ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO

abtl REPORT

*Volume MMXVIII No. 4* *Winter 2018/19*

# ABTL's Commitment to Trial Advocacy: Law Students and Attorneys Alike

*By David Lichtenstein*

David Lichtenstein

Pat Paconahey was the top grossing realtor and salesperson at Penthouse Suite, Inc., a real estate investment company that purchase, remodels, and sells San Diego skyline apartments. At work and in his personal life, Pat cultivated the personality as a "ladies man." One day, Pat e-mailed his bosses with a doctor's note notifying them that he was being treated for an unspecified "medical condition" and that he needed to be on total disability. Months later, Pat returned to Penthouse with a doctor's note indicating that Pat was "non-binary" and should be thereafter called "Grey Matter" or referred to by a plural pronoun. Upon return to Penthouse, Grey Matter was reinstated as a realtor/sales manager at the same rate of pay that he enjoyed as Pat before taking medical leave. At work, Grey continued flirting with other female employees, but also insisted on using the women's bathroom, which made many female employees uncomfortable. Employees also complained that Grey was intentionally hanging out in the hallway outside of the women's restroom until one of the female employees would enter the restroom, after which Grey followed the female employees into the bathroom. Penthouse released an addendum to is employee handbook, stating that employees assigned a female gender at birth may use the restroom for the 59 minutes following each even hour of the day, and employees assigned a male gender at birth but had a female gender identify could use the women's restroom during the 59 minutes following odd hours of the day. Days later, a female employee made allegations of sexual harassment against Pat when he still identified as Pat years earlier. Grey Matter also complained about the bathroom policy, arguing it did not provide for non-binary employees. Penthouse Suite hired a person to administer a lie detector test to determine if Grey Matter was faking being non-binary. Grey elected not to take a lie-detector test and later sued Penthouse Suite alleging claims for violation of California's Fair Employment and Housing Act and wrongful constructive discharge in violation of public policy.

This was the fact pattern used during this year's Fifth Annual ABTL Mock Trial Tournament hosted on November 2-4, 2018 at the Edward J. Schwartz Federal Office Building. Since 2014, ABTL has sponsored a mock trial competition for local law students. Each year, law school student advocates from California Western School of Law, Thomas Jefferson School of Law, and the University of San Diego School of Law compete in the ABTL Mock Trial Championship using a closed-universe busi-

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## Inside

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## *President's Letter*

*By Michelle Burton, Shoecraft Burton LLP*


Michelle Burton

The year has gone quickly! It's hard to believe this is my last President's message. As I reflect on the past year and some of the challenges we faced as an organization, I am proud of the accomplishments of ABTL this year. When I started this year as President, I had two main goals: 1) to highlight and address the degradation of civility among lawyers in our profession and 2) to replicate, on a smaller scale, the wine fundraising event that our Orange County Chapter does annually to raise money for the Orange County Center for Public Law. Both of these goals have been realized through the hard work and dedication of ABTL officers, board members and LDC members who agreed to serve on these committees.

Our Civility Committee was able to work with the San Diego County Bar to retool the Civility Guidelines. The Civility Guidelines have now been finalized and I am hopeful that they will be adopted by the courts in their Local Rules. Our committee generated interest across the state. Moving into 2019, I will serve on the Civility Committee to work with our other chapters to update and incorporate the Civility Guidelines in other jurisdictions across the state.

Our wine and craft beer event at Coasterra could not have gone better for our inaugural event. We were able to donate $2,500 to each of our three local law schools for their Veterans Assistance Programs. The location was stunning and the event generated positive feedback. It will serve as a model for changing up our programs and events over the next few years. I am truly grateful to everyone that worked so hard to make my vision a success.

Serving on the board and as an officer of ABTL for the past seven years has been a professional and personally enriching experience. I have worked with amazing lawyers and judges over the years and been able to connect with and get to know my colleagues, not only locally, but across the state. As we close the book on 2018, I look forward to continuing to be involved and working with the 2019 officers, who will do an excellent job of leading ABTL.

