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ADR for IP Cases: Neutral Evaluations and Mock Exercises

Hon. Irma E. Gonzalez (Ret.)

By Hon. Irma E. Gonzalez (Ret.)

When a business model centers around copyrights, patents, trademarks or trade secrets, these high-stakes cases are the proverbial "bet-the-company" lawsuits. These cases span most industries, but particularly those that have become essential to today's economy: life sciences, biotechnology, data security, privacy, energy, medical devices, telecommunications and pharmaceuticals.

Not surprisingly, **IP litigation** is exceptionally complex, often involving several jurisdictions and multiple parties. This kind of litigation is disruptive for any company but especially when the case's effects may impact an entire industry. Therefore, IP cases almost always require swift – and sometimes confidential – resolution. For many parties, ADR may be the answer.

When it comes to ADR, lawyers must employ the most appropriate device to achieve the best outcome for the client. Fortunately, in addition to traditional tools like mediation and arbitration, other highly effective processes can help resolve IP cases favorably. Two devices in particular – neutral analysis and mock trials – are especially suited for IP litigation.

With **neutral analysis** – also called neutral evaluation – a party or parties consult with a veteran third-party to evaluate the case's facts and legal arguments. The result is a non-bind-

(continued on page 5)

Who Holds the Work Product Privilege?

Carole J. Buckner

By Carole J. Buckner

Those of us who have been engaged in the practice of law for any length of time have generated extensive "work product," that is, writings reflecting our impressions, conclusions, opinions, theories and legal research. The work product privilege (or doctrine) is routinely asserted in response to discovery to avoid revealing this information to the adversary. The policy behind the privilege is that a lawyer engaged in litigation should be able to prepare the case with some degree of privacy, without having to share that preparation with an opponent.

(continued on page 9)

Inside

President's Letter
By Paul Tyrell .... p. 03

The Supreme Court Puts the Brakes on Disgorgement – Kokesh v. S.E.C.
By William P. Keith .... p. 6

The "A" to "B" of Witness Preparation: A Simply Effective Approach
By Mark Mazzarella .... p. 10

Eight Annual Judicial Mixer Recap
By Alejandra Mendez .... p. 13

Crisis Management in Pre-Trial: Discovery Bombshells and How to Deal with Them
By Sara A. McClain .... p. 15

Does Bristol-Myers Squibb Mark a Dramatic Shift in Specific Juristiction?
By William J. Doyle............... p. 17

Grim Financial Times for the San Diego Superior Court
By Judge Jeffrey Barton........ p. 20

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President's Letter

By Paul Tyrell

Paul Tyrell

Don't Panic!

Consider crisis. If nothing comes to mind right away, think about this scenario: It's the middle of a busy afternoon. You're already running behind and trying to figure out how you can possibly get through your To-Do list. Then, it happens.

The phone rings.

It seems like your phone has been ringing non-stop since you decided you were going to take time and focus on that big important brief, but this call is different. This call is from a long-time client you haven't heard from in a while. She has a problem. A big problem.

The client just found out that her business partner has started a competing business. Worse, he's recruiting the company's top employees to join his new business, and her IT department has discovered that he downloaded a massive amount of data in the last 48 hours. If the press finds out about the data breach, it could be a public relations nightmare. Oh, and on top of that, she has been locked out of the company's bank accounts because the accounts were set up in her partner's name and he has changed all of the access codes.

She needs your help.
Your mind starts racing.

"What can we do?"

"How quickly can we get into court?"

"Which court?"

"What facts do we have to prove for a TRO?"

"What evidence do we need?"

"Do we have to give notice to the other side if we seek a TRO?"

"Does the data breach trigger a reporting obligation?"

"Are there HIPAA issues?"

"Should we contact law enforcement?"

"Should the company issue a press release to 'get ahead' of the bad news?"

"What do we do ***first***?"

Those questions aren't just in your head. The client is asking you the same questions. She wants to know what to do. The questions are flying, and she's looking to you for the answers.

Obviously, the client is experiencing a crisis situation. And guess what? It just became ***your*** crisis situation.

And you thought your day was stressful **before** you picked up the phone!

* * *

Crisis, by its nature, doesn't happen every day, but lawyers, by our nature, have to deal with crisis more frequently than the general population. Crisis events can be of critical importance to our clients, of course, but crisis events can have impacts beyond the events themselves. Client crisis events and our response to those events can solidify or destroy client relationships, make or break careers and significantly impact our well-being.

Simply put, the ability to handle a crisis is an enormously valuable skill. Yet despite its importance, crisis management isn't part of the standard law school curriculum, and last I checked, neither The Rutter Group nor Witkin has published a chapter on the subject.

Fortunately, ABTL is here to help!

The **ABTL 44th Annual Seminar** is going to take a deep dive into all sorts of crises that arise in the world of litigation. Entitled "***When the Perfect Storm Hits: Managing the Crisis Event***", and hosted by the San Diego chapter, this year's Annual Seminar features an impressive lineup of top trial lawyers and judges from around the state. The topics cover every flavor of crisis and crisis management, including: *"Managing the Client With the Crisis Event"; "Managing the Need for Expedited*

(continued on page 4)

Don't Panic!

(continued from page 3)

Relief In Motion Practice", "Judicial Perspectives in Managing Crisis Litigation" and "*Managing the Unexpected In Trial",* to name a few.

Annual Seminar Committee Chair Alan Mansfield has been working overtime to make sure it is going to be a great weekend, and we hope everyone will come away from it better prepared to respond to the next crisis event.

For those of you who are not able to attend the Annual Seminar this year, stay tuned for the Winter edition of the ABTL Report, which will include write-ups on various aspects of the weekend's programs and activities. It won't be the same as being there in person, of course, but perhaps it will provide a few tips and, hopefully, encourage you to sign up for the 45th Annual Seminar in 2018.

Finally, while I'm on the topic of signing up for things: Keep an eye out for information about renewing your ABTL Membership for 2018. Sign up early and encourage your colleagues to do the same. Your membership and participation help support our programming and other activities throughout the year.

Regards,

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After graduating from the University of San Diego School of Law in 1971, **Judge William C. Pate (Ret.)** moved on to private practice and the San Diego County Superior Court. **Judge Irma E. Gonzalez (Ret.)** served on the Superior Court and later became a leader at the U.S. District Court in San Diego. **Judge Kevin W. Midlam (Ret.)**. began his local law practice in 1965, served on the Superior Court with Judge Pate and became one of JAMS San Diego's first neutrals. **Michael J. Weaver, Esq.**, a law school classmate of Judge Pate, has been a successful attorney and neutral here for 40 years. All four bring diverse experience and exceptional skills to resolving a wide range of complex disputes.

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ADR for IP Cases: Neutral Evaluations and Mock Exercises

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ing analysis of how a fact-finder (a judge, jury, arbitrator or administrative agency) might decide the case or other proceeding.

