ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO

abtl REPORT

Volume MMXVI No. 4 *Winter 2016*

ABTL'S Dinner Program Welcomed Renowned Defense Attorney, Judy Clarke, Who Reminded Us of Our Obligation to Represent Our Clients and Profession with Dignity and Respect

Judy Clarke

By Luis Lorenzana

On November 15, 2016, ABTL hosted its last dinner program of the year and was fortunate to have Judy Clarke share the fascinating stories and lessons she has amassed during her remarkable, high-profile career as the go-to defense attorney for many of America's most infamous criminal defendants. Ms. Clarke earned nationwide notoriety for defending the likes of: Zacarias Moussaoui (the "20th hijacker" who pleaded guilty to participating in an al Qaeda conspiracy in connection to the September 11, 2001 terrorist attacks); Susan Smith (the South Carolina mother who drowned her children and initially blamed the crime on an African-American male); Jared Loughner (Arizona mass shooter who killed six people and severely injured U.S. Representative Gabrielle Giffords), Dzhokhar Tsarnaev (the Boston Marathon bomber); and Ted Kaczynski (also known as the "Unabomber," or as Ms. Clarke's nephew, Alan, used to refer to him, the "Unoboomer"). Ms. Clarke has spent her career zealously advocating against the death penalty, and has helped many of her clients avoid such a fate.

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How To Prepare and Try Your Case Without Breaking the Bank

Mark Mazarella

By Mark Mazarella

There was a time, long ago, when trial lawyers presented their cases with little more than a few witness statements taken by their investigator and a handful of key documents. Depositions, when taken, were brief and to the point. There were no copy machines or computers to duplicate documents by the thousands in the blink of an eye. Trial lawyers didn't file notebooks filled with Motions in Limine before trial; and Trial Briefs really were brief.

Amazingly, the system worked. Judges and juries were provided the facts needed to decide cases. Lawyers, free from the burden of multi-volume depositions and bookcases filled with exhibit note-

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event details

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continental breakfast and lunch to be provided

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COST: $195 for current ABTL members
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Brian Foster

President's Letter

By Brian Foster

The winter edition of the ABTL Report marks the end of ABTL's activities for the year. This is also the time when our Executive Committee can reflect on the year and plans for 2017 and assess the state of the San Diego chapter. I am delighted to report that our chapter is in good health and poised for another successful year in 2017.

Membership in the San Diego chapter has been steady for the last several years, during which time chapter leaders have worked hard to expand the programs we offer and create meaningful and entertaining content for our members. This is largely due to the leadership of those who preceded me in office, including our recent presidents Hon. Margaret McKeown, Rich Gluck, Marisa Janine Page, and Jack Leer. Through their efforts we diversified the types of programs we offer, particularly to our younger members, and forged an even closer working relationship with our judicial board members from both the federal and state courts. I'd also like to acknowledge our Executive Director Maggie Shoecraft, who deserves an equal amount of credit for her contributions in keeping us organized and managing the logistics of our events. And, last, our sponsors who serve the legal community are hugely deserving of our thanks. They continue to show incredible commitment to our organization, and without them we could not offer the programs we do. Our sponsors are listed on our San Diego chapter's web site (http://www.abtl.org/sandiego.htm), and they would certainly appreciate it if you would take a moment to visit and learn about them.

Over the last 12 months we have enjoyed a full slate of programs arranged by our Dinner Programs Co-Chairs David Aveni and Luis Lorenzana. Through their efforts, along with the assistance of others, we were treated to five dinner programs this year, beginning with an opportunity meet the candidates running for San Diego City Attorney. We were treated to two evenings of storytelling, first by television producer and writer (and former litigation attorney) Jonathon Shapiro, and most recently by inspiring criminal defense attorney Judy Clark, who reflected on her experiences defending notorious criminal defendants such as "Unabomber" Ted Kaczyinski, "20th Hijacker" Zacarias Moussaoui, and "Boston Marathon Bomber" Dzokhar Tsarnaev. We also enjoyed what has become now become an annual fixture, our Judicial Roundtable dinner program. Thanks to Judges Trapp, Bencivengo Haller and Barton for another informative evening catching us up to the state of our courts. Finally, we were treated to a spirited debate between Irvine Law School Dean Erwin Chemerinsky and Gibson, Dunn partner Miguel Estrada, who has argued 22 cases before the United States Supreme Court. The civility of that debate can and should be taken to heart by everyone who attended, as the country appears to be entering what might prove to be tumultuous era of increased polarization and discord.