Onward,

*Michelle Burton*

# From the Pentagon Papers to Today

*By Emily Bishop, Staff Attorney with Robbins Arroyo LLP*

Current attacks on the media as "fake news" may seem radical, but such attacks have precedent. President Richard Nixon attacked *The New York Times* in the 1970s due to its decision to publish portions of the "Pentagon Papers," a top-secret Pentagon study of the U.S. government decision-making in relation to the Vietnam War. There was widespread criticism of the press for its reporting of President Bill Clinton's sex scandal with a White House intern. Myriad other attacks have occurred over the years, culminating in President Donald J. Trump's characterization of the mainstream media as the "enemy of the people."

JUDGE MARGARET MCKEOWN

SAM POPKIN

LORIE HEARN

On November 14, 2018, the ABTL presented a program titled "First Amendment: From the Pentagon Papers to the Twittersphere." Through the lens of the Pentagon Papers scandal, the panelists, consisting of Ninth Circuit Court of Appeals Judge Margaret McKeown, UCSD Professor Emeritus Sam Popkin, and Lorie Hearn, Executive Director and founder of inewsource, a nonpartisan investigative journalism organization based in San Diego, explored the ethical and practical boundaries of journalists, disclosure of sources, government secrecy, and transparency.

Judge McKeown provided the context for the Pentagon Papers scandal. *The New York Times* acquired the Pentagon Papers, officially titled, "Report of the Office of the Secretary of Defense Vietnam Task Force," in 1971 after Daniel Ellsberg, a strategic analyst who worked on the study, photocopied the classified documents, and presented them to New York Times reporter Neil Sheehan. As Judge McKeown explained, the editorial staff questioned whether or not *The New York Times* had the right to publish the study due to its classified status. While the paper's outside counsel, Lord Day & Lord, objected to the publishing of the Pentagon Papers, *The New York Times*' in-house counsel, James Goodale, argued that the First Amendment gave the press the right to publish information significant to understanding the government's policy. On this advice, *The New York Times* began publishing excerpts of the report in June 1971.

At first, then-President Nixon planned to take no action against those responsible for the leaked documents, but Henry Kissinger convinced him that failure to oppose the publication would set a negative precedent for future leaks. After unsuccessful attempts to persuade *The New York Times* to voluntarily cease publication of the report, Nixon secured an injunction forcing the paper to cease publication. Days later, *The Washington Post* published its own series of articles on the leaked Pentagon Papers. As it had done with *The New York Times*, the Nixon administration sought an injunction against *The Washington Post* seeking to prevent it from publishing the classified documents.

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## From the Pentagon Papers to Today

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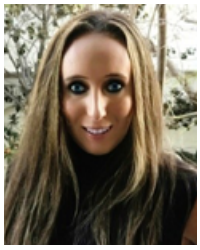
Sam Popkin explained how the Nixon administration engaged in an aggressive campaign to discover and punish anyone remotely involved in the leak. Popkin was jailed after refusing to answer questions from a federal grand jury convened to investigate the matter. The questions put to Popkin would have required him to disclose the names of people who had provided him with information on a confidential basis relating to the Pentagon's research study on the Vietnam War.

After reporters were jailed and the media was silenced, the issue of whether the constitutional freedom of the press, guaranteed by the First Amendment, allowed *The New York Times* and *The Washington Post* to publish the then-classified documents eventually made its way to the U.S. Supreme Court. In 1971, in a 6-3 ruling, the U.S. Supreme Court held that the First Amendment protected the rights of *The New York Times* and *The Washington Post* to print the leaked Pentagon Papers.

