ASSOCIATION OF BUSINESS TRIAL LAWYERS
SAN DIEGO

abtl REPORT

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Plaintiff and Defense Perspective on:

Class Action Waivers After The U.S. Supreme Court Decision In *AT&T v. Concepcion*

By Shannon Petersen, Esq. and Alan Mansfield, Esq.

On April 27, 2011, the U.S. Supreme Court held in *AT&T v. Concepcion* that the Federal Arbitration Act "preempts California's rule classifying most collective arbitration waivers in consumer contracts as unconscionable."[1] The Court referred to this rule as the "*Discover Bank* rule," after *Discover Bank v. Superior Court*.[2] In *Concepcion*, the Ninth Circuit Court of Appeals affirmed a trial court's finding, based on *Discover Bank*, that a class action waiver in a form arbitration agreement was unconscionable because 1) the contract was a contract of adhesion, 2) the damages at issue were small (averaging $30 per class member), and 3) the plaintiff alleged a scheme to cheat consumers out of small sums of money.

The U.S. Supreme Court reversed. Writing for a 5-4 majority (Justice Thomas wrote a concurrence), Justice Scalia concluded state laws that undermine the enforceability of class action waivers in consumer arbitration agreements improperly obstruct the FAA. The following is a defense and plaintiff perspective on the impact of *Concepcion*.

Discover Bank Is Dead: A View From The Defense

Shannon Petersen, Esq.

Concepcion fundamentally alters the law in California and elsewhere. In addition to *Discover Bank*, the Court's decision also necessarily overturns a host of California cases limiting the enforceability of class action waivers and restricting arbitration agreements on public policy grounds. While the Court's decision applies only to arbitration agreements written under the FAA, it is only a matter of time before

(see "Concepcion: Defense" on page 5)

The Sky Is Not Falling: A Plaintiff's Perspective

Alan M. Mansfield, Esq.

Public interest groups, business associations and plaintiffs' attorneys have either rejoiced or lamented, depending on their point of view, how *Concepcion* either protects businesses from predatory lawsuits or makes it impossible for consumers to obtain redress from predatory practices. While *Concepcion* holds it is a violation of the FAA to find an arbitration clause with a class action waiver provision in certain types of

(see "Concepcion: Plaintiff" on page 6)

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Hon. Anthony J. Battaglia
Judge,
U.S. District Court

Hon. M. Margaret McKeown
Circuit Judge,
U.S. 9th Cir. Ct. of Appeals
Panel Moderator

Join Chief Judge Irma Gonzalez, Judge Janis Sammartino, and Judge Anthony Battaglia for a candid discussion of how attorneys can best help their clients (and themselves) in the United States District Court for the Southern District of California. Moderator Judge Margaret McKeown of the 9th Circuit Court of Appeals will lead the discussion based on actual questions submitted by ABTL members. Get the judges' perspectives on issues ranging from supplemental disclosures under Rule 26 to motions in limine, scheduling orders to tentative rulings. Judge Gonzalez' role as Chief Judge, Judge Sammartino's prior experience as a Superior Court judge, and Judge Battaglia's prior experience as a Magistrate Judge provide a unique insight into common policies and practices in the Southern District, key differences between Federal and State court practices, and the complementary roles of the Magistrate and District Court judges. Whether you practice in the District Court exclusively or only occasionally, this is a program you cannot afford to miss!

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President's Letter

By Anna Roppo, Esq., President ABTL San Diego

"Court Funding, "State Funding," "Judicial Funding," "Court Administration" – over the past few months these are terms which we have heard with greater frequency and, for those of you that can find time to read, have also read in newspapers throughout the State. This President's letter is designed to raise the level of awareness regarding the critical issue of court funding. It is a hotbed of political debate. ABTL, as an organization, cannot and will not take a position on political issues, including this one. Nonetheless, it is important that we, as attorneys, stay informed and learn the facts so that we can vote intelligently when it comes time to do so. This column only scratches the surface, but I hope that it will be the catalyst for all of you, as individuals, to take action and to stay informed.

Anna Roppo, Esq.

Court funding impacts our business and the business of our clients.

We depend upon the operation and administration of the *judicial branch*, and we must make sure that it continues to operate efficiently and successfully. It simply cannot do so without adequate funding. The decisions relating to these issues are made by persons who are voted into office. We, as voters, have the right, and the obligation, to make our concerns known to our representatives.

Before writing this column, I asked for help. I needed facts about our courts in San Diego. I asked Judge William McAdam to point me in the right direction. He sent me to Mr. Mike Roddy. Mr. Roddy is the Executive Officer of the Superior Court of San Diego County. He presently serves on the State Judicial Council and is a member of the Council's Executive and Planning and Litigation Management Committees. He is also active on the Council's Court Emergency Response and Security Task Force, and the Commission for Impartial Courts Steering Committee. In short, Mr. Roddy is responsible for overseeing the administration of the San Diego County Superior Court. I also learned something that I had not known before, which is that the Superior Court has 1,450 employees. Wow.

