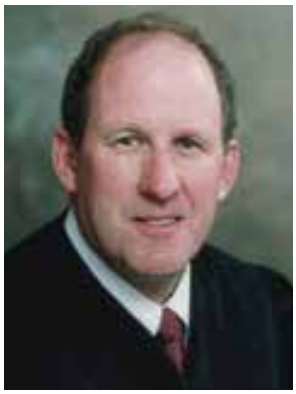
ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO

abtl REPORT

Volume XXI No. 4 *Winter 2014*

Things I Wish I Had Known Before I Became a Judge

By: Judge David B. Oberholtzer



Judge *Oberholtzer*

I learned a lot about the court after my 2002 appointment to the bench, including many things I wish I had known as a lawyer. I will summarize some of these things in this article, which you may accept or discard, and remember these are my thoughts - none of it is official policy.

Rule Number 1

This is the most important thing I can tell you: Any time you disparage or disrespect opposing counsel, the judge thinks less of *you*. I really mean it. There are no exceptions to this rule. Talk about how the other side's position is unreasonable, not how the person is unreasonable (or unethical). I know it is difficult not to personalize – I did – but that was before I knew better.

Briefs

I am going to read your brief, but not all of it, so headings are important, as is a table of contents, even if not required. I do not need a paragraph on summary judgment law (or whatever) at the beginning – just get on with it. Use bullet points for the fact section – much easier to absorb than paragraphs.

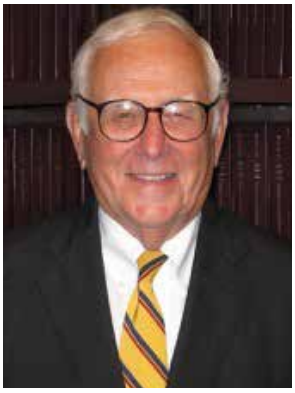
Also, your briefs are not too long. They are just too poorly written. I see pages of jargon and paragraphs with too many words by half – edit, edit, edit! Eliminate unnecessary words and dependent clauses, and delete all adverbs, and almost every "that." The active voice is preferred. (Oops, I mean "use the active voice.")

Stop using prepositional phrases for verbs – "in receipt of, in compliance with,

(see "Things I wish I had known" on page 4)

Pineda v. Williams-Sonoma Stores, Inc.: The Cobra Effect?

By: Justice Howard B. Wiener, Retired



Justice Weiner

On February 10, 2011, a unanimous California Supreme Court in *Pineda v. Williams-Sonoma Stores, Inc.*, (2011) 51 Cal.4th 524, held that collecting ZIP codes from cardholders during a credit card transaction violates California's Song-Beverly Credit Card Act of 1971 (the "Act"). [1] With certain limited exceptions, the Act prohibits companies from requesting and recording "personal identification information" during a credit card transaction.[2] The court made clear that its decision was to have retrospective application. [3]

In my view, by making its decision retroactive, the court subjected companies to massive financial penalties for relying on a contrary Court of Appeal decision, which the Supreme Court casually dismissed as originating from an "inferior court." As a former justice of the California Court of Appeal I was taken aback by this label, as well as the Supreme Court's apparent

(see "Pineda v. Williams-Sonoma" on page 10)

Inside

The Association of Business Trial Lawyers of San Diego Proudly Presents

Teaching the Art of Trial Skills Seminar

Come learn and improve your trial techniques by watching experienced ABTL trial attorneys and judges from throughout San Diego provide instruction and tips to practicing attorneys throughout a full trial presentation.

ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO
abtl

event details

DATE: January 24, 2015

TIME: 9:00 a.m. to 4:00 p.m.
lunch to be provided

LOCATION: Robbins Geller Rudman & Dowd LLP,
655 W. Broadway, 19th Floor, San Diego, 92101

COST: $195 for current ABTL members
$225 for non-members

INFORMATION: Contact Maggie Shoecraft at abtlsd@abtl.org

REGISTER ONLINE: www.abtl.org/sandiego.htm

sponsored by

JAMS®
THE RESOLUTION EXPERTS


AJL Litigation Media, Inc.

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

President's Letter

By Marisa Janine-Page

As we wrap up 2014 and prepare for 2015, I pause to reflect on the amazing dialogue the ABTL-SD has lead this year.