The conflict between the media and politicians has intensified in the ensuing almost 50 years. In fact, media harassment may be one of the only issues that politicians on both sides of the aisle can agree on. Whether it's liberal political operative David Brock and his "War on Fox" or conservative political consultant Roger Stone's "War on Fake News," the media is being attacked either way as it attempts to hold those in power accountable. Nonetheless, investigative reporter Lorie Hearn and her colleagues continue to recognize the important function the media plays in service to the country as a government watchdog. Hearn explained that the protection of sources is essential to the media being able to carry out its vital mission. Journalists must be prepared to, like Popkin and Hearn, face the penalties for refusing to disclose their so



*Emily Bishop is a Staff Attorney with Robbins Arroyo LLP urces.*

### *Back Issues Available on Our Website!*

Readers can browse the ABTL website for back issues of ABTL San Diego Report, covering the premier issue in the winter of 2002 through the current issues.

***VISIT: www.abtl.org***

# The Early Effects of *Dynamex* on Independent Contractor Classification in California

*By Anne Wilson*

It has been over six months since the California Supreme Court announced a dramatic change in the standard for determining whether a worker should be classified as an employee or independent contractor in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903 *("Dynamex").* On April 30, 2018, the *Dynamex* Court replaced the patchwork, multi-factor common law test with the rigid three-factor "ABC" test.

Under the ABC test, California workers will be considered independent contractors only if the hiring entity can prove ***all three*** of the following:

**A.** that the worker is ***free from the control and direction*** of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;

**B.** that the worker performs work that is ***outside the usual course of the hiring entity's business;*** and

**C.** that the worker is ***customarily engaged in an independently established trade occupation, or business*** of the same nature as the work performed.

The ABC test places an affirmative burden on companies to prove that independent contractors performing work for them are being properly classified.

**A: "Freedom from Control and Direction"**

Part "A" is similar to the old common law test set forth in *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341 (the "*Borello* test"), asking whether the worker is free from the "type and degree of control a business typically exercises over employees." The *Dynamex* Court confirmed that a business "need not control the precise manner or details of the work" in order to be found to have maintained the necessary control sufficient to lead to a finding that the worker is an employee.

**B: "Outside the Usual Course of Business"**

Part "B" is the biggest hurdle for businesses seeking to classify workers as independent contractors. This element focuses on whether the worker is "providing services to the business


in a role comparable to that of an employee," including any worker whose "services are provided within the usual course of the business" and would "ordinarily be viewed by others as working in the hiring entities' business." This broad language appears to expand the definition of employee to include almost any worker who engages in the same business as the hiring entity.

In *Dynamex,* the California Supreme Court used the example of a retailer that hires a plumber or electrician to perform maintenance at their establishment, stating that hiring such a worker would be outside of the company's business and, thus, the hiring entity would be able to demonstrate independent contractor status. However, the Court stated that a clothing manufacturer that hires a work-at-home seamstress, or a bakery hiring a cake decorator, would not typically be able to make such a demonstration.

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## The Early Effects of Dynamex...

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### C: Customarily Engaged in Independent Trade, Occupation, or Business

Part "C" asks whether the worker "independently has made the decision to go into business for him or herself," evidenced by factors such as "incorporation, licensure, advertisements, [or] routine offerings to provide the services of the independent business to the public or to a number of potential customers." If, on the other hand, the worker is "simply designated as an independent contractor by the unilateral action of a hiring entity," there is substantial risk he or she will be found to be an employee.

The *Dynamex* Court stated that a business does not necessarily have to prove that the worker in question took steps such as incorporation, licensure, advertising, and the like to prove part C. However, the simple fact that a company does not prohibit or prevent a worker from engaging in such an independent business will not be sufficient for a hiring entity to establish a worker has independently made the decision to go into business for himself or herself.

### How the State and Courts Are Applying the ABC Test

While the *Dynamex* Court limited its holding to cases involving whether a worker is an employee or independent contractor for purposes of the California IWC Wage Orders, the decision potentially impacts all types of cases involving worker classification.

### Attempts at Legislative Reform

Before the close of the legislative session, business groups petitioned the California Legislature to address the new standard set forth by the California Supreme Court in the *Dynamex*; however, no definitive action was taken in the last session. The California Chamber of Commerce also asked Governor Jerry Brown to convene a special legislative session to address this issue—to no avail.

