ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO

abtl REPORT

Volume XVIII No. 4 *Winter 2011*

Budget Cuts and the State of the San Diego Superior Court

By: Jessica A. Chasin

On September 19, 2011, ABTL presented its dinner program "The State of The Court: How State Budget Cuts Will Affect Our Superior Court." The speakers included Presiding Judge Kevin Enright, Civil Presiding Judge Jeffrey Barton, Judge Joan Lewis, and Court Executive Officer Michael Roddy.

Jessica A. Chasin

The Budget Shortfall

Judge Enright provided a brief fiscal overview. The California Legislature cut 2011 fiscal year court funding by $350 million. This is on top of the cuts already instituted over the past several years. More than $300 million earmarked for court construction was swept into the state's general fund and is no longer available to the courts.

San Diego court's Executive Officer, Michael Roddy, offered an overview of how San Diego is dealing with the severe budget cuts. Over the past five years, San Diego has managed to find short term solutions to immediate funding shortfalls. The courts have now used every spare dollar they were able to dig out of the couch cushions to minimize the impact of the budget crisis on court services. All of the "one-time fixes" have been exhausted, and the full impact of the budget woes are likely to hit San Diego in the next fiscal year. Throughout the evening, the panel referred to the pending impact as financial "Armageddon."

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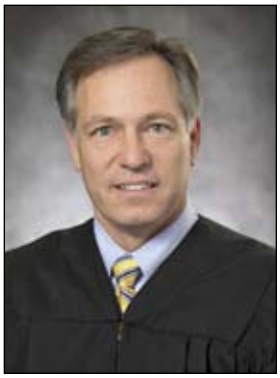
Brown Bag Lunch: Inside the Courtroom of Judge William S. Dato

By: Marisa Janine-Page

On September 28, 2011, Judge William S. Dato sat down with ABTL members for an informal discussion on insights into his courtroom. Judge Dato addressed his approaches to case management and law and motion.



Judge William S. Dato

Case Management

In the majority of his assigned cases, Judge Dato sets trial for 12 to 15 months from filing. In cases with minor unforeseen developments, he may entertain 18 months from filing. However, if a party wants trial set further out than 18 months, that party will be required to meet a greater burden of showing good cause. Likewise, if a trial continuance is sought, even if the parties stipulate, Judge Dato requires all the details in the supporting declaration(s). He is willing to consider such stipulations, but the

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Inside

The Association of Business Trial Lawyers of San Diego

Proudly Presents

LESSONS FROM LINCOLN'S LAW PRACTICE

Featuring:

John A. Lupton

John A. Lupton is the Director of History Programs with the Illinois Supreme Court Historic Preservation Commission and also serves as its Acting Executive Director. Mr. Lupton's presentation, Lessons from Lincoln's Law Practice, highlights the twenty-five-year legal career of Abraham Lincoln. Twenty-six of our nation's forty-three presidents were lawyers, and Lincoln may have had the most extensive law practice before taking the oath of office. Mr. Lupton worked for nearly twenty years on the Lincoln Legal Papers and Papers of Abraham Lincoln projects. He has published dozens of articles and chapters on Lincoln's law practice and legal history, and was an assistant editor in the publication of The Papers of Abraham Lincoln: Legal Documents and Cases. Mr. Lupton also specializes in Lincoln's handwriting, has appeared in several television programs to authenticate Lincoln documents, and has even been called as a trial witness in a lawsuit over an allegedly forged Lincoln document. Please join us as Mr. Lupton discusses what modern lawyers can learn from Lincoln's long service as a trial and appellate lawyer.

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1 HOUR MCLE CREDIT

The ABTL certifies that this activity conforms to the standards of approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education

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President's Letter

By Anna Roppo, President ABTL San Diego

Anna Roppo

ABTL's founding President, Allan Browne, said that "one of the great byproducts of ABTL is the fact that it has developed wonderful camaraderie amongst trial lawyers… and all of us share similar concerns in the courthouse as well as the legislature."

ABTL offers the unique opportunity to learn from those that lead the legal community both in practice and from the bench. In addition, entering a courtroom where the judge presiding or your opposing counsel is someone that you had dinner with at an ABTL event the Monday evening before provides an advantage – not one that will necessarily impact the outcome of your case – but instead the "wonderful camaraderie" that Allan Browne describes.

This year practitioners and judges joined together at an ABTL dinner program on a Monday evening in San Diego to share their concern about the crisis that impacts California's courts. Described as "courtmageddon" in San Francisco (25 courtrooms closed, almost all civil, and 200 employees let go) the crisis looms large over the entire state and San Diego is no exception. In fact, a large number of court systems throughout the country are facing budget cuts and have had to freeze or reduce salaries, lay off staff, reduce operating hours, increase fines/fees paid by the public and leave positions for judges and court staff unfilled.