According to Mr. Roddy:

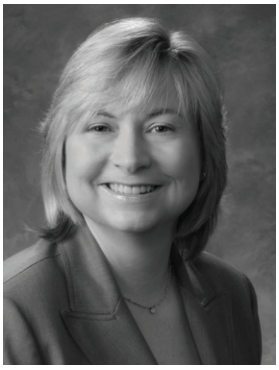
> The budget cuts suffered by the California trial courts have impacted the daily services provided to attorneys and the public in ways that may not be fully appreciated. Since personnel costs comprise, by far, the largest portion of court budgets, the steady erosion of base funding over the past three/four years has left virtually all courts with a workforce much smaller than before.
>
> The result of the continuing cutbacks has resulted in reductions in clerks' office hours, longer waiting lines in business offices, delays in filing and processing documents, delays in preparing and producing court orders after hearing, long waits for court services such as family mediation and probate court services, and for some courts delays

(see "President" on page 17)

Inside

Do You Want to Know a Secret? Recent Developments in California Trade Secret Law

By Nancy L. Stagg, Esq., Olga I. May, Esq., and Benjamin J. Morris, Esq.



Nancy L. Stagg, Esq.

Olga I. May, Esq.

Benjamin J. Morris, Esq.

Trade secret law has been a hot topic in California over the past few years. The following cases have significant implications for plaintiffs and defendants alike.

Whose Secret Is It? Trade Secrets and Employee Time

Trade secret issues often arise in the context of employment. If an employee conceives of an idea that becomes the basis of a trade secret, who owns the trade secret—the employee or the employer? Assignment agreements attempting to prevent related disputes are common, but not always successful.

In *Mattel, Inc. v. MGA Entertainment, Inc.,*[1] the Ninth Circuit Court of Appeals identified the two most pertinent questions related to employee invention assignment agreements: first, does the agreement encompass this type of intellectual property, and second, does it assign the property to the employer?

Mattel's employee conceived of an idea for the now-famous Bratz dolls and pitched the idea to MGA Entertainment. Mattel claimed the employee violated his employment and assignment agreement and sought the ownership rights to the Bratz line. The agreement assigned to Mattel the employee's inventions (defined as "discoveries, improvements, processes, developments, designs, know-how, data computer programs and formulae"), patents, copyrights, patent applications, and copyright applications conceived or reduced to practice "at any time during the employment." The employee claimed the assignment agreement did not cover "ideas" and that he created the Bratz doll concept outside of the scope of his employment at Mattel. The employee's job duties at Mattel included designing fashions and hair styles for Barbie, but not creating new doll lines.

The assignment agreement did not specifically list ideas, as distinguished from inventions. The district court originally found the assignment was broad enough to cover ideas, and also to cover ideas conceived during the entire period of time the employee worked at Mattel. The ninth circuit reversed and remanded, finding that the agreement was ambiguous as to whether it covered "ideas" and work outside of the scope of employment. Being ambiguous, the agreement required extrinsic evidence for the interpretation of its terms, such as the company's practices and other employees' understanding of the same agreement. After the remand, Mattel and MGA filed cross-motions for summary judgment regarding their interpretation of the assignment agreement. Having considered the extrinsic evidence presented with the motions, the district court denied both and left the issue for the jury. The jury awarded the Bratz copyright ownership and $88.4 million in damages to MGA.

Lesson? If you represent the employer, make the assignment agreement detailed. If you are the employee, or a competitor hiring another company's former employee, review the existing agreement with experienced litigation counsel to determine its scope.

Trade Secret Crime and Punishment Criminal Liability for Trade Secret Misappropriation

If the trade secret belongs to the employer,

(see "Trade Secrets" on page 8)

Concepcion: Defense

continued from page 1

form contracts across the country are re-written to provide for arbitration under the FAA and thus benefit from this decision.

According to the Court, the "overarching purpose" of the FAA "is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings."[3] This purpose trumps any state law designed to protect class action rights. The Court was unpersuaded by the rationale of *Discover Bank* that enforcing class action waivers in cases involving small sums of money will essentially kill such claims. As the dissent argued: "The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30."[4] The majority was untroubled: "The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."[5]

As Justice Thomas explained in his concurring opinion, "Contract defenses unrelated to the making of an agreement—such as public policy—could not be the basis for declining to enforce an arbitration clause."[6]

Under *Concepcion*, many other seminal California cases refusing to enforce arbitration clauses now share *Discover Bank*'s death, including *Gentry v. Superior Court*;[7] *Cruz v. Pacific Health Systems, Inc.*;[8] *Broughton v. Cigna Healthplans*;[9] and *Fisher v. DCH Temecula Imports LLC*,[10] among others.

In *Gentry*, the California Supreme Court held that in most cases an arbitration clause cannot be used to waive a statutory right. In *Fisher*, the court relied on *Gentry* and held that there is an unwaivable statutory right to a class action under the Consumers Legal Remedies Act (the CLRA). Both decisions are grounded in state public policy favoring class actions rights over a parties' agreement. Both are now out the window in light of *Concepcion*.