### No Enforcement Guidance from the California Department of Industrial Relations

The California Department of Industrial Relations ("DIR"), who is responsible for enforcing the Wage Orders, has yet to provide any updated guidance in the Division of Labor Standards Enforcement Manual ("DLSE Manual") or opinion letters. Rather, the DLSE Manual continues to cite to former multi-factor, common law *Borello* test as the standard for determining independent contractor status. (DLSE Manual, §§ 28.2-28.4.) At least some DIR field offices have stayed independent contractor misclassification cases pending further enforcement guidance.

### Retroactive Application of the ABC Test by Courts

In the interim, California courts are beginning to decide independent contractor misclassification cases under the ABC test set forth in *Dynamex.*

On October 22, 2018, the Fourth District Court of Appeal weighed in on the retroactivity of the *Dynamex* decision in *Garcia v. Border Transportation Group, LLC* (2018) 28 Cal.App.5th 558. The Court of Appeal partially reversed summary judgment in favor of a taxi company against a taxi driver on the grounds that the driver was an independent contractor. The Garcia court of Appeal upheld summary adjudication for the taxicab company on the issues of overtime under Labor Code § 510, wrongful termination of employment in violation of public policy, and waiting time penalties, all of which arose ***outside*** of the applicable Wage Order and, thus, were properly decided by the trial court under the common law test articulated in *Borello.* However, summary judgment was reversed as to the driver's claims against the taxi company for the unpaid wages, unpaid minimum wages, failure to provide meal and rest periods, and failure to provide accurate itemized wage statements because these claims were made under the applicable Wage Order, and, therefore, the ABC test set forth in *Dynamex* applied. The *Garcia* court found that the taxicab company failed to meet prong C of the ABC test because it did

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## ABTL's Commitment to Trial Advocacy

*(continued from cover)*

ness litigation fact pattern ranging from shareholder disputes, to lease disputes, and this year's employment law fact pattern. The students try the case in front of sitting judges from both the federal and state bench. This year's judges were the Hon. Jill L. Burkhardt, the Hon. Randa Trapp, the Hon. Anthony J. Battaglia, the Hon. Joel R. Wohlfeil, the Hon. Kenneth J. Medel, the Hon. Roger T. Benitez, and the Hon. Jeffrey T. Miller, who presided over the final round. The students also tried their cases in front of panel of experienced ABTL litigators, who scored the student advocates based on their overall advocacy skills, including their command of the facts, legal arguments, presence, and persuasiveness. Six teams competed in the competition (two from each law school), and the top two teams from the preliminary rounds, Thomas Jefferson School of Law and the University of San Diego, advanced to the final round.

After the closest round in tournament history, Thomas Jefferson School of Law emerged as the champion, which was the school's first ABTL tournament victory in five years of competition. Lilys D. McCoy, the Director of the Thomas Jefferson School of Law Center for Solo Practitioners and the Director of the Thomas Jefferson School of Law National Trial Team, understands the importance of providing law students with stand-up opportunities at trial advocacy competitions like the ABTL Mock Trial Tournament. "They say that 'neurons that fire together wire together,' and I have never seen anything like law school mock trial competitions to re-wire the law student's brain so that they become able to actually try jury trials at the level that the courts and clients expect from competent trial counsel," Ms. McCoy said. "I can't thank SD-ABTL enough for providing our students with the opportunity to hone these invaluable skills. The work that goes into producing a competition is massive and we owe the ABTL Mock Trial Committee a debt of gratitude each year for their efforts."

Tyler Barclay, a 3L and member of the winning Thomas Jefferson team, also understands the value of trial advocacy classes and competition and the benefits both he and other student advocates stand to gain in the future as licensed attorneys: "Allowing students to participate in trial tournaments while attending law school promotes competition and camaraderie on campuses and within the community. The main purpose of any trial program is of course to teach law students the skills necessary for trial, but the collateral benefits are noteworthy. Students have the opportunity to engage with professors, practicing attorneys, other students, and judges while honing their skills. Students also gain exposure to real world situations and new areas of law in a setting that allows for a broadened understanding of the issues we may face after graduation. Trial advocacy classes and tournaments strengthen our legal community by ensuring future attorneys have the skills necessary to provide access to justice for all." Mr. Barclay noted: "The competition itself was special for many competitors because of the unique opportunities of trying the case in the federal courthouse and incorporating TrialPad during the rounds. Trying the case before current federal judges was a distinctive and certainly beneficial experience to the competitors. TrialPad also provided a new and exciting twist by encouraging familiarity with technology that we will most certainly encounter in practice."