I will use my last President's letter to discuss the issue and to once again ask for your help.

Why is the judicial system facing this battle? Despite the fact that the judiciary is an independent branch of government, the legislature controls its funding. You may have noticed that legislators are much younger than they used to be and that there are fewer lawyers in their ranks. Therefore, we may have a legislature that is not entirely aware of the benefits of the court system. Do they understand that the courts and the people that use them are their constituents? Maybe not. But YOU do.

Write to your legislator, have your clients (many of them people and businesses with extraordinary power) do so as well. Explain that we are in an unprecedented time of recession (if not depression) when people need access to the courts more than ever, to resolve their foreclosure, tenancy, business and employment problems (not to mention the ever present divorce and custody matters). Any increase to the already problematic shortage of courtrooms, judges and court staff will imperil equal access to the courts and to justice. That is not acceptable. Our legal system is envied throughout the world. It is a model for all nations that aspire to freedom and we need to do our part to make sure that it remains that way. Former U.S. Supreme Court Justice Sandra Day O'Connor said it best (even though it was in the context of a discussion about judicial elections it is equally applicable here): "Justice Souter and I look at the court as the one safe place where a person can have a fair and impartial hearing to resolve a legal issue and we have to keep that."

"Any increase to the already problematic shortage of courtrooms, judges and court staff will imperil equal access to the courts and to justice. That is not acceptable.."

I could not have said it better myself.

Making the Record: Appellate Hints for Trial Lawyers

Kate Mayer Mangan

High Tech Trials on Appeal

By Kate Mayer Mangan

This is the first in a series of biannual articles that will present tips and information that trial lawyers can use to set up their cases for success on appeal. The columns will cover everything from the practical to the esoteric, from hints for preserving your record to appellate motion practice, and everything in between. Please look for the column in future issues of the ABTL Report.

A high-tech video or a snappy PowerPoint can be a dream at trial, livening up testimony and simplifying complex ideas. But these technologies can turn into nightmares on appeal if a party doesn't make a proper record. Making a record of a high-tech trial can be tricky because court reporters usually are not required to transcribe videos and slideshows. No matter how brilliant your video deposition was, it won't matter on appeal unless you properly make your record. As one court wrote, on appeal, "if it is not in the record, it did not happen." (*Protect Our Water v. County of Merced,* 110 Cal.App.4th 362, 364 (2003).) Even worse, if you fail to provide a sufficient reporter's transcript and no error is evident, the appellate court will *presume* the judgment is correct. (See, e.g., *Foust v. San Jose Const. Co., Inc.,* 198 Cal.App.4th 181, 186-97 (2011).) "To put it another way, it is presumed that the unreported trial testimony would demonstrate the *absence of error*." (*Estate of Fain,* 75 Cal.App.4th 973, 992 (1999) (emphasis added).)

Don't join the litigants who lost their appeals because they didn't make an adequate record. Here are some steps you can take to be confident your high-tech trial will make an impression on the appellate court.

Videos

A new rule of court that became effective in July 2011 clarifies how to get your videos in the record. Because the court reporter generally does not have to transcribe videos (Cal. Rules of Court, rule 2.1040(d), the party offering the video has the burden of making sure it is in the record. The procedure depends upon whether the video is of prior testimony, such as a deposition, or is another type of recording.

If the video is of prior testimony, you must lodge with the court a transcript of the testimony before you may present the video. (Cal. Rules of Court, rule 2.1040(a)(1).) When you play the recording, identify for the record the page and line numbers of the testimony you are offering. (*Ibid.*) For instance, "For the record, I am playing the video deposition of Mrs. Brown, page 12, line 4 through page 36, line 10." Then, either at the close of evidence or within five days of offering or presenting the recording, whichever is later, serve and file a copy of the transcript. (Cal. Rules of Court, rule 2.1040(a)(2).) The version you file and serve must: (1) show on its cover the witness's name, (2) include the pages containing the testimony you presented or offered, and (3) be marked to identify exactly which testimony was presented or offered. (*Ibid.*) You can use brackets in the margins to mark the testimony.

If the video is not prior testimony, a slightly different procedure applies. Before you present such a video in court, you must provide the court and opposing parties a transcript of the recording *and* a copy of the video. (Cal. Rules of Court, rule 2.1040(b)(1).) If you forget, you may be able to provide the transcript

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Making the Record

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or copy later for a showing of good cause, (Cal. Rules of Court, rule 2.1040(b)(2)), but the best practice is to provide the transcript and copy before you try to present the video.

