ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO

abtl REPORT

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In *Brown v. Ralphs Grocery Co.*, California Court of Appeal Strikes Back on Enforceability of Class Action Waivers in Arbitration Agreements

By Travis Anderson, Esq. and Shannon Petersen, Esq.

Travis Anderson, Esq.

Shannon Petersen, Esq.

In the recent decision of *AT&T Mobility v. Concepcion*, the U.S. Supreme Court held that the Federal Arbitration Act (FAA) "preempts California's rule classifying most collective arbitration waivers in consumer contracts as unconscionable."[1] Many believed this marked the end of California courts' resistance to arbitration. *Concepcion*, after all, mandated that the FAA trumps any state law prohibiting arbitration of a particular type of claim. This rule, if faithfully applied, would surely be the death-knell for many other California judicially-created rules protecting from arbitration other types of class action claims, representative claims, and claims for public injunctions. Or so we thought.

On July 12, 2011, a California court of appeal struck back in *Brown v. Ralphs Grocery Co.*, revealing that California courts' resistance

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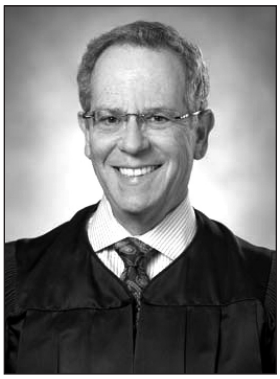
Brown Bag Lunch: Inside the Courtroom of Judge Ronald S. Prager

By Krista M. Cabrera, Esq. and Silvia Paz Romero



Judge Ronald S. Prager

On July 13, 2011, the Honorable Ronald S. Prager met with local attorneys in his courtroom for a brown bag luncheon presented by ABTL. Judge Prager discussed three primary areas of case management: discovery, trial and law and motion.

Discovery

Judge Prager sees the discovery dispute resolution process as a microcosm of how the overall case should be resolved. He explained that most discovery motions are usually voluminous, boilerplate and overly technical. In addition, once a formal motion is filed, there are many pitfalls (such as a non-conforming separate statement) which could result in the denial of an otherwise meritorious motion.

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Inside

Complex Issues in Complex Cases:

A Focus on Damages, Daubert, & Ethics

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President's Letter

By Anna Roppo, Esq., President ABTL San Diego

Anna Roppo, Esq.

In this President's Letter, I would like to take the opportunity to highlight this Fall's ABTL programs that you cannot afford to miss. If you want to bypass the details offered in this letter, then just put the dates — which you will note are in bold print — on your calendar and simply register for the programs. (Don't forget that you have to make those difficult dinner choices as well.)

In my first President's Letter this year, I emphasized the uniqueness of ABTL as an organization and encouraged your participation and/or continued support. The goal of my second President's Letter was to raise your level of awareness regarding the issue of court funding. The first program that I highlight below combines both of those themes.

Will *Fast Track* survive the state budget debaucle and the general apathy (or should I say purposeful ignorance) of state legislators? How will the San Diego Superior Court civil departments fare in 2012? What do your clients need to know about getting their day in court in these tumultuous economic times? San Francisco has already undergone critical changes, including court closures and employee layoffs. Presiding Judge Kevin Enright, Civil Presiding Judge Jeffrey Barton, Executive Committee Member and Independent Calendar Judge Joan Lewis and San Diego Superior Court Chief Executive Officer Michael Roddy will provide ABTL San Diego an exclusive about these issues and more at the **September 19, 2011** dinner program.

Every year ABTL as a statewide organization, puts on an Annual Seminar. Business trial lawyers and judges come together at a beautiful location to learn from experts and to spend some time socializing while doing so. This year you will learn about "Damages, Daubert & Ethics" while enjoying golf, tennis, exclusive sailboat, yacht or catamaran excursions, surfing, windsurfing, beautiful ocean vistas and luxurious accommodations. The ABTL Annual Seminar will be held only a short drive up the coast at the opulent Bacara Resort in Santa Barbara from **October 13–16, 2011**. This year's hypothetical involves the always unpredictable adventures of Richie Rich, mood-enhancing green glowing pills, tsunamis and exposure to radiation. The Honorable Armand Arabian (Ret.) will deliver the Keynote address. There is no better way to learn from the experts, get eight hours of MCLE credits including three in legal ethics.

Will *Fast Track* survive the state budget debaucle and the general apathy (or should I say purposeful ignorance) of state legislators? How will the San Diego Superior Court civil departments fare in 2012?

Does Delaware still offer a safe haven for corporations? What is the "Court of Chancery" and its jurisdiction? On **October 24, 2011**, ABTL San Diego will host Vice Chancellor J. Travis Laster from the Delaware Court of Chancery. A wonderful opportunity to listen and learn about the inner workings of a pure court of equity.

ABTL continues to offer current and informative programs while at the same time a break from the rigors of everyday private practice. Please join your colleagues and me at the upcoming dinner programs and Annual Seminar. I look forward to seeing you there!

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Tips From The Trenches: "Zen and The Art of Maintaining Balance During Trial"

By Mark C. Mazzarella, Esq.

Mark Mazzarella, Esq.

