ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO

abtl REPORT

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Judge Timothy B. Taylor

Brown Bag Lunch: Inside the Courtroom of Judge Timothy B. Taylor

By: Timothy M. Hutter

On August 7, 2012, ABTL sponsored a brown bag luncheon with Judge Timothy B. Taylor. Although he is known to enjoy the lunch hour with his brethren from the bench at the Grand Central Café, Judge Taylor took time out of his schedule for a conversation with local attorneys about the judicial system and his courtroom.

Judge Taylor began his remarks by noting two things that he considers critical knowledge for those appearing before him. First, he is prepared and likes to be active in oral argument. Sometimes this is confused with (or, on occasion, overlaps with) impatience with attorneys, but he views oral argument as an active exchange of argument and ideas. Part of that process requires that attorneys allow judges to interject with questions. Prior to taking the bench, Judge Taylor practiced as a civil litigator in environmental, unfair competition, and trade regulation actions, frequently representing large companies. His favorite part of being a litigator was oral argument with an active bench, and he considers a hotly contested law and motion calendar as a highlight of his current assignment. Judge Taylor's second critical note is that he is very insistent about holding counsel to their trial time estimates. As Judge Taylor explained, this stems primarily from his respect for jurors and his concern that if the jury's time is not respected, the waters of the jury pool will continue to recede, thereby threatening the long-term future of the civil jury trial.

Case Management and the Funding Perils Ahead

Judge Taylor's docket currently consists of approximately 650 civil cases, but he anticipates that number growing substantially in the near future. In light of upcoming funding cutbacks, Judge Taylor warned that the San Diego Superior Court may not be able to bring all cases to trial within a year of filing. As has been discussed by the ABTL, San Diego County Bar Association, and many other groups, the funding cuts will have a severe impact on our

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President's Letter

The Tale of Women in the Legal Profession

By Hon. M. Margaret McKeown

United States Circuit Judge, Ninth Circuit Court of Appeals, President ABTL San Diego

Hon. M. Margaret McKeown

The tale of women in the legal profession is one of the glass half full. First it was a question of admission to the profession, followed by hiring barriers, only to be met with the glass ceiling for partnership and concerns about gender bias in the courts. Women have cracked these blockades, but their career paths remain tangled. In particular, a continuing conundrum--one that has taken on an almost existential twist--is whether women can have it all. The answer of course depends on how you frame the question.

This variation on the work-life balance issue affects all of us in the profession--judges, practicing attorneys, law firms and other legal employers, and men and women alike, including those with children and those who define balance by different parameters. The traditional definition of success for men in the law was a highly accomplished professional whose primary focus was work while providing for his family and taking time to play a supporting role in parenting. Women in the law, relatively new arrivistes on the ladder of professional success, have more complex metrics. All the assumptions of the traditional formula—primary focus on work, sole income earner, supporting role in parenting—are more like questions than givens for women and have also been turned upside down for everyone by changing social patterns and the economy.

Despite the cracked barriers to progress, the past few years have seen disappointing indicators for success for female attorneys. Women's law school enrollment peaked in the early 2000s at close to 50 percent, and then dropped.[1] For the first time since the National Association for Legal Professionals (NALP) began collecting statistics, the number of women in law firms dropped two years in a row in 2011.[2] In a report released last year, the National Association of Women Lawyers (NAWL) noted that the number of women equity partners has been fixed at 15 percent for the past 20 years. NAWL argued that the limited prospect for advancement for women in firms was to blame: these limitations result in "female flight" from the law, as well as reduced enrollment.[3]

But the legal profession is merely a microcosm of the workforce as a whole. Earlier this summer, prominent State Department lawyer and Princeton professor, Anne-Marie Slaughter stirred up controversy in her article, "Why Women Still Can't Have it All," which appeared in the July 2012 issue of *The Atlantic*. Slaughter castigates her cohort of feminists for suggesting that failing to run both a board meeting and a nursery with equal aplomb means that a woman is a failure, lacks ability, or, as Sheryl Sandberg of Facebook famously suggested at her Barnard College commencement speech last year, lacks ambition. Those women who *do* have it all, Slaughter argues, are not women, but superwomen. Rather, much like the NAWL study, she suggests that it's the workplace that must adapt to accommodate the family lives of women, and increasingly, men. She offers practical suggestions: less face time especially after school hours, more variations in career paths, and making it ok to value family life and family choices openly in the workplace. Nothing in the cottage industry of blogs, articles, and commentary that grew from Slaughter's article undermined her essential point: the structure of American working life poses problems for women (and men) who want a work life balance. What is remarkable about Slaughter's article is not its content, but that it still needs to be written and that it spawned such a widespread emotional response.

