ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO

abtl REPORT

Volume XVIV No. 2 *Summer 2012*

Brown Bag Lunch: Inside the Courtroom of Judge Cathy Ann Bencivengo

By: Matthew A. Tessieri

On February 27, 2012, the Federal Bar Association sponsored a brown bag luncheon at the federal courthouse with recently appointed Judge Cathy Ann Bencivengo. Some of Judge Bencivengo's law clerks were also present and participated in the discussion. The luncheon offered a unique opportunity for local attorneys to interact with Judge Bencivengo, to discuss matters of interest related to their practice and for Judge Bencivengo to explain both the procedures she will utilize in her courtroom and her preferences on certain issues.

Judge Cathy Ann Bencivengo

Judge Bencivengo was confirmed by the Senate on February 9, 2012. Since her confirmation, Judge Bencivengo has been in a transition phase from her former role as a magistrate judge. She is currently handling approximately 200 active cases—mainly civil matters that were transferred to her from other district judges. She expects that as she is assigned additional new cases, the volume of criminal matters on her docket will substantially increase.

Background

In 2005, Judge Bencivengo was appointed to the bench as a magistrate judge for the Southern District of California. Before she was appointed a magistrate judge, Judge Bencivengo practiced law for seventeen years at Gray Cary/

(see "Judge Bencivengo" on page 10)

Making the Record: Objections: When and How to Make Them

By Kate Mayer Mangan

This is the second in a series of articles that present tips and information that trial lawyers can use to set up their cases for success on appeal. Please look for the column in future issues of the ABTL Report.

"I object. It is after 5 o'clock." [1]

"Objection, your honor. She knows the answer to that question." (Sustained.) [2]

Kate Mayer Mangan

Funny as these actual objections are, objections are no laughing matter on appeal. In fact, failure to object properly often dooms an otherwise strong appellate issue. This article addresses when and how to object in common situations.[3]

(see "Making the Record" on page 16)

Inside

ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl®

39th Annual Seminar September 19 - 23, 2012

Please join us for an intimate interview with

CHIEF JUSTICE TANI CANTIL-SAKAUYE

by Justice Richard Huffman

GRAND HYATT KAUAI® RESORT & SPA

President's Letter

Celebrating ABTL Members' Public Service

By Hon. M. Margaret McKeown

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

Hon. M. Margaret McKeown

The practice of law is a service profession. Although the bread and butter of the business practice is serving paying clients, many lawyers have taken to heart the broader service aspect of our profession, contributing countless pro bono and community service hours each year. This letter celebrates that service.

In their confirmation hearings and in graduation speeches, several of the U.S. Supreme Court justices have echoed the theme of lawyers as public citizens. Professor Deborah Rhode, in her 2000 book, *In the Interest of Justice: Reforming the Legal Profession,* commented that "[p]ro bono contributions have been responsible for many of the nation's landmark public interest cases and have helped millions of low income families meet basic needs." (Rhode 2000, at 37-38.) For example, volunteer attorneys played a significant role in *Brown v. Board of Education,* the seminal case on equality in education, and in *Rotary International v. Rotary Club of Duarte,* the decision that cleared the way for women's admission to Rotary. I was fortunate to have played a role in the Rotary case while I was in private practice.

Though the profession's commitment to pro bono legal services pre-dates any stated guideline, in 1983 the American Bar Association House of Delegates resolved that all lawyers should "render public interest service." Later refinements recommended that attorneys aspire to provide at least 50 hours a year of pro bono legal services. (ABA Model Rule 6.1.) In 1993, the Pro Bono Institute began the Law Firm Pro Bono Project, which challenged lawyers to contribute 5 percent of billable hours to pro bono legal services. By September 2007, 149 law firms across the country had signed on to the Project as signatories. The Institute's most recent report, published in June 2011, indicated that in 2010, 19,222 partners and 31,367 associates (50,589 attorneys, total) participated in pro bono. Law firms participating in the Project contributed 4.5 million hours of pro bono work in 2010, with nearly 1.5 million hours spent on litigation matters.

Trial lawyers are uniquely positioned to enrich their larger communities. The same skills that aid us in achieving favorable results for clients in the courtroom permit advocacy on behalf of those most in need of legal representation. In times when lawyers across the country attempt to navigate post-2008 economic realities, ABTL-San Diego members have continued to make remarkable contributions to their communities and the public at large. Because of the value that pro bono service adds to our daily practice, I wanted to use this President's Letter as an opportunity to highlight some of these members and their work. Hundreds of others deserve praise as well.

- **Hon. Peter W. Bowie** — Rotary Club's Camp Enterprise

  Through Rotary Club, Judge Bowie served as chair of Camp Enterprise, a retreat for high school students to learn the basics of business. What better training ground for future ABTL members! Even as a busy judge, Judge Bowie takes time for community service.

- **Rob Shields** — A Night to Remember

  Rob Shields, a partner at Wilson Turner Kosmo LLP, and his wife, Cheryl, began "A Night to Remember," a prom night for special needs children. This year's event hosted guests from 51 high schools, complete with a red carpet, photos, make-up and hair styling. The Shields received the Channel 8 News Leadership Award for their efforts.

(see "President's Message" on page 4)

President's Message

continued from page 3

- **Elizabeth Balfour** — Children At Risk Committee

  Elizabeth Balfour, a litigation partner at Sheppard, Mullin, Richter & Hampton LLP, has received numerous awards for her work with the Children at Risk Committee of the San Diego County Bar Association. The Committee works with schools and children's organizations to teach how the justice system operates and to implement literacy and enrichment programs.
- **John F. "Mickey" McGuire** — Los Niños International

  For more than 25 years, Mickey McGuire, a partner at Thorsnes Bartolotta McGuire, has supported Los Niños International, an orphanage in Tijuana. The orphanage emphasizes that "sustainable communities with healthy children are the foundation of a strong civil society."
- **Andrew J. Kessler** — San Diego Volunteer Lawyer Program 2011 Pro Bono Attorney of the Year