Those who deserve recognition for our chapter's 2016 agenda also include Brett Weaver and Jason Ohta, who organized our specialty MCLE programs for those hard-to-get ethics, substance abuse, and elimination-of-bias credits. Our Leadership Development Committee also had a particularly busy year, putting on several "Nuts and Bolts" programs on litigation basics for younger practitioners, as well as several "Sidebar" social mixers targeted at the same peer group. All members of the LDC worked hard, but co-chairs Ryan Caplan and Daniel Gunning deserve particular thanks. I have already mentioned Judge Randa Trapp, the chair of the Judicial Advisory Board, who—in addition to conceptualizing the Judicial Roundtable program—also organized our seventh annual Judicial Mixer. Thanks also to all the judges who attended and gave us a spectacular turnout at that event. Last, I'd like to recognize Re-

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President's Letter

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becca Fortune and Andrea Myers, who stepped in mid-year to co-chair our Community Outreach committee, and who organized our ABTL-sponsored mock trial between San Diego's local law schools.

There are still other members to thank. Alan Mansfield worked on the 2016 Annual Seminar in Hawaii, and Rich Gluck, Randy Grossman and Mhairi Whitten are currently organizing the one-day ABTL Mini-Seminar that will take place in January. And the other members of this year's entire Executive Committee provided tremendous support and guidance for all of our efforts. Randy Grossman, Michelle Burton, and Paul Tyrell will continue on the Executive Committee into 2017, as Paul takes over as president.

It takes the efforts of a lot of people for our San Diego chapter to plan and organize these programs over the course of a year; even in this extensive list of people I mentioned, I know I have missed many, and I apologize for the oversight. The commitment of these people is rewarded, though, by our membership's enthusiastic attendance and participation at our programs. This next year's Annual Seminar will provide a particularly important opportunity for member support, as the San Diego chapter will be hosting the event in town at the La Costa Resort. For the many of you who have never been able to attend an ABTL Annual Seminar, this is the year to put a toe in the water and come out. You will be amazed at the quality of the programming, and the opportunities you will find to meet and socialize with our peers from across the state.

It has been my privilege to serve as ABTL president this year alongside so many dedicated lawyers and judges. I look forward to continuing on the Executive Board for another year as the Immediate Past President, and I enthusiastically pass the baton to Paul Tyrell, who will be a terrific President.

LOCAL PERSPECTIVES

How To Prepare and Try Your Case Without Breaking the Bank

(continued from cover)

books, were able to spend their time honing the skills which made so many of them great advocates. And most important of all, clients could afford to take their cases to trial without breaking the bank. Those were the days.

The world has changed. It will never be as simple as it was in days gone by. Today, in lieu of a few letters every day, we exchange hundreds of e-mail. Record keeping in virtually every aspect of society has expanded commensurate with our capacity to store information. Whereas in the good ole days the universe of documents relevant to a typical business dispute may have consisted of 100 pages, today it may number into the 10s of thousands. But apart from that, not much has changed. There are no more potential witnesses to disputes today than yesterday. The legal issues are essentially the same as they have been for 600 years. Judges and juries don't need more information to reach the right result than they needed 50 years ago.

"The world has changed. It will never be as simple as it was in days gone by. Today, in lieu of a few letters every day, we exchange hundreds of e-mail. Record keeping in virtually every aspect of society has expanded commensurate with our capacity to store information."

What has changed is our approach to the process of preparing and trying cases. Most of us have become "litigators," not "trial lawyers." We have stocked our litigation arsenal with every tool available; and we use them all, generally to the fullest extent possible. In the process we cast our net so broadly that we spend most of our time sorting the wheat from the chaff. The result is litigation has become prohibitively expensive for most clients. And, often we are so busy keeping track of all the documents we have assembled, and what was said in the thousands of pages of depositions we have taken, that we don't tell our client's story well.

What follows are my suggestions for how to turn back the clock. They may not always apply, but they are worth considering in every case, as they can substantially reduce the cost of litigation—and maybe even make it a little more enjoyable.

Get Control of Your Documents Efficiently:

- Ask your client to organize any documents he provides. Let him know that he'll be able to do this a lot faster than you can; and it will save him a lot of money.

- As you receive documents, separate the potentially relevant ones from those that clearly aren't. Too often, lawyers hand over mountains of documents to be coded and loaded into a computer data base, even though only a fraction are even potentially relevant. This increases the cost of setting up the database, and makes the database unnecessarily voluminous, which wastes more time and money every time it is accessed.