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President's Message

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Do Slaughter's suggestions make sense in a legal context? Not only do they make sense, they are positively clichéd. For years, the profession has discussed the need for a work-life balance. Over a decade ago, the American Bar Association Commission on Women in the Profession warned that "workplace structures must adapt" to the family needs of women and men.[4] Anticipating Slaughter's description of punishing work schedules, linear career paths, and devaluation of family life, the Commission's report criticized the "close to 2000 hours a year" that lawyers billed and the penalizing of lawyers who take time off or adopt part time schedules. The Commission promoted "on-site facilities" for childcare; personnel and leave policies must be put together by special committees whose members are highly respected in the organization, but at the same time "diverse." The report also criticized the pressure placed on men: "The traditional expectation . . . was that men with newborn infants would 'just go to the hospital, take a look, and come right back to work.'" As the report suggests, the default rules should change for everyone.

Fast forward to 2012 and things are not much better. Even in a highly regulated profession such as law, progress has been elusive. Don't get me wrong: things have changed, mostly for the better. But the billable hour still remains stubbornly supreme, over the 2000 hours per year mark, with only a slight drop as a result of the economic downturn.[5] The pool for firm committees has a limited number of women: although women make up 44 percent of seventh year associates, they make up only 25 percent of non-equity and 15 percent of equity partners. As a result, approximately only 20 percent of the members of major law firm committees are women.[6] Women are often sidelined due to a perceived lack of commitment to the job; home life is still devalued.

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Brown Bag with Magistrate Judges Crawford and Bartick

By Leah S. Strickland, Esq.

On June 7, 2012, the San Diego Chapter of the Federal Bar Association and the Association of Business Trial Lawyers presented a brown bag luncheon with the Honorable Karen S. Crawford and David H. Bartick, United States Magistrate Judges for the Southern District of California. The magistrate judges explained their approaches to a variety of topics, including Early Neutral Evaluation conferences ("ENE") and settlement conferences, scheduling, discovery disputes, electronic discovery, protective orders, and the magistrate judges' pet peeves.

Honorable Karen S. Crawford

Honorable David H. Bartick

Magistrate Judge Crawford

Magistrate Judge Crawford comes from a civil litigation background and practiced at large law firms and at the Civil Division of the U.S. Attorneys' office for a number of years. She understands federal claims and has handled (among other things) complex litigation, business, pharmaceutical and medical device cases, trade secret litigation, and stock option backdating cases.

ENE and Settlement Conferences

Regarding the requirement that someone with settlement authority must attend the ENE, Judge Crawford advised that it does not necessarily to have to be the president of the company. ENE briefs are required, but can be submitted confidentially. Confidential information will be kept confidential. In-person ENEs (as opposed to by telephone) are helpful because they allow attorneys to educate their clients regarding relative case strengths and weaknesses.

Magistrate Judge Crawford is receptive to suggestions at the ENE regarding preliminary discovery that may help the parties move closer to settlement. If the parties indicate that such discovery would help them move toward early resolution, she may set a status conference at a later date to reevaluate settlement after preliminary discovery is conducted.

Outside of the ENE context, parties may call chambers to schedule a status conference for the purpose of discussing settlement.

Protective Orders

Magistrate Judge Crawford believes that protective orders can be very important in allowing for the meaningful exchange of documents and information during the discovery process. See her chambers rules for some required language, but beyond that, the parties can be very creative in framing protective orders.

Consenting to a Magistrate Judge for All Purposes

Litigants have the option to consent to having a magistrate judge assigned to the case for all purposes. Magistrate Judge Crawford suggested that one big advantage to consenting is that generally the magistrate judge will be able to conduct a trial more quickly.

Discovery Disputes and ESI

Magistrate Judge Crawford is sensitive to ESI cost issues. She therefore asks the parties to meet and confer to develop an ESI protocol at an early stage in the litigation, and her orders generally require as much. She prefers not to address nuances of ESI protocol unless the parties are unable to reach an agreement and require guidance. She will have an "appropriate response" if she is confronted with an unreasonable ESI demand.

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President's Message

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Although things are changing, they are changing slowly. However, in my view, small but significant immediate steps can be taken to reduce pressures that all lawyers face.

Technology: Firms, and courts, are jumping on the technology bandwagon. Courts have consciously attempted to reduce the burden on lawyers with e-filing, teleconferences, and videoconferencing. For example, in the Ninth Circuit we have accommodated, via videoconference, fathers and mothers with family conflicts. And our judges are now reading briefs and memos on iPads, making us more mobile and less burdened by reams of paper briefs. Telecommuting is no longer a fantasy of the Jetsons and firms and clients have integrated technology into the workplace. Of course technology has its hazards--being available and connected 24/7 is not the point. But giving lawyers and judges the technology and flexibility to accommodate their lives is a reasonable and easily achievable proposition.