I decided to selfishly devote this edition of *Tips From the Trenches* to a topic of great interest to me, not because I have any particular insight into the matter, but rather, because I don't. Even after 33 years in the trenches myself, and more than forty often lengthy jury trials and an equal number of bench trials and arbitrations under my belt, I still struggle to maintain some semblance of a healthy mental, physical and emotional existence during trial. The fact is, I still need help in this regard, as I assume most of you do, and that's what "Tips From the Trenches" is all about—mentorship!

I've joked about how lawyers going to trial are much like sailors going on Westpac. For all but those who have joined us on the journey, we virtually disappear. We might as well be at sea. Everything about our lives changes starting in the weeks leading up to trial, and continuing until we have been back in our office saddle long enough to have waded through the piles of paper, screens of e-mails, and countless voice mail messages we have put on the back burner.

For years I rationalized my inability to blend trial into a remotely normal routine on the need to focus 100 percent on the task at hand. I've told clients, other than the one with whom I'm in trial at the time, that if and when his or her turn comes to venture into the Hell that is a courtroom, he or she too will get my undivided attention. To a client who is asked to wait patiently while I spend weeks solving someone else's problems while theirs percolate, that goes over like flatulence in church. I've argued with no more success to my family that like the family of a noble warrior who must venture off to battle, their sacrifice is the price that must be paid for the greater good. After a couple trials that one falls on deaf ears as well. And I've found equally unreceptive audiences among my staff and associates whose pleas for a few minutes of my time to help them do their jobs more effectively are swept aside with a curt, "I can't talk now. I may have time Friday when the court is dark."

What is truly remarkable about my adherence to this approach to the challenges of trial is that for years I have overlooked, ignored, or simply rejected out of stubbornness, experiences that should have taught me better. I don't know about you, but I always did better on exams when I spent at least part of the night before relaxing and clearing my head. Whatever last minute tidbits of information I might cram into my throbbing head as the clock struck midnight were of minimal help the next day, especially when compared to the significant benefits of a clear and rested mind. And in my experience the best prepared lawyers are not those who have spent all their time simply loading their minds and trial notebooks with facts. While thorough preparation is essential, the best lawyers I have ever seen in action have prepared their body, and spirit for battle, not just their mind. They are not drones, but rather performers, orators and educators who are spontaneous, reactive and charismatic. And that takes energy, vitality, perspective and balance.

"So," you might ask, "Just how do you attain this state of consciousness while also responding to the rigorous demands of trial?" "What is the secret to Zen and the art of maintaining balance during trial?" In search of the answer to these questions I asked several dozen extremely talented and experienced trial lawyers drawn from my lists of past and present members of the Board of Directors of ABTL-San Diego, and Masters of the American Inns of Court the question: "How do you maintain your sanity, and maximize your effectiveness, during trial?"

Their suggestions, though varied, were marked by consistency and compatibility. And, best of all, try as I might to find an excuse to ignore them, I could not concoct a credible argu-

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Tips

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ment for not trying each and every one of the sages' remedies the next time I find myself in the crucible of trial. In no particular order of importance, here are the Tips From the Trenches for "Zen and The Art of Maintaining Balance During Trial:"

DIET: If ever there was a time to be careful not to ignore the importance of a good diet, it is during trial. Yet many of us don't take the time or effort to assure that we are not only maintaining our customary diet, but enhancing it. Instead, we may skip meals altogether, or replace nutritious meals with candy bars or whatever else we find at the courthouse snack shop. Have healthy meals (soup, sandwiches, salads, etc.) waiting at your office during the noon break for you, your client(s), witness(es) and entire trial team. This will give you the time to eat leisurely while you prepare for the afternoon court session. If you can't get back to the office, make arrangements for meals to be delivered to wherever you spend the lunch break. And, if this is truly impossible, at least pack some trail mix or other snacks that will keep your energy level up during the day, and avoid the sugar rush, and crash, that come from a diet of simple carbs.

If you are working nights, as typically will be the case on at least most days, make sure to work a healthy meal into your evening routine. The evening meal presents a great opportunity to take a much needed break from the constant stress of trial, as well as to refuel for the evening ahead. (More on the importance of taking occasional breaks below.) A number of different approaches were suggested. Some lawyers followed the same routine every night; others favored variety. Options included: go out for a quick dinner with your husband, wife or significant other (or maybe even kids) before returning to the grind stone; go out to dinner with the client(s), witness(es) and/or trial team, where trial preparation can be mixed with some relaxation and rejuvenation; go home to eat the evening meal with the family, and either work at home afterword, if necessary, or return to the office after dinner; have your spouse or significant other bring a hot meal to the office and take a break to relax and catch up (more on this later as well); or order meals in for everyone (these days there are services that will bring in meals from many local eateries, which will give everyone something to look forward to as they settle in for the evening's work).

Be careful to avoid over-reliance on coffee, alcohol or other chemicals to get you through your trial day or night. While loading up on caffeine during the day, and compensating with a drink or two at night, might get you through a few days, long-term, it's no replacement for good nutrition, exercise, rest and stress reduction techniques that can be sustained indefinitely.

The importance of good nutrition cannot be overstated. Trial places extreme demands on our minds, bodies and emotions. With proper fuel, we are better able to meet the challenges it presents. The longer the trial, the more critical it becomes to make a concerted effort to assure that our diet enhances our mental, emotional and physical health, and, hence, our performance in the court room.