We started the year with the first-ever San Diego Bench and Bar Summit, where our local federal and state court judicial leaders engaged in meaningful discussion with seventeen local Bar organization leaders about how the legal community can assist the courts with pressing budgetary constraints. In the late spring, we had record-breaking attendance at our fifth annual Judicial Mixer, where our members, especially associates, had the unique opportunity to meet and talk with more than 40 of our local state and federal judges in an informal setting. Mid-summer, we had another record-breaking attendance when we borrowed from a favorite annual seminar event and introduced a new annual tradition of having an interactive evening with our judges, where our local judges lead small-group table discussions on tips for motion practice. In the fall, the ABTL hosted its inaugural Mock Trial Competition between the three local law schools – their first time competing against each other – for scholarships directed to continued development of the law school's mock trial programs. Finally, throughout the year, the ABTL-SD led the charge in its partnership with the National Association of Women Judges on its Informed Voter Project. The ABTL took to the radio, television, community meetings, and the street to educate voters on the importance of getting informed about judicial candidates and voting for fair and free courts.

I'm very proud to have participated in the ABTL-SD's dialogue this year and it's been a true honor and privilege to serve you as the ABTL-SD's President. The ABTL-SD's amazing Bench and Bar dialogue has been the product of many hard-working and dedicated volunteers. At the forefront, I give special thanks to Honorable Randa Trapp, Chair of the Judicial Advisory Board who gave tirelessly to the success of this year's dialogue; to the Honorable Joan Irion, Michelle Burton, and Lynn Beekman for their vigor in educating voters on the Informed Voter Project; to Randy Grossman, Lynn Beekman, Rebecca Fortune, Christine LaPinta, David Lichtenstein, and the Honorable Jan Adler for their year-long planning and hard-work to put on the inaugural Mock Trial Competition; to Luis Lorenzana for kick-starting ***sidebar*!** the associate members' networking happy hours; to Jack Leer, Brian Foster, and Paul Tyrell the best executive officers ever; to all of you who came and participated in the executive committee meetings and Board meetings; and to Maggie Shoecraft, our incomparable executive director!

Thank you for the opportunity to hold the Talking Stick this year and as I pass it on to Jack Leer, I look forward to hearing the dialogue continue in 2015 under his leadership!

Things I wish I had known

(continued from cover)

in agreement with, on a daily basis," etc. Avoid "a perfect storm" unless you are talking about the weather, and "in harm's way" unless you are quoting John Paul Jones. ("I wish to have no Connection with any Ship that does not Sail fast for I intend to go in harm's way." 16 November 1778.)

Do not ALL CAP NAMES – it makes the brief impossible to read. For the same reason, use *italics* for emphasis, not ALL CAPS, underline or **bold,** and use emphasis sparingly. A brief is not a contract, so avoid things like "fifteen (15)," and "Plaintiff Thomas E. Jones ("Jones")." These things just interrupt the flow of your writing.

None of these recommendations are just about aesthetics. An average law and motion calendar presents the court with 450 or so pages of your work product. The better written your brief, the more of it your judge will read. When we get into bloated prose, we start skimming, and soon we are flipping pages (or hitting "page down"). In a perfect world, we wouldn't do that, but it isn't and we do.

"Most importantly, be someone the judge can rely on for an unbiased summary of the facts, and your reputation will blossom. "

A Note on E-Filing

Bookmarks are mandatory, see, *Electronic Filing Requirements of the San Diego Superior Court – Civil Division,* buried in the court's website. (It also requires OCR formatting, but converting exhibits to an OCR text-searchable PDF takes forever. Ignore this for a while and see if it annoys anyone.)

Discovery

Stop falling in love with your interrogatories. You seldom need anything not included in the form interrogatories – background, documents, witnesses and a brief statement of contentions – and name the last time you used an answer in trial. Examine your motives: Are you really using interrogatories to get information, or to aggravate the other side?

Judicial Notice

You do not need to request judicial notice for past pleadings in your case. I do not know how that got started. Judges can and often do look back in the file. That does not mean everything is admissible, but previous orders and findings, and a pleading inconsistent with a party's present claim are always admitted, just put it in your lodgment.

Oral Argument

The most effective argument is telling me why the other side is wrong, not why you are right. We like fairness, so if the law leads to an unfair result, give us a roadmap to come down on the other side. Never interrupt, and do not get testy when you are interrupted. The judge will respect your professionalism.

Most importantly, be someone the judge can rely on for an unbiased summary of the facts, and your reputation will blossom. If opposing counsel must tell me "the rest of the story," your reputation suffers.

Another good way to sink your reputation is blame staff and/or an associate for filing mistakes. Which raises another point, I was surprised how often a young associate showed up to argue a pretty important motion – made me wonder if it really was.

Finally, when you submit pages of frivolous objections to affidavits, you just told me some of your arguments are likely frivolous as well.

Witnesses

Do not ask the witness if he or she remembers previous testimony, it ruins the rhythm of your examination, it is not relevant whether the witness recalls past testimony, and really, you are just being lazy. Do it this way: "Yesterday you testified A, B and C, my question is …." Your examination will be shorter and stronger by following this advice, trust me.