Similarly, in *Broughton* and *Cruz*, the

(see "Concepcion: Defense" on page 6)

Concepcion: Defense

continued from page 5

California Supreme Court held that claims for a public injunction under the CLRA and the Unfair Competition Law (the UCL) are not subject to arbitration. The Court in *Concepcion* rejected this approach as well. "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."[11]

Plaintiffs will try to work around *Concepcion*, but they have little room to maneuver. Though the FAA does not preempt "generally applicable contract defenses" such as fraud, duress, or unconscionability, a plaintiff can no longer argue that the class action waiver itself is unconscionable. Plaintiffs will continue to argue procedural unconscionability, but the Supreme Court did not think much of this argument either, holding that "the times in which consumer contracts were anything other than adhesive are long past."[12] Non-negotiable form contracts remain enforceable. For plaintiffs' class action counsel, the sky is indeed falling. ▲

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Concepcion: Plaintiff

continued from page 1

arbitration clauses *per se* unconscionable, as the dissent observed, the California Supreme Court had already held as much in *Discover Bank*: "[c]lass action and arbitration waivers are not, in the abstract, exculpatory clauses . . . We do not hold that all class action waivers are necessarily unconscionable."[13] Thus, the U.S. Supreme Court may have only overruled that which the California Supreme Court did not say.

The U.S. Supreme Court's ruling is also limited in that it focused primarily on attacking class action arbitrations under the FAA, not class action waivers generally. The Court conceded if such a clause had other unconscionable elements or defenses that did not apply only to arbitration, such a clause could be stricken without offending the FAA under its savings clause, which "permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability."[14] *Concepcion* leaves open whether a class action waiver provision in a non-interstate commerce case, or when combined with other unconscionable elements or defenses that are not solely arbitration-related, could still be invalidated.

The Court also recognized that, "Of course States remain free to take steps addressing the concerns that attend contracts of adhesion—for example, requiring class action-waiver provisions in adhesive arbitration agreements to be highlighted."[15] While this may be an avenue of pursuit in some cases, Defendants will counter that this only applies to laws created by legislation, and not judges, and that any such law cannot interfere with arbitration. Defendants will also argue that this footnote must be reconciled with the Court's own precedent in *Doctor's Associates, Inc. v. Casarotto*,[16] holding that the FAA preempted a Montana statute requiring all contracts containing arbitration provisions to provide notice of such on the first page in underlined and capitalized letters.

The U. S. Supreme Court also did not address a number of other key issues. For example, despite the defense's claim to the contrary, *Concepcion* does not alter the rule of *Broughton* or *Cruz* that claims for injunctions under the CLRA

(see "Concepcion: Plaintiff" on page 7)

continued from page 6

or UCL cannot be arbitrated because of the need for judicial oversight over a public injunction (in fact, the majority cited the lack of judicial oversight over a class action as one of the reasons for its holding). Nor did the Court address the holdings of *Gentry, Fisher*, and other California cases that an unwaivable statutory right to a class action exists under certain California statutes. Indeed, the U.S. Supreme Court expressly declined to review *Gentry* several years ago. It and its progeny remain good law.[17] Unless the U.S. Supreme Court decides to undertake a wholesale review of California law, significant questions as to the scope of *Concepcion* remain.

Nor did the Court address class action waivers outside the context of arbitration agreements. California precedent remains unaltered in such circumstances. The Court also did not address the so-called "poison pill" provision contained in many arbitration agreements—that if a class action waiver is found to be unenforceable for any reason, the entire arbitration clause is unenforceable. While arguably such provisions are not enforceable, it remains to be seen how courts will address these issues.

Finally, there is the possibility *Concepcion* will be short-lived. In an ironic twist (since they likely have much more bargaining power than consumers ever will), since 2002 car dealers have been exempt from arbitration clauses altogether for claims by and against car manufacturers under the "Motor Vehicle Franchise Contract Arbitration Fairness Act."[18] The Act was necessary, according to the legislative history, because of "the disparity in bargaining power between motor vehicle dealers and manufacturers," and because motor vehicle franchise agreements "are inherently coercive and one-sided contracts of adhesion." An argument is being advanced that, if this was the justification for imposing a legislative exemption under the FAA for car dealers, the same protections should apply to all consumers. In fact, on May 17, 2011, a trio of Democratic Senators introduced a bill in Congress called the "Federal Arbitration Fairness Act" that would eliminate forced arbitration clauses in consumer and employment contracts. There are other arbitration exemptions as well, such as in the insurance and residential mortgage loan context.

Has the sky fallen, just as pundits claimed with passage of the PSLRA, CAFA and Proposition 64? Likely no—just tell plaintiffs the height of the bar and they'll adjust to hurdle it. But we agree it will take years for plaintiffs, defendants, and the courts to sort out the limits of *Concepcion* and its application to established California authority. ▲

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Mr. Mansfield is the founder of the Consumer Law Group of California, where he specializes in national consumer class action and public interest litigation.