  Andrew J. Kessler, an associate at Procopio, Cory, Hargreaves & Savitch LLP, has spent hundreds of hours representing domestic violence victims and, in two 2011 cases, ultimately obtained permanent protective orders and child custody orders for his clients.
- **Matt Dart** — California Bar Association's Wiley W. Manual Award for Pro Bono Legal Services

  Matt Dart, an associate at DLA Piper, serves as a member of the Board of Directors for the Boys & Girls Club of Greater San Diego. His pro bono work has included: representing an elderly homeowner against a trustee who obtained an irrevocable option to purchase the home at a strike price; representing a victim of San Diego's "Cedar Fire" who was

(see "President's Message" on page 5)

APPS FOR LAWYERS

By: Hugh Kim

As smart phones and other devices such as tablets and ultra books have become prevalent, if not the norm in the workplace, lawyers have become increasingly reliant upon mobile technology to keep in touch with their offices, colleagues and clients, maintain productivity when outside the office and manage their professional and personal lives. Not surprisingly, over the last few years, software developers have been creating and marketing thousands of apps targeted to business customers, including those in the legal industry. To help wade through the large number of smart phone apps available in the marketplace, this article focuses on a selection of free or low cost apps for Apple's iOS and Google's Android platforms that can help you be more productive outside the office and potentially save your skin in an emergency.

Hugh Kim

Dropbox (iOS, Android, Blackberry; Free)

Have you ever wanted or needed to continue working on a document when you did not have access to your computer? Dropbox may be the solution you are looking for. Go to www.dropbox.com and download and install the free software on your desktop or laptop computer. Once you register your account, you can upload documents, photos and video to the cloud. Next, install the Dropbox app onto your smart phone or tablet and you can now access and use these files, or upload new ones, interchangeably on all of your Dropbox-enabled mobile devices and computer. Dropbox also makes it easy to share these files with others. E-mail a photo or a link to a file or send a link to a file via text message. The free account comes with 2 gb of cloud storage, which is more than adequate for most text documents (you can also earn an extra 500 mb of space for each Dropbox referral, with an 18 gb cap). Heavy users and those who need to store large video files or high-resolution photos may want to purchase more space, which begins at $9.99/month/$99.00/year for 50 gb.

(see "Apps for Lawyers" on page 6)

President's Message

continued from page 4

denied coverage by an insurance company; and representing Catholic nuns in a trademark action against a former employee.

- **John Hellmann** — California Bar Association's Wiley W. Manual Award for Pro Bono Legal Services

  John Hellmann is a litigation associate at Latham & Watkins LLP. His pro bono work has included: obtaining temporary restraining orders for victims of domestic violence; appearing before the U.S. Immigration Court on asylum matters; handling claims to the Social Security Administration; and representing creditors in U.S. Bankruptcy Court.

- **Pam Parke**r -- International, Labor and Human Rights Cases

  Pamela Parker is a staff attorney for the California Court of Appeal. While in private practice, she was President of the Legal Aid Society and on the Advisory Board of the Immigration Justice Project. Her many pro bono cases included representing garment workers in Saipan who claimed labor and human rights violations from their working conditions. She was named Trial Lawyer of the Year by Public Justice.

Hats off to these attorneys and their firms and the hundreds of other ABTL members and their firms who are committed to pro bono legal services and community service.

Apps for Lawyers

continued from page 5

Dragon Dictation (iOS; Free)

From the makers of Dragon NaturallySpeaking speech recognition software comes in a free iOS app which provides basic voice transcription capabilities. The controls are straightforward and easy to use. Simply tap the Record icon at the bottom of the app's home screen to record your voice (indicate punctuation as you would with a Dictaphone) and hit Done to end the recording. The app will then process your speech and convert it to text. While the speech processing is fairly accurate, you may need to manually edit the transcript. This is easy enough to accomplish. Tap the keyboard icon in the lower left corner of the screen and you can now manually edit the text. To delete text outside of the edit mode, hold your finger on a word and drag your finger to highlight whatever text you want to delete, tapping Delete to confirm. Once you have finalized your text transcript, you can send it via e-mail, text message or just copy and paste it into another program.

JotNot Scanner Pro (iOS; $1.99)

For those who have ever needed a mobile document scanner, the JotNot Scanner Pros app may fit the bill. Take a photo of a document using the device's camera or select an existing image in your photo library. The app will prompt you to adjust the document's proportions and orientation with a grid that you can drag to match the edges of the document. You can also use the edge detection function and fine tune adjustments as necessary. The app also provides a surprising number of options to help you optimize the image including image enhancement presets for receipts, black and white documents and color documents, the ability to rotate images, timestamps, adjustable image resolution and presets for common paper sizes. Once image editing is finished, hit Process and the scan is complete. From there you can export the image as a PDF, JPG or PNG file and send it via e-mail or fax or access the document through a list of other apps such as

(see "Apps for Lawyers" on page 7)

Apps for Lawyers

continued from page 6

iBooks, Dropbox, Evernote, etc. Files you create can also be printed directly from your iOS device through an AirPrint-compatible printer.

Sign-N-Send (iOS; Free with in-app ads; $4.99 without ads)

With Sign-N-Send, you can sign a document (PDFs, Microsoft Office documents or an image) on the screen of your iOS device using your finger as a pen/stylus. From there, you can either print the document to an AirPrint-compatible printer or send it as an e-mail attachment. Documents can also be exported to Dropbox and other apps that accept PDFs. At first, positioning the document image and getting your signature to look realistic can be tricky, especially if you have large fingers or are using an iPhone, as opposed to an iPad, but after some practice, you should be able get the hang of creating your electronic signature. Once you do, the app works fairly well, though depending on the source document, you may have issues with the resolution of the exported document. Also, while the app will automatically convert Microsoft Office documents into PDFs for signing, during testing, I experienced several conversion errors when trying to convert Microsoft Word documents into PDFs, though I did not experience any issues when working with native PDF files. Finally, the free version of this app inserts an ad as the first page of any documents you send while the paid version is ad-free.