If you are going to disrespect a witness, make sure you can pull it off. I have seen some experienced attorneys fall on their sword by being rude. On the other hand, there are liars and some experts working on the margins of science and finance who deserve your disdain, but discredit them first.

Sandpaper your witnesses. Nothing destroys your client's credibility faster than a per-

(see "Things I wish I had known" on page 5)

Things I wish I had known

(continued from page 4)

sonality change where they become defensive and reticent during cross.

You can use the deposition of the opposing party any time for any purpose. See Code Civ. Proc. § 2025.620(b). You do not have to show him or her a transcript. In fact, the opposing party does not have to be on the stand. Just tell counsel what page you are on and start reading.

By the way, you are not required to show the transcript to a witness before impeaching them either. Make sure your judge agrees with me, however, plus some judges want you to ask before reading from a deposition.

Dealing with the Jury

Most jurors have the same complaint after a trial with inexperienced counsel: "Do the lawyers think we're stupid?" Aim your trial at the best six jurors – they will be the leaders in deliberation. In your closing, give them the tools they need to convince the others.

During voir dire, the fastest way to prove you are unskilled is ask questions they already answered. And when you are choosing whom to strike from the jury, include your client in the discussion. It looks weird if you don't.

Dealing with Judges

Upon taking the bench, a judge becomes "the court" – there is a difference. See Code Civ. Proc. § 166. When you are before the court, the form of address is "Your Honor," not "Judge." (Those of a certain age still use "The Court.")

If you think you are being treated unfairly, say so respectfully, at side bar, on the record. "My client does not think he is getting a fair trial" works better than "stop picking on me."

Conclusion

Some parts of this may be helpful, others may be not. It reflects some of what I would have done differently as a lawyer, which is pretty subjective, I know. If it works for you, fine – glad I could help.

Judge David B. Oberholtzer presides over Department 5 of San Diego Superior Court's main courthouse.

California Employees' Whistle Just Got Much Louder

By: Noah J. Woods

Noah J. Woods

In late-2013 Governor Jerry Brown signed into law three bills (SB 496, SB 666 and AB 263), which together significantly expanded California Labor Code Section 1102.5 (Section 1102.5), California's general whistleblower statute. While litigation continues in California courts regarding whether these amendments apply retroactively, one thing is certainly clear, whistleblower claims in California will assuredly be on the rise going forward based on these new amendments.

Prior to 2014, Section 1102.5 essentially prohibited an employer from retaliating against an employee who either (1) discloses information to a governmental or law enforcement agency based on a reasonable belief that the employer is violating a statute, rule, or regulation, or (2) refuses to participate in an employer activity that would result in a violation of a statute, rule, or regulation. Under the prior version of Section 1102.5, internal complaints by an employee to his employer were not enough to support a claim of retaliation.

The new amendments to Section 1102.5 extend whistleblower protection not only to employees under the circumstances described above, but also to employees who report suspected illegal behavior: (1) internally to "a person with authority over the employee" or to another employee with the authority to "investigate discover, or correct" the reported violation; or (2) externally to any "public body conducting an investigation, hearing, or inquiry." Taking it a step even further, the new amendments also provide protection to employees who allege that they have been retaliated against because the employer "believes" that the employee disclosed or may disclose information internally or externally. This last amendment is potentially most troubling because it effectively exposes an employer to potential allegations of retaliation under Section 1102.5 based on the mere belief that an employee disclosed or might disclose information about a reasonably-believed violation of federal, state, or local law, even if the employee in fact did not make such a disclosure.

In addition to significantly expanding what employee conduct is protected under Section 1102.5, AB263 also amended another Labor Code section which has a significant impact on Section 1102.5. Prior to the passage of AB263, longstanding California Supreme Court precedent had held that pursuant to Labor Code section 98.7, an employee was required to file a complaint with the Labor Commissioner as a prerequisite to filing a lawsuit in state or federal court alleging retaliation under Section 1102.5, often referred to as administrative exhaustion.[1] Thus, prior to the passage of AB263, where an employee failed to first satisfy his or her administrative exhaustion requirements before filing a lawsuit in state or federal court alleging retaliation under Section 1102.5, an employer could effectively move to dismiss the employee's claims on procedural grounds. AB 263 expressly did away with this mandatory administrative exhaustion requirement when it amended Labor Code section 98.7 and added subsection (g), which states "In the enforcement of this section, there is no requirement that an individual exhaust administrative remedies or procedures."

Thus, the new amendments to Section 1102.5 dramatically change the statute both procedurally and substantively. Violations of Section 1102.5 can have serious consequences for employers, including civil penalties of up to $10,000 per violation. This $10,000 penalty is in addition to all other penalties and damages that an employee may be entitled to.