This kind of expert evaluation can happen at any time, even before a case is filed, which could save an otherwise idealistic attorneys precious time and money. Because patent cases can be remarkably technical for the average juror, neutral evaluation can also help a party decide whether to waive a jury. Similarly, pretrial motions and hearings – including summary judgment – can be streamlined with neutral analysis. Neutrals may also be consulted before a mediation or settlement conference. Neutral analysis can also include post-judgment second opinions in which an appeal's likelihood of success is assessed.

Another exceptionally useful ADR tool for IP cases are **mock exercises**. Here, a neutral is consulted not to determine whether a party is likely to prevail, but instead to offer practical tips for refining a case. Specifically, in simulated oral arguments, arbitrations, jury and bench trials, and Markman and appellate hearings, IP lawyers can experiment with trial strategies, practice presenting evidence and arguments, and select the most effective witnesses. These kinds of "dry runs" are helpful not only to the lawyers but also to witnesses and others who may be otherwise unfamiliar with litigation procedures.

In my experience, breaking between segments is helpful to lawyers, who can ask the neutral targeted questions such as which arguments and angles in opening statements were most persuasive or how a jury may react to a particular witness and why.

Patent suits, in particular, require finely slicing out inessential or overly complex information so the fact-finder can zero in on the most critical issues. Because these cases can be highly technical, it's crucial that lawyers present the evidence and legal arguments in a comprehensible way without bogging down in technical details. In those cases, mock exercises may be especially helpful to witnesses who need coaching and practice explaining complicated concepts to laypeople.

Alternative DISPUTE RESOLUTION

In modern IP litigation, billions of dollars may be at stake. So it's no surprise that appeals are common. On appeal, lawyers sometimes have just 20 minutes to cover as many as 15 legal issues. In a mock appellate argument, neutrals can train lawyers to quickly home in on their strongest points, distinguish the other side's position and strategically concede weaknesses.

The usefulness of traditional ADR tools – arbitration and mediation – are long settled. But in the demanding and constantly changing world of intellectual property litigation, attorneys have other extremely useful tools at their disposal. Neutral analysis and mock exercises may not result in a settlement or dismissal of the case, but with customized, expert feedback, the lawyers can proceed with increased confidence and an informed, enhanced strategy.

Hon. Irma Gonzalez (Ret.) is a JAMS panelist based in San Diego. Her background makes her an ideal arbitrator, mediator and special master for cases involving a wide range of issues, including business, class action, employment, intellectual property, securities matters and more. She can be reached at igonzalez@jamsadr.com.

The Supreme Court Puts the Brakes on Disgorgement – *Kokesh v. S.E.C.*

By William P. Keith

Introduction

This June the United States Supreme Court resolved the long-running question of whether disgorgement claims brought to remedy federal securities law violations are subject to a statute of limitations. The unanimous answer is yes—disgorgement claims are governed by the 5-year limitations period in 28 U.S.C. § 2462, which applies to any "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise."[1] According to the Court, disgorgement qualifies as a "penalty."[2]

While the holding in *Kokesh v. S.E.C.* is quite narrow, the far-reaching impact of the issue drew considerable interest, especially from those with experience weathering SEC enforcement proceedings. Weighing in with amicus briefs were Dallas Maverick's owner Mark Cuban and the estate of deceased Texas entrepreneur Charles Wyly, who together with his brother suffered one of the largest disgorgement awards in history ($300 million) for concealing trading profits.

The *Kokesh* decision also marked a second setback for the Securities and Exchange Commission before the Supreme Court in recent years. In 2013, the Court unanimously held in *Gabelli v. S.E.C.* that § 2462's 5-year limitations period applied to statutory penalties under the securities laws, and that such suits were not subject to the discovery rule.[3]

As discussed in this article, on its face *Kokesh* involves a rather dry statute of limitations question. The reality, however, is that it may be the initial step in a larger movement by the Court to restrict government enforcement actions, especially those involving the disgorgement remedy.

The Backstory on Disgorgement

Written by Justice Sotomayor, the *Kokesh* opinion begins with a brief but useful history of the SEC and the disgorgement remedy. As recounted by the Court, for many years after the enactment of the federal securities laws in the 1930s and 1940s, the SEC's only statutory remedy was to obtain injunctive relief barring future securities laws violations.[4] In the 1970's

however, courts began answering the Commission's call to use their equitable power to order disgorgement in securities enforcement proceedings both to deprive defendants of profits earned by their wrongdoing and to deter future violations.[5] By 1990, new legislation enabled the Commission to seek an array of monetary civil penalties in addition to its other enforcement tools. Justice Sotomayor capped off this summary with the observation that, despite now having an array of tools at its disposal, the Commission has continued its practice of seeking disgorgement in enforcement proceedings.[6]

Courts generally hold that disgorgement is grounded in a federal court's equitable powers.[7] Statutory authority allows the SEC to order disgorgement in administrative proceedings,[8] but no specific congressional authorization permits the SEC to seek disgorgement in actions brought in federal court. However, the SEC has used disgorgement extensively and has often obtained more by way of this equitable remedy than statutory remedies. For example, in 2015, the SEC obtained $3 billion in disgorgement orders, far outstripping the $1.2 billion obtained in penalty orders.[9]

By the time the *Kokesh* case reached the Supreme Court, the question of whether any statute of limitations applied to claims for disgorgement had ripened into a circuit split. The Eleventh Circuit held that § 2462 barred disgorgement claims older than 5 years.[10] The First, Tenth, and D.C. Circuits, however, held that no statute imposed a time limit.[11]

While the Ninth Circuit never specifically addressed § 2462 in the context of disgorgement claims, it was firmly in the camp rejecting any strict time bar. In the leading case, S.E.C.

(continued on page 7)

The Supreme Court Puts the Brakes on Disgorgement

(continued from page 6)

v. Rind, the Ninth Circuit cited a variety of reasons—most of them based on the policy of deterring future securities law violations—for its conclusion that no statute of limitations applied when the SEC sought disgorgement.[12] While the Rind Court did not make mention of § 2462, district courts in the Ninth Circuit, relying heavily on Rind's policy rationale, subsequently concluded that § 2462 did not apply to disgorgement claims as they were not a "penalty."[13]

The *Kokesh* Opinion

The Kokesh case involved straightforward facts. In 2009, the SEC began enforcement proceedings against Charles Kokesh, contending he had used his two investment advisor firms to misappropriate $34.9 million from four business-development companies to whom his firms were providing investment advice. Notably, the misappropriations occurred between 1995 and 2009—a 14-year period.[14]

After a trial, the jury found Kokesh violated sections of the Investment Company Act, Investment Advisors Act, and the Exchange Act. The district court then tackled the job of imposing the penalties the Commission sought. The 5-year statute of limitations in § 2462 was at the forefront of the discussion. With respect to civil monetary penalties, the court determined that § 2462 precluded any penalties before October 27, 2004—i.e., 5 years before the case was filed. The district court ordered Kokesh to pay a civil penalty of $2,354,593, which represented "the amount of funds that [Kokesh] himself received during the limitations period."[15]