Life at Work: Slaughter, a noted speaker, requires that her children be mentioned when she is introduced at lectures. That is a personal preference I don't impose but the point is that the old adage that "children should be seen but not heard" takes on a new meaning in the workplace. Family, whether spouses, children or parents, should be part of the workplace mosaic and not relegated to the obligatory desktop photo. Putting a face on family, friends, and outside interests provides a real life backdrop for work-life balance.

Career Arcs: Lawyers are generally ambitious, driven individuals, always on the lookout for the next dragon to slay. We tend to live by a linear formula---college, law school, clerkship, associate-ship, partnership---and make judgments about those who do not. But princes---and princesses---who spend their lives slaying dragons non-stop never get to live happily ever after. The beauty of the law is that it is wonderful training for many different kinds of jobs.

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Judges Crawford and Bartick

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For discovery disputes in general, as well as ESI disputes, she expects the parties to engage in meaningful meet and confer sessions, and does not consider the exchange of nasty letters about areas of disagreement to be sufficient. She also requires a joint motion for litigation disputes because it enables her to evaluate the issue quickly and rule more promptly.

Pet Peeves

Magistrate Judge Crawford mentioned three pet peeves. She dislikes obstreperous litigation tactics because they re not an effective form of advocacy. She asks that, if litigants need more time on something, they ask for it as soon as they know it will be needed, rather than the day before a looming due date. And, phone calls to chambers regarding the status of a pending motion are generally unhelpful.

Magistrate Judge Bartick

Magistrate Judge Bartick has an extensive background in criminal law. As a result, he is quite comfortable with the criminal matters that come before him. Civil litigants should take note that he appreciates opportunities counsel for civil litigants have to explain relevant legal issues, such as during ENE briefing.

ENE

It is essential for the parties to have someone with settlement authority attend the ENE. Magistrate Judge Bartick is, however, aware that a company representative may still need to call the company to discuss particular settlement offers. If an attorney wants to request the court to relieve the client of having to attend the ENE, the request must be filed as a joint motion so the court will be aware whether the other parties agree or disagree with the need for the client's presence.

The parties must submit ENE briefs, which Magistrate Judge Bartick believes help the magistrate judge understand the specific aspects of the case. He finds them especially helpful for understanding the civil law issues, in light of his extensive criminal law background. He believes the ENE process really helps litigants by forcing them and their counsel to discuss the realities of the case before more significant costs have accrued. If counsel requests, he is willing to address a particular issue with the attorney's client from a "neutral" perspective. Although generally in-person ENEs are required, he will schedule a telephonic ENE where initial discovery is needed.

Magistrate Judge Bartick sees his role in the ENE as that of a mediator. He begins the ENE in a joint session in his chambers by explaining the process to the litigants, particularly the confidential nature of the ENE, hopefully making the parties more comfortable. He does not ask for opening statements, because he feels that can cause the litigants to become more entrenched in their positions. After this preliminary joint session, he then breaks out into caucus sessions.

Scheduling and Settlement Conferences

In scheduling pretrial matters, magistrate judges are constrained by the directive of the district judge. Magistrate Judge Bartick will try to accommodate the litigants' schedule, but ultimately he is constrained by the district judge's calendar.

If parties would like to schedule a settlement conference, he invites them to call chambers to ask for a date. Likewise, if the parties realize an upcoming settlement conference will be fruitless, they may contact chambers to request it be taken off calendar in order to avoid wasted time.

Protective Orders

The parties can be very creative in fashioning a protective order, and Magistrate Judge Bartick will entertain reasonable requests. He will review documents in camera if necessary. He has generally been impressed with the cooperation he has seen between counsel in preparing protective orders.

Discovery Disputes and ESI

As part of his chambers rules, Magistrate Judge Bartick has issued a guideline for litigants in navigating discovery disputes. He finds the joint motion process helpful for resolving such disputes and generally makes his decision from the papers, although he may set oral argument if he feels he needs more information.

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New and Noteworthy

California Supreme Court Finds Recorded Witness Statements Are Entitled to at Least Qualified Work Product Protection

Coito v. Superior Court of Stanislaus County (2012) 54 Cal.4th 480

By Lois M. Kosch

California Supreme Court Finds Recorded Witness Statements Are Entitled to at Least Qualified Work Product Protection

Coito v. Superior Court of Stanislaus County (2012) 54 Cal.4th 480

In June, the California Supreme Court clarified the scope of work product protection for recorded witness statements in Coito v. Superior Court. The court held that witness statements obtained by an attorney are not automatically entitled to absolute work product protection, but they are entitled to "at least" qualified work product protection.