What this all means to California employers is that just about any complaint made or believed to have been made by an employee internally or externally alleging activity reasonably believed to be unlawful can now form the basis for a whistleblower retaliation claim under Section 1102.5. An employer's best defense in avoiding significant exposure under Section 1102.5 is to regularly review and update internal policies, handbooks and procedures, to en-

(see "California Employees Whistle" on page 7)

California Employees' Whistle

(continued from page 6)

sure that these policies reflect the changes effected by the amendments to Section 1102.5. California employers would also be well advised to apprise their managers and supervisors of the new amendments and to emphasize the need for proper documentation when complaints are made by employees of the type discussed herein.

Noah J. Woods is an attorney with the Brown Law Group. He represents employers in areas of traditional labor law, including grievance arbitrations, unfair labor practice charges, union contract negotiations and other union-related matters. In addition, Mr. Woods defends employers in all areas of employment-related matters at both the state and federal level, as well as before administrative agencies such as the NLRB, EEOC, DFEH and DLSE.

Endnotes

1 *See Campbell v. Regents of University of California* (2005) 35 Cal.4th 311.

Why You Should Talk to Yourself Like LeBron James: Better Trials with Less Stress

By Kate Mayer Mangan

Kate Mayer Mangan

When LeBron James explained why he was leaving Cleveland for the Miami Heat, he sounded a little strange. He talked about himself in the third-person, saying he "wanted to do what's best for LeBron James and to do what makes LeBron James happy." He didn't say, as most of us would, I "want to do what's best for me and what makes me happy." It turns out LeBron was on to something. Talking to yourself like LeBron—using your name instead of "I"—may help you perform better on two tasks that are critical to winning trials: stressful public speaking and making good first impressions. Even better, talking to yourself like LeBron is very likely to reduce your anxiety about those two tasks.

Making Good First Impressions

In recent research, scientists told people to make a good first impression during a short conversation with someone of the opposite sex. Before participants met the new person, one group reflected on their feelings about the meeting using the third-person (like LeBron), and the other group used first-person references.[1] If I were in the LeBron-style group, I might tell myself something like, "Kate, you don't need to worry about this. You'll do just fine." But if I were in the first-person group, I'd talk to myself more like this: "I should be fine. I meet people all the time."

The results were impressive. Objective judges reported that the LeBron-style self-talkers appeared less nervous during the interaction and made better impressions. The only difference was how they talked to themselves before hand.

This finding could have big implications for your next trial because making good first impressions can be so essential. Jurors may quickly form lasting impressions of lawyers, and those impressions can affect the outcomes of cases. Perhaps a little LeBron-style self-talk could help attorneys make a better initial impression on juries. First impressions matter for witnesses, too. Jurors are likely to judge witnesses within a few minutes of testimony. Teaching your key witnesses this little trick of self-talk might help them prepare for the stand more effectively.

Talking to yourself like LeBron seems to help people reduce anxiety about initial meetings, too. In the study, the anxiety of the third-person self-talkers dropped more quickly after the meeting with the new person, something that could be critical for trial work. If you remain stressed after an encounter with a judge or the jury, you may not be able to resume your work as well. Giving yourself a pep talk in the third-person might reduce your anxiety faster, enabling you to focus more clearly on the next witness or the next motion.

Better Public Speaking Under Stress

A second group of experiments tested the effects of third-person self-talk on another essential trial task: stressful public speaking. In the studies, people were told to give a speech to interviewers about why they are qualified for their dream jobs. They were given just five minutes to prepare and were not permitted to make any notes. That sounds a lot like what happens when opposing counsel springs a new case or issue on you, and you have only a few minutes to prepare your response before the judge emerges from chambers.

Before the participants in the study gave their speeches, one group reflected on their feelings like LeBron, using the third-person, and the other group used the first-person. By now, you won't be surprised to learn that those who talked to themselves using third-person references performed better. Two judges who were blind to how the speakers had talked to themselves rated the third-person self-talkers higher.

The people who used the third-person also felt less anxious about their speeches. They were more likely to view their upcoming speech-

(see "Talk to Yourself Like Lebron James" on page 9)

Cal Western Wins Inaugural Mock Trial Competition

From left to right Cal Western's winning team: Sarah Reeb, Jordan DuBois, Madelynn Woodhall and Melissa Mack, with ABTL-SD President Marisa Janine-Page

The ABTL San Diego concluded its inaugural Mock Trial Competition on November 10. California Western School of Law took home the traveling trophy and a $5,000 scholarship. Thomas Jefferson School of Law took second place receiving a $2,000 scholarship, and University of San Diego took third place receiving a $1,000 scholarship. All three teams displayed remarkable skill, poise and creativity. The ABTL thanks the participating students and the judges and attorneys who volunteered to preside over and judge the mock trials.

