, California which specializes in complex insurance coverage litigation, placement and risk, professional liability, business law, and construction disputes. She successfully represented Pacific Specialty Insurance Company against the claims brought by Lars and Lisa Rouland both at trial and on appeal, which resulted in the published decision discussed herein.

(Endnotes)

1 *Rouland v. Pacific Specialty Insurance Company* (2013) 220 Cal.App.4th 280

2 *Puerta v. Torres* (2011) 195 Cal.App.4th 1267

3 *Puerta v. Torres, supra,* 195 Cal.App.4th at 1271, 1273

4 *Martinez v. Brownco Construction Co.* (2013) 56 Cal.4th 1014

5 *Puerta v, Torres, supra,* 195 Cal.App.4th at 1273

6 *Perez v. Torres* (2012) 206 Cal.App.4th 418, 425-426, fn. 6

7 *Boeken v. Philip Morris USA Inc.* (2013) 217 Cal.App.4th 992, 1003

8 *Whatley-Miller v. Cooper* (2013) 212 Cal.App.4th 1103, 1110

9 *Berg v. Darden* (2004) 120 Cal.App.4th 721, 731-732

10 *Cadlerock Joint Venture, L.P. v. Lobel* (2012) 206 Cal.App.4th 1531, 1549

Quick Start Guide for Preparing for an Oral Argument on Appeal

By Kate Mayer Mangan

Step 1: Identify Critical Affirmative Points

Identify the 3-4 most important affirmative points you need to make to win. Identify these critical points by rereading the briefs carefully. Take notes, find the crux of the controversy. Distill the controversy into a few headlines. Try to make these points no matter what.

Step 2: Develop Rebuttals

Develop responses to the hardest questions. Distinguish the worst cases and explain why the worst facts don't matter. Your responses should be succinct, responsive, and dispose of the argument.

Step 3: Know Your Record

Know the record inside and out. Study important exhibits and testimony. Know citations for key evidence and arguments made below. Try making a 1-page chart with critical citations and descriptions of the evidence.

Step 4: Update the Law

Shepardize the important cases, but don't stop there. Conduct new research on the main issues. This step is increasingly important as the lag time between briefing and argument increases; the law can change a lot in a year.

Step 5: Practice

Practice in front of a silent panel (like your cats). Practice in front of an active panel if you can. Practice what you'll do when you get interrupted and how you'll return to your affirmative points. Give your panelists a list of questions.

PRACTICAL TIP:
What to Take to the Podium

Take written "argument blocks" to the podium[1] Try outlining your points in two columns, as shown here. This allows you to quickly pivot from point to point, which is important because you never know where the judges are going to take you. The judges want to talk about *Smith v. Jones*? No problem. Jump over to your *Smith v. Jones* block, explain it, and then get back to Affirmative Point #2.

If your outline runs to two or more pages, which will happen only in very complex cases, you may want to paste the outline to the two flaps of a manila folder. That way you can see four columns (or two pages) without having to turn any pages. There's also no risk of dropping a bunch of papers as you walk to the podium.

AFFIRMATIVE POINT # 1

- ***Subpoint 1.*** AOB 32-35; Rep. 12
- ***Subpoint 2.*** AOB 36.

AFFIRMATIVE POINT #2

- ***Subpoint 1.*** AOB 40-42; Reply 15

DISTINGUISH KEY CASE

- Bad case for me does not control because….

RESPONSE TO OPPONENT'S BEST ARGUMENT

- Opponent is wrong because… AOB 12-14
- Reporter's Transcript at 37; Exhibit 23

WHY CONTRARY EVIDENCE DOESN'T MATTER

Rule of Law You Want:

- The principle of law that governs is….[note this may be a synthesis of multiple cases, statutes, and laws].

Strong Conclusion:

- The Court should reverse because of this succinct reason.

Practical Tip: Try keeping an ongoing list of possible oral argument questions, right from the first day you begin work on the case. Write down questions whenever you think of them, in a Word document, in a dedicated legal pad, or on index cards in a box. That way, even as you gain familiarity with the case, you'll have responses to questions that arise upon first glance.

1 This idea is from David C. Frederick's *The Art of Oral Advocacy*, an excellent resource for preparing for oral argument.