The issue arose in a wrongful death case against the State of Calfiornia (among other defendants) filed by the mother of a 13-year old boy who drowned in the Tuolumne River in Modesto. Six juveniles witnessed the drowning and there were allegations that all of the juveniles were engaged in criminal conduct immediately before the drowning. Prior to depositions of the witnesses, counsel for the state sent two investigators to interview four of them. The state's counsel provided the investigators with questions to ask. Each interview was audio-recorded. The state's counsel used the content of the recorded interview during one witnesses' deposition.

Plaintiff's counsel then served the state with supplemental interrogatories, including Judicial Council form interrogatory 12.3, which sought the names, addresses and telephone numbers of individuals from whom written or recorded statements had been obtained, and a document demand for production of the audio recordings of the four witness interviews. The state objected to these discovery requests based on the work product privilege.

Plaintiff filed a motion to compel, which included declarations from two of the four interviewed witnesses asserting that they did not intend for their statements to be confidential. Without reviewing the audio recordings, the trial court found the witness statements entitled to absolute work protection and denied plaintiff's motion, except as to the recording used by the state to examine a witness at deposition. The court of appeal granted plaintiff's writ of mandate and held that the witness statements and information sought by form interrogatory 12.3 were not entitled to either absolute or qualified work product protection.

California's work product privilege is codified in Code of Civil Procedure, section 2018.030. Writings that reflect an attorney's "impressions, conclusions, opinions, or legal research or theories … [are] not discoverable under any circumstances." (2018.030 *subd.* (a).) Section 2018.030, subdivision (b) provides qualified protection for all other work product, which is not discoverable "unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice." Courts have resolved whether particular materials constitute work product on a case by case basis.

The Court reviewed the history of the work product privilege in great detail, noting that state policy behind the privilege is meant to accomplish two important goals. First, the privilege is designed to allow attorneys to prepare cases for trial with a degree of privacy that will allow them to investigate not only the favorable but also the unfavorable aspects of their cases. (Section 2018.020, *subd.* (a).) Secondly, the privilege is meant to prevent attorneys from

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taking undue advantage of their adversary's "industry and efforts." When an attorney obtains through discovery a witness statement obtained by opposing counsel, that attorney may gain an unfair advantage; thus there must be a showing that the witness is no longer available or accessible or some other showing of unfair prejudice or injustice to warrant discovery of that witness statement.

The Court held that witness statements obtained through an attorney-directed interview may be entitled to absolute protection in certain circumstances, especially where those statements reveal information about the attorney's thought process or case evaluation. However, at minimum, such statements are entitled to at least qualified work product protection and a party seeking disclosure has the burden of establishing that denial of disclosure will unfairly prejudice the party in preparing its claim or defense or will result in an injustice. The case was remanded for consideration of whether the absolute privilege applied to all or part of the recorded witness interviews. If any or all of the interviews were not absolutely protected the trial court was directed to consider whether plaintiff could show unfair prejudice or injustice which would be grounds to permit discovery.

The Court further held that information responsive to form interrogatory No. 12.3 is not automatically entitled to absolute or qualified work privilege, and that this interrogatory will usually need to be answered. However, the Court envisioned various scenarios where the disclosure of a list of witnesses from whom an attorney took recorded statements at his or her own initiative might implicate the work product privilege. For instance, in a case involving many witnesses, whose identities are not readily ascertainable by all parties and where the attorney expended significant effort in identifying and contacting those witnesses. Moreover, in a case with numerous witnesses, the fact that an attorney chose only to interview a select few may reflect something about counsel's case evaluation or strategy. Under the *Coito* facts, where there were a finite number of witnesses to the drowning, asking counsel to identify the names of those interviewed would not have revealed anything of consequence regarding defendant's evaluation of the case. Moreover, form interrogatory No. 12.1 already requires parties to provide a list of all known witnesses.

Lois M. Kosch is a Partner at Wilson Turner Kosmo LLP. She specializes in representation of employers in all aspects of employment law and litigation. She is the editor of the San Diego ABTL Report.

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Judge Taylor

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practice. Judge Taylor noted that a possible reduction in staffing could lead to delays in contacting calendar clerks to reserve hearing dates. Similarly, the loss of court reporters in civil courtrooms could create an awkward transition period between cases on calendar, leading to a potential "on-deck circle" for reporters hired for different cases. Judge Taylor commented that this could put increasing pressure on judges to manage courtroom logistics. When asked about the possibility of audio recordings, Judge Taylor pointed out that our civil courtrooms are not wired for sound in the same way that other local and federal courts may be, and that transcripts from such recordings can be difficult to understand anyway.