Penultimate (iOS (iPad only); $.99)

If you prefer taking handwritten notes to using a touch screen keyboard, but you own an iPad, Penultimate may be the right note taking app for you. Think of Penultimate as an electronic note pad, only instead of a physical pen or stylus, you use your finger as the pen. The app's presentation is top notch and it is very user friendly. It also features several customizable options to help fit your style. You can choose between several colors of ink, three levels of pen thickness and three default types of paper (graph, lined or plain), with other paper options available for purchase. Once you have selected your paper and pen options, simply write your notes with your finger. Embedding images into your notes is as simple as tapping the photo icon and selecting an existing image from your photo library or taking a photo with the iPad's camera. Navigation within your notebook is just as simple. Tap or swipe the page number to turn to the next page or swipe the page number to the left to go to the preceding page. Tap the "My Notebooks" button to see all of your saved notebooks. Your notes and notebooks can be sent or shared via e-mail, Dropbox, iTunes file sharing, Evernote, iBooks, Adobe Reader and other apps. If you have an AirPrint-compatible printer, you can wirelessly print notes or notebooks directly from the app.

Evernote (iOS, Android, Blackberry; Free (Premium $5/mo. or $45/yr.))

Evernote is a sophisticated, yet easy to use, note taking app which allows you to save your ideas in text form, but also lets you include voice and audio notes, photos and lists. Unlike Penultimate, text entry is via keyboard only. Notes can be tagged for organization, synced across your computer and other devices and can be shared via e-mail or through other apps such as Facebook and Twitter. Notes can also be printed wirelessly through an AirPrint-compatible printer. One function that Evernote is ideally suited for is task lists, which can be checked off as you complete items, and can be accessed and updated from your computer and any other Evernote-enabled device, ensuring you will always have an up to date version of the list. The free

(see "Apps for Lawyers" on page 14)

Annual Judicial/Bar Mixer

An opportunity to meet and converse with members of the judiciary in an informal setting

Details:

When: June 18, 2012, from 5:30 to 7:30 p.m.

Where: Procopio, Cory, Hargreaves & Savitch, 525 B Street, Suite 2200, SD.

RSVP: by June 8, 2012 to *abtlsandiego@yahoo.com*.

ABTL Members only event.

Sponsored by: Legal Arts, Hutchings Court Reporters & DTI

New and Noteworthy

California Supreme Court Primarily Sides with Employers In Historic Meal And Rest Period Decision

By Lois M. Kosch

In April, the California Supreme Court issued its long-anticipated decision in the matter of *Brinker v. Superior Court*, a landmark case in California's wage and hour history. Although analysts and practicioners will doubtless wrestle for years over the implications of the opinion (written by Justice Werdegar and joined by Justices Cantil-Sakauye, Kennard, Baxter, Chin, Corrigan, and Liu), the opinion has settled a few long-standing questions in what appears to be a near-total victory for California employers. Here are the key holdings.

Rest Periods

Employees are entitled to 10 minutes of rest for shifts from 3.5 to 6 hours in length, 20 minutes for shifts of more than 6 and up to 10 hours and 30 minutes for shifts of more than 10 hours up to 14 hours.

The wage orders require employers to "authorize and permit" rest periods at the rate of "ten (10) minutes net rest per four (4) hours [worked] or major fraction thereof." The Court held that the term "major fraction" in the rest period requirement refers to work period lengths of two hours or more, not the 3.5 hours advocated by the employer. Clarifying its interpretation, the Court held that "[e]mployees are entitled to 10 minutes' rest for shifts from three and one-half to six hours in length, 20 minutes for shifts of more than six hours up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours, and so on." The Court rejected the employees' contention that rest periods must be provided before meal periods. Instead, the Court held that employers are required to make a "good faith effort" to provide rest periods in the middle of work periods, but "may deviate from that preferred course where practical conditions render it infeasible." In reversing the court of appeal and upholding certification of the Rest Break subclass, the Court identified Brinker's common policy, which failed to give effect to the "major fraction" language of the wage order. This decision is likely unique to Brinker, but employers should review their rest period policies in light of this clarification of the law.

Meal Periods

An employer's duty is to provide a meal period to its employees. The obligation is satisfied if the employer relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so.

Must employers force employees to take meal periods, or can they simply make meal periods available to employees, leaving it to the employee's discretion whether to take a meal break?

The Supreme Court held that employers "must relieve the employee of all duty for the designated period, but need not ensure that the employee does no work." In so holding, the Court explicitly rejected the employees' contention that the employer must "ensure" that no work is done. In its footnote 19, the Court explained that premium pay is not owed if an employer relieves an employee of all duties but "knew or reasonably should have known that the worker was working through the authorized meal period." Instead, in that instance, only straight-time pay would be owed for the hours worked. The meal period premium is only owed if the employer "refuses to relinquish control over employees during an owed meal period." As a result, "employees cannot manipulate the flexibility granted them by employers to use their breaks as they see fit to generate…liability."

(see "New & Noteworthy" on page 9)

continued from page 8

The Court did caution employers against applying informal pressures that would make it difficult to take a meal period, for example, scheduling employees in a way that would make it difficult to take breaks or enforcing an "anti-meal-break policy...through 'ridicule' or 'reprimand.'"

Although its decision does leave open the question of what will suffice to "relieve employees of all duty," a question the Court acknowledges may vary from industry to industry, the Court has explicitly renounced the strict liability scheme that California employers have operated under for years.

Meal Period Timing and The So-Called "Rolling 5-Hour Rule"

There is NO Rolling 5-hour rule. Employers must provide a first meal period after no more than five hours of work and a second meal period after no more than 10 hours of work.

The "rolling 5" question has long plagued employers - does an employer need to provide a meal period for each five hours work period within the total shift, or can the employer engage in a practice known as "early lunching," in which the employer provides a meal period early in the shift and employees work the remaining six or seven hours without another meal period?

The Supreme Court held that a meal period must be provided during the first five hours of the shift, but rejected the employees' claim that an employer must provide a meal period for each five hour period of work within a shift. Second meal periods must be provided no later than the start of the 11th hour of work. In so holding, the Court upheld the "early lunching" practice and abandoned the cumbersome "rolling 5" rule advocated by the Plaintiff's bar.

Off-the-Clock Work

The off-the-clock work class could not be certified where there was no systemic or common policy requiring off-the-clock work.