Advising Witnesses to Maintain Confidentiality During Internal Investigations Following the NLRB's 2012 Decision in the *Banner Health Systems* Case

By Lois M. Kosch

The common practice of advising witnesses interviewed during the course of an investigation that they may not discuss the investigation with co-workers fell into some doubt when the National Labor Relations Board (NLRB) issued a controversial decision in July 2012 in the *Banner Health Systems* matter. (*Banner Health Systems d/b/a Banner Estrella Medical Center and James A. Navarro*, Case 28-CA-023438, 358 NLRB No. 92 (2012).) It is a standard practice for those conducting internal investigations to instruct employees to maintain the confidentiality of investigations and ask that witnesses not speak to other employees about the investigation while it is ongoing. The common concern is that if employees talk to each other about an investigation, the employees would have an opportunity to align their stories, conceal evidence or potentially violate the privacy rights of those involved in the investigation, all of which may compromise the integrity of an investigation. However, in *Banner Health Systems*, the NLRB made it clear that a blanket confidentiality instruction likely violates the National Labor Relations Act (NLRA)(Section 8(a)(1)), which protects employees' rights to engage in concerted activity. The NLRB found that an employer's "generalized concern with protecting the integrity of its investigations through a blanket confidentiality rule does not outweigh employee rights to engage in protected activity." (358 NLRB No. 92 at p. 2.) Rather, it was the employer's burden to determine whether witnesses needed protection, evidence was in danger of being fabricated or there was a need to prevent a cover-up which are some reasons that might justify an instruction to employees to maintain confidentiality of information discussed during a workplace investigation.

Overall, the decision provides employers with very limited guidance on how to decide when and to whom confidentiality instructions are appropriate. In situations where employers and their employees prefer an investigation to remain confidential the individuals may have few options and, in fact, may be in a worse position in light of the NLRB's position. The NLRB's position also seems to ignore the obvious reality that the more individuals talk about the subject of an investigation the more diluted and/or exaggerated the facts may become. In addition, there is the very real potential for collusion (as employees align their stories), and even bullying or coercion as individuals intimidate or threaten others to report facts a certain way when questioned by the investigator. The result is thereby tainted, the investigation has lost much of its inherent value, and the truth may never be uncovered.

> *The NLRB found that an employer's "generalized concern with protecting the integrity of its investigations through a blanket confidentiality rule does not outweigh employee rights to engage in protected activity."*

It is interesting to note that the NLRB reached its conclusion in the *Banner Health* case despite acknowledging the need for workplace confidentiality in earlier cases. (*IBM Corp.*, 341 NLRB 1288 (2004).) In addition, there is case law that acknowledges the importance of confidentiality and finds failure to maintain confidentiality during workplace investigations to be a valid reason for termination of employment. (See *Day v. Sears Holdings Corp.*, 2013 U.S. Dist. LEXIS 41052 (Central Dist. CA March 13, 2013)(plaintiff's termination for failure to maintain confidentiality during workplace investigation was a non-discriminatory reason for termination and plaintiff could not establish pretext, thus summary judgment in employer's favor on plaintiff's multiple employment-related claims was appropriate); *Harkola v. Energy*

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998 Offer

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ken gestures" made without any expectation of acceptance. The trial court rejected this argument and found the expert fees were reasonable and necessary, but agreed the offer was defective under *Puerta v. Torres*[2] because it failed to strictly comply with the dictates of sSection 998. The court therefore granted Plaintiffs' motion to strike the expert witness fees, and PSIC appealed. The issue was whether the method provided for acceptance in PSIC's offers satisfied the requirement of Code of Civil Procedure section 998(b) that the offer contain a provision that allows the accepting party to indicate acceptance by signing a statement to that effect.

In an opinion by Justice Aronson, the Fourth District Court of Appeal, Division 3, reversed the trial court's ruling and found PSIC's 998 offers complied with statutory mandates. Section 998(b) requires the offer to "include a statement of the offer, containing the terms and conditions of the judgment or award, and a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted. Any acceptance of the offer, whether made on the document containing the offer or on a separate document of acceptance, shall be in writing and shall be signed by counsel for the accepting party or, if not represented by counsel, by the accepting party." As noted in *Puerta v. Torres*,[3] the legislature added this provision to Section 998 in 2006 to eliminate uncertainty by removing the possibility that oral acceptance of an offer might be valid.