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United States Supreme Court Precludes Title VII Class Action Involving 1.5 Million Plaintiffs from Proceeding against Wal-Mart

Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 180 L.Ed.2d 374 (June 20, 2011)

By Katherine M. McCray, Esq.

In a landmark 5-4 decision, the United States Supreme Court recently reversed the certification of a class of one-and-a-half million current and former female employees of Wal-Mart. *(Wal-Mart Stores, Inc. v.* Dukes, __ U.S. __, 180 L. Ed. 2d 374 (2011).) The lawsuit alleged Wal-Mart's policy of allowing its local managers to exercise substantial discretion in pay and promotion decisions had an unlawful disparate impact on female employees in violation of Title VII. The federal district court and an *en banc* panel of the Ninth Circuit Court of Appeals had certified the proposed class; however, the Supreme Court reversed. The Court held that the plaintiffs did not demonstrate commonality, as required by Federal Rule of Civil Procedure 23(a)(2). The Court also concluded that claims for monetary relief may not be certified under Rule 23(b)(2) when the monetary relief is not incidental to injunctive or declaratory relief and rejected the use of exemplars to establish proof of liability in class actions when doing so would deprive a defendant of a right to litigate individualized defenses.

First, the Court observed that Rule 23(b)(2)'s requirement of "commonality" demands more than class members working for the same company and alleging the same type of injury (e.g., Title VII gender discrimination); rather, their claims must arise from a common contention (e.g., discriminatory bias by a common supervisor or a corporate policy of discrimination). (*Dukes*, 180 L. Ed. 2d at 389-90.) The Court emphasized that "'[w]hat matters to class certification . . . is not the rising of common 'questions' -- even in droves -- but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.'" (*Id.* at 390 [internal citation omitted, alterations in original].) The Court suggested such commonality may be established in a Title VII case by demonstrating the employer used a biased testing procedure to evaluate candidates or employees, or alternatively, by "significant proof" the employer operated under a general policy of discrimination. (*Id*. at 391-92.) However, there was no testing procedure at issue in *Dukes*, and the plaintiffs failed to provide proof of a general policy of discrimination.

The *Dukes* plaintiffs did "not allege that Wal-Mart ha[d] any express corporate policy against the advancement of women." (*Id*. at 386). Indeed, the Court noted Wal-Mart had an express policy prohibiting sex discrimination and imposing penalties on individuals who violated this policy. Instead, the plaintiffs "claim[ed] that their local managers' discretion over pay and promotions [was] exercised disproportionately in favor of men, leading to an unlawful disparate impact on female employees." (*Id*. at 386.) The Court concluded that this was actually "the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices," and thus did not provide proof of commonality. (*Id.* at 392-93 [emphasis in original]).

The Court also concluded plaintiffs could not establish commonality through statistical analy-

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sis or anecdotal testimony from approximately 120 of the 1.5 million employees, noting these anecdotes about violations at particular stores or regions did not demonstrate a *company-wide* policy of discrimination or single "specific employment practice" tying together the claims of all class members. (*Id*. at 393-94.)

Four justices dissented from this portion of the Court's holding, emphasizing that Rule 23(a)(2) requires only that there be "questions of law or fact common to the class." (*Id*. at 401, Ginsburg, J., dissenting.) The dissent concluded that "a 'question' 'common to the class' must be a dispute, either of fact or of law, the resolution of which will advance the determination of the class members' claims." (*Id*.) The dissenting justices agreed with the district court that there was a common question at issue -- "whether Wal-Mart's pay and promotions policies gave rise to unlawful discrimination." (*Id*. at 404.) The dissent observed that "[a] system of delegated discretion . . . is a practice actionable under Title VII when it produces discriminatory outcomes," and disagreed with the majority that a policy of discretion could never support a finding of commonality. (*Id*. at 406.) Moreover, the dissent criticized the majority for "blend[ing] Rule 23(a)(2)'s threshold criterion with the more demanding criteria of Rule 23(b)(3), and thereby elevat[ing] the (a)(2) inquiry so that it is no longer 'easily satisfied,'" and importing Rule 23(b)(3)'s more stringent requirement of predominance into *all* class actions, even for those plaintiffs who seek to certify under Rule 23(b)(1) or 23(b)(2). (*Id*. at 405-406.)

The Court's second holding was unanimous: the class action plaintiffs' claims for back pay were improperly certified under Federal Rule of Civil Procedure 23(b)(2). The Court noted that Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each class member . (*Dukes*, 180 L. Ed. 2d at 396.) The Court held that "individualized monetary claims belong in Rule 23(b)(3)" if plaintiffs can show that common issues predominate over individualized issues, because additional procedural protections and standards in 23(b)(3) protect class members from potential due process violations; however, the Court concluded that backpay claims should not be certified under Rule 23(b)(2) when the monetary claims are not incidental to claims for injunctive or declaratory relief. (*Id*. at 397-98.)

Third, the Court rejected class action procedures that would deprive defendants of the right to litigate individualized statutory defenses. The lower courts had certified the class based in part on the assumption that liability for backpay could be determined after a sample set of class members were deposed and the percentage of claims determined to be valid among the deposed sample was applied to the entire remaining class, with the number of presumptively valid claims multiplied by the average backpay award to calculate the total class recovery. (*Id*. at 400.)