The Commission also requested $34.9 million in disgorgement, $29.9 million of which resulted from violations outside of the limitations period. The district court agreed with the Commission that because disgorgement was not a "penalty" within the meaning of § 2462, no statute of limitations applied. Accordingly, the district court entered a disgorgement judgment for $34.9 million and ordered Kokesh to pay an additional $18.1 million in prejudgment interest.[16] The Court of Appeals for the Tenth Circuit affirmed, agreeing with the district court that disgorgement was not a penalty; it also held disgorgement was not a forfeiture.[17]

The Supreme Court reversed, holding that disgorgement did indeed amount to a "penalty." This holding was based on two central principles. First, the disgorgement remedy is effectively a sanction to redress a wrong to the public, not a wrong to any individual.[18] The SEC does not stand in the shoes of injured parties, but seeks to remedy a violation against the United States.[19]

Second, the primary purpose of disgorgement, as courts have repeatedly articulated, is to deter future securities violations, not to compensate victims.[20] This is evident by the fact that funds are typically paid to the district court, who decides how and to whom to distribute the funds. While funds are sometimes paid to victims, other times they are paid to the United States Treasury.[21]

The Court seemed to have little trouble arriving at the conclusion that disgorgement, as requested by the SEC and implemented by the district courts, bears all the hallmarks of a penalty. Thus, the 5-year limitations period in § 2462 applies.[22]

The Sign of More to Come?

Kokesh has immediate impact on the Commission's enforcement toolkit as well as on defendants facing the prospect of disgorgement orders.[23] Yet the Court's questioning at oral argument and a few comments in the opinion may be a sign the Court has come to view the disgorgement remedy with skepticism.

At oral argument, the Court reached beyond the statute of limitations issue and probed the authority for a district court to order disgorgement in the first instance. Justice Kennedy asked—to Kokesh's counsel, no less—if "specific statutory authority . . . makes it clear that the district court can entertain [the disgorgement] remedy."[24] Justice Sotomayor commented that the source of power for the remedy was "unusual."[25] Justices Alito and Gorsuch also asked questions about the authority behind the remedy, with the latter commenting, "We're just making it up."[26]

Footnote 3 of the opinion has also drawn attention. The note starts out by stating that "[n]othing in this opinion should be interpreted as

(continued on page 8)

(continued from page 7)

an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context." It goes on to state that the sole question presented is whether disgorgement is subject to § 2462's 5-year limitations period.[27]

While in isolation this innocuous language might be no more than a statement about the breadth of the holding, the questioning of the justices at oral argument suggests it could be a signal of broader change. Commentators have been quick to point out that defendants will take the footnote as an open invitation to argue the SEC does not have authority to seek disgorgement in securities enforcement proceedings in federal court.[28]

Last but not least, it bears repeating that the holding in *Kokesh*, as in *Gabelli*, was unanimous. Judges from both ends of the ideological spectrum wrote the opinions and questioned the disgorgement remedy at oral argument. Thus, there are signs the Court may be poised to further curtail the SEC's enforcement powers.

Conclusion

Due to the incredible sums of money district courts order disgorged and the frequency with which the SEC employs the remedy, it is hard to imagine the Court will not have another opportunity in the near future to consider deeper questions about the propriety of disgorgement. For the meantime, defendants in SEC proceedings can rest assured their sins outside § 2462's 5-year window will be forgiven, if not forgotten.

William P. Keith is a shareholder at Duckor, Spradling, Metzger & Wynne ALC. His practice focuses on business and securities litigation, as well as employment litigation.

(ENDNOTES)

1 Section 2462 is not specific to securities laws, but governs penalty provisions throughout the U.S. Code. *Gabelli v. S.E.C.*, 133 S.Ct. 1216, 1219, 185 L.Ed.2d 297 (2013).

2 *Kokesh v. S.E.C.*, 137 S.Ct. 1635, 1643-45, 198 L.Ed.2d 86 (2017).

3 *Gabelli*, 133 S.Ct. at 1224.

4 *Kokesh*, 137 S.Ct. at 1640.

5 *Id.* (citing *SEC v. Texas Gulf Sulphur Co.*, 312 F.Supp. 77, 91 (S.D.N.Y. 1970), aff'd in part and rev'd in part, 446 F.2d 1301 (2d Cir. 1971).

6 *Id.*

7 *See*, *e.g.*, *S.E.C. v. Kokesh*, 834 F.3d 1158, 1164-1167 (10th Cir. 2016); *S.E.C. v. Rind*, 991 F.2d 1486, 1492 (9th Cir. 1993).

8 Sections 77h-1(e), 78u-2(e), and 78u-3(e) of Title 15 of U.S. Code provide that the SEC may order disgorgement in an administrative proceeding.

9 Robert J. Anello, *Chronicle of Disgorgement's Death Foretold: Kokesh v. SEC*, Forbes, July 11, 2017.

10 *S.E.C. v. Graham*, 823 F.3d 1357, 1363 (11th Cir. 2016).

11 *S.E.C. v. Tambone*, 550 F.3d 106, 148 (1st Cir. 2008); *S.E.C. v. Kokesh*, 834 F.3d 1158, 1164-1167 (10th Cir. 2016); *Riordan v. S.E.C.*, 627 F.3d 1230, 1234 (D.C. Cir. 2010).

12 *S.E.C. v. Rind*, 991 F.2d 1486, 1491-1492 (9th Cir. 1993).

13 *See*, *e.g.*, *S.E.C. v. Berry*, 580 F. Supp. 2d 911, 919 (N.D. Cal. 2008); *S.E.C. v. Stoecklien*, No. 15CV0532 JAH WVG, 2015 WL 6455602, at *3 (S.D. Cal. Oct. 26, 2015).

14 *Kokesh v. S.E.C.*, 137 S.Ct. 1635, 1641.

15 *Id.*

16 *Id.*

17 *Id.* (citing *S.E.C. v. Kokesh*, 834 F.3d 1158, 1164-1167 (10th Cir. 2016)).

18 *Id.* at 1642-43.

19 *Id.* at 1643.

20 *Kokesh v. S.E.C.*, 137 S.Ct. at 1644.

21 *Id.*

22 *Id.* at 1644-45.

23 *See*, *e.g.*, Dave Michaels & Brent Kendall, *Supreme Court Says SEC Has a Limited Time to Recover Firm's Illegal Profits*, Wall St. J., June 5, 2017.

24 Transcript of Oral Argument at 7-8, *Kokesh v. S.E.C.*, 137 S. Ct. 1635 (No. 16-529).

25 *Id.* at 9.

26 *Id.* at 13, 52.

27 *Kokesh*, 137 S.Ct. at 1642 n.3.

28 Anello, *supra*; Peter J. Henning, *Supreme Court Casts Doubts on a Potent S.E.C. Weapon*, N.Y. Times, June 12, 2017; *Supreme Court Disgorges the SEC*, Wall St. J., June 5, 2017.