The Roulands argued PSIC's acceptance provision failed to satisfy section 998's acceptance provision requirement for two reasons: (1) it had no line for them to accept the offers by signing them "as included in Judicial Council form CIV-090," and (2) it "had no language ... which stated that [the Roulands] shall accept the offer[s] by signing a statement that the offer[s are] accepted."

Citing *Martinez v. Brownco Construction Co.*,[4] the court first noted the principal purpose of Section 998 is to encourage settlement by

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998 Offer

(continued from page 1)

failed to pay a covered claim after their home was damaged in a landslide.

PSIC moved for summary judgment and prevailed on its coverage position. Plaintiffs appealed and made a coverage argument to circumvent the exclusions contained in the policy. Plaintiffs argued the damage to the home resulted not from hundred year rains which caused numerous other landslides across the state and in close proximity to Plaintiffs' home, but from hidden decay in a sewer pipe that caused the pipe to leak and in turn the hillside to collapse. Plaintiffs argued they had coverage under the Additional Coverage Section of the policy which provided coverage for a collapse caused by hidden decay. Although intended to be limited to decay in the structure itself, the actual hidden decay language contained in the policy did not contain a limitation that the decay occur within the structure making the language somewhat ambiguous.

In opposing PSIC's motion for summary judgment, which was heard prior to the parties' exchange of expert witness information, Plaintiffs' counsel included declarations from undesignated experts who opined hidden decay in a sewer pipe rather than rain was the efficient proximate cause of the loss. Based on the declarations and policy language, the court of appeal reversed finding a triable issue of fact existed as to the efficient proximate cause of the loss. Following reversal, PSIC immediately deposed Plaintiffs' experts. Notably, preparing for these depositions required PSIC to incur substantial expert fees of its own in evaluating, and developing its rebuttal to, the opinions expressed in the summary judgment declarations. The credibility of Plaintiffs' initial experts was ultimately undermined, however, when it emerged at their depositions: they were personal friends of Plaintiffs' counsel and had no foundation for their opinions. Their opinions were also based on review of a photograph provided by Plaintiffs' counsel and they had not actually inspected the pipe before executing their declarations. When the parties officially designated experts in the case, Plaintiffs did not identify any of their original experts and instead served PSIC with a slew of newly designated experts.

Strict compliance with statutory mandates of Section 998, or the use of particular "magic language," is not required. Rather the offer's acceptance provision must simply specify the manner in which the offer is to be accepted and the only statutory requirements for a valid acceptance mandate a written acceptance signed by the accepting party or it's counsel.

The parties were unable to settle the case and proceeded to a jury trial. Pre-trial Plaintiffs demands were in excess of five million dollars. Prior to trial, PSIC served Lars Rouland with an offer to compromise pursuant to Code of Civil Procedure section 998 in the sum of $95,000.00. PSIC also served Lisa Rouland with an offer to compromise in the sum of $30,000.00. PSIC's offers stated: "If you accept this offer, please file an Offer and Notice of Acceptance in the above-entitled action prior to trial or within thirty (30) days after the offer is made."

After a five week trial in Orange County in front of the Honorable Gail Andler, the jury found the Roulands did not suffer a loss covered under PSIC's policy and the trial court entered judgment in favor of PSIC. PSIC timely filed its Memorandum of Costs. The Memorandum of Costs included $331,562.55 in expert fees per Code of Civil Procedure section 998. Expert costs were high due to Plaintiffs' designation of a different set of experts than those originally relied upon for the opposition to PSIC's summary judgment motion, designation of a plethora of non-retained experts by Plaintiffs, and the complicated technical issues that required hydrologists, geotechnical and construction experts.

The Roulands filed a motion to strike PSIC's Memorandum of Costs arguing the 998 offers were defective because they did not contain an "acceptance line" on which Plaintiffs or their counsel could sign to signify their acceptance of the offers. The Roulands further asserted that because a jury verdict "well in excess" of $3 million would have been "reasonable," PSIC's offers, which totaled $125,000, were merely "to-

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Internal Investigations

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East, Util. Shared Servs., 2011 U.S. Dist. LEXIS 87942, 2011 WL 3476265 (Western Dist. NY August 9, 2011)(summary judgment granted to employer where one reason for plaintiff's termination was failure to maintain confidentiality during two human resources investigations); *Mantero v. AGCO*, 192 F.3d 856 (9th Cir. 1999) (acknowledging requirement of confidentiality.)