In deciding whether the employees' off-the-clock claims were amenable to class treatment, the Court upheld the court of appeal decision vacating certification. The Court held that, in light of Brinker's formal policy disavowing off-the-clock work and the lack of evidence demonstrating a systematic or common policy requiring off-the-clock work, no class could be certified. As a result, it appears future Plaintiffs will have an uphill battle in certifying off-the-clock claims, needing to convince a court that "substantial evidence...points to a uniform, companywide policy" of encouraging off-the-clock work before a class can be certified.

Retroactivity

Although the Court appeared to wrestle with the question of whether its ruling would be retroactive, the ruling contains scant reference to its retroactive effect, containing only a single sentence that the ruling constitutes a "clarification of the law." The ruling therefore has retroactive effect and applies to each and every currently pending meal period case.

Certification of Meal Period Class Actions

Significantly, in a concurring opinion, Justices Werdegar and Liu offered "guidance" regarding certification of meal break claims. In it they opine that the question of why a given meal period was missed does not render a class "categorically uncertifiable." That is, if an employer's records show an employee did not clock out for a meal period, a rebuttable presumption arises that the employee was not relieved of duty. The employer's assertion that the employee was relieved of all duties remains an affirmative defense, and whether a class can be certified is an inquiry unique to each case.

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

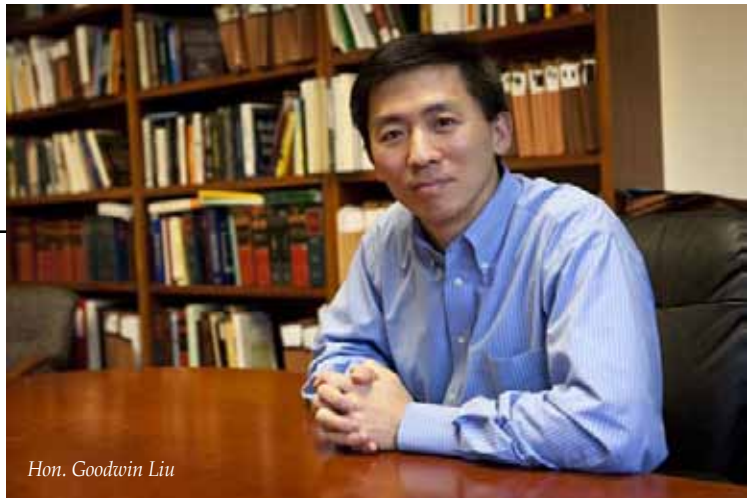
September Dinner Program

Featuring:
the Hon. Goodwin Liu,
Associate Justice of the
California Supreme Court

Date: Monday, September 10, 2012

Schedule: Cocktails 5:30 p.m.
Dinner 6:00 p.m.
Program 6:45-7:45 p.m.

Location: Westin San Diego
400 West Broadway



Hon. Goodwin Liu

Judge Bencivengo

continued from page 1

DLA Piper specializing in civil litigation, with extensive trial experience in intellectual property matters and related business disputes.

Procedural Issues

Judge Bencivengo recently posted her chamber rules for both civil and criminal matters. She plans on using a pragmatic approach to addressing and handling procedural issues in her courtroom. Attorneys with matters pending before her, in particular attorneys with matters that have been transferred to her department, may contact the Court to discuss questions they may have regarding the current status of a case or other scheduling or calendaring issues. Judge Bencivengo requires that counsel with knowledge of the matter be the one to contact the Court so that any issues that arise can be fully and efficiently addressed. When contacting the Court, Judge Bencivengo requests that counsel be prepared to identify the case at issue by case name and number so your questions can be directed to the appropriate law clerk.

Motion Practice

Judge Bencivengo plans on scheduling motion hearings on Fridays, with criminal matters being heard in the morning and civil matters being heard in the afternoon. Judge Bencivengo requests that if a filing is more than twenty pages, counsel submit a courtesy copy, that includes the ECF docket number, directly to Chambers as soon as practicable after filing.

Counsel must obtain a hearing date from the appropriate law clerk before filing any moving papers. Once a hearing date is reserved, all moving papers must be filed within three court days. Any uncontested motion should be designated as a "joint motion."

All motions to dismiss under Rule 12 will be resolved on the papers, unless oral argument is specifically requested and granted by the Court. On all other motions, if the Court decides to take the motion under submission on the papers, a minute order will be issued no later than two court days before the scheduled hearing notifying the parties that no appearance is necessary.

(see "Judge Bencivengo" on page 11)

Judge Bencivengo

continued from page 10

Judge Bencivengo does not plan on posting tentative rulings before a hearing. When counsel appear for their hearing, Judge Bencivengo stressed that the Court will have already read and thoroughly analyzed all the papers submitted. Judge Bencivengo may indicate what the Court's initial thoughts are, and she may pose questions to counsel or, in some limited or exceptional circumstances, send questions to counsel before the hearing. Judge Bencivengo made it a point to stress that when the Court asks a question, it is critical that counsel answer the question directly and as thoroughly as possible. The question often relates to an unresolved issue that the Court wants to address.

Judge Bencivengo does not require a separate statement of facts in support of a motion for summary judgment. But Judge Bencivengo does request that the parties provide accurate citations in all motion papers so that the Court can easily identify and find the evidence or authority cited. For any cases not reported in an official reporter, Westlaw citations should be provided if available; if no case citations are available, a copy of the case should accompany the brief. Citation to items already in the record are sufficient and reattaching copies of these items is unnecessary.

Patent Litigation

Judge Bencivengo has not yet enrolled in the Southern District's Patent Pilot Program; however, at the appropriate time, she intends to join the program.

When addressing a claim construction hearing, Judge Bencivengo will shape the proceedings depending upon the numbers of claims at issue. She may choose to, or request that counsel agree to, limit the number of claims to be construed—reserving counsel's right to come back at a later time to address certain dependent or other claims.

Judge Bencivengo will allow, and when necessary encourages, tutorials to help explain complex claim construction issues. This may involve experts, or alternative authorities, to assist the Court's understanding of the claims at issue. Judge Bencivengo requests that counsel work together to present a non-argumentative tutorial and to make every effort to simplify the matter so complex issues are made easier for the Court to understand.