- As you review documents, code them to the specific issues in your case, and put them in the appropriate files. For example, all documents that pertain to the formation of a contract are put in one file. All documents that pertain to the breach go into another. Damage documents go into a third. The point is to avoid the need to go through your control set of documents more than one time. Never just review documents without doing what is needed to make sure you don't have to duplicate the process later.

- Prepare focused requests for production of documents that will result in the production of what is truly important to your case, and will not invite the production of thousands of pages of irrelevant documents. Asking for every document under the sun not only invites expensive disputes over the reasonableness of your request; if the other side complies, you will end up wasting time sorting through the mountains of documents that are produced.

Stick With The Theories You Will Pursue At Trial:

- Don't plead every theory or defense that theoretically applies. You aren't going to submit

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How To Prepare and Try Your Case Without Breaking the Bank

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18 causes of action to a jury. Why waste the time drafting them, fending off demurrers to them or preparing jury instructions relative to them?

- If the plaintiff alleges causes of action that may not apply, don't waste time with a demurrer unless you can get rid of the case, or some significant part of it.

Use Written Discovery Surgically:

- It seems that in every case, every lawyer bombards the others with at least one set of form interrogatories, special interrogatories and requests for admission. Yet, in many trials, none of the responses is admitted into evidence. Don't ask hundreds of generic or overbroad questions that will prompt either objections or generic and overbroad answers. They are generally a complete waste of time. Draft each question with the expectation that it will be read to the jury. Make sure it is clear and seeks relevant information.

- Avoid discovery disputes over answers to written discovery unless absolutely necessary. They can take up an inordinate amount of time; and at the end of the day, you probably will have received much better information during the depositions taken in the case.

Don't Waste Time During Depositions:

- Thankfully, the courts have limited depositions to one day per witness. But that doesn't mean you need to fill up the full day with your examination of every witness. Your time is expensive. The transcript is expensive. And the longer the deposition, the more time you will have to spend reviewing it to prepare for trial. Every hour you spend translates to perhaps $1,000 in cost to your client.

- You don't need to waste time asking about facts that are not in dispute.

- You don't need to lay a foundation for every document with every witness. If you anticipate a problem getting a document in at trial, make sure you have laid a good foundation once. Otherwise, show the witness the document and ask her about it.

- You don't need to go over the background of every witness. Ask yourself if there is any chance you will want to ask the witness at trial about his college major or past employment.

- When you get the transcript, don't automatically summarize it or have someone summarize it. Odds are, you won't need a summary until you begin trial preparation. I wish I had a dollar for every deposition that was summarized in cases that settled before the summary was ever used. Even if the case goes to trial, you may choose not to call the witness; or you may want to read the deposition testimony again yourself rather than rely on a summary.

- Ask for and extend stipulations which will shorten the deposition, such as a stipulation that an attorney may have a continuing objection to questions on a particular topic.

- Give yourself a set amount of time to complete a deposition, say 2 hours. You may amaze yourself with your ability to take an excellent deposition in 2 hours.

Don't Waste Money On Senseless Motions:

- The primary offender in this regard is the Motion for Summary Judgment. They are expensive; and unless they either get rid of the case, or at least cut the heart out of your opponent's case, are not worth the money. You can get rid of bogus causes of action with oral motions for nonsuit or directed verdict at trial, assuming

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How To Prepare and Try Your Case Without Breaking the Bank

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your opponent doesn't voluntarily dismiss the causes of action or defenses she can't prove.

- Discovery motions are another potential waste of time and money. In the time you spend meeting and conferring, drafting your moving and reply papers and attending oral argument, you could have taken the deposition of several witnesses who would be more likely to give you better answers than you'll get in written discovery anyway.

Make Motions At Trial Orally When Possible, and When Briefs Are Needed, Keep Them Brief:

- Most trial motions can be made orally. Certainly, there are instances when the issues require briefing. But any experienced trial judge knows the law applicable to virtually any trial motion. Therefore, if the motion is fact intensive, an oral motion is usually adequate.
- When you do prepare a written motion (both before and during trial), don't waste your time, or the court's, briefing undisputed "hornbook" law. A page or two discussing the standard for granting a motion for directed verdict is a waste of time. Focus on the issues about which there is or may be a dispute.
- With most cases these days tried before an independent calendar judge who has lived with the case for a year or two, at some point, you can dispense with long factual introductions. Get right to the point. The judge knows who the parties are and what the case is about.

It may take a bit of a leap of faith to start cutting the deadwood out of your trial preparation and trial presentation. But as our hourly rates continue to soar, we owe it to our clients to do what we can to make litigation affordable.