Et Tu EEOC?

Adding to the uncertainty surrounding confidentiality admonitions, there has been some indication the Equal Employment Opportunity Commission (EEOC) may align itself with the NLRB on this issue. For years the EEOC's guidance has emphasized confidentiality as part of the investigative process. (See, "*Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*" (1999) and "*Questions and Answers for Small Employers on Employer Liability for Harassment by Supervisors*" (2010). Both are available on the EEOC website at eeoc.gov.) But last year, following the NLRB's decision in *Banner Health*, it was reported that the EEOC's Buffalo, New York, office notified an employer of an investigation of its policy of warning employees not to discuss harassment investigations with co-workers. The EEOC office claimed that complaints to anyone, including high management, union officials, other employees, newspapers, etc. about discrimination is protected opposition. According to the EEOC, discussing one's complaints of sexual harassment with others is protected opposition and any employer who tries to stop an employee from talking with others about alleged discrimination is flagrantly violating Title VII rights. (See Jon Hyman, *Confidential Workplace Investigations Are Under Attack … By the EEOC?* Lexis Nexis Legal Newsroom, Labor & Employment Law August 16, 2012.) Granted, this is a communication issued by just one EEOC district office and, as of the writing of this article, the EEOC had not made any official pronouncement along these lines. At minimum though, it muddies the waters even further for employers and investigators trying to conduct effective and lawful workplace investigations.

Going Forward in Light of *Banner Health*

While the controversial *Banner Health* decision will likely face strong resistance from employers if appealed to the federal circuits, employers must determine how to conduct investigations until such time as the ruling is invalidated. In the meantime, the practical application of the NLRB ruling is that employers should assess the need for confidentiality on a case-by-case basis, and continue to give confidentiality instructions when warranted under the specific facts. Until either the EEOC or NLRB issue more definitive guidance, a necessary initial step in conducting any investigation

will be consideration of whether a confidentiality admonition is needed and how it will be justified. Ideally, an investigator will document at the outset the reasons confidentiality is vital to the investigation and at least consider the possibility of dispensing with the usual instruction to witnesses not to discuss the investigation outside the investigator's office.

Is *Banner Health* Even Binding Authority?

There is yet another wrinkle in this analysis which results from challenges to the NLRB's ability to issue valid decisions due to lack of a required quorum. (See, *NLRB v. Noel Canning*, 705 F.3d 490 (D.C. Cir. 2013).) The controversy is rooted in President Barack Obama's January 4, 2012 recess appointments of Sharon Block, Terence Flynn and Richard Griffin to the National Labor Relations Board.

The 112th Congress officially began on January 3, 2012, but pursuant to a unanimous consent agreement, for a period of nearly three weeks (from January 3 to January 23) they were only in *pro forma* session. That is, no business was conducted and no senators were required

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explained that he is more inclined to rule from the bench rather than issue a written order.

Although there is no requirement for tentative rulings in federal court, based upon his experience as a Superior Court judge, Judge Curiel strives to issue tentative rulings whenever possible to help focus the parties on the issues of greatest consequence to the court.

Motion Practice

Judge Curiel encourages attorneys to make the most of their opportunities to inform and advise the court through written presentation. In particular, he explained that attorneys should never underestimate the importance of an opening statement. For example, when writing the introduction to a motion, attorneys should set aside extraneous facts that may not be dispositive and instead highlight the essence of the case.

Judge Curiel also stressed the importance of brevity so as not to dilute strong points with extraneous issues. For example, although he acknowledged that block quotes can be particularly powerful in certain circumstances, he nevertheless encourages attorneys to reduce block quotes to one or two sentences when possible.

The judge's chamber rules specifically require motions for summary judgment to be accompanied by a separate statement of undisputed material facts. Judge Curiel recommends the parties point to specific evidence in their memorandum of points and authorities to eliminate the court's need to cross-reference the parties' evidence. He also explained that attorneys should be careful to reference credible authorities. An attorney will lose goodwill with the court if a case does not stand for its cited proposition.