Who Holds the Work Product Privilege?

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When you leave a law firm to join a new firm, what happens to the work product you generated? Some of it may go with you, along with the client. Other work product materials on cases you are not taking with you will be left behind. Who then holds the work product privilege: lawyer or law firm? Earlier this year, in *Tucker Ellis LLP v. Superior Court*, 12 Cal. App. 5th 1233 (2017), the court addressed this question as a matter of first impression, holding that, as between a law firm and an attorney formerly employed with that law firm, the firm, not the former attorney, holds the attorney work product privilege codified in California Code of Civil Procedure § 2018.030. This practical, not-so-obvious conclusion has several significant implications as the case illustrates.

In *Tucker*, the lawyer involved had worked for the law firm doing litigation involving asbestos defense. In connection with his employment, the lawyer agreed that all information used in connection with his employment was the property of the law firm which employed him, specifically including email. During his employment, the lawyer exchanged emails with an expert pertaining to the certain medical research articles pertaining to smoking and/or radiation, rather than asbestos, as causes of mesothelioma. After the lawyer left to join a competing law firm, a subpoena was served on his former law firm requesting production of the email communications. At first the firm objected based on attorney work product and attorney client privilege, but ultimately, the law firm produced the emails. The firm did not notify the lawyer.

Eventually the emails were distributed widely to over 50 asbestos plaintiffs' attorneys. Allegedly as a result of this, the attorney who wrote the emails was terminated from his new law firm, and could not find new employment in his field. He filed suit against his former employment for negligence, negligent and intentional interference with contract and with prospective economic advantage, invasion of privacy and conversion. At the trial court level, the court granted a motion for summary judgment, finding that the law firm owed a duty to the attorney not to disclose the attorney's work product, noting that writings reflecting an attorney's impressions, conclusions, and opinion or legal research or theories are not discoverable under any circumstances.

The appellate court granted writ relief and held that the law firm, not the lawyer, was the holder of the work product privilege. The court indicated that the statute itself was ambiguous regarding the reference to the "attorney" holding the privilege was the law firm or the individual attorney employed by the firm. As a result, the court examined legislative intent and public policy to address this question of first impression.

Ultimately, the court arrived at a very practical conclusion. Because the law firm was in the best position to address the disclosure of work product, given its current knowledge of the related litigation, the court determined that the law firm held the work product privilege. The court also observed that resolving conflicting claims regarding the work product of attorneys no longer with a firm could be unduly complicated. Because the court determined that the law firm was the holder of the work product privilege, the court further found that the law firm did not have any duty to the lawyer to get his permission to disclose the emails he had created. This approach operated to serve the firm's duty of undivided loyalty to the client.

Who controls the work product privilege when a lawyer takes a case to a new law firm is not addressed in the opinion. The court did emphasize the "narrowness" of its holding, stating that "on the record before us" the law firm was the holder of the attorney work product privilege. Because the logic of the court's decision is premised in part on the law firm's superior knowledge of the ongoing litigation, an attorney taking a case to a new law firm could assert that the attorney and the new firm hold the work product privilege. The practicalities of such a situation may not dictate such a straightforward resolution of the issue, depending on the circumstances. Future judicial guidance or a statutory modification may refine the niceties of such scenarios.

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The "A" to "B" of Witness Preparation: A Simply Effective Approach

By Mark Mazzarella

I used to wonder if I'd become wiser after 40 years in this business, or if I just got lazy. My approach to just about every part of my trial practice has become progressively less complex over time, more simple, but hopefully not overly simplistic. The way I prepare witnesses is a good example of what I mean.

When I was a relatively new lawyer I happened upon an article in a publication by the Litigation Section of the American Bar Association. It was called "The A to Z of Witness Preparation," or something to that effect. As you might have guessed, it listed 26 different tips for witness preparation. I don't recall what they were now, but they began and ended with something like: "**A**ways listen carefully to the question," and "**Z**ero in on the question that was asked." In between were tips like: "**D**on't argue," "**L**isten to your lawyer's objections," and "**P**repare thoroughly."

Of course, priding myself on my thoroughness, I took to covering all 26 points with every witness. Their eyes glazed over by the time I reached the "**L**" or "**M**" admonition; but I attributed that to their intense concentration. In my inexperience and zeal to cover every possible topic, I completely overlooked what I now realize were expressions of "deer in the headlights" panic.

As time passed, the number of "how to" tips I covered in my witness preparation sessions steadily declined from 26 until I settled on just two about 25 years ago. As I tried more cases, I begin to notice that almost every witness I saw questioned by a judge during trial looked directly at the judge, listened intently to the judge's questions, and gave wonderfully concise, direct, but complete answers. They were not sarcastic or argumentative, did not make light of the questions, or do any of the other bad things on my A to Z list. They were naturally excellent witnesses in that environment, even though, or perhaps because, it was extremely stressful.

Eventually, I realized if I could just put my witnesses into the same mindset when questioned by the opposing lawyer during a deposition or at trial that they naturally adopted when questioned by a judge, I would have nothing but all-star witnesses. I started pruning my "A" to "Z" list bit by bit as I looked for the keys to creating the mindset that came naturally to witnesses on the stand when questioned by a judge. I was amazed at how easy that ultimately turned out to be.

First, I learned from witness after witness, that I did not need to tell them how to answer a question if a judge asked it. Almost every witness inherently understood what responses were appropriate and what were not. Second, I discovered, not surprisingly, that witnesses focused much more intently the questions judges asked them during trial than on the questions lawyers asked them, whether during deposition or at trial. Putting the two observations together, I realized that to get the same quality of responses from my witnesses when questioned by a lawyer either in a deposition or at trial, as they naturally give when asked questions by judges during trial, I needed to get them to focus on the questions with the same intensity in both contexts. And then, they needed to answer the questions as if the judge was asking them. If they did that, the quality of their answers also would be the same.

Like any scientist intent upon proving or disproving a hypothesis, I begin testing mine. I started my witness preparation sessions by telling witnesses the story about how I used to ask witnesses to master the "A" to "Z's" of being a good witness; but I no longer did that. That was a good way to start out the preparation session, since immediately my witnesses felt a sense of relief and indebtedness to me for saving them from that fate. I then told them I had only 2 requests of them. But they would need to follow them religiously.

First, they had to listen to every question asked by the lawyer with the same degree of focus they would give to questions asked of them by the judge if they were on the witness stand at trial. I told them exactly how that could occur during trial. I made them envision themselves

(continued on page 11)

(continued from page 10)

on the witness stand, with the judge bent over the bench, looking down at them as she or he asked questions. I told them to think about how they would look at the judge, how they would see his or her lips moving and how they would strain to make sure they heard and understood every word. I would ask them to imagine the level of focus they would have, pushing every other noise or distraction out of their mind so there was nothing to interfere with their communication with the judge.