Talk to Yourself Like LeBron James

(continued from page 8)

es as challenges that they could overcome. They said things like, "I'm qualified and have worked hard; I have confidence in my abilities." In contrast, the people who used the first-person felt more nervous and viewed the speeches as more threatening. They said things like, "I can't prepare an oral speech in three minutes"; "I don't think I am prepared enough…" The difference is striking, suggesting that the linguistic shift—from "I" to one's name—may have profound effects on feelings of confidence.

What's Going On?

Why does this small change in language make such a difference? The theory is that using third-person pronouns promotes self-distancing, which makes people feel like observers to their own lives, rather than like they're in the middle a stressful experience. That, in turn, can help people think more objectively about their thoughts. Self-distance can also increase people's ability to exert self-control. This new research suggests that more self-distance can also improve people's performance in public speeches and in meeting new people, as well as help them feel a bit less anxious.

Be More Like LeBron

The next time you have to make a good first impression or perform in public, especially if you don't have time to prepare, remember LeBron. Don't try to quiet the voices in your head; just make sure those voices are calling you by name. You might feel calmer and perform better.

Kate Mayer Mangan is the owner of Donocle, a company that helps lawyers work at their best. Before founding Donocle, she had a successful career as a litigator. Her work has appeared in The Huffington Post, The LA Daily Journal, and Ms. JD.

Endnotes

1 Ethan Kross, Emma Bruehlman-Senecal, et al., *Self-Talk as a Regulatory Mechanism: How You Do It Matters*, Journal of Personality and Social Psychology 2014, Vol. 106, No. 2, 304-324.

Pineda v. Williams-Sonoma

(continued from cover)

failure to consider the practical consequences of retroactivity.

The *Party City Corp.* Decision

Three years earlier, a unanimous panel of the Court of Appeal in *Party City Corp. v. Superior Court* (2008) 169 Cal. App.4th 497, had decided that collecting ZIP codes did not violate the Act. The Court explained: "the record shows that in 2000, there were 24,953 individual addressees in the ZIP code of this plaintiff, and in the location of the superior court that decided this case, approximately 27,000. A ZIP code is not an address, but only a portion of it, and knowing a stand-alone ZIP code has not been shown to be potentially more helpful in locating a specific person than knowing his or her state or county of residence. A ZIP code is not an individualized set of identification criteria, such as telephone numbers would be, but rather ZIP codes provide identification of a relatively large group …. A five-digit ZIP code is not, as a matter of law, that kind of personalized or individual identification information within the statutory terms." *Id.* at 518.

Consistent with the doctrine of stare decisis, appellate cases decided after Party City and before the California Supreme Court's decision in *Pineda* held in favor of defendants reiterating what appeared to be established precedent that a ZIP code is not personalized information coming within the Act.[4]

The Consequences of Applying *Pineda* Retroactively

Following *Pineda*, however, a number of ZIP code cases pending in the California Courts of Appeal were remanded for trial. In addition, anecdotal information and articles in the legal press say that more than 100 new cases were filed seeking damages and attorney fees for alleged violations of the Act. Perceived Song-Beverly Credit Card Act violations had indeed become a robust cottage industry for a core of plaintiffs' lawyers who were committed to ob-

(see "Pineda v. Williams-Sonoma" on page 11)

(continued from page 10)

taining redress for what they saw as routine violations of the Act by a substantial number of California retailers.[5]

These post-*Pineda* cases, many of which were putative class actions, constituted potential claims from tens of millions of customers for appropriate penalties up to $250 for the first violation and up to $1,000 for each subsequent violation authorized by Civil Code section 1747.08 (e). The almost astronomical financial impact on retailers doing business in California was both clear and ominous. With the probable number of violations for tens of millions of claimants, including those within class actions, the penalties and significant attorney fees, retailers might be ordered to pay was potentially in the billions.

This conceptual potential has been recently quantified in a San Diego Superior Court nonjury trial involving defendant Restoration Hardware, Inc. ("RHI") in which the plaintiff "introduced classwide proof to show that during the class period, RHI requested and recorded ZIP codes as part of 1,213,745 credit card transactions." (*Restoration Hardware, Inc.* (Case No. 37-2008-94395-CU-BT-CTL) slip opn., p. 4.) Although the court imposed a considerably lesser penalty, i.e. $30 per violation, it opined "Having found at this point as many as 1,213,745 violations, the maximum aggregate penalty would be in excess of $1.2 billion and the burden is on the defendant to introduce evidence of the mitigating factors indicating the penalty should be less than the statutory maximum (citation omitted)." (Slip opinion, p.8.)[6]

The Cobra Effect

In a setting in which the invasion of each claimant's privacy is unknown, and as a practical matter, probably minimal, one must ponder whether the California Supreme Court's *Pineda* decision has characteristics of the *Cobra* effect.