However, the Supreme Court "disapprove[d] that novel project," dismissing it as "Trial by Formula." (*Id.* at 400.) The Court explained that Title VII and the cases interpreting it expressly provide employers a defense to liability for backpay; thus, each employer, including Wal-Mart, was "entitled to individualized determinations of each employee's eligibility for backpay." (*Id*. at 399-400.) Procedures for determining class-wide liability based on exemplars or samples from among the class would deprive a defendant of its right to present individualized defenses to the claim. The Court reasoned that the Rules Enabling Act, 28 U.S.C. § 2072(b), forbade interpreting Rule 23 to "abridge, enlarge or modify any substantive right," and concluded that "a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims." (*Id*. at 400.)

Dukes is already having an impact on pending cases. For example, a California wage and hour case recently was decertified in part because of the *Dukes* court's rejection of "Trial by Formula." In *Cruz v. Dollar Tree Stores, Inc.* 2011 U.S. Dist. LEXIS 7398 (N.D. CA July 8, 2011), the Northern District of California pointed out that "'the crux' of Plaintiffs' proof at trial will be representative testimony from a handful of class

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members." (*Cruz*, 2011 U.S. Dist. LEXIS 73938, at *12.) The *Cruz* plaintiffs had proposed a formulaic manner for determining individualized damages in their case regarding misclassification and unpaid overtime; but the court concluded that such a trial plan "is now untenable in light of . . . the Supreme Court's decision in *Dukes*." (*Id*.) The court concluded that even if class-wide liability were established, there was no feasible way to analyze each class member's individual damages in the context of a class action, and decertified the class. (*Id*. at *19.)

In addition, a South Carolina court recently applied *Dukes* in the context of an FLSA collective action. (*McGregor v. Farmers Ins. Exchange* (D.S.C. July 22, 2011) 2011 U.S. Dist. LEXIS 80361.) The plaintiffs argued that they worked off-the-clock because a company policy required supervisor approval for overtime, but supervisors did not appropriately approve requested overtime. (*Id*. at *9.) However, the court found that "each supervisor's actions are essential to establishing any violation of the law," (*id*.), and concluded, following *Dukes*, that "if there is not a uniform practice but rather decentralized and independent action by supervisors that is contrary to the company's established policies, individual factual inquiries are likely to predominate and judicial economy will be hindered rather than promoted by certification of a collective action" (*id*. at *13-14).

It remains to be seen what, if any, impact *Dukes* may have on class actions pending in California state courts, and in particular on wage and hour class action litigation. As of the time this article went to press the writers were unaware of any California trial or appellate courts that had considered the impact of the *Dukes* case.

Katherine M. McCray is an associate at Wilson Turner Kosmo LLP where she defends business and employment cases, including class actions. ▲

Tips

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EXERCISE: As I've become less youthful (I refuse to acknowledge that I've gotten older), I've become increasingly aware of the physical demands of trial. The days when I could bounce out of bed after 6 hours of sleep and be ready for another 18-hour day disappeared along with cell phones that just made phone calls. Today, like many of the lawyers I surveyed, I need to "train" for trial, and sustain the exercise routine during trial to maintain peak performance. Not only is exercise a proven, and essential, antidote for stress, enhanced physical conditioning is a definite plus when a trial lawyer returns to action after the mid-afternoon break.

While a regular exercise routine is a good idea for lawyers whether or not in trial, it is particularly important to take regular breaks to exercise during trial. That is not to say that an hour-long high-intensity workout is essential, although if this is part of your normal routine, don't stop it just because you're in trial. It will serve you well. Nor is trial the time to begin an exercise routine. The last thing you want is for exercise to deplete your valuable reserves of strength and energy. Get into a comfortable routine before trial, one that you can continue once trial begins without creating unwanted physical demand on our body.

What is important is that you take time to comfortably de-stress and keep physically active as often as possible during trial -- ideally daily. Some of those surveyed preferred to start their day with a trip to the gym or a walk. Others set aside the hour immediately after court ended to take a break. Some liked to exercise alone and "clear their head," or contemplate the previous or upcoming trial session. Others prefer to incorporate exercise with uninterrupted time with one or more key members of the trial team, or even the client, during which they could either "debrief" or plan the next move, depending upon the circumstances.

One thing that came through loud and clear from those who have incorporated exercise into their daily trial routines is that whatever time is spent in the gym, walking or exercising in some other manner, is time very well spent. Those who advocate exercise are zealous in their belief that it is absolutely essential for maintaining balance during trial. And, my guess is that you will agree with my observation that trial lawyers who exercise regularly during trial bear up better than the rest of us to its rigors.

SLEEP: There really isn't much that needs to be said about the importance of getting sufficient sleep during trial to keep you alert and sharp during your long trial days. There have been hundreds of books written about the importance of sleep to cognitive function, and emotional and physical health. We all know that to be true. We just need to quit making excuses for ignoring the facts, or attempting to persuade ourselves that we are an exception to the rule. The fact is, our performance as trial lawyers will suffer if we don't give our body and mind enough time every day to recover from the demands of trial; and the impact will be cumulative if we ignore the essential need for sleep day after day.