Experts

As the parties prepare for trial, Judge Bencivengo suggests that any issues related to experts or their qualifications be addressed earlier versus later. Bringing a Daubert motion as a motion in limine will likely create problems that could have been resolved by addressing the issue at an earlier point in time.

Scheduling Issues

When possible, Judge Bencivengo will attempt to accommodate scheduling issues. If there is a scheduling problem, she invites counsel to initiate a discussion with the Magistrate Judge assigned to the matter. However, Judge Bencivengo will keep matters moving forward, and she will give discretion to the Magistrate's decision on any scheduling issues.

Conclusion

Judge Bencivengo is excited about her new position and she looks forward to serving both the parties and the attorneys who appear in her courtroom. After completion of the new federal courthouse, she will stay in Courtroom No. 2 in the existing courthouse. Judge Bencivengo's chamber rules may be found at: http://www.casd.uscourts.gov/index.php?page=chambers-rules.

Matthew A. Tessieri is an litigation associate at Solomon Ward Seidenwurm & Smith, LLP. He specializes in representing businesses and individuals in all aspects of civil litigation.

TIPS FROM THE TRENCHES: Creating the Sense of Injustice

By Mark Mazzarella

Mark Mazzarella

This edition of "Tips From the Trenches" focuses on the basic premise of New York University Law School Professor Edmond N. Cahn's 1949 book, The Sense of Injustice. I was first exposed to Professor Cahn's work by well-known trial lawyer, Harvey Levine, who had become a convert of Professor Cahn's philosophy years earlier. Professor Cahn's message instantly struck a cord with me, and has served as the center point around which I have built every case since.

So what is this earth-shattering insight? This magic pill? The message is as simple as it is profound. It relies upon a subtle distinction between individuals' intellectual desire to do justice and their psychological, even physiological drive to avoid injustice. We've all observed the distinction, without understanding it.

An example to which any past or present "big firm" lawyer can relate arises from the annual rite of passage from associate to partner for some, while others are turned away from the goal they have strived to reach for half of their lives. In most cases, to the junior associates, all of the senior associates seem worthy of elevation in rank based on their intelligence, hard work, personal sacrifice, commitment and knowledge of the law. When nine of 10 associates "up for partner" make the cut, who are all the young associates whispering about at the water cooler the next morning? The one out of ten who was "passed over." Whatever celebration takes place to recognize that justice has been done in nine cases is dwarfed by the wringing of hands and gnashing of teeth over the injustice of rejecting someone who seemingly has paid his dues and deserved to be invited into the club. A sense of injustice has a more powerful influence on a person's psyche than the sense of justice having been done.

The reason, as Professor Cahn explains, is that we humans take unjust acts against others personally. The same example used above serves to illustrate this tendency. When the young associates go home and tell their spouses the result of the partners' vote, what will be featured more prominently in their conversation are comments like, "Good news honey, nine out of ten made it. I'm a shoo-in!" or "I can't believe they passed over Joe. If they could do that to him, they could do it to me!" The sense of nine associates being treated in a manner that is perceived to be just doesn't translate to a sense of calmness and confidence in the same manner or to the same degree as the sense the one associate was treated unjustly does.

The goal when developing your trial themes and arguments is to make the jurors feel that a result contrary to the one you advocate in some fashion is threatening to them, and hence, fundamentally unjust from their perspective.

I enjoy identifying the themes that will make my client become what I refer to as, "one of the yaks, standing shoulder to shoulder with all the other yaks on the jury." I'm sure you have seen photographs of the Tibetan oxen and yaks circled, butts pointed to the center of their pack, heads and horns down, facing out toward ag-

(see "Tips from the Trenches" on page 13)

Article Submission

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

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

Authors are responsible for Shephardizing and proofreading their submissions.

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

continued from page 12

gressors, such as wolves, who threaten the pack. The entire pack depends upon the integrity of every spot in their defensive alignment. If the wolves successfully attack and injure any member of the circle, all members are left vulnerable. While Professor Cahn was way ahead of his time with his analysis of the psychological and physiological mechanisms involved in the jury's decision-making process, his analysis has been confirmed repeatedly as time, and the advent of an entire profession of jury consulting, has weighed in in support of his conclusions. The challenge is to make the jury feel that if your opponent prevails against you, somehow that will translate to an increased risk that the jurors will somehow, someway, suffer a similar fate.

At first glance, some cases appear to have little chance of engendering a lot of sympathy from a jury. And, it is essential that a jury be made to feel that an outcome other than that for which we advocate is "unjust." As Professor Cahn wrote, "[T]he sense of injustice is no mere generic label . . . . It denotes that sympathetic reaction of outrage, horror, shock, resentment, and anger, those affections of the viscera and abnormal secretions of the adrenals that prepare the human animal to resist attack. Nature has thus equipped all men to regard injustice to another as personal aggression. Through a mysterious and magical empathy or imaginative interchange, each projects himself into the shoes of the other, not in pity or compassion merely, but in the vigor of self-defense. Injustice is transmuted into assault; the sense of injustice is the implement by which assault is discerned and defense is prepared."

This isn't always easy, but it is probably more important than all the document review, depositions, legal analysis and other aspects of trial preparation combined. With a sense of injustice guiding its decision-making process, juries will arrive at conclusions that will leave those who ignore the realities of the human psyche wondering as they walk out of the courtroom, heads down, "How in the heck did the jury come up with that verdict?" This is what "jury nullification" is all about. Juries will figure out a way to avoid injustice, even if that means ignoring the facts and the law or at least distorting them to the extent they would lead to an unjust result if followed.

So, how do we make a jury your cheerleaders, pulling for you to prevail and unwilling to accept any other result? Take a good hard look at what the case is really all about, and think of yourself, your client and the jurors as yaks, and the opponent and his attorney as wolves, and the answer should reveal itself. If that doesn't happen, tell your friends, family, co-workers and even clients what you are trying to do, and listen for recurring themes that ring of injustice.