On the topic of sound, Judge Taylor also fielded a question about CourtCall, a topic that can be divisive even among lawyers in the same law firm. Judge Taylor was emphatic with his response: "I would never do it." Drawing on his background as a litigator, Judge Taylor is sympathetic to lawyers who view telephonic appearances as a means of conserving resources, both for clients and themselves. That said, the difficulties in communicating – with the judge, other counsel, and courtroom staff – outweigh the benefits in Judge Taylor's view, and he recommends making every effort to appear in person.

Technology in the Courtroom

When asked about the impact of technology in the courtroom, Judge Taylor reflected on a recent trial in his courtroom, noting that both sides were using computers to project transcript excerpts and other images, but one side was more effective because it had a dedicated a team member for the task. In his experience, many lawyers think that they can shift slides and still control the presentation with ease, not realizing that they are only slowing down the proceedings. He did note one exception, offering high praise for ABTL member Rebecca Fortune and her command of courtroom technology. Overall, he finds that lawyers can sometimes be too enamored of technology, forgetting basic ways to present factual information, such as the use of timelines.

As for the court's shift to imaged electronic filings, Judge Taylor played a role on the committee charged with implementing the system, and therefore earned the honor of being one of the early adopters in his courtroom. Although he would sometimes prefer to have hard copies of voluminous lodgments, his day to day review of briefs has not been affected by the digital upgrade. Indeed, his proficiency with using multiple screens even led one jury to ask "what is Judge Taylor doing with all of those computers?"

Discovery Disputes

Civil discovery disputes can be a source of great frustration for many judges. Asked about his preferred method of resolving such disputes, Judge Taylor remarked that he prefers "resolution by wise and seasoned lawyers without the involvement of the court." Failing that ideal, he holds *ex parte* hearings on Tuesday, Wednesday and Thursday mornings. Although an *ex parte* appearance is not required prior to filing a discovery motion in his courtroom, Judge Taylor will often offer his likely ruling on such motions during an *ex parte* hearing, and has even issued rulings right then and there. With wait times for motion dates extending well into the future, he noted that counsel should be cognizant of trial dates and not always assume that requests for orders shortening time or to continue trial will be granted.

Law & Motion Analysis

Not surprisingly, the audience asked many questions about Judge Taylor's approach to his law and motion calendar. First, he does employ a research attorney and hopes to continue doing so. Here again he noted the potential impact of budgetary constraints, and offered the insight that recommendations from his research attorney do carry some weight on smaller motions such as writs of attachment or post-judgment attorney fees. On the other hand, Judge Taylor likes to review the moving and opposition papers on his own, and will work up as many cases as he can personally. He shared that during a particularly slow trial month of July, he

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TIPS FROM THE TRENCHES: A License to Steal

By Mark Mazzarella

Mark Mazzarella

In today's high speed, high stress, high tech world, intellectual property has replaced such things as land, gold and gems, which for thousands of years were valued above all other possessions. And, in keeping with the heightened value of "ideas," we have provided more and more protection of them; which makes sense in light of the relative ease of stealing an idea as opposed to tangible property. However, it is not as though the sanctity of original thought is a product of the 20th or perhaps even the 21st century. Certainly for as long as any of us can remember, even children have learned to condemn "copy cats," a term often heard in elementary school. And that is as it should be. Why should just anyone be able to pirate a brilliant idea from its creator? If that were allowed, there would be little incentive for anyone to devote the time and thought required to create something new and better, whether a gadget sold on early morning TV, or an academic concept studied in university philosophy classes.

We lawyers are sometimes accused of thinking because we are masters of "rules," which after all is all that law is, we are not subject to them. While that is generally untrue, there is one very significant area in which it is. Great lawyers, judges and legal academicians spend countless hours, days and even years creating unique and effective ways to express legal concepts and their application to everyday life. Brilliant arguments are recorded in treatises, magazines and books for consumption by anyone with some measure of curiosity and a drive to improve his or her skills. Most bar organizations offer programs that feature the masters of our craft displaying their talent in mock trials and other forums. And every day the courts are in session, there are thousands of trial lawyers across America sometimes using tried and true techniques, stories and tactics, and sometimes airing some that are new and innovative. After all, that is what trial lawyers sell. And the better we are at creating effective ways to make a point the further we can travel down the road to success.

But unlike most other creative geniuses, lawyers with the special talent needed to produce truly memorable trial moments are not protected from shameless piracy, theft, and misappropriation. In fact, such conduct, which could lead to an indictment in some fields, is encouraged in ours. Those whose original ideas are stolen and used by others as if their own, generally feel honored, not defiled. And there is no shame in admitting that the best parts of the best closing argument you ever gave were taken wholesale from another attorney.