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1. *563* U.S. ___, 131 S.Ct 1740, 1746 (Apr. 27, 2011)
2. 36 Cal.4th 148 (2005)
3. *Id*. at 1748.
4. *Id*. at 1761.
5. *Id*. at 1753.
6. *Id*. at 1755.
7. 42 Cal. 4th 443 (2007) (*cert. den.* 128 S. Ct. 1743, Mar. 31, 2008)
8. 30 Cal. 4th 303, 316 (2003)
9. 21 Cal. 4th 1066, 1082 (1999)
10. 187 Cal. App. 4th 601 (2010)
11. *Concepcion*,131 S.Ct. at 1747
12. *Id*. at 1750.
13. 36 Cal.4th at 161-62
14. *Concepcion* at 1746.
15. *Id*. at 1750, n.6
16. 517 U.S. 681 (1996)
17. *See also Gutierrez v. AutoWest, Inc*., 114 Cal.App.4th 77, 95 (2003) ("plaintiffs are entitled to contest the arbitration clause on the basis that it is a private agreement in contravention of public rights—a separate, generally available contract defense not preempted by the FAA")*; America Online, Inc. v. Superior Ct*., 90 Cal.App.4th 1, 17-18 (2001); *Cf. Piccardi v. Eighth Jud. Dist*., 127 Nev. Adv. Rpt. 9 (Nev. Supr. Ct., dated March 31, 2011) (holding provision that waived consumer protections under Nevada statutory law unenforceable, even under FAA, citing *Fisher)*
18. 15 U.S.C. § 1221 *et seq*.

continued from page 4

unauthorized access by an employee or third party may result in criminal liability. On April 28, 2011, the ninth circuit held that the Computer Fraud and Abuse Act (CFAA),[2] designed to combat computer hacking, can be used against individuals who improperly access a company's trade secrets using a computer.[3] The CFAA imposes criminal liability on persons who access a computer knowingly and with intent to defraud, without or in excess of authorization, and through this conduct further the intended fraud and obtain something of certain value.[4] The CFAA also provides for a private right of action.

In *Nosal*, the criminal indictment alleged that the defendant, a former employee of an executive search firm, engaged three of the firm's employees to help him start a competing business. The employees used their firm accounts to access the firm's computer system and transfer the firm's trade secrets. All of the firm's employees had signed agreements restricting the use and disclosure of this information except for legitimate firm business.

The ninth circuit's decision turned on the interpretation of "without authorization or in excess of authorized access" in the CFAA. The district court had dismissed the indictment based on an earlier decision in *LVRC Holdings LLC v. Brekka,*[5] which held that an employee e-mailing company documents from his work computer to his personal account did not violate CFAA. Brekka did not have any agreement with his employer that restricted his computer access, and had full access to the company computer.

The ninth circuit in *Nosal* found that the district court misinterpreted *Brekka*. According to the ninth circuit, *Brekka* held that it is the employer's actions that determine whether an employee acts without authorization. Because Brekka's employer did not impose computer use restrictions, Brekka did not violate CFAA. In contrast, the employer in *Nosal* had placed restrictions on the employees' access, the employees violated those restrictions, and thus violated CFAA.

The ninth circuit commented that its holding does not make criminals out of countless employees who may use their work computers for personal purposes, such as to access their personal e-mail. Under §1030(a)(4), an employee is liable only if the employee: (1) violates an employer's restriction on computer access, (2) with an intent to defraud, and (3) by that action furthers the intended fraud and obtains anything of value.

Lesson? Because the CFAA test is fact-sensitive, employers should clarify any restrictions on computer access, and employees—to exercise caution in using company computers.

(see "Trade Secrets" on page 9)

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 other reasons, 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.

Trade Secrets

continued from page 8

Once a Secret, Always a Secret? Preemption Under the California Trade Secret Act

The California Trade Secret Act, Cal. Civ. Code §§ 3246, *et seq.* (CUTSA) provides that it does not affect contractual or "other civil remedies that are not based upon misappropriation of a trade secret." This language left it to the courts to define what claims are "based upon misappropriation of a trade secret" and thus preempted by the statute. Since CUTSA's enactment, California courts have been taking an increasingly broad view of CUTSA's preemption, rejecting plaintiffs' attempts to plead around CUTSA by alleging common law claims, such as conversion of confidential information.

In *K.C. Multimedia, Inc. v. Bank of America Technology & Operations, Inc.*,[6] the California court of appeal held that the purpose of CUTSA was to provide uniformity in determinations of trade secret claims, including the definition of trade secrets and trade secret misappropriation, as well as a single statute of limitations for the various claims that had protected trade-secret-related interests before CUTSA was enacted. CUTSA defines the key terms, provides the remedies, spells out methods for preserving trade secrets, and sets forth the limitations period. Given this comprehensive legislative effort to designate CUTSA as the vehicle governing trade secret misappropriation claims, CUTSA would be rendered meaningless if it did not preempt pre-existing common law claims. This analysis made unavoidable the conclusion that CUTSA preempts all common law claims based on the same nucleus of facts as the misappropriation of trade secret claims.