Make sure that the clerk marks the transcripts for identification and files them. (Cal. Rules of Court, rule 2.1040(c).) You should also make sure that opposing counsel does the same, in case you need to base an appeal on your opponent's video evidence.

As a failsafe, you should also make an oral record of exactly what you played in court. For example, say "Please let the record show that the video commenced with the counter set at 4011, showing the scene where . . . , and the video stopped when the counter read 8902 and the last scene was . . . ." It's important to describe the scenes so that an appellate court can make sure it views the same part of the video you played.

You always have the option of requesting that the court reporter record the content of a video. (Cal. Rules of Court, rule 2.1040(d).) This is not advisable for long video depositions or other lengthy videos that can stand alone. However, you may want the court reporter to take down video clips that are interspersed with live testimony. For instance, if you use video deposition clips to impeach a live witness, the appellate court will be able to understand the impeachment better if the transcript shows the live testimony immediately followed by the impeaching testimony.

PowerPoints

Like videos, PowerPoints are not automatically part of the record. Preserving slides, both yours and your opponent's, can be critical because PowerPoints can create appealable issues. (See, e.g., *People v. Katzenberger,* 178 Cal.App.4th 1260, 1269 (2009).) The best way to preserve a slideshow is by saving it on a disc and marking the disc as an exhibit. That way the appellate court can see exactly what was presented, even if the slides contained animation that a printout wouldn't convey. (See, e.g., *People v. Chia* 2007 WL 3073341 at *7 [court reviewed the presentation that was admitted into evidence on a compact disc].) As a safeguard against any technology glitches, you should also submit a hard copy printout of the PowerPoint and mark that as well. Make sure your opponent does the same.

Kate Mayer Mangan practices appellate law at Mayer Mangan, A PLC and previously practiced at Latham & Watkins, LLP. In 2009, Mayer Mangan founded the Appellate Litigation Clinic at the University of San Diego School of Law.

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abtl

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

Editorial Board:
Eric Bliss, Richard Gluck, Alan Mansfield,
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Tips From the Trenches: Technology In The Courtroom

By Mark C. Mazzarella

Mark Mazzarella

The intent and design of *Tips From The Trenches*, has always been to provide surrogate mentorship, through interviews with elder statesmen and women, to the vast majority of lawyers who today don't have the benefit of a consistent mentoring relationship with a savvy senior partner down the hall, who a generation ago, long before MCLE mandates and programs broadcast on over the web, was the source of most trial tips and other words of wisdom derived from years in the litigation trenches. This article, however, deviates from the usual format. The reason is quite simple. When it comes to using technology in the courtroom, the most knowledgeable lawyers are not the grey-hairs, many of whom have to be dragged into the digital age kicking and screaming, but rather the generation just junior to them, who may have much less trial experience, but understand and utilize technology in a way that only those for whom technology is their "first language" can. As a consequence this article relies upon a combination of my discussions over the years with numerous trial lawyers and consultants of all levels of age and experience, my personal experience, and a review of a considerable amount of literature on the topic.

During the four years, from 1996-2000, I split my professional time between a conventional trial practice here in San Diego, and work throughout the country with renowned jury consultant Jo-Ellan Dimitrius of O.J. Simpson, Rodney King, Scott Peterson and Enron fame, to mention but a few of Dimitrius' high profile cases. I not only co-authored *Reading People* and *Put Your Best Foot Forward* with Dimitrius, but also assisted her as a jury consultant on cases ranging from the prosecution of the first four criminal trials against Los Angeles Police Department Rampart Division officers who were charged with framing criminal defendants by planting evidence or falsifying police reports, to the Pinnochio trial in which Dimitrius' client, Francis Ford Coppola, received an $80 million dollar verdict against Time Warner for its breach of a contract for Coppola to create a remake of the Pinnochio story, and every type of case in between. The time for me to have been involved in such frequent discussions regarding the use of technology in the court room couldn't have been better. In the late 1990s the use of trial technology was in its period of adolescence, during which it transitioned from an unstable, inexperienced and mistrusted youth to a strong and independent adult.

During this time period, Dimitrius and I were often asked by lawyers of all levels of trial experience, "How much technology is too much?" "If I don't use technology, will that hurt me?" "What are jurors' expectations regarding the use of technology during trial?" and a host of similar questions. One question routinely asked before investing the time and money into trial technology was, "What is the likelihood that it will be allowed into evidence at trial?" The answers we gave to such questions then were very different than the answers that would have been given 15 years earlier in the early to mid-1980s, or the answers that are appropriate now, 15 years later. The reason is simple. 30 years ago the ELMO, (nothing but a video camera that projected the image of whatever was put under it onto a screen), represented the outer limits of commonly used trial technology. A lot has changed since then. In fact, the newer generations of lawyers probably would be surprised to learn just how far the use of technology in the courtroom has come over just the past three decades.