So, with hundreds of years of recorded outstanding lawyering, and thousands of talented men and women plying their craft across the country every day, why aren't we all stealing a lot more of others' material? We're not comedians whose careers would come to a sudden halt if they borrowed other comedians' jokes or artists who would never sell a painting outside of a swap meet if it was just a copy of another artist's work. We get to steal. We are even encouraged to do so. Trial demonstration programs are designed around the concept that great law-

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Article Submission

If you are interested in writing an article for the ABTL Report, please submit your idea or completed article to Lois Kosch at *lkosch@wilsonturnerkosmo.com*.

We reserve the right to edit articles for reasons of space or for otherwise, to decline to submit articles that are submitted, or to invite responses from those with other points of view.

Authors are responsible for Shephardizing and proofreading their submissions.

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

Tips From the Trenches

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yers will put on great performances, portions of which less talented, less experienced or less creative lawyers can take away with them. If we use the stolen portions of someone else's work, we don't have to give attribution; but if we do we're considered well schooled, not criminal.

I have been a big fan of trial demonstration programs since I was a puppy lawyer trying to figure out how to ask questions, and what questions to ask, during *voir dire*. I kept going to programs where talking heads would describe what they are hoping to accomplish during jury selection, but never illustrating the process. No one actually gave me question that I could use. They only gave me concepts from which I could try to create a competent *voir dire*. It would have been a lot easier if they just did a mock jury selection to show how it was done.

Beginning with an example taken from a program on jury selection, what follows are a handful of the best ideas, techniques and tactics I've acquired over my 35 years studying our craft, and probably 100 trial demonstration programs I've attended in the process, as well as from an equal number of years in the courtroom trenches. As you read these few examples, I hope you are inspired to go out there and steal a bunch of ideas yourself. You can start with mine. After all, I stole them from someone else.

At the Association of Business Trial Lawyers (ABTL) Annual Seminar two years ago a panel of lawyers and jury consultants discussed an assortment of *voir dire* related topics when one of the jury consultants threw out an idea that single handedly made my attendance at the four-day seminar worth every dollar and every second spent. He told the audience that one of his favorite questions to ask jurors in order to separate the sheep from the leaders was, "When you're with a group of people, do you enjoy participating in a spirited discussion about politics, current events and some other topic?" Now that was brilliant. Most trial lawyers believe that picking the leaders out of the panel is more important than identifying who is likely for or against your position, since a leader will carry any number of sheep with him or her. But posing a question that will indicate whether a potential juror will be a leader of the pack isn't easy; you don't want a question that broadcasts its purpose, which might influence the candor of the response. So, if you think about it, this question is perfect. From now on, I'll ask the question during every *voir dire* I conduct.

I have also had several occasions to copy an exchange that occurred during the cross-examination of plaintiff in an ugly dispute between former husband and wife. She was a producer. He was an actor. After their divorce she reneged on two movies in which she had agreed he would star. He sued. During his cross-examination by James Brosnahan, plaintiff took several pot shots at his ex-wife. In response to one question the plaintiff added gratuitously, and with feeling, "She is such a princess." Brosnahan looked at him with a puzzled look for a second or two. He then asked, "Do you take every chance you have to say something bad about your ex-wife? The plaintiff was taken aback, and responded indignantly, "Why, of course not." Brosnahan nodded slowly as he turned to return to the lectern, took a couple of steps and turned back to look at the witness and said, "Oh, you pass up an occasion every now and then." The brilliance of this exchange was immediately evident. Brosnahan had gutted the Plaintiff with this brief exchange. I used Brosnahan's lines in a trial as recently as two years ago.

Brosnahan is the author of my next example as well. He was cross-examining the expert for the plaintiff in a case in which she alleged she was passed over for partnership by her firm because she is a woman. The expert testified that while women constituted one third of the lawyers in large firms only one in ten was a partner. He added statistics showing that nationwide women lawyers were paid less, given less important cases to handle, and otherwise victimized by the good ol' boys who control most large firms. When Brosnahan stood up to begin his cross he knew his client had more women partners, who were paid more and given better work than the vast majority of comparably sized firms. His point was driven home, like a stake in the heart of the expert. His first words to the expert were, "Thank you Mr. Expert, that was all very interesting, but if you don't mind, I'd like to talk with you about

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Tips From the Trenches

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this case. While placing emphasis on the word "this." He looked at the witness as if pitying him for providing so much material with which to work. I have used this simple and brilliant exchange in about half of the cases I've tried over the past 20 years.