Dinner Program Recap - Judy Clarke

(continued from cover)

During her presentation, Ms. Clarke recalled the enormous amount of scrutiny and vitriol she received from the media and public every time she would agree to defend one of these notorious individuals. She read emails that she had received and saved throughout the years in which people would label her a "terrorist supporter," and attack her looks, her motives and even her grammar during her closing arguments. She was described as "brilliant, dedicated and misguided" for defending her clients. Her own nephew, Alan, would question her by asking, "Do you always lose?" and "Why do you defend the 'Unoboomer' [*sic*]."

"She lamented that many members of the media and public seemed to have "skipped out" on their civics lessons and seemed to forget that she had an obligation to advocate for her client, no matter what crime the client was accused of committing. "

She remembered answering Alan's last question by telling him that as lawyers, "we help those who can't help themselves." She lamented that many members of the media and public seemed to have "skipped out" on their civics lessons and seemed to forget that she had an obligation to advocate for her client, no matter what crime the client was accused of committing.

Based on her experience under the spotlight, Ms. Clarke implored her audience to have a media strategy that does not depend on the counsel of record as being the primary spokesperson. She recognized the need to educate the media and public in high-profile cases but advised that this may be accomplished through the pleadings and surrogates. Ms. Clarke stated that no client, or attorney for that matter, wants to be defined by their worst moment and when representing a client and educating the public, try to uncover the story of the client and acknowledge human behavior.

Not all of the emails and comments Ms. Clarke received from the media and public were negative. Ms. Clarke shared an email she received from a woman who thanked her for elevating the level of discourse related to the death penalty while defending her client. Ms. Clarke recognized that we, as a nation, are experiencing challenging times after having endured a tumultuous and divisive presidential election. However, Ms. Clarke assured her audience that she remains an optimist; and she asked that we remember that an attorney's primary focus should always be on maintaining the dignity of our clients, especially those less fortunate who need our counsel and who are entitled to due process, while always maintaining the dignity of the legal practice.

Written by
Luis Lorenzana

ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO

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Editor: Lori McElroy | redromancreative@gmail.com

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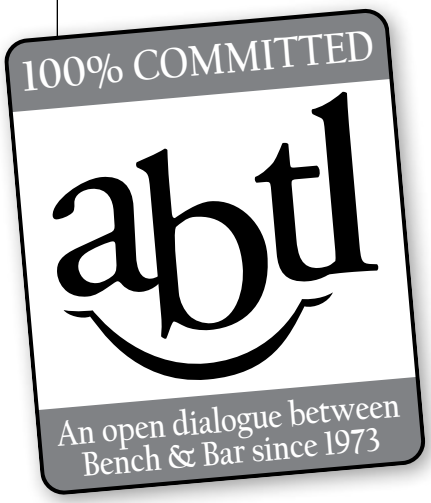

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Brevity, Timing, Motions, and Amicus: Key Amendments to the Federal Rules of Appellate Procedure

Rupa G. Singh

By Rupa G. Singh

Following two years of deliberations, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (the "Committee") proposed notable—and sometimes controversial—amendments to the Federal Rules of Appellate Procedure. After public hearings and voluminous commentary, the United States Supreme Court adopted final amendments earlier this year, transmitting them to Congress for approval on April 28, 2016.[1] Because Congress took no action on them, the amendments took effect December 1, 2016.

The most important changes affect the length of briefs; the time to respond to briefs and motions; word limits for motions and petitions for extraordinary writs; and amicus briefs related to petitions for panel rehearing or rehearing en banc. Many circuits, including the Second, the Fifth, the Seventh, ***the Ninth***, and the Federal Circuit, have declined to follow all the new rule changes, while other circuits have decided the opposite. These differences reflect known disagreements about changes related to the length of briefs and motions, which the Committee resolved by explicitly allowing each circuit to decide word limits.

Shorter Briefs Under FRAP 28.1: One of the most significant amendments reduces the length of federal appeal briefs from 14,000 to 13,000 words for a principal brief—appellant's opening brief or appellee's answering brief—and from 7,000 to 6,500 words for a reply brief. The first reduction of the word count since its adoption in 1998, this change requires breaking nearly eighteen years of habit. On cross-appeal, appellee's combined principal and response brief has been reduced from 16,500 to 15,300 words, the first such change since 2005. The Committee's original proposal would have reduced principal briefs to 12,500 words, but vociferous objections by lawyers salvaged an additional 500 words, and led to corresponding minor increases in the other proposed word limit reductions.