The court of appeal again addressed CUTSA preemption in detail in *Silvaco Data Systems v. Intel Corp*,[7] This decision reaffirmed that CUTSA provides the exclusive civil remedy for conduct falling within its terms and supersedes other civil remedies based upon misappropriation of a trade secret. The court of appeal reasoned that information is not property unless some law makes it so. Therefore, if the plaintiff

(see "Trade Secrets" on page 10)

Trade Secrets

continued from page 9

identifies no property right outside of trade secret law, the plaintiff has no remedy outside that law, and there is nothing "unsound or unjust" in holding other theories superseded.

Since *K.C. Multimedia* and *Silvaco*, both California state and federal courts have steadily found broad CUTSA preemption of claims based on latent allegations of trade secret misappropriation. Recently, courts have taken the next logical step: finding CUTSA preemption where the plaintiff alleges misappropriation not specifically of a trade secret, but of confidential—or nonpublic—information. In a sweeping-reach decision in *Mattel, Inc. v. MGA Entertainment, Inc.*,[8] the court, relying on *Silvaco*, reiterated that information is not property unless some law makes it so, and that California law recognizes no property right in confidential information outside of trade secrets law. Thus the court concluded that CUTSA supersedes *any* common law claim based on misappropriation of confidential information, regardless of whether that information meets the statutory definition of a trade secret.

Lesson? CUTSA reigns supreme in California. If you represent the plaintiff, make sure you state a well-founded CUTSA claim. If you represent the defendant, make sure you assert CUTSA preemption as a defense to any non-CUTSA claims based on facts alleging trade secret misappropriation, however artfully pleaded.

Know Your Secrets Well "Reasonable Particularity" Requirement under §2019.210

A trade secret plaintiff must be able to articulate any alleged secrets before bringing suit. California has a gate-keeping statute, Code of Civil Procedure section 2019.210, and this statute has teeth. Section 2019.210 prohibits a plaintiff alleging trade secret misappropriation from conducting related discovery until the plaintiff identifies the alleged secrets with "reasonable particularity." What exactly is "reasonable particularity" has been the subject of three decisions by the California courts of appeal. These courts paid close attention to the purposes of section 2019.210 which are:

- promoting well-investigated claims and dissuading the filing of meritless trade secret complaints;
- preventing plaintiffs from using the discovery process as a means to obtain the defendant's trade secrets;
- assisting the court in framing the appropriate scope of discovery; and
- enabling defendants to form complete and well-reasoned defenses without waiting until the eve of trial.

First, in *Advanced Modular Sputtering, Inc. v. Superior Court*,[9] the court of appeal described the trade secret plaintiff's required showing as "reasonable, i.e., fair, proper, just and rational." The plaintiff needs to do at least two things: 1) define the boundaries of the alleged secrets; and 2) distinguish the alleged secrets from matters generally known in the field. If the field is highly technical and trade secrets consist of incremental advances, the level of particularity may be heightened. Although the plaintiff does not need to disclose every minute detail of the alleged secrets, the designation must satisfy the purposes of section 2019.210.

Second, in *Brescia v. Angelin*,[10] the court of appeal clarified that the requirement to distinguish the alleged secrets from matters already known depends on whether the plaintiff sufficiently defined the boundaries of the alleged secrets. If the designation permits the defendant to prepare defenses and permits the court to craft discovery, additional detail distinguishing the secrets from matters already known may not be required. *Brescia* made it clear, however, that the plaintiff cannot hide the designation in a voluminous production of documents attached to the trade secret statement.

Third, in *Perlan Therapeutics, Inc. v. Superior Court*,[11] the court of appeal held that the trial court has broad discretion to determine whether the "reasonable particularity" standard announced in the *Advanced Modular* and *Brescia* cases is met. The court also held that open-ended language and unilateral reservations of the right to amend the designation—without good cause—are prohibited.

Lesson? These cases set the current stan-

(see "Trade Secrets" on page 11)

continued from page 10

dard for the "reasonable particularity" requirement of section 2019.210. If you represent the plaintiff, prepare and critically review the designation before filing suit. If you represent the defendant, determine whether the trade secret statement allows your client to prepare a defense. If it does not, immediately seek court assistance in resolving the issue.

Conclusion

California leads the nation in developing intellectual property while promoting employee mobility. The cases above show that it is not enough to know the language of CUTSA, but is essential to stay up to date on the case law that interprets this language. ▲

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1. 616 F.3d 904 (2010)
2. 18 U.S.C. § 1030
3. *See U.S. v. Nosal*, --F.3d--, 2011 WL 1585600, 2 (9th Cir. Apr. 28, 2011)
4. 18 U.S.C. § 1030(a)(4)
5. 581 F.3d 1127 (9th Cir. 2009)
6. 171 Cal.App.4th 939 (2009)
7. 184 Cal.App.4th 210 (2010)
8. F.Supp.2d, 2011 WL 1114250 (C.D. Cal. Jan. 5, 2011)
9. 132 Cal.App.4th 826 (2005)
10. 172 Cal.App.4th 133 (2009)
11. 178 Cal.App.4th 1333 (2009)

Tips From The Trenches: How To Make A Great (Or Awful) First Impression On The Judge

By Mark C. Mazzarella, Esq.