The ABTL's next trial advocacy opportunity will be the 2019 Mini-Annual Seminar and Mock Trial, which is a day-long CLE, on January 26, 2019 at the Gomez Trial Attorneys' in-house moot court room. During the Mini-Annual Seminar and Mock Trial, young attorneys (typically with anywhere from three to ten years of experience) will perform a mock trial, using another business-related fact pattern, in front of sitting judges and a panel of senior ABTL litigators who will provide constructive feedback about their performances. Andrea N. Myers, a civil litigation Partner at Seltzer Caplan McMahon Vitek and one of the Co-Chairs of the Mini-

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## ABTL's Commitment to Trial Advocacy

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Annual Seminar Committee, noted the benefits of attending and/or participating in the Mini-Annual Seminar: "The Mini-Annual Seminar provides a rare opportunity for young lawyers to practice important trial skills, including voir dire, opening statements, direct and cross examinations, and closing arguments, while also providing a meaningful way for the local bench and bar to provide feedback to our next generation of litigators."

ABTL is committed to providing opportunities for not only its members, but also to local law students to enhance their trial skills and techniques. All members are encouraged to participate in these valuable trial advocacy opportunities, whether it is volunteering as an attorney judge at next year's Sixth Annual ABTL Mock Trial Tournament, or attending the 2019 Mini-Annual Seminar and Mock Trial.

*David Lichtenstein is a business and real estate litigator at Caldarelli Hejmanowski Page & Leer. He was the Co-Chair of the Mock Trial Committee (2018) and is one of the Co-Chairs of the ABTL Mini-Annual Seminar and Mock Trial (2019).*

## The Early Effects of Dynamex...

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not demonstrate that the driver was "customarily engaged in an independently established trade, occupation, or business."

Importantly, the *Garcia* court left the door open for further interpretation by questioning the retroactivity of *Dynamex*. The *Garcia* court noted that: (1) judicial decisions are generally given retroactive effect, but that this rule is not absolute; and (2) that exceptions to the general rule may lie where the parties reasonably relied on the previously existing state of the law. This issue was not briefed by the parties in *Garcia*, and, in a footnote, the Court decided it had no impact on its decision. Yet, for the hiring entities at risk of retroactive liability for up to three years of Wage Order violations, this possible exception to the retroactivity of *Dynamex* may provide a welcome reprieve from the strict ABC test.

The retroactivity of the ABC test is currently before the Ninth Circuit Court of Appeals in *Lawson v. Grubhub, Inc.* (Case No. 18-15386). On February 8, 2018, *Grubhub* became the first gig economy misclassification case to reach a trial on the merits, with the Northern District of California concluding that a former delivery driver for Grubhub, Inc. was properly classified as an independent contractor under the multifactor *Borello* test. *Lawson v. Grubhub, Inc.* (N.D. Cal. 2018) 302 F.Supp.3d 1071. The driver promptly appealed to the Ninth Circuit. Among the issues on appeal will be the retroactivity of *Dynamex*. No date for oral argument of this appeal has been set.

The reach of *Dynamex* will continue to be determined over the next few years. However, it is clear that the decision has had a significant impact of California businesses and workers, particularly in the growing gig economy.