The amendments require attorneys to consider more carefully which issues to appeal, and to write even more concisely. But some note that the reduced word counts may not do justice to complex appeals, which are hard to shorten even with diligence. As a result, the Committee Note to these amendments urges courts to grant leave to extend word limits in individual cases as appropriate, which were historically disfavored and regularly denied. The Committee Note even allows federal appellate courts to opt out entirely from the word limit reductions.

The Ninth Circuit, among others, has decided to take this route by keeping the previous word limits for principal briefs and cross-appeal combined briefs.[2] But this is no carte blanche against relentless brevity. Indeed, former Ninth Circuit Chief Judge Alex Kozinski stated in a recent dissent from an order allowing an oversized brief that he felt no compulsion to read the government's "fat," "chubby," answering brief in a criminal case beyond the 14,000 word count, or approximately 66 pages.[3] In the interests of full disclosure—and to provide context for the reduced word limits—this column is 1,287 words.

Word Limits for Motions Under FRAP 27

A second important amendment applies to Rule 27 and motions practice, which is sometimes critical to prevailing on appeal, whether

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Brevity, Timing, Motions, and Amicus

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through a routine request (e.g., for judicial notice) or a dispositive motion (e.g., dismissal for lack of jurisdiction). Instead of page limits for motions produced on a computer—20 pages for a motion or response to a motion and 10 pages for a reply—the amended rule limits motions or responses to 5,200 words,[4] and replies to 2,600 words.[5] But, amended Rule 27(d)(2) retains the page limits (20 and 10) for motions, responses, and replies that are "handwritten or typewritten."

While the new word count does not substantially affect the average length of appellate motions—motions can still be 20 pages if formatted to fit 260 words a page—it requires attorneys to aim for brevity, and submit a certificate of compliance under amended Rule 32(g)(1) in support of motions, responses, and replies (as with substantive briefs).

No Three-Day Extension for Electronic Service Under FRAP 26(c)

A third noteworthy rule change eliminates the "three-day rule" under current Rule 26(c) for electronically-served motions, briefs, or other papers. Thus, the amended rule will continue to add three days to a given response period from the date of service where service is accomplished by mail but not by electronic service. This common-sense amendment recognizes that electronic service is well-established and reliable, the functional equivalent to hand-delivery on the date of service. Thus, it is no longer necessary to include electronic service as among the types of service that trigger application of the three-day rule.

But, the Committee Note to this amendment recognizes that, where a brief or other document is filed close to midnight on a day preceding a holiday weekend, removing the extra three days could functionally make an already short deadline exceedingly difficult to meet. In such instances, the Committee Note encourages appellate courts to freely extend the response time. Meanwhile, the Ninth Circuit has chosen to continue to provide the additional 3 days for service by electronic method for those deadlines that are based on service of another document.[6]

FRAP 29 and Amicus Filings in Connection with Rehearing

Rule 29 governs the filing of amicus briefs in appeals, but did not give clear guidance on the time to file an amicus brief in support of or opposition to a petition for rehearing.

Rule 29(e) allowed an amicus brief to be filed within seven days after a "principal brief" which the amicus brief supports, but there is no "principal brief" in support of rehearing, only a "petition." While the Committee Notes to the 1998 amendments encouraged courts to establish the filing time for amicus in support of rehearing petitions, not all circuits did so. Thus, amended Rule 29 clarifies that amicus briefs on the merits be filed within seven days of the principal brief, while amicus briefs in connection with a rehearing be filed within seven days of the petition.[7] The amendments also convert the 10-page limit for amicus briefs to 2,600 words (originally proposed to limit amicus briefs to 2,000 words).

Miscellaneous Amendments

The amended rules package includes other amendments, adding replacing existing page limits with word count limits in Rules 5, 21, 35, and 40. For example, under amended Rules 35(b)(2)(A) and 40(b)(1), a petition for rehearing en banc and for panel rehearing, respectively, are each limited to 3,900 words (instead of the current 15-page cap). A complete set of the amendments to the Federal Rules of Appellate Procedure is available on the Supreme Court's website.

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Brevity, Timing, Motions, and Amicus

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Given that these amendments are to govern appeals "commenced" or "pending" on or after December 1, 2016, it remains to be seen whether or how they will apply to cases docketed before December 1 that are yet to be briefed. But a good rule of thumb is to comply with the amended rules for any briefs filed after December 1, or to call the circuit clerk's office for clarification. Otherwise, one or more judges may not read the entirety of your "fat," "chubby" briefs.

Rupa G. Singh is a partner at Hahn Loeser & Parks LLP, where she co-chairs the firm's Appeals and Critical Motions practice, and also litigates complex commercial disputes.