As an illustration of how seemingly unsympathetic parties can be brought into the herd of yaks that is the jury, Harvey Levine uses a hypothetical insurance bad faith case, where a large, national bank is suing an enormous insurance company, in which he represents the bank who is suing the insurance company for bad faith. How do you get a jury to pull for a giant bank? How do you trigger "those affections of the viscera and abnormal secretions of the adrenals that prepare the human animal to resist attack" in the jury box? The argument is simple: "If gigantic insurance companies (i.e., like the ones who insure the jurors) can run roughshod over the rights of one of the world's biggest financial institutions, with hundreds of in-house lawyers and tens of thousands of outside lawyers at its beck and call, what chance do the rest of us have? Translated: "If the wolves can bring down the biggest and strongest yak in the circle, it is just a matter of time before all of you little yaks fall victim to the wolves as well." The jury feels compelled to draw a line in the sand, and draw it deep.

As you get used to giving less attention to proving (or arguing) what is just, in favor of concentrating on arousing a sense of injustice, the initially subtle distinction between the two concepts will become more and more clear, and more important your ability to convey that sense of injustice will start to come naturally.

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

Apps for Lawyers

continued from page 13

version of the app comes with a 60 mb monthly upload allowance. If you need more space, you can upgrade to the Premium app, which has a 1 gb monthly upload allowance as well as other features.

LawStack (iOS; Free)

LawStack is a useful free app, giving you instant access to the Federal Rules of Civil Procedure, Appellate Procedure, Evidence, Bankruptcy Procedure and Criminal Procedure. It also comes preloaded with the U.S. Constitution. While each library indicates how current the set of rules are, you may want to double check to make sure no further rule amendments have been issued. Additional statutes can be downloaded for free or for purchase from Apple's App Store.

Voice Recorder (Android; Free)

If you have an Android device and want a no-frills voice recorder app for those times when you do not have a dictaphone handy, Voice Recorder is a free option worth your consideration. Using Voice Recorder, you can save multiple voice files and export them via e-mail. You can also use the app to create custom ringtones for your phone. While this app does not have transcription capabilities, it performs its primary function admirably.

CourtDays (iOS; $.99)

Have you ever found yourself at a restaurant, airport or other non-work location trying to determine the briefing schedule on a motion that was just filed? CourtDays is an interesting app for your iOS device that can take out some of the guess work when you need to quickly determine court-related dates. With CourtDays, you can quickly calculate deadlines based on the number of court or calendar days before or after a date. You can also use it to calculate the number of court and calendar dates that fall between two dates. Once you run your calculations, you can e-mail the results. It is not one of the prettiest apps available and may take some time to get used to, but after you familiarize yourself with the various calendaring options, it

(see "Apps for Lawyers" on page 15)

continued from page 14

can be a helpful tool in a pinch.

Get Cases (Lexis) (iOS; Free, but requires Lexis account))

When this app is working (I experienced numerous connection problems during testing), it does what it says it does—it gets you cases and statutes. The presentation is similar to Lexis on your computer, albeit in a much more simplified form, and it lets you quickly review cases and statutes on the fly. It also features a stripped-down Shepardizing function (no direct links to citing references) to see if your search results are still good law. It also lets you save bookmarks for authority you want to quickly reference later. As with other Lexis products, pricing and document access are dependent on the terms of your existing plan.

Westlaw Next (iOS (iPad Only); Free, but requires Westlaw account)

For those of you with Westlaw accounts, Westlaw Next represents one of the most robust legal research apps available and, perhaps, a sign of things to come. Although the app is limited to iPads, the Westlaw Next mobile site can accessed on a Blackberry, iPhone, Android or Windows Mobile device at: https:/m.next.westlaw.com. The app features an intuitive user interface--just enter your search terms as you would for a natural language search. Search results are easy to read and navigate. Once you click on a result, use the Go To button to jump to the headnotes, case synopsis, etc. You can e-mail your search results, save them to a folder, save them offline and add your own notes. You can also do word searches within a document. Notwithstanding its great features and user-friendly interface, Westlaw Next comes with one significant caveat. While the app itself is free, the price to use the app may be steep for commercial users depending on your plan. So make sure you are familiar with the terms of your plan before using. That said, if your Westlaw plan covers Westlaw Next, it is worth checking out.

Lexis Advance (iOS; Free, but requires Lexis Advance account)

Like Westlaw, Lexis has released a full-featured legal research app for iOS devices in the form of Lexis Advance. Although presented in a simplified form compared to its desktop counterpart, the look and feel of the app will be familiar to Lexis users. Start your search by entering search terms and selecting tools to narrow the search by content type (e.g., cases, statutes, analytical materials), practice area (e.g., civil procedure, patent law) and/or jurisdiction (e.g., U.S. Federal, states). Once you receive your initial search results, you can select additional options to refine your search. After clicking on a search result, hit the "Jump To" button to call up a list of items you can immediately access such as a case's Subsequent History, Prior History, LexisNexis Headnotes, etc. Unlike Lexis' free Get Cases app, Lexis Advance provides a true Shepardizing tool allowing users to access linked materials by tapping the entry. Once you have finished your research, you can e-mail your results or save them in a folder for future access. Note that as with standard Lexis and Lexis Advance access on your computer, pricing for access to databases and documents will depend on the terms of your plan. Also, out of plan documents are completely inaccessible via the app.

Fastcase (iOS; Free)

Fastcase for iOS devices offers an impressive no-cost legal research alternative to Lexis and Westlaw. Like many of the apps discussed in this article, the user interface is clean and easy to use. Begin your search by selecting one of the caselaw or statute libraries. Within the library, you can select additional options to refine your search, such as jurisdiction, date range and result sorting preference (e.g., relevance, decision date). Next, enter your keywords (Boolean), natural language phrase or a citation and hit Search. Once you obtain your search

Save the Date!

ABTL-San Diego will hold its bi-annual Trial Skills Seminar for local practitioners on October 20, 2012 beginning at 9 a.m. at the offices of Robbins Geller Rudman & Dowd, 655 West Broadway, Suite 1900, San Diego.

Watch for additional details this September in the Fall Issue of the ABTL Report .