*Anne Wilson is a member of Duckor Spradling Metzger Wynne's employment law group.*


# California Case Summaries ADR™ September 24 to October 5, 2018

*By Monty A. McIntyre, ADR Services, Inc.*

## CALIFORNIA SUPREME COURT

### Employment

*Gerard v. Orange Coast Mem. Medical Center* (2018) _ Cal.5th _ , 2018 WL 6442036: The California Supreme Court affirmed the decision of the Court of Appeal that had affirmed the trial court's order granting summary judgment for defendant in a wage and hour putative class action by hospital employees alleging violations of meal period breaks. The California Supreme Court ruled that a wage order of the Industrial Welfare Commission permitting health care employees to waive a second meal period, even if they had worked more than 12 hours did not violate the Labor Code section 512(a) requirement that employees who work more than 10 hours must be provided with a second 30-minute meal period. (December 10, 2018.)

## CALIFORNIA COURTS OF APPEAL

### Attorney Fees

*Warren v. Kia Motors America, Inc.* (2018) _ Cal.App.5th _ , 2018 WL 6520889: The Court of Appeal affirmed the trial court's order denying plaintiff prejudgment interest, but reversed the trial court's order denying plaintiff $5,882 for the cost of trial transcripts and reversed the trial court's application of a negative multiplier of 33 percent (33%) to the lodestar figure of $351,055.26, resulting in a $115,848.24 attorney fee award on a $17,455.57 recovery for plaintiff in a Song-Beverly Consumer Warranty Act (Civil Code, section 1790 et seq.) case. The Court of Appeal ruled that plaintiff did not show she was entitled to prejudgment interest on her jury award as a matter of right. Plaintiff was entitled to recover trial transcript expenses. The Court of Appeal also ruled that the trial court abused its discretion in applying a 33% negative multiplier to plaintiff's requested lodestar attorney fees of $351,055. Part of the court's expressed purpose in applying the negative multiplier was to tie the attorney fee award to a proportion of plaintiff's modest damages award. This was error because it is inappropriate and an abuse of a trial court's discretion to tie an attorney fee award to the amount of the prevailing buyer/plaintiff's damages or recovery in a Song-Beverly Act action, or pursuant to another consumer protection statute with a mandatory fee-shifting provision. (C.A. 4th, December 12, 2018.)

### Civil Procedure

*Calvert v. Binali* (2018) _ Cal.App.5th _ , 2018 WL 6322494: The Court of Appeal reversed the trial court's order denying a motion to vacate a $1,940,506 default judgment. The Court of Appeal ruled that the judgment was void on its face because plaintiff did not obtain service by publication in the Orange County Register as required by the court order, but instead published the notice in the Laguna News-Post. (C.A. 2nd, December 4, 2018.)

*J.W. v. Watchtower Bible & Tract Society of New York, Inc.* (2018) _ Cal.App.5th _ , 2018 WL 6444039: The Court of Appeal affirmed the trial court's order granting terminating sanctions striking defendant's answer as a result of defendant's failure to produce documents regarding known molesters in the church. The trial court later entered defendant's default, and, after considering evidence, it entered a judgment in favor of plaintiff and awarded her $4,016,152.39. The Court of Appeal affirmed all of the trial court's rulings. (C.A. 4th, December 10, 2018.)

### Torts

*Modisette v. Apple Inc.* (2018) _ Cal.App.5th _ , 2018 WL 6584127: The Court of Appeal affirmed the trial court's order sustaining a demurrer, without leave to amend, in an action for wrongful death and serious personal injuries caused by a driver using the FaceTime application on his iPhone who crashed into plaintiff's car on a Texas highway. The Court of Appeal ruled that defendant did not owe the plaintiffs a duty of care. Considering the factors set forth in *Rowland v. Christian* (1968) 69 Cal.2d 108, the

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## California Civil Case Summaries

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Court of Appeal concluded that there was not a "close" connection between defendant's conduct and the plaintiffs' injuries and that the extent of the burden to defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach would be too great if a duty were recognized. The Court of Appeal also concluded that plaintiffs could not establish that defendant's design of the iPhone constituted a proximate cause of the injuries they suffered. (C.A. 6th, December 14, 2018.)



I now offer a new product called ***California Case Summaries: Civil Update 2018 Q1™***. It has my short, organized summaries of every California civil case published in the first quarter of 2018, with the official case citations. This issue is missing 17 other new published California civil case summaries that are included in my subscription publication.