(ENDNOTES)

[1] All amendments to the rules can be found at https://www.supremecourt.gov/orders/courtorders/frap16_j92i.pdf.

[2] The Ninth Circuit has adopted local rules, effective December 1, 2016, that will maintain the existing word count limits for briefs, and page limits for motions and petitions, rather than adopting the new limits in the revised Federal Rules. *See* http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000682

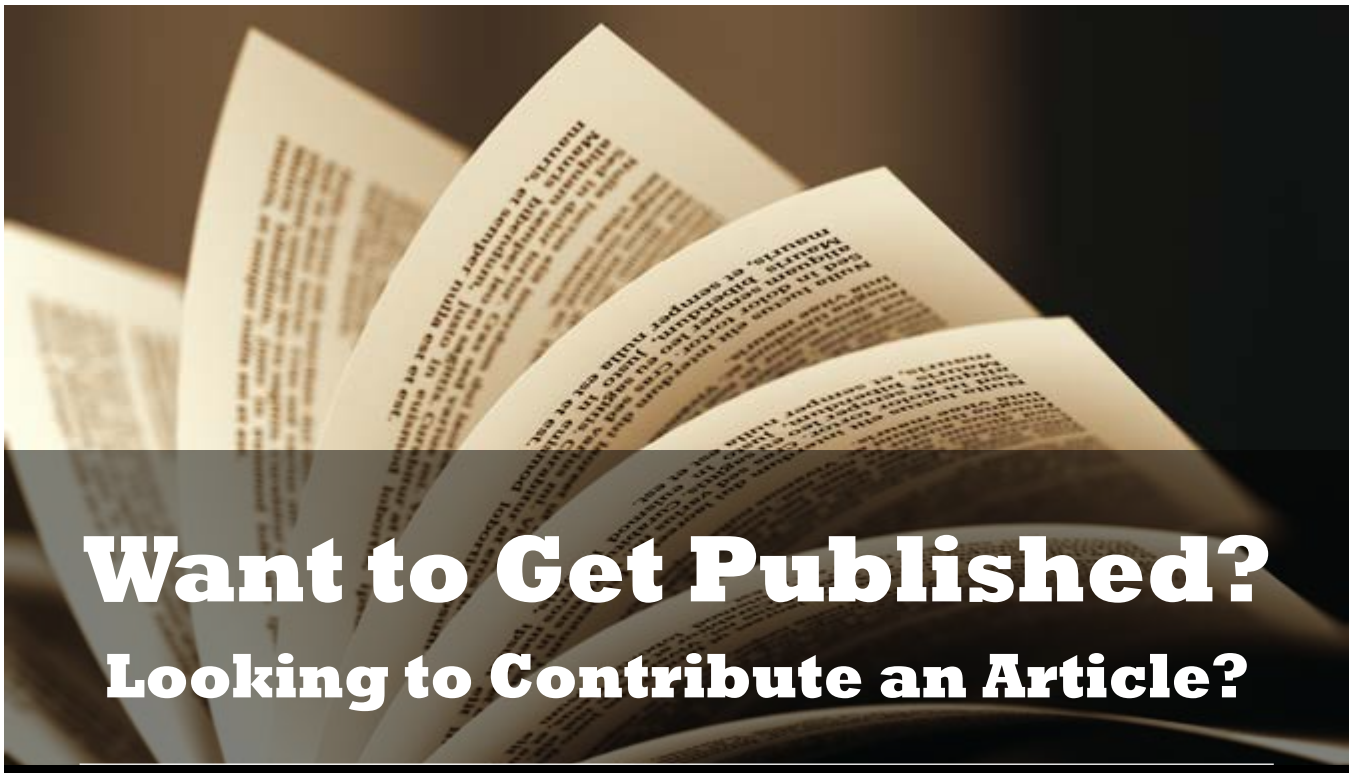
[3] *See* http://abovethelaw.com/2016/08/judge-kozinski-wont-read-your-fat-or-chubby-brief/

[4] Amended Rule 27(d)(2)(A).

[5] Amended Rule 27(d)(2)(C).

[6] *See* Ninth Circuit Rule 26-2.

[7] *Compare* Amended Rule 29(a) *with* 29(b). The original proposed amendment would have shortened the deadline for amicus in connection with rehearing to three days, but was rejected after further deliberation.