Next, I told them they had to answer every question exactly as they would answer it if it was the judge peering down from the bench at trial that was asking it. No matter what a jerk the questioning lawyer is or how much you detest him or her, just pretend the lawyer asking the question is the judge, and answer accordingly. If the judge was sarcastic, wouldn't you respond with humility in an attempt to temper that sarcasm, or with aggression that would simply enhance it? If a judge repeated the same question several times, wouldn't you give progressively more effort to explain your answer, rather than snap back, "You've already asked that question 3 times?" If a judge asked a stupid question, wouldn't you respond in a way that showed respect and tact, while trying to explain the judge's error?

Once we've discussed those 2 simple rules, it's time to put them to practice. And never is the cliché "practice makes perfect" more applicable than in witness preparation. While I can't say I am able to do this in every case with every witness, I've found that there is no substitute for videotaping practice sessions. I prefer to have another attorney in my office play the role of opposing counsel, while I am the video technician and commentator. But when necessary, I play both roles. We discuss the most problematic lines of questioning we anticipate, and how best to respond to them. We then practice the questions and the responses.

Whoever is asking the questions from my office attempts to duplicate the way we anticipate the questions will be asked by opposing counsel. There is no joking around. This is serious stuff. The witness is to answer exactly as he or she would in deposition or at trial. Typically, I like to go for several minutes without interruption. I take notes of answers that I want to discuss and

where on the tape they occur so I can find them quickly when we pause the questioning. After a topic has been covered, we stop. I rewind the tape, and play back those portions that illustrate either good or bad answers. We talk through how the witness could have answered the questions more effectively, using specific questions and answers to illustrate the critique. We then run through the process again and again until the witness is completely comfortable with that topic of inquiry. We then move on to the next.

During the process, I try to identify what I call "safe harbors" for each of the more difficult lines of questions, and for the testimony generally. These are responses that will always be helpful, and, in more difficult areas, may be essential for survival. For example, I have handled a number of cases in which my clients have alleged certain promises were or were not made, which allegations are contradicted by written agreements my clients have signed. We all know what questions to anticipate under these circumstances.

In one such case, the other party was my client's brother. He was prepared to respond to questions with answers that utilized the "safe harbor:" "He is my brother. It never occurred to me that I needed to read every word of the agreement before I signed it." During his preparation, I asked questions in a number of ways that called for him to utilize this "safe harbor." After a few practice runs, my client understood what a powerful defensive tool this was. The result was his confidence increased, as did the quality of his answers. During the deposition, time after time, questions designed to drive home the fact that my client signed documents contracting what he said was the real deal were not only neutralized, they became vehicles to emphasis the fiduciary nature of the brothers' relationship, and highlight how my client's brother had violated it.

During the preparation sessions, I also keep my eyes and ears open for times when the witness has violated one of the 2 basic rules I've

(continued on page 12)

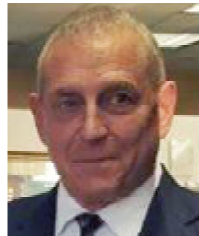
The "A" to "B" of Witness Preparation

(continued from page 11)

asked them to follow. Generally, all I have to do is play back the tape and say, "Is that the way you would have responded if the judge had asked that question?" and the witness immediately understands my point. As the session progresses, the need for me to remind the witness to follow the two rules always decreases, until eventually, it all but disappears. The witnesses simply "get it."

After using this technique for the past two decades, I no longer wonder if I adopted it because I became lazy, or wiser. I know it is that latter for two reasons. First, as it turns out, it is not easier. It takes a lot of hard work and discipline to force your witnesses to endure the practice sessions, even though they always recognize the value after they have been through one of them. And, second, I've come see the irrefutable wisdom in the process. It is absolutely amazing how much more effective instructions to witnesses are when I use both verbal and visual illustrations from the witnesses' own mock testimony. If I keep focusing the witness on the two fundamental rules to follow, listen carefully to the question and answer them as if the judge was asking them, and if we identify the witnesses' "safe harbors" during the process, my witnesses' confidence and the quality of their testimony increases remarkably–every single time.

But don't take my word for it. Try it yourself. But just not on a case in which I'm on the other side!



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Eight Annual Judicial Mixer Recap

By Alejandra Mendez

On June 27, 2017 the Judicial Advisory Board and Leadership Development Committee hosted the Eight Annual Judicial Mixer. The event was held at the offices of DLA Piper which allowed everyone to enjoy the best parts of San Diego – great lawyers, great views and great weather.

As this year's turnout showed, the Judicial Mixer is one of the more popular events, and it is not hard to see why. ABTL member attorneys, young and older, are treated to the rare opportunity to meet and mingle with our judiciary in a relaxed atmosphere.

Knowing that lawyers can talk "trial" amongst themselves all night long, the Judicial Advisory Board crafted a fun ice-breaker game at this event each year. I personally loved this opportunity to be "forced" to talk to judges knowing they are actually waiting for me ask them a question. No matter how many times I have appeared in front of a judge, it is daunting to walk up and talk to them at a networking event.

As this year's ice breaker, attorneys were encouraged to ask the members of our judiciary for "two truths and one alternative fact." I was assigned Justice Huffman. In a few short minutes we talked about his career, he asked about mine and, as I later found out, he lied quite a bit.

With Judge Trapp as master of ceremonies, the entire group was allowed to weigh in on the "facts" provided by Justice Huffman, Judge Crawford and Judge Barton. While Justice Huffman stumped me, most ABTL members were able to sniff out his alternative fact and that of the other judges.

After three years of attending this event, I can honestly say that it is one of my favorites. These ice-breakers have led to conversations with judges regarding the changes in the practice of law, their advice for success, and what they would like to see from attorneys in the future. For practical purposes, it is a little easier to walk into a courtroom and argue your motion or case to a face you recognize. And that is all thanks to the Judicial Mixer.

Alejandra Mendez is an associate in the Business Real Estate Practice Group at Kimball, Tirey & St. John. She assists clients with a variety of business and real estate litigation and transactional matters.

The views and opinions expressed in this newsletter are solely those of the authors. While these materials are intended to provide accurate and authoritative information in regard to the subject matter covered, they are designed for educational and informational purposes only. Nothing contained herein is to be construed as the rendering of legal advice for specific cases, and readers are responsible for obtaining such advice from their own legal counsel.