Judge Curiel expects counsel to be professional at all times. He explained that personal attacks against opposing counsel, even in briefings, should always be avoided as it only detracts from the focus of the case and negatively impacts the attorney's reputation. The focus should instead be on whether the client deserves to prevail based upon the facts and the applicable law.

Trial Practice

Similar to motion practice, Judge Curiel believes attorneys should provide the jury with a roadmap of significant issues during their opening statements.

As for scheduling, trial dates are set during the pretrial conference. Judge Curiel noted that a scheduled trial date typically encourages early resolution between the parties. In the context of criminal cases, he mentioned that 95 percent of criminal cases result in a settlement and that he is always willing to add to the next Friday calendar individuals pleading to time-served sentences.

With regard to jury selection, Judge Curiel uses the "Double Blind Method" for jury selection in both civil and criminal cases, in which counsel simultaneously exercise their peremptory challenges. The first twelve jurors in criminal cases and seven to eight jurors in civil cases who survive the challenges will constitute the jury.

New to the Bench

As a newly-appointed member of the bench, Judge Curiel explained that his biggest hurdle has been the heavy caseload he inherited when he first started last year. Although he has found copyright and patent cases particularly challenging, he is most excited about these cases due to their complexity. He specifically stated that intellectual property is of great importance to the world economy, and he even admitted that he is looking forward to his first Markman hearing ("claim construction" hearing).

Judge Curiel routinely reviews case reports identifying pending motions and cases pending trial for at least three years, and aims to rule on pending matters and move cases forward in an expeditious manner. He expressed gratitude for his talented law clerks who have helped him get through almost all of the pending motions on his docket. In addition to ruling on countless motions since joining the bench, Judge Curiel has presided over five civil trials and seven criminal trials in the last year.

When asked about his most positive surprise since his appointment to the bench, Judge Curiel remarked that the courthouse is exceptionally well-managed and well-run. He gave credit to Chief Judge Moskowitz for ensuring that the court continues to serve the people to the best of its abilities given various challenges. Specifically noting the impact of the recent government shutdown, Judge Curiel stated proudly that the federal court did not have to furlough any court staff due to smart budgeting. However, he remains concerned for January 2014 as the court no longer has a surplus of funds.

(see "Judge Curiel" on page 9)

Judge Curiel concluded by stating that it has been an honor to be in his position and that he considers his role as a district court judge to be one in which he serves both attorneys and the parties.

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to attend other than one senator who gaveled each *pro forma* session in and out. Following an adverse ruling from the NLRB, Noel Canning appealed the order to the United States Court of Appeals for the District of Columbia Circuit contesting not only the board's order, but also arguing (1) the Senate was not in recess when the president made the three recess appointments to the NLRB and (2) the board therefore lacked a quorum when it issued its decision. Without a quorum, any decision issued was invalid. The D.C. Circuit agreed that all three appointments were constitutionally invalid and thus the Board lacked a quorum. As such, the Board's order against Noel Canning was vacated. Meanwhile, in May 2013 the U.S. Court of Appeals for the Third Circuit also found that the January 2012 NLRB appointments violated the recess appointments clause (*NLRB v. New Vista Nursing and Rehabilitation,* 719 F.3d 203 (3d Cir. 2013)) and in July 2013 U.S. Court of Appeals for the Fourth Circuit joined this school of thought. (*NLRB v. Enterprise Leasing Company Southeast, LLC,* 2013 U.S. App. LEXIS 14444, 2013 WL 3722388 (U.S. Court of Appeals for Fourth Circuit, July 17, 2013).)

Based on the decision in *Noel Canning,* the Board also lacked a quorum when it issued its decision in *Banner Health* so potentially that decision is invalid. However, in June 2013 the U.S. Supreme Court agreed to review *Noel Canning* and decide whether the president's recess appointments to the NLRB violated the Constitution. The result could invalidate hundreds of Board decisions, including *Banner Health.* The *Noel Canning* case is set for oral argument before the U.S. Supreme Court on January 13, 2014. Because of the separation of powers issue it presents, it is one of the most important cases on the Court's docket this term.

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