Mark Mazzarella, Esq.

As some of you may recall from the genesis of *"Tips From the Trenches,"* the objective of each article is to help fill the void in today's lawyers' training that once was met by mentors — those women and men who were not only willing to provide sage advice to the uninitiated, but also kept watch over them as they tested their wings, correcting their missteps, and pointing them in the right direction whenever they strayed from the course, which occurred frequently. These legal priests and priestesses spoke with such authority and credibility that, in those days, their advice was treasured always, and contested only by those few who believed they were blessed from the womb with unsurpassed talent and intelligence.

Time has changed not only the accessibility of mentors to the average attorney, but, sadly, the awareness by many of the need for and benefits of mentorship. When given advice, it is as common today to reject it as uninformed, inhibiting, or old-fashioned, as it is to heed it without question. In today's world, what is learned in college is largely obsolete within five years. There is almost nothing that isn't constantly evolving at an unnerving pace. We no sooner learn how to program our cell phones than they are replaced with a new generation that present totally new options, and require entirely new skills to navigate. It is easy to understand the temptation to believe that there are no longer any "constants" in life, no "truisms" that are true for more than a blink of an eye.

But whether or not that attitude is warranted in other contexts, it isn't in one sphere, the

(see "Tips" on page 13)

Tips

continued from page 12

one in which we, as trial lawyers, must excel. The fact is, the way we as humans respond to one another hasn't changed all that much since we first started recording human interaction 5,000 years ago. And, the importance of making a good first impression in court today is just as important as it was at the Forum in Socrates' day.

In the process of writing *Put Your Best Foot Forward* (Simon & Schuster 2000) with jury consultant Jo-Ellan Dimitrius, we conducted extensive research regarding what characteristics favorably, and negatively, impact the impressions we make upon one another. Our focus in that book was not just the courtroom, although we concluded that the courtroom was not much different than other similar environments. For this article, I attempted to refine, and considerably condense, that project by asking the present and former judicial members of ABTL-San Diego's Board of Governors to list the five characteristics of attorneys that (1) favorably and (2) negatively impact a first impression of them. Not surprisingly, the "favorable" and "negative" traits were usually mirror images of one another.

With the judges' comments in mind, what follows is a description of a typical court appearance by Jane Doe attorney, who graduated first in her class at "Impression Management University," and her fraternal twin, John Doe, who was convinced "the old guys" at IMU had nothing to teach him, and it shows. While I have not listed the "do's" and "don'ts" that consistently were identified by the judges who responded to our survey, they are obvious. The key to this exercise in mentorship is not whether you can identify them; it lies in how well you will apply them to your own practice.

The hearing was set for 9:00 a.m. Jane arrived 10 minutes early to assure that she had plenty of time to check in, go to the restroom to make sure her hair was not messed up by the wind as she walked to the courthouse, her blouse was tucked in neatly, her collar was properly positioned and her makeup applied in that unnoticeable way she had learned at IMU. She looked like the consummate professional in her navy blue suit and cream colored blouse. When she returned to the courtroom she reviewed her argument, organized her papers, and made certain that she could quickly access anything she might need during the hearing. With that done, she settled in, relaxed, and mentally prepared to present her argument as she sat up straight in her chair and watched the courtroom goings on.

John burst through the courtroom door just as the judge was calling the morning calendar. His hair was a mess, his shiny tie loose, and his brightly colored shirt partially untucked and even more wrinkled than his sport coat and slacks. When the judge glanced up, her first thought was that he must have slept in his clothes after a late night out. John rushed over to the bailiff, saying loudly enough for all to hear, "Hey, John, how's it going. I'm on number 16." After a brief pause during which the bailiff whispered to John, John responded: "I represent the defendant. I don't remember his name." As he shuffled through his wallet, John laughed: "Sorry, I guess I gave my last card to the waitress last night, ha ha." After forcing several other attorneys to stand while he slid past on his way to a vacant seat, John sat down and began rummaging through his briefcase until he finally pulled out pleadings on the morning's motion and began shuffling through them. The judge's occasional glances his way were coupled with a noticeable frown.

When the judge called, "number 16, Smith vs. Jones," Jane stood up, brief case at the ready, and walked briskly to counsel's table. As she set her briefcase down on the table, she announced clearly and distinctly, "Jane Doe, for plaintiffs, John Smith and Amanda Forzehema, that's spelled F-O-R-Z-E-H-E-M-A." Taking her eyes off the judge only long enough to pull her papers from her briefcase, place them on the table neatly in front of her, close her briefcase, and set it on the floor beside her, Jane remained standing. By any measure, she looked ready, confident, and extremely capable. Everyone in the courtroom had good reason to expect a top flight, organized and entirely credible argument from her.