As an illustration, in 1982 I "second chaired"

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a products liability trial in Los Angeles with Bob Steiner against very successful trial attorney, Browne Greene, in which Browne's accident reconstruction expert Derwin Severy, created a number of "Little Big Books" to graphically demonstrate the accident sequence. (For those of you who are too young to remember Little Big Books, they consisted of a progression of photographs or drawings affixed to a spine, like a book, which created a "motion picture" when the reader held the book by the spine with his left hand and shuffled through the pages rapidly by bending the middle of the book toward the reader and quickly releasing the right side of the pages one by one.) That was "cutting edge technology" just 30 years ago. About eight years later in 1990, working with Steve Yunker, we commissioned our first computer generated accident reconstruction, a very basic 18-second simulation of a head-on automobile accident, at a cost of $10,000, recognizing the risk that the trial judge might not even allow us to introduce such novel evidence at trial. The cost of our computer-generated accident simulation was peanuts compared to the $250,000 price tag on a simple computer simulation of a plane crash in Detroit prepared by the defense team in that case, headed by Tom McDermott, at about the same time, which was admitted only over vigorous objection by the plaintiffs.

In contrast, today multimedia presentations during trial are so commonplace that virtually all new courtrooms have the built-in capacity to accommodate virtually any technology without the need for the trial team to bring to court anything more than laptops and imagination. Computer simulations are routinely admitted as evidence. And computer simulations could probably be generated by any computer savvy teenager with an iPhone for a fraction of the cost of the stick figure presentations that were considered high tech in the past. And, perhaps most importantly, technology, if fairly and competently used, is embraced by the bench. As a result, trial lawyers generally no longer need to worry if well done high tech presentations will be allowed at trial. They will.

While trial technology has become more affordable, and is now routinely admissible if it accurately represents what it purports to represent, many trial attorneys still prefer 'low-tech" presentations, for some cases. But there is no question that the trial lawyer's "menu" of presentation options today ranges from the most basic techniques that have been used for hundreds of years, like an easel, paper and pen, to high tech multimedia extravaganzas, that would leave Steven Spielberg in awe. Therefore, the first question frequently asked is, what is more effective, high tech, low tech, or a combination of both. The answer, to the extent there is any uniform answer, is, "it depends."

The contrast between the use of cutting edge multimedia technology and the old fashioned approach was demonstrated in a recent trial here in San Diego which pitted formidable foes Ed Chapin and Ken Sullivan against the equally able team of e robert (bob) wallach and Bob Dyer. I watched Sullivan and wallach's closing arguments with particular interest, since the contrast between their respective use of technology was no doubt as great as I will ever see. On the one hand, Sullivan was extremely proficient and effective with the multimedia presentation upon which his closing argument relied. In fact, Sullivan's presentation was so professional and seamless, that when wallach stood up to begin his closing argument, his first comment was something to the effect that he felt as though he had just climbed out of the Matrix. What followed was a two- hour closing argument in which bob showed the jury just a single one-page exhibit. Both closing arguments were magnificent in their own ways. As for which presentation was favored by the jury....After weeks of deliberation, it could not reach a verdict. While the need to retry the case may not be what Chapin, Sullivan, wallach and Dyer would have preferred, it does present the potential opportunity, for anyone who is so inclined to witness firsthand the contrast I discuss above.

As Sullivan and wallach's closing arguments

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New and Noteworthy

Consumer Arbitration Agreement Found Unconscionable As Case Law Develops Post Conception

Sanchez v. Valencia Holding Company, LLC, --- Cal. Rptr. 3d ----, 2011 WL 5027488 (Cal. Ct. App. Oct. 24, 2011)

In what some will see as the latest in judicial hostility to arbitration, the California court of appeal in *Sanchez* has held that a form consumer arbitration agreement widely used by auto dealerships throughout the state is unconscionable. In so finding, the *Sanchez* court dodges the U.S. Supreme Court's recent holding in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) that the Federal Arbitration Act (the "FAA") preempts California law limiting the terms of arbitration on state public policy grounds, including class action waivers.

Sanchez also involved an arbitration agreement containing a class action waiver. In it, a consumer filed a putative class action against an automotive dealership, alleging disclosure violations in the purchase of his vehicle. The dealership moved to compel arbitration and enforce the class action waiver. Before the Supreme Court decided *Concepcion*, the trial court denied the motion on the ground the class action waiver was unconscionable under California law. The dealership appealed, and while that appeal was pending *Concepcion* was decided.