*For ADR Services, Inc. scheduling, contact my case manager Christopher Schuster*
*Phone: (619) 233-1323.*
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*Cell: (619) 990-4312.*

ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO

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# DON'T MISS IT! - JANUARY 26, 2019

## ABTL Mini-Annual Seminar and Mock Trial

*All Day Event | **6.75** hrs MCLE Credit*

**Come join us at this exciting event where trial lawyers of all levels can learn and improve their courtroom presentation skills.** Watch junior to mid-level attorneys from San Diego's most respected law firms conduct a full trial involving a variety of complex factual and evidentiary issues. Judges and senior ABTL trial attorneys provide instruction and tips to each trial participant throughout each phase of a jury trial.

**We still have a few spots open for any aspiring trial lawyer to participate in a segment of the trial at no cost.** If you are between 2 and 8 years out of law school and would like to participate, please email us by clicking ***HERE.***

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**DETAILS**

**Date:** January 26, 2019
**Time:** 8:30 am - 4:30 pm (continental breakfast & lunch will be provided)
**Place:** Gomez Trial Attorneys
655 West Broadway, Suite 1700 | San Diego | CA | 92101
**Cost:** *ABTL Members* - $195 | *Non-Members* - $225
**MCLE Credit:** ***6.75*** hour general
**For more information:** email abtlsd@abtl.org

**REGISTER at:** *https://conta.cc/2RK2LVH*

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# This Holiday Season, Give the Gift of Elevating Form *and* Substance


*By Rupa G. Singh*

*The twinkling lights, pumpkin-spiced everything, and ubiquitous canned-food drives can mean only one thing—it's time to brush up on scintillating small talk for upcoming legal holiday parties.*

**Lawyer 1:** Have you seen the research that the human eye responds best to a text that combines serif- and sans-serif fonts, whether in print or digital form?[i]

**Lawyer 2:** Why, no, that's fascinating.

**Lawyer 1:** Can you believe that leaving two spaces after a period is an artifact of the typewriter age, and betrays slavish adherence to an archaic practice?[ii]

**Lawyer 2:** [Two spaces and a gulp of wine later] No, you don't say!

**Lawyer 1:** Do you know that the brain skips over single-spaced, block-indented text no matter how informative and relevant?[iii]

**Lawyer 2:** Aha, so that's why my briefs are so misunderstood!

Ok, so perhaps these examples channel conversations between appellate lawyers . . . and not *just* at holiday parties. But laugh as we may at the average appellate lawyer's unusually high nerd-factor, there is a lesson here for all advocates—to not just make our briefs comply with style and formatting requirements, but also look pleasing to the eye. This is not elevating form over substance. Rather, as long as style does not substitute for content, but complements it, we artfully use form to elevate substance.

Why do recruiters suggest dressing well for interviews? Because the good first impression you make primes the interviewer in your favor. It doesn't guarantee you the job, which you will get based on relative ability, experience, and other factors. By the same token, "dressing" your brief well primes your reader(s) in your favor. It doesn't guarantee you a win, which will depend on whether your arguments are clear, persuasive, and supported by relevant authority.

**But get a head start with the following suggestions.**

- Choose a clean, proportionately-spaced font and a generous font size, one that reads easily in print and on electronic devices.
- Leave one space after periods or other ending punctuation, or, if you subscribe to the minority two-space view,[iv] just be consistent.
- Avoid block and other mundane quotations, unless paraphrasing will lose the punch or panache of the words as combined in the quote.[v]
- Use generous, consistent, left-aligned margins so the text looks neat, without "rivers of white space" caused by justified margins.[vi]
- Pick bold, underline, italics, or all caps to emphasize, not all four, unless you want to appear be screaming.
- Avoid cluttering the page, such as breaking up long arguments with multi-level headings and sub-headings, preceded by alternating letters and Roman and Arabic numbers.