(see "Apps for Lawyers" on page 18

Making the Record

continued from page 1

Evidentiary Objections in Motions for Summary Judgment

For years, the law was a confusing mess when it came to objecting to evidence in a summary judgment motion. The Supreme Court has finally cleared things up. To preserve an evidentiary objection, you must object either by filing written objections before the hearing or by orally objecting at the hearing. *Reid v. Google,* 50 Cal.4th 512, 531 (2010); CCP § 437c(b); CCP § 437c(d) (objections to affidavits or declarations). Either way will preserve your objection.

You are *not* required to obtain rulings on your objections to preserve them for appeal. *Reid,* 50 Cal. 4th at 517. But if the trial judge does not rule, a court of appeal will presume that your objections were overruled. *Reid,* 50 Cal. 4th at 534. The old "stamp and scream" rule—under which you were required to stamp and scream for a ruling (*Gallant v. City of Carson,* 128 Cal. App. 4th 705 (2005) (dis. opn. of Vogel, J.)—has been abolished.

You are not required to respond to evidentiary objections if you want to challenge the objections on appeal. *See, e.g., Greenspan v. LADT, LLC,* 191 Cal. App. 4th 486, 526 (2010) ("There is no authority requiring a party in a law-and-motion matter to respond to evidentiary objections in the trial court or waive appellate challenge to the trial court's rulings.").

Evidentiary Objections at Trial

Object at the time your opponent moves to introduce the evidence, or immediately move to strike the evidence if you aren't fast enough with your objection. Evid. Code §353(a); *Broden v. Marin Humane Society,* 70 Cal.App.4th 212, 1227 fn. 13 (1999) (failure to object in trial court forfeited argument for appeal). Timeliness is important for an objection at trial: if you are too slow, the court may not take your objection.

Unlike with objections made in motion practice, at trial, you must respond to your opponent's objection in order to preserve your response for appeal. *Shaw v. County of Santa Cruz,* 170 Cal.App.4th 229, 282-83 (2008) (failure to raise hearsay exception in response to an objection during trial forfeited right to challenge the trial court's ruling on the objection).

Motions in limine can be a good way to make objections, but be careful. If you intend to rely on such a motion to preserve your objection, make sure that your motion satisfies Evidence Code section 353: it must contain the specific legal ground for exclusion; it must identify a particular piece of evidence; and it must be made when the trial judge can understand the context of the evidence. *People v. Morris,* 53 Cal. 3d 152, 189-190. Often, judges decline to rule on motions in limine because they do not yet know the context of the evidence. If that happens, make sure you renew your objection when

(see "Making the Record" on page 17)

ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO
abtl

Editor: Lois M. Kosch
(619) 236-9600
lkosch@wilsonturnerkosmo.com

Editorial Board:
Eric Bliss, Richard Gluck, Alan Mansfield,
Olga May and Shannon Petersen

continued from page 16

the evidence is actually introduced. Failure to do so will forfeit your objection even though you filed the motion in limine. *People v. Morris,* 53 Cal.3d at 189-90.

If there are a lot of motions in limine, consider making a chart listing each motion, the evidence at issue, and the judge's ruling. Most trial judges will be happy to have such a chart to help them keep their rulings consistent throughout the trial.

Jury Instructions

You must object to a jury instruction if you want to challenge it on appeal. *See, e.g., Electronic Equipment Express, Inc. v. Donald H. Seiler & Co.,* 122 Cal. App. 3d 834, 856-857 (1981). Further, you cannot challenge a jury instruction on appeal if you stipulated to it or proposed it. *See, e.g., Stevens v. Owens Corning Fiberglass Corp.,* 49 Cal. App. 4th 1645, 1653-55.

The biggest jury instruction problems on appeal come not from failing to properly object, but from failing to make a good record. Trial courts frequently conduct discussions about jury instructions off the record. If that happens, ask for the court reporter to be present or take careful notes and ask for permission to put your objections, your reasoning, and the rulings on the record later. If the instruction is really important, consider requesting leave to file a pocket brief that explains your objections.

You should also make sure that the record reflects which party proposed the jury instruction. If the record does not reveal who requested an erroneous instruction, the appellate court must presume that the appellant requested the instruction. *See, e.g., Lynch v. Birdwell,* 44 Cal.2d 839, 846 (1955). That means the appellant cannot complain about the instruction. Id. Consider including with all proposed instructions a matrix like the one below. Such a matrix makes it easy for the judge to record the rulings, and it helps you keep accurate notes during hectic proceedings so you can later make sure everything important was recorded.

Proposed By | Given as Proposed | Given & Modified
Rejected | Withdrawn

Tips for All Objections

State your grounds. It is not enough to object generally, or to state the wrong grounds. For example, you'll forfeit your argument on appeal if you object that evidence is irrelevant, and it turns out that you should have objected on hearsay grounds. *See, e.g., Rupp v. Sumerfield,* 161 Cal. App. 2d 657, 662 (1958) ("An objection specifying the wrong grounds, or a general objection, amounts to a waiver of all grounds not urged."). To preserve your objection, state exactly the ruling you want (i.e., which evidence or portion of evidence you oppose) and why.

Get your objections on the record. Always ask for the court reporter to be present or, if that is not possible, seek permission to record objections and rulings immediately after they are made. *See American Modern Home Ins. Co. v. Fahmian,* 194 Cal.App.4th 162, 170 (2011) (in response to debate on appeal about whether an objection had been asserted below, court of appeal wrote that the dispute "could and should have been avoided if the trial court and counsel had put the objection and ruling on the record immediately after the [unreported] chambers conference").

Be selective. For years, courts have complained that litigants file too many "blunderbuss" objections in motion practice. *Nazir v. United Airlines, Inc.,* 178 Cal. App. 4th 243, fn. 3 (2009) (quoting *Demps v. San Francisco Housing Authority,* 149 Cal.App.4th 564, 578-79 fn. 6). "This is hardly good advocacy, and it unnecessarily overburdens the trial court." Id. Take heed of the Supreme Court's advice: "litigants should focus on the objections that really count." *Reid,* 50 Cal. 4th at 532.

Make it easy for the judge to rule and to record her rulings. For example, use a matrix for jury instructions (like the one above) or include a box like the one below for written evidentiary objections.