How much sleep is required, or even how it is achieved, depends upon the person. Some of those queried found six to seven hours of sleep sufficient, which is possible. Others needed more to feel 100 percent. Still others believed they could get by on even less, although research suggests that in all but the truly extraordinary case, anyone who thinks less than six hours of sleep is sufficient, even in the short term, simply doesn't realize how much he or she is impaired by sleep deprivation. Some found short naps during the day helped; for others a lunch time "power nap" was anything but restful.

What is sufficient sleep will vary from person to person. What is important is that we do whatever we can to maintain the same, or similar, sleep pattern during trial as when we are not in trial. Most experienced trial lawyers agree that they would never trade the ability to respond quickly and accurately with a well-rested mind to the twists and turns of trial for a couple more hours the night before spent adding pages to examination outlines.

Sleep, like a good diet and exercise, reduces stress, and maintains physical, mental and emotional health. And a sick trial lawyer is neither a well-balanced, nor effective, trial lawyer.

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BREAKS: Similar to sleep, occasional breaks, even brief ones, are suggested by many of those who have spent considerable time in the trial trenches. I've discussed exercise, meals and time with family as examples of when breaks can, and should be taken to help reduce stress, increase mental acuity, and enhance overall performance. Once again, the when, where, how and why of break-taking is not set in stone. There are trial lawyers who take cigarette breaks (a practice strongly discouraged by most). Others set aside 10 to 20 minutes for meditation at noon, after trial, or at some other time during the day. And the list of examples is virtually endless. What all seem to agree is that a couple minutes now and then during which the mind and body are free from thought of trial are minutes well spent.

FAMILY AND FRIENDS: It is tempting, and all too easy, to sacrifice contact with family and friends during trial; but that is a mistake against which most experienced, and well balanced, trial lawyers caution. To the contrary, they make a persuasive argument that maintaining your connection during trial with those whose love, friendship and support sustain you between trials is critical. First, we all need to keep life in balance if we are to be happy, healthy, and, ultimately, successful. A great career as a trial lawyer isn't created in a year or two, or even ten, nor as a result of a couple trials. Just as life is a marathon, and not a sprint, a successful career as a trial lawyer must incorporate sustainable practices.

"Burnout" is the product of excess. And excess is the result of placing emphasis on one aspect of life at the expense of others. It is the antithesis of "balance." To maintain balance, and ultimately longevity as a trial lawyer, we cannot ignore those upon whom we depend for happiness, contentment, satisfaction, meaning and every other emotion that no healthy human being can acquire solely through success in the court room. That is not to say that our social/family life should be "business as usual" during trial. We all know that is impossible. It is simply to say that you will be a better trial lawyer if you are a healthy, happy and well-adjusted trial lawyer. And who better to bounce ideas off during trial than friends and family?

One way to kill multiple birds with one stone, is to occasionally involve friends and family in your meal and/or exercise breaks during trial. Take your morning walk with your spouse or significant other. Have dinner with friends once a week. Go home for dinner with the family occasionally. Invite friends and/or family to come down to court and get involved in the trial, at least as spectators. An added benefit to this is that it will provide them with sufficient facts regarding the case to make for meaningful conversation about it.

DELEGATION: The final major category of techniques listed for "The Art of Maintaining Balance During Trial" by the tipsters with whom I consulted, is delegation. We lawyers' egos are prone to making us believe that no one can handle anything of any importance better than we can. For the sake of argument, I'll assume that to be true—under normal circumstances. However, if you believe the best efforts of your staff, associates, partners, spouses, friends and others is not as good as your trial spawned neglect, you need to reconsider the adequacy of your support system and/or your opinion of yourself as more essential than carbon to all forms of life on this planet. The fact is, you are not doing anyone—you, your clients, your associates, or your family—a favor by failing to delegate what realistically can, and should be delegated while you are in trial.

One of the major fallacies noted by experienced, and busy, trial lawyers, is the concept that it is possible to be too busy to delegate. There seems to be universal agreement among the wisest of our profession that whatever time is required to triage pending or anticipated matters, and assign responsibility to resolve, or at least babysit them, pending your ability to tend to them personally, is time well spent. Delegation is virtually always helpful, even if the only task which is assigned is for someone to call the client, opposing counsel, and/or others involved in a matter, to let them know that you are in trial and out of commission temporarily, and to ask if there is anything they can do help in the interim.

Trial is demanding enough without making it worse by taking upon yourself the entire bur-

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den. Sit down with your staff, other attorneys in the office, your clients, even your family, and spend a few minutes talking about what needs to be done in your absence, and who can help get it done. You'll be glad you did when you come up for air at the end of trial, and find that much of what otherwise would have been waiting to pull you right back under again has been taken care of.