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## Elevating Form *and* Substance

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All this is not to say that you should spend as much time researching, drafting, and editing your briefs as fiddling with the typeface, headings, and footnotes (if your must have them). Rather, pay attention to font, margins, and other formatting to frame your arguments attractively for a judicial audience that, it turns out, has the human weakness for beauty in form and in content. As management guru Dee Hock put it, "preserve substance; modify form; know the difference."[vii]

And embrace the principle that presenting something attractively will make it seem more right. In writing, as at the upcoming holiday parties, put your best foot forward, minus the ugly holiday sweater.

*Rupa Singh handles complex civil appeals and critical motions at Niddrie Addams Fuller Singh LLP, San Diego's only appellate boutique. She is founding president of the self-proclaimed historic San Diego Appellate Inn of Court, former chair of the County Bar's Appellate Practice Section, and a subdued Bond fan.*


(ENDNOTES)

i. Carri Cousins, "Serif vs. Sans Serif Fonts: Is One Really Better Than the Other?" Design Shack.net (Aug. 13, 2018); Harshita Arora, "How Typography Determines Readability: Serif vs. Sans Serif, and How To Combine Fonts," Free Code Camp.org (Jan. 6, 2018).

ii. Jennifer Gonzalez, "Nothing Says Over 40 Like Two Spaces after a Period!" Cult of Pedagy.com (Aug. 12, 2014).

iii. Bryan Garner, "Law Prose Lesson #266: The Plague of Block Quotations," https://www.lawprose.org/law-prose-lesson-266-plague-block-quotations;

*iv. But see* James Hamblin, "The Scientific Case for Two Spaces After a Period," The Atlantic (May 11, 2018).

v. "When And How To Use Block Quotes In Your Essay," Writing with Design, http://www.writingwithdesign.com/blog/2016/1/27/when-and-how-to-use-block-quote-in-your-essay; Jason P. Steed, "Cleaning Up Quotations in Legal Writing," ABA Litigation Journal (Dec. 7, 2017).

vi. Jane Watson, "To Justify or not to Justify Text," https://ontariotraining.net/to-justify-or-not-to-justify-text.

vii. M. Mitchell Waldrop, "Dee Hock on Management: Dee Hock's management principles, in his own words," (Oct. 31, 1996), https://www.fastcompany.com/27454/dee-hock-management.

# Nuts & Bolts

*By Eric Carrino*

On November 7, 2018, ABTL held its final Nuts and Bolts MCLE of the year. Titled "The Written and Unwritten Rules of Civility," the event was held at the offices of Knobbe Martens and sponsored by Imagine Reporting.

Attendees networking

In keeping with ABTL San Diego's focus on civility in the practice of law, the panelists, the Hon. Jan M. Alder (ret.), the Hon. Karen S. Crawford, and Benjamin Galdston, moderated by Lauren Katzenellenbogen, examined best practices and strategies for promoting civil behavior among members of the bar. The program began with a brief overview of written civility rules mandated by state and federal courts, as well as the guidelines adopted by the State Bar of California and the San Diego County Bar Association. The panelists provided their personal reflections from the bar and bench as guidance for attorneys of all ages to promote civility in practice and build meaningful relationships with opposing counsel. Judges Crawford and Adler shared their firsthand observations that rules requiring lawyers in the same county to confer in-person (which both Judges have adopted), routinely facilitated resolution on issues without judicial intervention and promoted lasting relationships. And, the panelists all agreed that often times much more can be accomplished when opposing counsel actually meet and confer face-to-face rather than over an endless string of e-mails. The panelists also discussed how granting routine professional courtesies, such as reasonable extensions, or working in good faith to avoid unnecessary motion practice, can benefit not only the profession but also your client's bottom-line. And, in keeping with this theme, Mr. Galdston explained the importance of reminding your client of your civility obligations at the outset of representation, as well as sharing how the client also stands to benefit from a cordial and cooperative relationship with opposing counsel. The big take away from the presentation: civility does not just benefit the profession; it can also be a boon to you and your client.

*Eric M. Carrino is an Attorney at Robbins Arroyo LLP*

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