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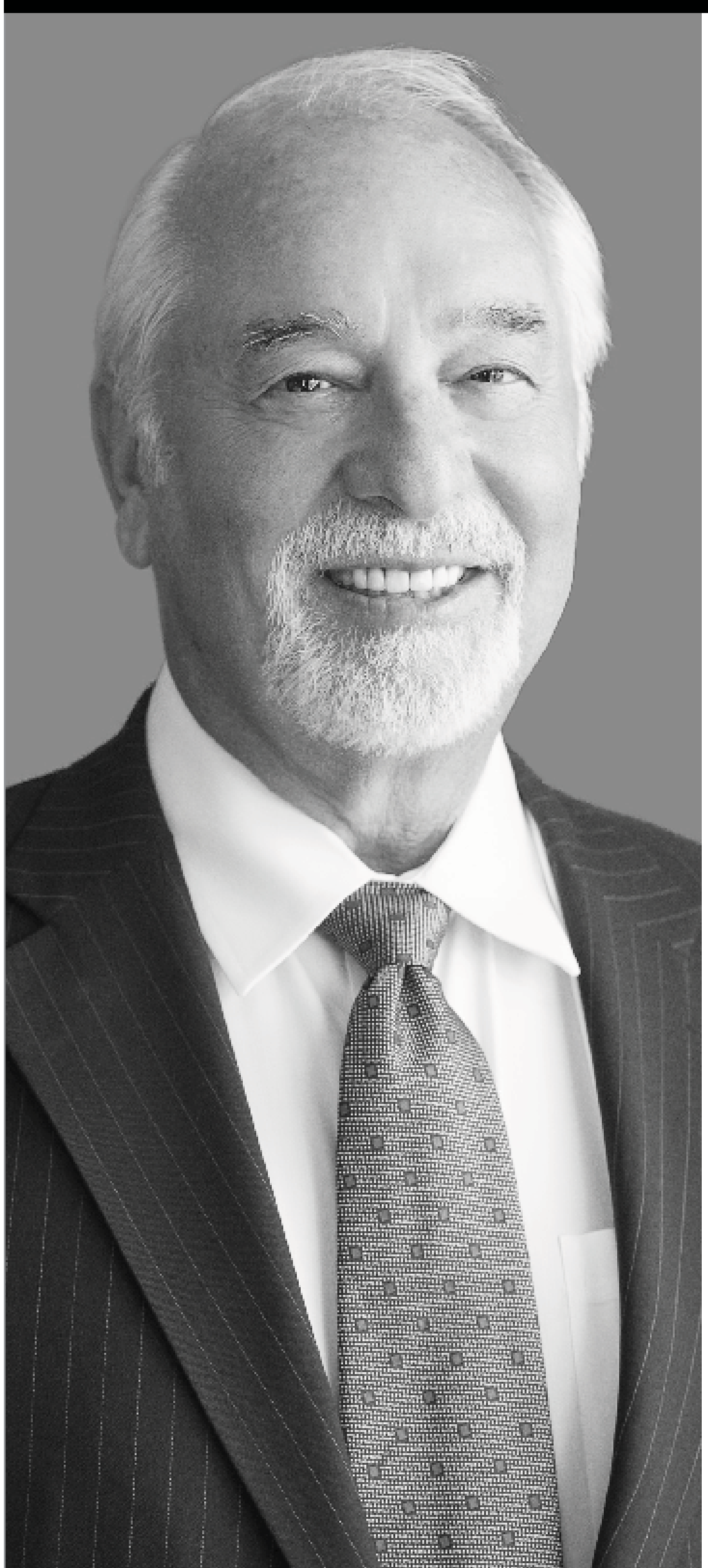

We congratulate Judge Pressman on his retirement from the San Diego Superior Court after more than 15 years of distinguished service where he handled a variety of complex civil matters.

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Crisis Management in Pre-Trial: Discovery Bombshells and How to Deal with Them

By Sara A. McClain

It is often said civil cases are won or lost in discovery. So how do you keep your case from imploding when a bombshell is dropped? In the second session of the Nuts and Bolts series, Hon. J. Richard Haden (Ret.), Amy Rose Martel, and Randy Grossman used personal experiences and anecdotes to illustrate how to effectively and ethically handle discovery bombshells.

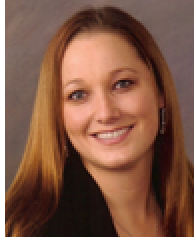
The panelists all agreed the best way to avoid such unpleasant surprises in discovery is preparation. That means meeting with your clients early in the case and having a candid discussion about both the good and bad facts. It also means counseling your clients on how to behave in public forums, such as social media. While it is improper to instruct your client to delete existing social media postings, there is nothing wrong with advising them to adjust their privacy settings so that the information is not easily accessible to opposing counsel. Even better would be advising them to cease any further postings so there is no harmful information to discover. As Judge Haden noted, it is important to explain to your client that you need to know everything. Opposing counsel is looking for harmful information and if it's out there, they will find it, whether it be on the internet, public records, or through a Sub-Rosa investigation.

It seems the most common place where bombshells are dropped is in deposition. Ms. Martel pointed out that pre-deposition preparation is critical, even if you have to go so far as cross-examining your own client. However, as the stories told by the panelists demonstrate, even thorough preparation cannot guarantee an uneventful deposition. The critical factor then becomes how you handle the crisis. As Mr. Grossman noted, thinking it cannot happen to you is dangerous so check your ego at the door and be prepared for what's next.

You need to decide whether the issue is something that can be resolved immediately with a quick discussion with your client off the record. If it is something more complex, deal with it later when you've had more time to reflect and research the available options and implications of same. A rush attempt to correct the problem may make the problem even worse. Do not be afraid to stop a deposition dead in its tracks and pull your client aside to get the issue resolved as this too can help contain the problem.

Expert depositions can be even more tricky than client depositions because rarely if ever can you instruct your expert not to answer a question. Here too the key is preparation. It is important to vet your experts before selecting them. It is also critical to prepare them for deposition because once the damage is done, your only remedy may be to be to de-designate the expert.

The big take away from the presentation is discovery bombshells are inevitable. The best way to avoid them is prepare, prepare, prepare. But when they rear their ugly head, be sure your attempt to resolve or at least diffuse the situation does not make the matter worse. At the very least, it will be a learning experience that will help prepare you for the next time a bomb is dropped.



Sara A. McClain is an associate with Shoecraft Burton, LLP. Her practice focuses primarily on defending insurance companies against claims for bad faith, fraud, unfair competition, and contribution. She is co-chair of the ABTL's Leadership Development Committee.

ABTL is always looking for articles geared toward business vs business litigation.

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Does *Bristol-Myers Squibb* Mark a Dramatic Shift in Specific Juristiction?

By William J. Doyle

On June 19, 2017, the United States Supreme Court issued its anticipated decision concerning the scope of a state court's personal jurisdiction over an out-of-state corporation. *Bristol-Myers Squibb Co. v. Superior Court,* 137 S. Ct. 1773 (2017). In the underlying mass action filed in California state court, the only related contact by nonresident Bristol-Myers Squibb identified in the record was its use of a California corporation, McKesson, to distribute the drug Plavix. The U.S. Supreme Court was unpersuaded by this singular contact, noting "[t]he bare fact that BMS contracted with a California distributor is not enough to establish personal jurisdiction in the State." *Id.* at 1777.