THE "ZEN" IN THE ART OF MAINTAINING BALANCE DURING TRIAL: As should be expected, the key to maintaining balance during trial, according to those who have become masters at the process, is to incorporate the many different ways of doing so into your trial routine. As a practical matter, time is a very valuable commodity during trial. For that reason, the true Zen master has learned how to incorporate two, three or more of the techniques simultaneously. A healthy meal, shared during a dinner break after trial with your family simultaneously provides nourishment, a break and connection with your normal routine, while taking you away from trial preparation for no more than an hour. A half hour or hour-long walk after trial with your client or co-counsel, during which you discuss the case without the stress of interruption, actually enhances your trial preparation while reducing stress and increasing mental alertness. How you incorporate these tips from the trenches into your routine the next time you are in trial is not the important point. The important point is that you incorporate them in some fashion. I know I will. ▲

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to arbitrating certain types of claims remains alive—or at least on life support—until the California Supreme Court says otherwise.[2] *Brown* held that *Concepcion* did not apply to representative claims under the Private Attorneys General Act of 2004 (PAGA). *Brown* also indicated that the California Supreme Court's holding in *Gentry v. Superior Court*,[3] which restricts class action waivers, remains the law in California, despite *Concepcion*, at least until the California Supreme Court says otherwise.

Background

In *Brown*, the plaintiff filed a class action against Ralphs Grocery Company and The Kroger Company for alleged violations of the California Labor Code and unfair business practices. The plaintiff further alleged she had satisfied the prerequisites for bringing a representative action for sanctions under the PAGA. Defendants petitioned to compel arbitration based on Ralphs' arbitration policy incorporated by reference into the plaintiff's employment application. Plaintiff opposed the arbitration petition and argued that the arbitration policy's representative and class action waiver was unconscionable.

Ralphs' arbitration policy applied to "any and all employment-related disputes" other than those relating to the terms and conditions of a collective bargaining agreement.[4] The policy specified that "there is no right or authority for any Covered Disputes to be heard or arbitrated on a class action basis, as a private attorney general, or on bases involving claims or disputes brought in a representative capacity on behalf of the general public, of other Ralphs employees (or any of them), or of other persons alleged to be similarly situated. . . . [T]here are no judge or jury trials and there are no class actions or Representative Actions permitted under this Arbitration Policy."[5]

The trial court ruled that the arbitration policy was both procedurally and substantively unconscionable, and therefore unenforceable. Ralphs appealed.

While the *Brown* appeal was pending, the U.S. Supreme Court decided *Concepcion*. *Concepcion* held that the Federal Arbitration Act (FAA) preempted *Discover Bank*, and reaffirmed

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that Section 2 of the FAA requires enforcement of all arbitration agreements, "save upon such grounds as exist at law or in equity for the revocation of any contract."[6] In *Discover Bank*, the California Supreme Court ruled that class action waivers are unenforceable if (1) the waiver was in a contract of adhesion; (2) the damages at issue were small; and (3) the plaintiff had alleged a scheme to cheat large numbers of customers out of individually small sums.[7] This rule effectively killed most class action waivers found in arbitration agreements. The U.S. Supreme Court rejected this so-called *Discover Bank* rule, holding that the right to freedom of contract and federal policy favoring arbitration under the FAA trumps state policy concerns about protecting the rights of consumers to bring class actions.[8] "The overarching purpose of the FAA," *Concepcion* explained, "is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings."[9]

The Majority In *Brown*

After receiving supplemental briefing in light of *Concepcion*, the *Brown* court in a 2-1 decision held that *Concepcion* does *not* require enforcement of arbitration agreements barring PAGA representative actions. *Brown* construed *Concepcion* to apply only to "the preemption of unconscionability determinations for class action waivers in consumer cases. . . . [*Concepcion*] does not purport to deal with the FAA's possible preemption of contractual efforts to eliminate representative private attorney general actions to enforce the Labor Code."[10] *Brown* therefore invalidated the parties' representative action waiver.

The *Brown* majority's narrow interpretation of *Concepcion* may be a sign that some California courts will continue to resist its core holding that arbitration agreements under the FAA should be enforced according to their terms.[11] Under *Concepcion*, "parties may agree to limit the is-

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sues subject to arbitration, to arbitrate according to specific rules, and to limit with whom a party will arbitrate its disputes."[12] Additionally, *Concepcion* is clear that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."[13]

Concepcion addressed and explicitly rejected *Discover Bank*. It did not, however, expressly address the several other California Supreme Court decisions limiting arbitration agreements—such as *Gentry*; *Armendariz v. Foundation Health Psychcare Services, Inc.*;[14] *Cruz v. Pacific Health Systems, Inc.*;[15] and *Broughton v. Cigna Healthplans*.[16] In each of these cases, the California Supreme Court established rules exempting claims from arbitration and treating arbitration agreements differently from other agreements. *Gentry* held that an arbitration clause cannot waive a statutory right to a class action in certain circumstances. *Armendariz* imposed similar restrictions as well as other limitations on arbitration agreements, effectively re-writing such agreements to favor employees. *Cruz* and *Broughton* both denied arbitration of claims for public injunctions under the Unfair Competition Law and the CLRA. In light of *Concepcion*, some federal district courts in California have already held that the FAA also preempts some of these state court rules.[17]

Consumer advocates, however, might use the *Brown* majority's reasoning to argue that *Concepcion* has no bearing on these state precedents because *Concepcion* involved only "the private individual right of a consumer to pursue class action remedies[.]"[18] In that regard, *Brown* likened a PAGA action to the injunctive relief claims in *Cruz* and *Broughton*: "the relief is in large part 'for the benefit of the general public rather than the party bringing the action'[.]"[19]

Brown did, however, overturn the trial court's decision that the class action waiver was unconscionable, but did so because plaintiff had failed to make the factual showing required under *Gentry*. The *Brown* court held that the *Gentry* rule only applies when the employee presents substantial evidence of unconscionability. Because the plaintiff failed to make this showing, the *Brown* court reversed and remanded to the trial court to determine whether the entire arbitration policy should be unenforceable on the sole basis of the PAGA waiver provision. The majority did not address whether *Concepcion* invalidated the rule of *Gentry*.