As explained on the Wikipedia web site, the term cobra effect stems from an anecdote set at the time of British rule of colonial India. The British government was concerned about the number of venomous cobra snakes in Delhi. The government therefore offered a bounty for every dead cobra. Initially, this was a successful strategy as large numbers of snakes were killed for the reward. Eventually, however, enterprising persons began to breed cobras for the income. When the government became aware of this, the reward program was scrapped, causing the cobra breeders to set the now-worthless snakes free. As a result, the wild cobra population further increased. The apparent solution for the problem made the situation even worse.

Pineda's unsettling outcome caused me to examine it more carefully. Could the California Supreme Court have minimized *Pineda's* potential financial impact on California retailers consistent with the Act's legislative intent and California precedent? I believe so.

Without diluting the court's primary holding that recording ZIP codes violated the Act, the California Supreme Court could have made the decision prospective only to protect defendants who recorded ZIP codes in reliance on precedent and who terminated that practice upon the high court's granting the petition seeking review of *Pineda*.

Unfortunately, rather than making an effort to see if there were some way the conduct of those retailers who relied on their lawyers' advice pre-*Pineda* could be immunized from legal attack, the justices simply stated "Indeed, it is difficult to see how a single decision by an inferior court could provide a basis to depart from the assumption of retrospective operation. (Citations omitted.) In sum, defendant identifies no reason that would justify a departure from the usual role of retrospective application (Citation omitted.)" (*Pineda*, at pp. 540-541.)

***Pineda's* Startling Reference to the Court of Appeal as an "Inferior Court"**

Frankly, I was startled by the "inferior court" label affixed to the California Court of Appeal by the California Supreme Court. This was a first from my perspective. It may be that as a former justice of the California Court of Appeal, I took the "inferior court" label too personally. In any event, my reaction and further consideration of the unfairness of *Pineda*'s retrospective application led to the writing of this article.

As it turns out my intellectual and emotional reaction to the label "inferior court" for the Court of Appeal has support in the law. *Auto Equity v. Superior Court* (1962) 57 Cal. 2d 450,

(see "Pineda v. Williams-Sonoma" on page 12)

Pineda v. Williams-Sonoma

(continued from page 11)

categorically and emphatically stated "… decisions of this court are binding upon and must be followed by all the state courts of California. Decisions of every division of the District Courts of Appeal are binding upon all the justice and municipal courts and upon all the superior courts of this state, and this is so whether or not the superior court is acting as a trial or appellate court. Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court." (Citations omitted.)

Trial judges are well aware of the importance of this precedent, which has guided decision-making at the trial courts for over 50 years. Justices at the intermediate appellate courts also know the importance of *Auto Equity*, frequently reminding judges of inferior courts, i.e. the trial courts, that they must follow applicable appellate precedent.

This is not to say that an intermediate appellate court is free from the constraints of a California Supreme Court decision, but only to point out that the phrase "inferior court" is generally used to describe a trial court.

My view has support from an historical perspective as well.

As amended in 1924, California's Constitution provided in Section 1 of Article 6 that: "The judicial power of the state shall be vested in the Senate, sitting as a court of impeachment, in a supreme court, district courts of appeal, superior courts, such municipal courts as may be established in any city or city and county, and such *inferior courts* as the legislature may establish in any incorporated city or town, township, county or city and county." (Emphasis supplied; *Robertson v. Langford* (1928) 95 Cal. App. 414.) By definition an intermediate appellate court was not an "inferior court." Inferior courts were limited to trial courts with jurisdiction less than the jurisdiction of the municipal courts.

There is also nothing to suggest otherwise from an examination of the later amendments to the relevant statutes, including those relating to the California Constitution, as a result of Proposition 220 approved by the electors in June, 1998, which merged the superior and municipal courts. At the present time the California Constitution in section one simply states: "The judicial power of this State is vested in the Supreme Court, courts of appeal, and superior courts, all of which are courts of record." There is nothing in any of the other sections in Article 6 of the California Constitution defining California's judicial structure, labeling the Court of Appeal as an "inferior court."