While I could go on and on for pages with this, space constraints will limit me to just one more great example. Harvey Levine followed me as a member of the defense team in an ABTL-sponsored mock trial, in which the female plaintiff was suing the male defendant for sexual harassment. The theme of the program was how to deal with difficult witnesses. The plaintiff was given more favorable facts, but was to play the role of a shrew; while the defendant had tougher facts to overcome, but was to play the role of a nice guy without a mean spirited bone in his body. Somehow the plaintiff and defendant managed to reverse their roles, which left those of us on the defense with an obnoxious jerk with a tough factual case. After I cross-examined the plaintiff the mock jury was poled. They were 10 to 2 in favor of the plaintiff. The two defense jurors would have voted for the defense even if Attila the Hun was on trial for trespass. I wouldn't have known where to begin to try to turn the jury around given the facts, and the jury's obvious dislike of the defendant. Levine showed why he has more multi-million dollar jury verdicts than just about any lawyer alive or dead.

Levine begin his closing with that street wise Brooklyn manner, "You know, when I was a kid I was like most kids. I wanted to be popular because the popular kids had all the cool friends and got invited to all the cool parties. And like every other kid, I wanted everyone to like me." Harvey really took his time on this point, using almost half of his allotted 20 minutes to neutralize what he knew would be the biggest barrier to success in the case. He painted the picture of the human condition craving acceptance and

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Tips From the Trenches

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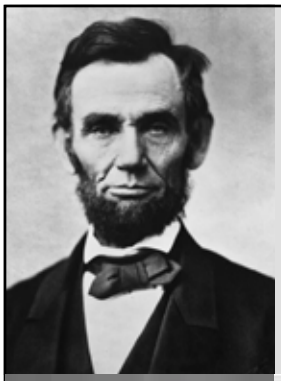
affection. Then he turned his discussion to the specific task at hand, saying: "You know it really isn't that different now that we're all adults. The popular ones still have all the cool friends, and get invited to all the cool parties. They get the raises, even though they may not be as well qualified as a less popular candidate. They just get a lot more of life's goodies than the guys who people don't like. But there is one place in this great country where popularity isn't a factor, where everyone, likeable or not, is treated exactly the same as everyone else. Where each and every person promises not to let personal likes and dislikes influence his or her decision. That place is right here, in a court of law. It doesn't matter if you like my client. It doesn't even matter if I like my client. You have to put that aside. Get it out of your mind. And do what you have sworn to do, decide the case on the facts, and only the facts." When the jury was polled after closing argument, amazingly, Levine had moved the jury to a 6 -6 split, giving the defense a fighting chance of getting a favorable verdict.

After reading this issue's *Tips From the Trenches*, I hope you are inspired to search out as many opportunities as you can to watch great lawyers display their hard earned brilliance and great ideas. And then, I hope you shamelessly steal the best of them, because if you do, whether or not you are brilliant, you will appear to be.

Mark C. Mazzarella is a trial attorney with Mazzarella Lorenzana LLP, and is a former president of ABTL - San Diego.



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President's Message

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Instead of viewing career gaps with suspicion, especially those taken to be with family, we should celebrate those who take time off, and treat them as living examples.

But I don't want to be all doom and gloom because there are many success stories and increasingly more role models for different ways to achieve success. ABTL San Diego is fortunate to have many accomplished women trial lawyers in its membership. They are heroes who have forged a path of success while balancing work, family and community obligations. Among those are our five former presidents: Hon. Maureen Hallahan; Anna Roppo; Claudette Wilson; Robin Wofford; and Meryl Young. And for the first time ever, all of the California ABTL chapters are headed by a woman.

For eons, women have been excluded from the legal profession, a phenomenon that has slowly changed over the last century. As women join the ranks of the legal profession, bringing the unique perspective of historic outsiders, we should not be stigmatized for declining to embrace completely the practices of our profession. Instead of changing women, we should take a serious look at how we might change the profession so that we may all benefit.

FOOTNOTES

[1] Catalyst, *Women in Law in the U.S.* (2012)

[2] NALP, *Law Firm Diversity Wobbles: Minority Numbers Bounce Back While Women Associates Extend Two-Year Decline* (2011)

[3] NAWL, *Report of the Sixth Annual National Survey on Retention and Promotion of Women in Law Firms 5* (2011).