John's delayed response when the judge

(see "Tips" on page 14)

continued from page 13

called "number 16" surprised no one, including the judge, since it was obvious that he was scrambling to finish reading the pleadings. He threw his stacks of papers in a heap in the middle of his briefcase, and banged his way past the other attorneys in his row of seats, hugging his briefcase to keep his papers from falling to the floor. When he arrived at counsel's table, he dropped the briefcase on the table with a thud. As he sat he down to sort out the mess in front of him, he mumbled, without ever looking up, "John Doe for the defendant." The judge thought to herself, "It's a good thing this guy isn't the moving party. Maybe by the time Ms. Doe has made her argument, he'll have his act together enough that his argument won't be a total waste of everyone's time."

As the judge looked at Jane and said, "Ms. Doe, you may proceed," Jane walked to the lecturn, set her notes down on the right side and the carefully tabbed notebook containing the pleadings and their exhibits just to their left. She began formally, "Thank you your honor," speaking with a clear, confident voice, while maintaining excellent eye contact. Her posture, gestures and energy further conveyed her enthusiasm and positive attitude. Her argument was clear and organized. As she referenced supporting authority, or the content of exhibits to the motion, she reached over to the notebook on the left side of the podium and turned to them with ease.

As Jane made one of her more important points, John interrupted. Still sitting down, glancing first to the bench, then to Jane and finally back at the notepad on which he had been frantically scribbling, he said, "That's not correct and, Jane, you know it." "Hold on counsel," the judge snapped. "You'll get your turn." When Jane finished her argument, she collected her notes and notebook, and returned to counsel table, where she sat quietly taking notes during John's argument.

John set the tone and focus of his argument immediately. As he continued to sit at counsel table, still fumbling through the papers before him, he began, "Once again, Ms. Doe has distorted the facts and the law beyond recognition.' As he continued, the judge felt compelled to ask John to speak up due to John's incessant mumbling and the fluctuations in the volume of his voice as he turned his head down to read his notes.

His argument was as disheveled as his appearance. Long awkward pauses occurred each time he sought to extract a note or exhibit from the stacks of paper on the table before him. During one awkward moment, the judge asked John to address the relevance of one of the cases upon which Jane relied. John responded, "I'll get to that later," but never did.

He concluded his presentation as effectively as he had begun. "Judge, Ms. Doe has tried to confuse you. I know a judge with your considerable abilities won't fall for that, and that you'll deny her motion."

While it is true that judges theoretically decide cases on the facts and the law alone, the fact is, beneath those black robes are human beings, with the same psychological, emotional, physiological and neurological make up as the rest of us. They may be more disciplined as a result of their education, training, experience and pre-disposition. But nobody without pointy ears and a funny haircut can set emotion aside entirely, and rely only on logic. As any marketer will confirm, we all "buy on emotion, and justify with logic" to one extent or another. Judges will not only be able to focus upon and understand your message better if you present your arguments more effectively, they will be more inclined to do so if you present yourself more effectively.

With apologies to the ad folks at Nike, next time you go to court, don't question the wisdom of the judges who have for generations described, in essentially the same way, how a lawyer can make a great impression on the judges before whom he or she appears, JUST DO IT!!!!

Special thanks to the judiciary who contributed to this article. ▲

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Motions for Summary Judgment/Adjudication: Perspectives From the Bench

By Daniel C. Gunning, Esq.

On April 27, 2011, the distinguished panel of U.S. District Court Judge Dana Sabraw, San Diego Superior Court Judge Richard Haden (Ret.) and former federal clerk Amanda Fitzsimmons presented and discussed their perspectives on preparing motions for summary judgment. The discussion was moderated by Colin Murray, a partner with Baker & McKenzie LLP, and presented by the ABTL Leadership Development Committee. The panelists shared helpful tips on preparing motions for summary judgment in state and federal court.

Daniel C. Gunning, Esq.

Keeping your Briefs Concise and Easy to Read

It is well known that federal and state courts are incredibly busy. Judge Haden reported that state courts typically have 3 to 5 significant demurrers and/or motions for summary judgment on calendar each week. These must be read in between jury trials and motion hearings. Federal courts are no different, Judge Sabraw said. Each Southern District docket consists of approximately 600 cases – 400 criminal and 200 civil. With these facts in mind, the panelists agreed that keeping the motion concise, to the point, and easy to follow is of the utmost importance.

The table of contents and argument headings should easily navigate the reader through the issues. It is also helpful to include a short introduction or executive summary at the beginning of the brief. Put the best arguments first. Since the judge is well versed in Code of Civil Procedure section 437(c) and Federal Rules of Civil Procedure, Rule 56, a short and concise legal standard is appropriate. Exhibits should be appropriately tabbed and easy to navigate. Avoid string citations by citing only to the best authority.