Admittedly, Code of Civil Procedure section 1085 contains the phrase "inferior tribunal" stating that "A writ of mandate may be issued

(see "Pineda v. Williams-Sonoma" on page 13)

ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO
abtl

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

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

(continued from page 12)

by any court to any *inferior tribunal,* corporation, board, or person, to compel the performance of an act which the law specially enjoins ...." (Code of Civ. Pro. § 1085 (a).) I am not aware, however, of any case in which the California Supreme Court has issued a writ to the Court of Appeal as the high court's correction of intermediate appellate court error is usually efficiently handled by the granting of a petition for review.

The foregoing explains why I was so startled to see the phrase "inferior court" used to support the high court's decision to finesse examining whether *Pineda* could be at least partially prospective. Undoubtedly, there will be some critics who will draw the uncharitable inference that the truncated manner in which the court treated the issue of retrospective or prospective application was its way to reach a pre-determined result.

Blanket Retrospective Application of the *Pineda* Decision is Problematic

Pineda's reliance on precedent to support its decision is also problematic as it cited only People *v. Guerra* (1984) 37 Cal. 3d 385, 401 and *Grafton Partners v. Superior Court* (2005) 36 Cal. 4th 944, 967. Because *Grafton* relies solely on *Guerra* for its holding, the retrospective application of *Pineda* on civil cases is based on the facts and discussion in a criminal case.

The question in *Guerra* was whether the holding in *People v. Shirley* (1982) 31 Cal. 3d 18, was to be applied retrospectively. In *Shirley* the California Supreme Court held the use of hypnosis to restore or improve the memory of a potential witness was not accepted as a reliable procedure by a consensus of the relevant scientific community, and hence the testimony of such a witness was inadmissible as to all matters that were the subject of the hypnotic session. Using similar logic to whether a penalty should be imposed on a law-abiding retailer, a lay person would readily have thought that California's highest court would have similar concerns of fairness for companies which reasonably believed they were following the law. Certainly, there is no reason to impose penalties

(see "Pineda v. Williams-Sonoma" on page 14)

Pineda v. Williams-Sonoma

(continued from page 13)

on law-abiding companies.

Before reaching its holding, *Guerra* identified the factors, primarily involving guilt or innocence of a person, that an appellate court should consider in deciding whether a decision should be prospective or retrospective. *Guerra* explains that in determining whether a decision should be given retroactive effect, the California courts must first undertake a threshold inquiry: does the decision establish a new rule of law? Even if it does, depending on all the circumstances, the decision does not necessarily have to be prospective. It may or may not be.[7]

When the decision does establish a new rule of law, the court has to then determine whether there was an earlier ruling to the contrary. The reason for this is that if there were no prior contrary ruling, there would have been no earlier reliance on an existing rule, which the appellate court has changed.[8] If a court does establish a new rule and there had been a widespread practice of reliance on the old rule, which had been approved by trial and appellate decisions, prospective application is proper.[9]

In my view, had the California Supreme Court considered the foregoing factors it would have rejected a blanket retrospective application of its decision in *Pineda*, crafting a selective prospective application for those retailers who complied with the law.

What is also startling is the high court's failure to appreciate the significance of its holding. *Pineda's* financial impact on commerce should have been apparent in light of the numbers of cases pending at the trial courts and courts of appeal. It may be the California Supreme Court was simply naïve as to what was occurring in reference to litigation involving the Act. Accordingly, unaware of the justifiable and widespread reliance by retailers on the published holding in *Party City*, thought it was deciding a simple case of statutory interpretation when in fact it was deciding an issue which would have a substantial financial effect on every retailer, wherever located, doing business in California. One wonders whether the court gave any thought to the "cobra effect" of its retroactivity decision.

Whatever the reason for the outcome, *Pineda* presents a serious quandary for lawyers asked to give advice on any legal issue decided by the Court of Appeal, but not yet decided by the California Supreme Court. The lawyers can only say the client must wait for a decision from the California Supreme Court, as a published decision by an "inferior court", i. e. the California Court of Appeal, has no binding effect.

Oliver Wendell Holmes was undoubtedly correct when he said, "The life of the law is experience and not logic." Hopefully, having this experience, when next confronted with a question whether a civil case should be retrospectively or prospectively applied, the California Supreme Court will consider how and in what manner the decision will affect those persons who relied on the law at the time of their conduct. Lawyers should not be confronted with disheartened inquiries from clients as to why they are being forced to pay a penalty when they did nothing wrong.

Justice Howard B. Wiener is a retired associate justice of the California Court of Appeal, Fourth Appellate District, Division One. He has been engaged in private dispute resolution since January 1994, serving in more than 5,000 cases as a mediator, arbitrator and private judge.

Endnotes

1 Cal. Civ. Code § 1747.08 (2011)

2 *Pineda,* 51 Cal 4th at 533-536.

3 *Pineda*, 51 Cal. 4th at 541.