[4] *Balanced Lives: Changing the Culture of Legal Practice* (2001)

[5] *NALP Bulletin,* February 2011

[6] Catalyst, *Women in Law in the U.S.* (2012)

Judge Taylor

continued from page 10)

was able to make significant progress on tentative rulings for the August calendar, even with his research attorney out on vacation. In that vein, Judge Taylor also divulged that he is less likely to change a tentative ruling when he has reviewed the papers and drafted the tentative himself. Asked for advice for lawyers looking to turn a tentative ruling, Judge Taylor counseled that lawyers should not give a jury speech, but instead identify the issues on which the tentative turns and explain why the tentative misses some nuance in the argument.

Things to Avoid

Finally, Judge Taylor also offered some advice about things to avoid in his courtroom. First, he reminded the audience of the importance of having a plan for *voir dire*. As a judge who conducts extensive questioning from the bench, he finds it particularly irritating when lawyers ask questions without an understanding of what they are trying to accomplish. On a similar note, Judge Taylor bristles at the constant repetition of information during trial. He noted that the game show "Wheel of Fortune" has been successful for so long because contestants and viewers feel like they have accomplished something when they solve the word puzzle. In this vein, Judge Taylor reminded lawyers that true persuasion occurs when you give a jury an outline of your case and allow them to draw the appropriate inferences. By filling in all of the blanks (sometimes multiple times), you not only bore the jury, but also run the risk of Judge Taylor sustaining an objection for cumulative evidence.

Conclusion

Overall, Judge Taylor stressed the need for patience and civility in our profession, especially with the pending impact of the statewide fiscal crisis. He emphasized his dedication to his own preparation, and has high expectations of the lawyers who appear in front of him.

Judges Crawford and Bartick

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Regarding ESI disputes, although Magistrate Judge Bartick's preference is for the litigants to address any issues if possible, if there are problems he asks litigants to bring it to his attention as early as possible. He isn't afraid to roll up his sleeves and get involved. He'll work with the parties to come to a solution, which will generally involve a discussion of costs and search terms—so come prepared with that information if you ask for his assistance.

Pet Peeves

Magistrate Judge Bartick said he really hasn't been on the bench long enough to develop pet peeves, but he did say that he does not appreciate it when parties appear unprepared. Overall, he has been very impressed with the civil bar so far.

Leah S. Strickland is an associate with Solomon Ward Seidenwurm & Smith LLP where she specializes in business litigation.

American Society of Trial Consultants Conducting Survey on State of the Courts

In response to concerns about ever-increasing litigation time and costs, the American Society of Trial Consultants Foundation (Foundation) is conducting a survey on civil litigation reforms: how to improve fact-finder comprehension, the jury selection process, and overall litigation and trial efficiency. By examining ways to cut unneeded time and expense in the litigation process while improving the quality of information used to make decisions on civil cases, this survey looks at both the efficiency and the effectiveness of our civil justice system. ABTL members may voice their concerns and ideas by completing an online survey, available at: http://www.surveymonkey.com/s/3TN9WQZ. The survey will remain open through the fall of 2012.

Founded in 2004, the Foundation is dedicated to the study of the United States judicial system, jury and judicial decision-making, and litigation communication. Through research and educational activities, it seeks to improve the quality of information used by judges, juries, lawyers, and litigants to resolve cases. For more information, visit the Foundation's website at http://www.astcfoundation.org .

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Justice Goodwin Liu has been an Associate Justice of the California Supreme Court since September 1, 2011.

The son of Taiwanese immigrants, Justice Liu grew up in Sacramento, where he attended public schools. He went to Stanford University and earned a bachelor's degree in biology in 1991.

Justice Liu graduated from Yale Law School in 1998, becoming the first in his family to earn a law degree. He clerked for Judge David Tatel on the U.S. Court of Appeals for the D.C. Circuit and then worked as Special Assistant to the Deputy Secretary of the U.S. Department of Education, where he developed and coordinated K-12 education policy. He went on to clerk at the U.S. Supreme Court for Justice Ruth Bader Ginsburg during the October 2000 Term. In 2001, he joined the appellate litigation practice of O'Melveny & Myers in Washington, D.C., and worked on an array of antitrust, white collar, insurance, product liability, and pro bono matters.

Justice Liu is a prolific and influential scholar. He has published articles on constitutional law and education policy in the California Law Review, Michigan Law Review, NYU Law Review, Stanford Law Review, and Yale Law Journal, among others. His 2006 article, "Education, Equality, and National Citizenship," won the Steven S. Goldberg Award for Distinguished Scholarship in Education Law, conferred by the Education Law Association. Justice Liu is also a popular and acclaimed teacher. In 2009, he received UC Berkeley's Distinguished Teaching Award, the university's most prestigious honor for individual excellence in teaching. He earned tenure at Boalt Hall in 2008 and was promoted to Associate Dean. The Boalt Hall Class of 2009 selected him as the faculty commencement speaker.

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