The Dissent In *Brown*

Justice Kriegler concurred and dissented. He agreed that plaintiff failed to make the factual showing required under *Gentry*. He also noted that in light of *Concepcion*, "*Gentry's* continuing vitality is in doubt." "Nonetheless, as the majority correctly points out, *Gentry* remains the binding law of this state which we must follow."[20]

Justice Kriegler disagreed with the majority's finding that plaintiff's PAGA claim was not subject to arbitration, "[g]iven the consistent line of Supreme Court cases mandating enforcement of arbitration clauses under the FAA, even in the face of California statutory or decisional law requiring court or administrative action rather than arbitration . . . "[21] Justice Kriegler quoted *Concepcion*'s clear mandate that, "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."[22] That mandate extends to PAGA claims, he argued.

Justice Kriegler also pointed out the direct conflict between the *Brown* majority's decision and the post-*Concepcion* federal district court decision in *Quevedo v. Macy's, Inc.*[23] *Quevedo* held that *Concepcion* requires the arbitration of PAGA claims when they are subject to representative action waivers in arbitration agreements. The *Quevedo* court had specifically considered the California appellate decision of *Franco v. Athens Disposal Co., Inc.*[24] — a decision which the *Brown* majority heavily relied on — and concluded that "*Franco* shows only that a state might reasonably wish to require arbitration agreements to allow for collective PAGA actions. . . . [*Concepcion*] makes clear however, that the state cannot impose such a requirement because it would be inconsistent with the FAA."[25] *Quevedo* likewise found that *Concepcion* "undercut" the California Supreme Court's reasoning in *Gentry*.[26]

Quevedo is not the only recent federal dis-

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trict court decision arrayed against the *Brown* majority's restrictive reading of *Concepcion*. The district court in *Zarandi v. Alliance Data Systems Corp.*[27] considered *Gentry* to have been "abrogated" by *Concepcion*, and held that the FAA required arbitration of plaintiff's injunctive relief claims. Likewise, *Arellano v. T-Mobile USA, Inc.*[28] held *Concepcion* disposed of both *Broughton* and *Cruz*, and ordered arbitration of CLRA and UCL injunctive relief claims.

The Aftermath

The *Brown* majority's decision to narrowly construe *Concepcion*, invalidate the representative action waiver under PAGA, and bypass the issue of whether *Gentry* remains viable, invites the California Supreme Court, and, potentially, the United States Supreme Court, to address the issue once again. In the meantime, the battle continues to rage between those who would arbitrate, and those who resist.

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1 131 S.Ct 1740, 1746 (Apr. 27, 2011)

2 --- Cal. Rptr. 3d ----, 2011 WL 2685959 (July 12, 2011)

3 42 Cal. 4th 443 (2007) (*cert. den.* 128 S. Ct. 1743, Mar. 31, 2008)

4 *Brown*, 2011 WL 2685959 at *1

5 *Brown*, 2011 WL 2685959 at *1

6 *Concepcion*, 131 S.Ct. at 1744

7 *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 162-63 (Cal. 2005)

8 *Concepcion*, 131 S.Ct. at 1753

9 *Concepcion*, 131 S.Ct. at 1748

10 *Brown*, 2011 WL 2685959 at *5

11 *Concepcion*, 131 S.Ct. at 1748 (internal quotations omitted)

12 *Concepcion*, 131 S.Ct. at 1749 (internal citations and emphasis omitted)

13 *Concepcion*, 131 S.Ct. at 1753

14 24 Cal. 4th 83 (2000)

15 30 Cal. 4th 303 (2003)

16 21 Cal. 4th 1066 (1999)

17 *See Zarandi v. Alliance Data Sys. Corp.*, No. CV 10-8309 DSF (JCGx) 2011 WL 1827228 (C.D. Cal. May 9, 2011) (stating *Gentry* was "abrogated" by *Concepcion*, and holding the FAA required arbitration of plaintiff's injunctive relief claims; *Arellano v. T-Mobile USA, Inc.*, No. C 10-05663 WHA, 2011 WL 1842712 (N.D. Cal. May 16, 2011) (holding the FAA as interpreted by *Concepcion* preempted both *Broughton* and *Cruz*, and compelling arbitration on plaintiff's UCL and CLRA injunctive relief claims)

18 *See Brown*, 2011 WL 2685959 at *5

19 *See Brown*, 2011 WL 2685959 at *6, (quoting *Broughton*, 21 Cal. 4th at 1082)

20 *Brown*, 2011 WL 2685959 at *8

21 *Brown*, 2011 WL 2685959 at *11

22 *Brown*, 2011 WL 2685959 at *10, (quoting *Concepcion*, 131 S.Ct. at 1747)

23 --- F. Supp. 2d ----, 2011 WL 3135052 (C.D. Cal. June 16, 2011).