The California Supreme Court had relied on the similarity between resident and nonresident plaintiffs' claims, and Bristol-Myers' non-Plavix related California contacts, in finding specific jurisdiction appropriate. *Bristol-Myers v. Superior Court,* 1 Cal. 5th 783, 799 (2016). The California Supreme Court used a "sliding scale approach" where "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim." *Id.* at 806. Because Bristol-Myers had "purposefully directed" its activities to California via its non-Plavix related contacts, a more attenuated connection between Bristol-Myers's forum activities and nonresidents' Plavix-related claims would still support specific jurisdiction. *Id.* The California Supreme Court's use of this "sliding scale" is consistent with prior California precedent. See *Vons Companies, Inc. v. Seabest Foods, Inc.,* 14 Cal. 4th 434, 452 (1996) ("the intensity of forum contacts and the connection of the claim to those contacts are inversely related.").

In reversing, the U.S. Supreme Court held specific jurisdiction requires an "affiliation between the forum and the underlying controversy" and when "there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State." *Bristol-Myers,* 137 S. Ct. at 1781. In rejecting California's sliding scale approach, the U.S. Supreme Court noted, it "is difficult to square with our precedents." *Id.* The U.S. Supreme Court was concerned the specific jurisdiction requirement could become so relaxed it would permit specific jurisdiction where a defendant had contacts with the forum state, even if extensive, but unrelated to a plaintiff's claim. *Id.* Allegations of a contractual relationship with McKesson, without more, failed to provide the state court with specific jurisdiction over Bristol-Myers. *Bristol-Myers,* 137 S. Ct. at 1781.

The decision has been criticized for its lack of clarity, including failing to address its application to federal courts and class actions, creating confusion in the lower courts. See, e.g., *Broomfield v. Craft Brew Alliance, Inc.,* 2017 U.S. Dist. LEXIS 142572 (N.D. Cal. Sept. 1, 2017). The U.S. Supreme Court created this confusion by "leav[ing] open the question whether the Fifth Amendment imposes the same restrictions on … a federal court." *Bristol-Myers,* 137 S. Ct. at 1783-84. The Court also declined to address the decision's application "to a class action in which a plaintiff injured in the forum state seeks to represent a nationwide class of plaintiffs, not all

(continued on page 18)

(continued from page 17)

of whom were injured there." *Id.*, at 1789, n. 4. Another potential criticism is the opinion fails to explain why the allegation that Bristol-Myers contracted with a California corporation to distribute Plavix failed to satisfy the "relatedness" element, other than stating individual nonresident plaintiffs had not alleged with certainty whether McKesson distributed the Plavix they ingested. *Id.* at 1782.

This lack of clarity may lead some to argue specific jurisdiction now requires the nonresident defendant's in-state activities be the cause of a plaintiff's claim. The Court, however, was clear that a defendant's forum contacts need not be a cause of a plaintiff's injuries. Only "a connection between the forum and the specific claims at issue" is needed. *Bristol-Myers,* 137 S. Ct. at 1781. This connection exists when the suit "aris[es] out of or relate[s] to the defendant's contacts with the forum." *Id.* at 1780 (quoting *Daimler AG v. Baumann,* 134 S. Ct. 746, 754 (2014)). In her dissenting opinion, Justice Sotomayer noted the decision adopted no "rigid requirement that a defendant's in-state contact must actually cause a plaintiff's claim." *Id.* at 1788 (Sotomayer, J. *dissenting*). While contacts which are a cause of the injuries would likely suffice, it is not required.

It does not appear the U.S. Supreme Court created a jurisdictional bar to a state court presiding over claims by a nonresident plaintiff against a nonresident defendant if the requisite contacts with the forum state are present. This is consistent with the Court's decision in *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770 (1984), where the Court made clear the "plaintiff's residence in the forum state is not a separate requirement and lack of residence will not defeat jurisdiction established on the basis of defendant's contacts." *Id.* at 775. In *Walden v. Fiore,* 134 S. Ct. 1115 (2014), the Court reaffirmed a plaintiff's domicile or where the injury occurs is not determinative. Instead the focus is "on the relationship among the defendant, the forum, and the litigation." *Id.* at 1121. The majority opinion took care to distinguish *Bristol-Myers* from *Keeton* and *Walden* on factual grounds.

In Walden v. Fiore, 134 S. Ct. 1115 (2014), the Court reaffirmed a plaintiff's domicile or where the injury occurs is not determinative. Instead the focus is "on the relationship among the defendant, the forum, and the litigation." Id. at 1121. The majority opinion took care to distinguish Bristol-Myers from Keeton and Walden on factual grounds.

The U.S. Supreme Court provided examples which may meet specific jurisdiction requirements in similar cases. For instance, was the drug or device in question developed, manufactured, labeled or packaged in the forum state, were legal obligations fulfilled in the forum state, was the marketing strategy created in the forum state, or was regulatory approval or compliance worked on in the state. *Bristol-Myers,* 137 S. Ct. at 1777. The Court also said it may suffice if there are allegations a nonresident defendant and forum defendant "engaged in relevant acts together" in the forum state or allegations a nonresident defendant is derivatively liable for a forum defendant's conduct in the state. *Id.* at 1783. Thus, a conspiracy between or including the nonresident and resident defendant, aiding and abetting by the resident defendant, or joint duty or obligation may suffice under *Bristol-Myers* if the conduct relates to the alleged harm. The Court's discussion of secondary liability may also implicate contractual indemnification agreements between a nonresident defendant and forum defendant if related to the claim.

Recent district court decisions provide additional guidance as to what allegations meet the *Bristol-Myers* standard. In *Cortina v. Bristol-Myers Squibb Co.,* 2017 U.S. Dist. LEXIS 100437 (N.D. Cal. June 27, 2017), which found specific jurisdiction, the district court distinguished *Bristol-Myers,* noting the "Plaintiff alleges that nearly every pivotal clinical trial necessary for NDA approval involved studying of the Saxagliptin drugs throughout the State of California" and "but for" these clinical trials and NDA approval, the drug would not have been sold and

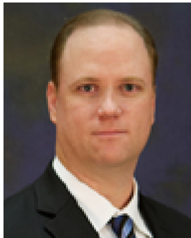
(continued on page 19)

(continued from page 18)

marketed to the plaintiff. *Id.* at *12-13; see also *Dubose v. Bristol-Myers Squibb Co.,* 2017 U.S. Dist. LEXIS 99504 (N.D. Cal. June 27, 2017). The Philadelphia Court of Common Pleas may soon issue a ruling about the sufficiency of contacts required for Pennsylvania to exercise jurisdiction over the pelvic mesh claims of nonresidents plaintiffs against nonresident Ethicon, Inc. Secant Medical, Inc., based in Pennsylvania, manufactured the mesh used by Ethicon in its pelvic mesh products. Plaintiffs allege Ethicon worked closely with Secant in Pennsylvania in designing, manufacturing and quality control of the mesh, and allege Secant was contractually bound to manufacture the mesh as directed by Ethicon. This included Ethicon's specifications for the mesh's properties (the weave, elasticity, mass and density), which are central issues in these pelvic mesh cases.