Evidence | Objection & Grounds | Overruled | Sustained

The next time you need to make an important objection—like that it's after 5 o'clock—you'll be confident your position is preserved for appeal.

FOOTNOTES

[1] Taken from the Texas District & County Attorneys Association, http://tdcaa.infopop.net/4/OpenTopic?a=tpc&s=347098965&f=157098965&m=3391009651.

[2] *Id.* | [3] This article focuses on California law.

results, Fastcase offers other helpful features to improve your research, such as displaying the number of citing cases for each hit, broken down by "Cited Generally" (all cases in the Fastcase database that cite the case) and "Cited Within Category" (cases cited within your search result list that cite the case). Fastcase will remember your search history and you can save specific cases and statutes for use later.

DLaw (Android (beta; new version coming soon); Free)

DLaw (formerly Droid Law) is one of the best "legal library" style reference apps specifically designed for Android devices. Similar to the LawStack app for iOS devices, DLaw comes with free access to the Federal Rules of Civil Procedure, Evidence, Appellate Procedure, Criminal Procedure, Bankruptcy Procedure and U.S. Constitution, each of which can be set up as a shortcut on the DLaw home page. DLaw also provides a free legal dictionary and a shortcut to Google Scholar, Google's search engine for scholarly literature and legal opinions. In addition to the default libraries, additional add-on libraries such as state codes and laws, the U.S. Code, U.S. Supreme Court case opinions, etc. can be downloaded at prices ranging from $1.99 (e.g., California Penal Code) to $19.99 (e.g., the entire Code of Federal Regulations). Libraries can be searched by keyword and search results can be bookmarked, saved to workbooks, annotated and saved offline. Results can also be shared via e-mail and text message. Another neat feature is DLaw's built-in RSS reader which comes pre-set with popular law blogs such as Above the Law, The Droid Lawyer and Bench Memos, and also allows user-defined RSS feeds. In addition, DLaw provides links to legal news sites and other legal resources to help keep you informed.

Hubert Kim is a senior associate with Wilson Turner Kosmo LLP. His legal practice primarily consists of complex business litigation. Mr. Kim may be reached at (619) 236-9600 or hkim@wilsonturnerkosmo.com.

Association of Business Trial Lawyers – San Diego

2011 Officers and Board Members

President
Hon. M. Margaret McKeown
Vice President
Richard D. Gluck
Treasurer
Jack R. Leer
Secretary
Marisa Janine-Page
ABTL Report Editor
Lois M. Kosch
Judicial Advisory Board Chair
Hon. Janis L. Sammartino
Leadership Development Co-Chairs
Brian A. Foster
Colin H. Murray
Membership Chair
Ross H. Hyslop
Program Chair
Paul A. Tyrell
Immediate Past President
Anna F. Roppo
Past Presidents
Hon. Jan M. Adler
Peter H. Benzian
Charles V. Berwanger
Michael Duckor
Edward M. Gergosian
Hon. J. Richard Haden (Ret.)
Hon. Maureen F. Hallahan
Frederick W. Kosmo, Jr.
Mark C. Mazzarella
Alan Schulman
Hon. Ronald L. Styn
Howard F. Susman
Claudette G. Wilson
Mark C. Zebrowski
Robin A. Wofford
Meryl L. Young
Executive Director
Pat Schmidt

Board Of Governors
Hon. Lorna A. Alksne
Felipe J. Arroyo
David J. Aveni
Hon. Jeffrey B. Barton
Hon. Anthony J. Battaglia
Hon. Cathy Ann Bencivengo
Daniel Benjamin
Raymond Bertrand
Callie A. Bjurstrom
Robert J. Borthwick
Gary K. Brucker, Jr.
Michelle L. Burton
John P. Cooley
Hon. Gonzalo P. Curiel
Hon. David J. Danielsen
Hon. William S. Dato
Roger A. Denning
William J. Doyle II
Hon. Kevin A. Enright
Brian A. Foster
Chad R. Fuller
Daniel E. Gardenswartz
Steven N. Geise
Richard Gluck
Hon. Judith F. Hayes
Robert M. Howard
Valentine Hoy III
Hon. Marilyn L. Huff
Hon. Richard D. Huffman
Ross H. Hyslop
Marisa Janine-Page
Lois M. Kosch
James R. Lance
Jack R. Leer
Guillermo Marrero
Brian D. Martin
Hon. M. Margaret McKeown
Marilyn R. Moriarty
Colin H. Murray
William M. O'Connor
Shannon Z. Petersen
Hon. Ronald S. Prager
Anna F. Roppo
Anthony M. Stiegler
Jill Sullivan
Susan G. Taylor
Hon. Timothy B. Taylor
Hon. Randa Trapp
Paul A. Tyrell
Judicial Advisory Board
Hon. Cynthia G. Aaron,
Hon. Patricia Yim Cowett (Ret.)
Hon. Steven R. Denton
Hon. Irma E. Gonzalez
Hon. William Q. Hayes
Hon. Herbert B. Hoffman (Ret.)
Hon. Joan M. Lewis
Hon. Frederic L. Link,
Hon. William H. McAdam
Hon. William R. Nevitt, Jr.
Hon. Leo S. Papas (Ret.)
Hon. Laura H. Parsky
Emeritus Board Members
William S. Boggs
Hon. Peter W. Bowie
Luke R. Corbett
Charles H. Dick
Hon. Irma E. Gonzalez
Hon. Judith L. Haller
Hon. William J. Howatt, Jr. (Ret.)
Hon. J. Lawrence Irving (Ret.)
Hon. Ronald L. Johnson (Ret.)
Hon. Arthur W. Jones (Ret.)
Michael L. Kirby
Michael L. Lipman
Hon. Jeffrey T. Miller
David E. Perrine (In Mem.)
Abby B. Silverman
Robert G. Steiner
William F. Sullivan
Reg A. Vitek
Michael J. Weaver
Shirli F. Weiss

ASSOCIATION OF BUSINESS TRIAL LAWYERS
abtl
SAN DIEGO

PRSRT STD
U.S. POSTAGE
PAID
PERMIT 2482
SAN DIEGO, CA

PMB #386
1010 University Avenue #113
San Diego, CA 92103