4 See e.g. *Carson v. Michael's Stores, Inc.,* (Cal.App. 4 Dist. Jul 22, 2010) WL 2862077; *Watkins v. AutoZone Parts, Inc.,* (S.D.Cal. Sep 29, 2009) (NO. 08-CV-1509-H), WL3214341.

5 My comments should not be construed as criticizing plaintiffs' attorneys who at all times have handled their cases with exceptional diligence and skill. I also want to make clear I do not disagree with the primary holding in *Pineda*, but only with its retrospective application.

6 Again, for clarification, I agree with the trial court's decision in *Restoration Hardware*. Consistent with its obligation under *Auto Equity Sales, Inc., infra*, its thoughtful and comprehensive Statement of Decision sets forth in an articulate fashion the reasons for its award of damages.

7 *Guerra,* supra, 37 Cal.3d at p. 399.

8 *Guerra,* supra, 37 Cal.3d at pp. 399-400.

9 *Id.*

Association of Business Trial Lawyers – San Diego

2014 Officers and Board Members

PRESIDENT
Marisa Janine-Page

VICE PRESIDENT
Jack R. Leer

TREASURER
Brian A. Foster

SECRETARY
Paul A. Tyrell

JUDICIAL ADVISORY BOARD CHAIR
Hon. Randa Trapp

DINNER PROGRAM CO-CHAIRS
Mary C. Dollarhide
Paul A. Tyrell

ANNUAL SEMINAR CHAIRS
David J. Aveni
Michelle L. Burton

MEMBERSHIP CO-CHAIRS
Gary K. Brucker, Jr
Ross H. Hyslop

ABTL REPORT EDITOR
Mathieu Blackston

LEADERSHIP DEVELOPMENT CO-CHAIRS
Brian A. Foster
Anna F. Roppo

COMMUNITY OUTREACH CO-CHAIRS:
Lynn M. Beekman
Randy S. Grossman

BOARD OF GOVERNORS
Hon. Lorna A. Alksne
Michael A. Amon
Felipe J. Arroyo
David J. Aveni
Courtney L. Baird
Hon. Jeffrey B. Barton
Hon. Anthony J. Battaglia
Lynn M. Beekman
Hon. Cathy Ann Bencivengo
Gary K. Brucker, Jr.
Michelle L. Burton
Sharon L. Cohen
Hon. Gonzalo P. Curiel
Hon. David J. Danielsen
Hon. Mitchell D. Dembin
Mary C. Dollarhide
Hon. Kevin A. Enright
Jason A. Forge
Brian A. Foster
Chad R. Fuller
Drew T. Gardiner
Randy S. Grossman
Charles T. Hoge
Valentine Hoy III
Hon. Marilyn L. Huff
Ross H. Hyslop
Hon. Joan K. Irion
Marisa Janine-Page
Robert G. Knaier
Lois M. Kosch
Christine M. LaPinta
Jack R. Leer
Hon Barbara L. Major
Alan M. Mansfield
Brian D. Martin
Thomas W. McNamara
Hon. Thomas P. Nugent
William V. O'Connor
Hon. Ronald S. Prager
Hon. Joel M. Pressman
Robert D. Rose
Anthony M. Stiegler
Paul A. Tyrell

JUDICIAL ADVISORY BOARD
Hon. Randa Trapp – Chair
Hon. Cynthia G. Aaron
Hon. Patricia Yim Cowett (Ret.)
Hon. Steven R. Denton (Ret.)
Hon. Irma E. Gonzalez (Ret.)
Hon. William Q. Hayes
Hon. Herbert B. Hoffman (Ret.)
Hon. Richard D. Huffman
Hon. Joan M. Lewis
Hon. Frederic L. Link
Hon. William H. McAdam (Ret.)
Hon. William R. Nevitt, Jr.
Hon. Leo S. Papas (Ret.)
Hon. Laura H. Parsky
Hon. Janis L. Sammartino

PAST PRESIDENTS
Richard D. Gluck – Immediate Past
Hon. Jan M. Adler
Peter H. Benzian
Charles V. Berwanger
Michael L. Duckor
Edward M. Gergosian
Hon. J. Richard Haden (Ret.)
Hon. Maureen F. Hallahan
Frederick W. Kosmo, Jr.
Mark C. Mazzarella
Hon. M. Margaret McKeown
Anna F. Roppo
Alan Schulman
Hon. Ronald L. Styn
Howard F. Susman
Claudette G. Wilson
Robin A. Wofford
Meryl L. Young
Mark C. Zebrowski

ASSOCIATION OF BUSINESS TRIAL LAWYERS
abtl
SAN DIEGO

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

PMB #386
1010 University Avenue #113
San Diego, CA 92103