The fallout on state court mass tort litigation has also begun. On the heels of *Bristol-Myers,* nonresident defendants in traditional mass tort locations such as the Circuit Court of St. Louis, the Philadelphia Complex Litigation Courts, and the California state courts, removed cases and filed jurisdictional challenges to all nonresident plaintiffs, resulting in several dismissals for lack of personal jurisdiction. *See, e.g., Jinright v. Johnson & Johnson, Inc.,* 2017 U.S. Dist. LEXIS 139270 (E.D. Mo. Aug. 30, 2017). After *Bristol-Myers,* removal followed by an immediate motion to dismiss nonresident plaintiffs' claims for lack of personal jurisdiction has become commonplace.

Post *Bristol-Myers,* developing the jurisdictional factual record will be crucial, particularly in showing how a nonresident defendant's in-state conduct is tied to a plaintiff's out-of-state injury. *Bristol-Myers* is part of a narrowing trend in both general and specific jurisdiction. As Justice Sotomayor recognized, "[t]hree years ago, the Court imposed substantial curbs on the exercise of general jurisdiction in its decision in [*Daimler*]. Today, the Court takes its first step toward a similar contraction of specific jurisdiction." *Bristol-Myers,* 137 S. Ct. at 1784 (Sotomayor, J., *dissenting*). The recent decisions in *Daimler* and *Bristol-Myers* seem far removed from the seminal decision in *International Shoe Co. v. Washington,* 326 U.S. 310 (1945) where personal jurisdiction was determined by looking at a defendant's "***minimum contacts*** with [the State]" *Id.* at 316. While not a seismic shift in personal jurisdiction, the debate over specific jurisdictional is far from over.



William J. Doyle is President of Doyle APC, a law firm representing consumers in mass tort and class action lawsuits throughout the United States. *Special thanks to Christopher Cantrell, Esq. for his assistance with this article.*

Grim Financial Times for the San Diego Superior Court

By Judge Jeffrey Barton

"Infusing the minimum level of dollars into our courts to fund a minimum level of functioning is like keeping a dying tree propped up in the yard so the landscaping will look "normal" to a passerby: It is little more than pretense."

-Hon. Paul De Muniz (Oregon Supreme Court)

These are grim financial times for the San Diego Superior Court. The court must cut a minimum of $6 million from our operation due to revenue reductions and cost increases to meet the FY 2017/2018 budget. As over 80% of our budget is staff, we have to reduce staff and the services they provide in order to meet our budget. It is our projection that this trend will continue for the next few years and thus, we anticipate the need for further reductions in the near future.

To explain this situation, I must reluctantly get a bit into the weeds of the arcane world of court funding. San Diego is a donor court under the Workload Assessment Funding Model (WAFM) that the branch adopted four years ago to redistribute funds within the branch on a workload based model as opposed to the historical model dating back to the time of unification in the late 90's. Under WAFM, San Diego receives approximately 15% less trial court trust fund revenue than in the past. Each year more of the revenue is distributed pursuant to WAFM. In 2017/2018 an additional 10% of trial court revenue will be distributed per WAFM which results in a loss of over $1.7 million to our court.

At the end of 2017/2018, WAFM will be 70% rolled out and it is our estimation that the remaining 30% will continue to be rolled out over the next few years, resulting in continuing revenue losses to the court. The total further reductions could approach $10 million.

In addition, SDCERA, the pension fund for most court employees, reduced its expected rate of return by ¼ of one percent which increased our employer contribution amount by just short of $3 million. Unlike other state branches, we are not reimbursed for these expenses in the year we incur the expense. We are reimbursed one year in arrears. With our legislatively inflicted 1% cap on reserves, we no longer have reserves and have no ability to fund the expense with reserves and wait for the reimbursement. Thus, the deficit must be covered in the 2017/2018 budget year. SDCERA indicates that they expect to continue to reduce the rate of return over the next few years, resulting in a continuing series of cost increases for the court.

Local revenue income was down $1.3 million in FY 2016/2017 and this loss will continue and likely worsen in FY 2017/2018. This trend is reflective of the problem of funding ongoing core operations with "user fees" that the Chief Justice has addressed on several occasions. Finally, operational costs and expenses continue to increase. Thus, our $6 million estimate is conservative.

The result is that in FY 2017/2018 our total revenue is $30 million below what it was nine years ago in 2008 and costs are up. As a result, we have gone from over 1,500 staff in 2008 to just over 1,100 in 2017/2018. We are a much smaller court than we were nine years ago yet serve many more San Diegans in many more ways.

Our court made dramatic cuts in service in 2012/2013, including the closing of 1/3 of the civil courts in San Diego County. We have not recovered from those reductions in service and now must cut more. We are forced to cut the services that were deemed too painful to touch

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in 2012/2013. Thus, the most vulnerable populations we serve will be hurt by these service reductions.

We need to reduce the size of the court and consolidate operations so we can try and process more cases with fewer people.[1] We have 149 judicial officers and after these cuts we will be able to run 139 departments. Thus, we are reducing service locations, reducing commissioners and instituting a program of judges without staff who will provide coverage for judges who are out and function in limited ways without staff. We will be losing 70 full time staff members who have accepted a package to leave employment with the court. This includes 3 Commissioners.

Some of the more visible reductions are as follows:

- Eliminate student workers; Eliminate use of 120 day workers; consolidate small claims and imaging into the civil business office;
- Eliminate use of court reporters in family court except for contempt proceedings;
- Reduce commissioner positions;
- Close small claims and unlawful detainer departments in the North County branch and consolidate into downtown departments;
- Centralize juvenile dependency operations in Meadow Lark Juvenile Court by closing central and south bay dependency departments and opening one department in Meadow Lark. Close a juvenile delinquency department;
- Close a downtown civil department;
- Presiding Judge and Assistant Presiding judge share one clerk; Standing assignment of judges without staff.

Over the last 5 years our workload has increased while we have reduced staff and closed departments. While we do our best to minimize the damage, the effects on service are inescapable. The effects result in delays, reductions in access, increasing costs for court users and frustration for all. Vigorous and multilayered advocacy efforts with the legislative and executive branches have not led to funding restoration.

As a result, an inexorable process is underway that undermines the legitimacy of the judicial branch. Every day many members of the public deal with these effects. A public that faces delay, increased costs, lack of access, inconvenience and frustration when dealing with the court loses faith in the judicial branch.

As the judicial branch loses legitimacy, what happens to the future of the legal profession? What happens to the vulnerable members of society we serve?

Since his appointment to the Superior Court of San Diego County in 2001, Judge Jeffrey Barton has served rotations in criminal, family, and civil assignments. He served six years as supervising civil judge and was then elected to serve as the assistant presiding judge in 2014.

ENDNOTES

1 The new courthouse is funded with a small add-on civil filing fee under SB 1407. These are dedicated funds and cannot be used for operations.

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