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You Must Always Keep a Secret (even if the secret's out)

The Attorney's Continuing Obligation of Confidentiality

Ken Fitzgerald

By Ken Fitzgerald & Keith Cochran, Fitzgerald Knaier LLP

Attorneys are well aware of the rules of evidence and discovery governing the attorney-client privilege. The attorney-client privilege encourages clients to tell their attorneys everything, and attorneys understand their obligation to keep these client communications confidential, even after the representation ends. However, many practicing attorneys are unfamiliar with, or not sufficiently mindful of, the broader ethical duty of confidentiality. And even attorneys who are familiar with the concept are fuzzy on its application.

It is quite common to hear attorneys discussing various aspects of prior cases, including the outlandish personalities of the clients they previously represented. Recently, for example, a former transactional attorney for Donald Trump made news by publishing a withering critique about him, saying among other things, that Trump "lies all the time," hasn't "the slightest inclination to read or study," and "is all about continuous gratification." He detailed how Trump – then married – "sought to regale me with the number and quality of eligible young women who in his words 'want me.'" http://www.huffingtonpost.com/entry/donald-trump-hired-me-as-an-attorneyplease-dont_us_579e52dee4b00e7e269fb30f?section=politics.

While telling "war stories," attorneys will often express critical or unflattering opinions about their former clients based on information learned during the case, even while being careful not to disclose attorney-client communications. In this regard, it is common to hear attorneys reference the fact patterns of prior cases – after all, the facts are contained within court filings that are a matter of public record. Anyone interested in knowing the details of the cases can readily learn information about the parties and the dispute with a few internet searches and a little diligence. But does the disclosure of potentially unappealing information, when that information is *contained in the public record,* constitute a violation of the attorney's ethical duty of confidentiality?

"But does the disclosure of potentially unappealing information, when that information is contained in the public record, constitute a violation of the attorney's ethical duty of confidentiality?

The short answer is yes."

The short answer is yes. The State Bar of California Standing Committee on Professional Responsibility and Conduct recently issued Formal Opinion No. 2016-195, addressing whether an attorney owes a former client a duty to refrain from disclosing potentially embarrassing or detrimental information about the client, including publicly available information the attorney learned during the course of the representation. The State Bar concluded that an attorney "may not disclose his client's secrets, which include not only confidential information communicated between the client and the lawyer, but also publicly available information that the lawyer obtained during the professional relationship which the client has requested to be kept secret *or* the disclosure of which is likely to be embarrassing or detrimental to the client." (Emphasis added.) Indeed, "[e]ven after termination of the attorney-client relationship, the lawyer may not disclose potentially embarrass-

(see "You Must Always Keep a Secret" on page 15)

You Must Always Keep a Secret

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ing or detrimental information about the former client if that information was acquired by virtue of the lawyer's prior representation."

In reaching this advisory opinion, the State Bar relied on Business and Professions Code section 6068(e)(1), which states that it is the duty of an attorney "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Citing Formal Opinion 1993-0133, the State Bar also explained that "client secrets means any information obtained by the lawyer during the professional relationship, or relating to the representation, which the client has requested to be inviolate or the disclosure of which might be embarrassing or detrimental to the client." The State Bar opinion also noted that the ethical duty of confidentiality is much broader in scope and covers communications that would not be protected under the attorney-client privilege. For example, the State Bar concluded that even "publicly available" information – available to those outside the attorney-client relationship, even if it must be searched for (e.g., in an internet search, a search of a public court file, or something similar)—must be kept confidential. Thus, contrary to the beliefs of many attorneys, client information does not lose its confidential nature merely because it is publicly available and may be located on a court docket.

Perhaps Donald Trump's former attorney got into litigation against him and therefore was freed of his ethical obligation to maintain Trump's dirty little secrets. After all, an attorney can reveal client confidences insofar as is necessary to defend against a malpractice claim or to prosecute a fee dispute. *Dietz v. Meisenheimer & Herron,* 177 Cal. App. 4th 771, 786 (2009). Absent such circumstance, however, attorneys must remember their solemn duty to protect all client confidences – not just privileged communications. Potentially embarrassing information about a client -- whether or not it is communicated by the client -- must be kept in the strictest confidence, regardless of whether it is in the public record or can be easily discovered by others.

Would You Consider Making Scriptural References In A Closing Argument?

Alan M. Mansfield

By Alan M. Mansfield, Whatley Kallas LLP

The ABTL Annual Seminar's mock trial presentation on closing arguments raised an issue that was probably the furthest away from the effective use and presentation of the newest technology at trial. Rather, the primary topic that engendered the most discussion both during and after that panel was whether it was appropriate to use and quote from one of the oldest forms of technology – books, and more specifically, the Bible.