24 171 Cal. App. 4th 1277 (2009)

25 *Quevedo*, 2011 WL 3135052 at *17

26 *Quevedo*, 2011 WL 3135052 at *1.

27 No. CV 10-8309 DSF (JCGx) 2011 WL 1827228 (C.D. Cal. May 9, 2011)

28 No. C 10-05663 WHA, 2011 WL 1842712 (N.D. Cal. May 16, 2011)

Article Submission

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Authors are responsible for Shephardizing and proofreading their submissions.

Articles should be no more than 2500 words with citations in end notes.

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Judge Prager prefers to avoid this process by resolving discovery disputes informally, *ex parte*. During this process, Judge Prager sometimes encourages attorneys to initiate settlement negotiations based on his calculation of the cost of litigating a discovery dispute versus the total amount at issue in the case. As an aside, Judge Prager announced that he is willing to conduct settlement negotiations of his own cases, as long as the parties sign a waiver so that he is not later disqualified from presiding over the case.

Judge Prager strongly encourages attorneys to conduct meet and confer conferences in person. He believes these meetings are most effective when attorneys just talk to each other instead of relying on impersonal, lengthy e-mails. Judge Prager recognized the importance of documenting communications, but emphasized that there is no reason attorneys cannot talk in person first to resolve issues and then document those resolutions later in writing.

Judge Prager also explained that discovery sanctions are the farthest thought from his mind during discovery disputes. His main goal is to get through the discovery process in a reasonable amount of time. He de-emphasizes sanctions, and will use them only when seriously warranted (such as in the case of violation of a court order).

Judge Prager does not handle electronic discovery much differently than other types of discovery. When vast amounts of electronic discovery are at issue, he has had success asking the moving party to select a few specific months for the responding party to produce as a sample. If abundant relevant information is discovered in the sample, he will consider ordering further electronic discovery. Most often, the sample electronic discovery satisfies the moving party and he does not hear back from the parties again.

Finally, Judge Prager stated he is willing to take calls during depositions as disputes arise and he has had a positive experience doing so.

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Trial Philosophy

Judge Prager splits the trial process into two phases: 1) the "Low-Key Phase" and 2) the "Time-Pressured Phase." During the Low-Key phase, Judge Prager handles *in limine* motions in chambers, very informally. At the end of this process, there is a thin transcript of the Judge's *in limine* rulings, which he reserves the right to reverse once he hears evidence at trial. Judge Prager advocates spending a lot of time on *in limine* motions, so that these issues are resolved before the jury is seated.

Once the jury comes in, Judge Prager switches gears to phase two, during which "we are on the clock and moving." Judge Prager gives the attorneys only 20 minutes each to voir dire all 36 jurors. Judge Prager does not limit the scope of voir dire and he conducts his own thorough voir dire questioning which covers most questions the attorneys would want to ask. With only 20 minutes to conduct voir dire, he usually does not face situations in which attorneys delve into specific issues that might be objectionable.

Judge Prager concluded his discussion on his trial practices by reminding the attorneys he invites settlement discussions throughout the process. Over half of his cases settle during the *in limine* phase, before a jury is ever seated.

Law & Motion

Judge Prager emphasized that attorneys should try to simplify, edit and re-edit motions so that they are as concise as possible. He reminded the audience that he has limited time to review motions and it behooves attorneys to be clear about what they are requesting and why the relief requested should be granted. The best approach to motions is to be succinct and straightforward. He discourages attorneys from wasting time explaining to the court obvious matters, such as the standard of review on a demurrer or summary judgment motion. With more complex issues, the Judge urges attorneys to include a clear introduction as a roadmap of the scope of the argument.

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Judge Prager provided a list of suggestions for motion practice. First, he advised the attorneys to avoid single-spaced, lengthy quotes. He explained they will not be read. In addition, he recommended the use of tabs for exhibits. Within those tabs, he also advised highlighting the material being emphasized. Above all, the Judge stressed the importance of accurately citing cases, to increase his level of confidence in the motion.

As for evidentiary objections, Judge Prager warned attorneys not to object to everything just for the sake of objecting. Instead, it is much more effective to identify significant objections so that they stand out. Post *Reid v. Google*, judges must review and rule on each objection, so the more exact objections are, the more likely a judge is to focus on the objection and rule favorably. On the other hand too many objections could drown the important objections from standing out and the attorney may lose on a crucial objection.

Judge Prager's final topic concerned advice for oral argument. It is important that both parties review his tentative rulings carefully. Parties receiving an adverse tentative ruling should look for points the court may have missed and highlight these issues during oral argument. Conversely, parties receiving favorable tentative rulings should not assume the job is done; but should address any concerns the court may have alluded to in order to strengthen their case.

Krista M. Cabrera is an associate with Wilson Turner Kosmo LLP specializing in employment litigation. Silvia Paz Romero is a law student at University of San Diego who was a summer 2011 law clerk at Wilson Turner Kosmo LLP through a Diversity Fellowship Program sponsored by the San Diego County Bar Association and the Association of Corporate Counsel. ▲

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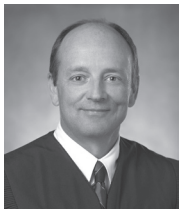

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