Finally, shorter motions are inviting to the reader, so focus the brief on the key issues in dispute. The opposition should identify and focus the court on the issues of material fact. The reply brief should refocus the court's attention on the evidence and issues that are most important to the motion, redirect the reader to the evidence not in dispute and explain why that evidence entitles the moving party to summary judgment.

Separate Statement of Material Facts

In state court, a separate statement of material facts is required pursuant to California Rule of Court 3.1350. In the Southern District of California, a separate statement of material facts is only required "where appropriate." L.R. 7.1(f)(1). In determining whether it is appropriate to file a separate statement in federal court, the panelists advised checking the judge's chamber rules.

The panelists agreed that if done correctly, a separate statement can be very helpful to the Court. Separate statements should avoid legal conclusions and use pinpoint citations to evidence submitted with the motion. For example, cite specifically to the line and page of the deposition being referenced.

Moreover, it is important to not mislead or cite evidence that does not stand for the fact

(see "Summary" on page 16)

Summary

continued from page 15

asserted. The separate statement will be completely disregarded and useless to the judge if credibility is lost.

Oral Argument

In federal court, many cases are decided on the papers without the need for oral argument. If the issues are close or need clarification, oral argument will typically be held. In state court, oral argument is required to be held unless the parties submit on the tentative ruling.

The panelists agreed that attorneys should be prepared to answer questions on the key issues, as well as be prepared to give a narrative summation. Judge Sabraw advised oral advocates to welcome questions posed by the judge and to answer those questions directly and succinctly. He instructed that oral arguments should address weaknesses and highlight strengths.

Judge Haden said that even if a tentative ruling is made in your favor, use oral argument as an opportunity to reaffirm the judge's initial thoughts. In these circumstances, succinctly make your point and address why the judge is correct. When the tentative ruling is not in your favor, use the argument as a chance to educate the judge. Present the argument in a different manner or new light.

Judge Sabraw said that on more complicated motions for summary judgment, demonstratives or powerpoint presentations may be helpful. Demonstratives can be useful in guiding the court through the argument. ▲

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continued from page 3

> in the scheduling of court hearings. In San Diego specifically, backlogs in our civil business offices reached a point where default judgments last year were taking more than six months to process. This intolerable delay has been addressed this year with the addition of some temporary workers, but the gains we have been able to achieve are in jeopardy if the suggested cuts contained in the Governor's proposed budget for FY 2011-12 are implemented.
>
> These delays directly impact on access to the courts and thereby access to justice and should be of concern to all those who use our court system.

We have all experienced what Mr. Roddy is talking about, haven't we?

Judge McAdam also pointed me in the direction of Ms. Karen Dalton, who is in charge of the Public Affairs Office for the San Diego Superior Court. She added the following:

> Budget cutbacks could . . . imperil the day-to-day workings of the court for attorneys by:
>
> • Imperiling efforts to modernize the court infrastructure (technology and facilities).
>
> • Reducing court employee resources needed to timely and accurately process filings, documents and judgments.
>
> • Threatening initiatives, like grants to provide access or improved access to court users who cannot hire attorneys.
>
> • Curtailing initiatives to expand interpreter services to those who cannot speak/understand English.

Dalton also said, "the court budget cuts impact the public's perception of the legal profession and the courts: long processing/filing times, long lines and delayed hearings impact the public's perception and confidence that justice is conducted in an expeditious manner and with full access. Further budget cuts will certainly make expediency a thing of the past.

The legal system rests on a foundation of public trust and confidence. While a majority of people gain their perceptions of the legal system from a distance (media reports), those who actually engage in the system (attorneys, plaintiffs, defendants, jurors) are and will be directly affected by the changes brought by the budget cuts which have and will continue to mold negative perceptions which will take years to change, if at all."

Judge McAdam also suggested I contact Judge Laura Parsky, who is very active on a State level, concerning how statewide budget issues might affect our local judicial system. Judge Parsky gave me information about a Bill which is presently moving through the State legislature – AB 1208 which deals with appropriation of money to the judicial branch. It requires the legislature to provide funding for statewide court issues (before funding is sent on to the local courts) and 66% of judges state-wide must approve the Judicial Council's withholding of any money from trial court operations to spend on "statewide information technology and administrative infrastructure expenses."

In terms of how state-wide budget issues might affect the local bar, Judge Parsky said "it is important to understand that, when it comes to judicial administration and resources, the true stakeholders are the lawyers and parties who utilize our courts. Whether it's hours (or days) of operation, new facilities, or information technology, the end users are the bar and the public. It is critical that local attorneys stay aware and active in these debates over court budgets and governance."

Need I say more? Yes, and you will hear from me again on this issue. It is too important to our business and to our clients to ignore it. Please, stay informed, stay involved, and make some noise.

Thanks to Judge William McAdam, Judge Laura Parsky, Mike Roddy and Karen Dalton for their continued hard work to serve the public and the justice system. This column would not have been possible without them. ▲

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