During the closing argument panel presentation one of the closing argument presenters, Don Howarth of Howarth & Smith in Los Angeles, included several Biblical allusions, including an extensive recitation of an Old Testament story. Mr. Howarth is an experienced and highly regarded trial lawyer in Los Angeles, but is known for pushing the envelope (see, e.g., http://www.businessinsider.com/lawyer-don-howarth-sanctioned-for-shocking-a-witness-2014-5)). In response to numerous questions from the audience he was asked by the moderator, the Hon. Richard Seeborg, whether this was a tactic he would use in a trial. Mr. Howarth responded that he routinely included Biblical references in his arguments, although he would sometimes advise the judge prior to doing so if there would be any issues if he did so. He claimed he had never been instructed not to do so. We were monitoring the on-line questions being sent in from the audience during his presentation, and questions about Mr. Horwarth's scriptural references were the primary questions submitted to that panel – if not the entire seminar.

These Biblical references were not lost on the jurors. During the post-verdict discussions lead by the jury consultant group, the 11 jurors were asked if they recalled the Biblical references during closing argument and their reactions. Four of the jurors responded, all negatively. Two stated that they believed in scripture but felt quoting the Bible in closing argument was either pandering to their emotions or simply distracting from the focus of the argument. The other two stated they were either agnostic or atheistic and did not appreciate bringing religious references into the trial. The jurors did not say why they felt the way they did, but those who responded to the question on both sides were emphatic in their opinion about the propriety (or impropriety) of such references during closing argument as being out of place, distracting and playing on their emotions. And, in the end, the jurors said it did not sway them one way or the other. So at best such references were neutral; at worst, they were negative.

It is a requirement under both state and federal law that witnesses take oaths to testify truthfully in trial. Until relatively recently and still in some states (e.g., North Carolina), witnesses are asked to place their hand on the Bible or other religious texts as one way to confirm that oath. 28 U.S.C. Section 453 requires that all federal justices and judges take an oath or affirmation that concludes "So help me God," and has provided as such since 1789. U.S. Supreme Court justices and many federal judges place their left hand on the Bible or other religious texts when they take that oath. And one of the questions during recent Presidential inaugurations is the history of the Bible the President will use in taking the Presidential oath of office -- even though the words "So help me God" or the use of the Bible in affirming that oath is not set forth in Article II, Section 1 of the U.S. Constitution. In fact, for history buffs, in 1825 President John Quincy Adams did not swear the oath of office on the Bible – he placed his hand on a law book!

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Would You Consider Making Scriptural References In A Closing Argument?

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So why is it viewed as so controversial or distracting to quote from the same book during a trial that at least federal judges are requested to place their hand on in taking their oath of office, and that was (and in some parts of the United States still remains) one of the instruments used to confirm a witness oath during a trial? Maybe it is because of such distractions, fears of playing on prejudice rather than the facts of the case, or often referenced concerns over the separation of church and state, that courts have found such references improper, particularly in criminal cases. For example, one appellate court in Oklahoma went so far as to find closing argument should not include Biblical references at all. *Long v. State,* 883 P.2d 167, 177 (1994) (quoting Bible was "intolerable self-serving perversion of Christian faith as well as the criminal law of this State" and "rank misconduct"). And in *Carruthers v. State of Georgia,* 528 S.E. 2d 217, 222-23 (2000)(*rev'd on other grounds*), the Georgia Supreme Court found it to be reversible error for a prosecutor to quote from the Bible during closing argument in a death penalty case: "It is difficult to draw a precise line between religious arguments that are acceptable and those that are objectionable, but we conclude that the assistant district attorney in this case overstepped the line in directly quoting religious authority as mandating a death sentence. In citing specific passages, he invoked a higher moral authority and diverted the jury from the discretion provided to them under state law." *Id.* (referencing *United States v. Giry,* 818 F.2d 120, 133 (1st Cir.1987) (such arguments are an "inflammatory appeal to the jurors' private, religious beliefs"); Elizabeth A. Brooks, Note, Thou Shalt Not Quote the Bible: *Determining the Propriety of Attorney Use of Religious Philosophy and Themes in Oral Argument,* 33 Ga. L.Rev. 1113 (1999)).

The sense from reading the audience questions during this panel's presentation, and in the ensuing discussions afterward, was that the audience had a reaction similar to that expressed by some of the jurors – scriptural references were distracting, if not offensive to some people, and were either neutral or negative. It is tempting to think of creative ways to engage the jury in closing argument. But as with any outside reference, be it Shakespeare, Mark Twain or even the Bible, the takeaways from the discussion over such references during closing argument were (1) tread carefully, and (2) it better work and be very relevant, or it may badly backfire.

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