The court of appeal in *Sanchez* did not address whether the class action waiver was unenforceable. Instead, it affirmed the denial of the motion to compel arbitration on the ground that the entire arbitration agreement was unenforceable under the unconscionability test articulated in *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83 (2000). The *Sanchez* court reasoned that even after *Concepcion*, "the doctrine of unconscionability is still a basis for invalidating arbitration provisions." *Sanchez*, 2011 WL 5027488 at *7. "Thus, *Concepcion* is inapplicable where, as here, we are not concerned with a class action waiver or a judicially imposed procedure that conflicts with the arbitration provision and the purposes of the [FAA]." *Id.*

The *Sanchez* court then found the arbitration agreement both procedurally and substantively unconscionable. It found procedural unconscionability because: (a) the arbitration agreement was located at the back of the two-page contract in small font and reduced line spacing; and (b) it was part of a take-it-or-leave-it contract not open to negotiation.

The court also found substantive unconscionability because of the following four terms: 1) the losing party at arbitration can appeal to a panel of three arbitrators only if the award is $0 or exceeds $100,000; 2) a party can appeal any award of injunctive relief; 3) an appealing party must advance the arbitration costs of appeal subject to a final determination by the arbitrator; and 4) self-help remedies, including the right to repossession, are excluded from arbitration. The *Sanchez* court concluded these provisions, though neutral on their face, are in practice one-sided in favor of the dealership.

The *Sanchez* court refused to sever the four offending terms. Instead, it concluded that the entire arbitration agreement was "permeated" with unconscionability and unenforceable.

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New and Noteworthy

Applying Dukes, the Ninth Circuit Directs Lower Courts to Rigorously Examine the Merits of Class-Wide Discrimination Claims at Class Certification Stage

Ellis v. Costco (9th Cir. 2011) 657 F.3d 970.

In its first employment class action decision of the post-*Dukes v. Walmart* era, the ninth circuit reviewed the standards for class certification in a gender discrimination lawsuit. In this action, the district court certified a nationwide class consisting of current and former female Costco employees who had been denied promotion to general manager or assistant general manager to seek injunctive relief, compensatory damages, and back pay in 2007.

The ninth circuit vacated the class certification order with regard to the district court's findings on commonality and typicality, and concluded the district court had applied the incorrect standards. The court held the rigorous analysis required by *Dukes* to determine commonality mandates that the district court weigh the merits of the class-wide discrimination claims to the extent that they overlap with class certification issues on remand. The court opined that the plaintiff must show that there is "a common question that will connect many individual promotional decisions to their claim for class relief." The court must resolve any factual disputes necessary to determine whether there was "a common pattern and practice that could affect the class as a whole." With regard to typicality, the court opined that a named plaintiff's claims are not typical if the named plaintiff is subject to defenses which are not typical of those that may be raised against other members of the proposed class.

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illustrate, the question, "how much technology is too little or too much?" is not susceptible to a simple answer. What I found upon reviewing the literature is the one thing upon which everyone seems to agree is, the answer is, "it depends." But that begs the question "depends on what?" While I found no single credible answer to this question, and in fact concluded that any attempt to answer the question definitively was not credible, there are some "facts" (or conclusions that are universally accepted as facts) that can and should be added to the analysis when answering that question for any particular case.

We live in a high tech society, in which most jurors receive information primarily, if not exclusively, through one form of high tech media or another. That is not subject to any serious debate. Nor does anyone who has studied the subject question that as a result, jurors' expectations are now that at trial, information will be presented to them in the formats to which they have become accustomed, which include all types of audio and visual media. As a consequence, the concerns of the past that too much technology will cause jurors to reach negative conclusions about the party using it, such as the party using more technology has money to burn, or the party using more technology has an unfair advantage over the other party, have been dispelled. Rather, the competent use of technology, even sophisticated technology, is perceived by most jurors as the norm. Those who use technology no

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longer draw unwanted attention to themselves as a result. Rather, it is those who do not use technology proficiently who are at risk of creating a jury bias.

With regard to all of the conclusions expressed here, and in the literature upon which I rely, there are exceptions and qualifications. The premise that those who do not use technology will have a strike against them in today's world is true, but to various degrees, depending upon a number of other factors. It is true that jurors today want to, expect to, and need to, be stimulated more today than in the past if the goal of obtaining their attention, comprehension and retention is to be achieved. And technology helps do this. But in simple cases, or cases that can be presented in a short period of time, the advantages of the use of technology may not outweigh the disadvantages, which primarily involve cost and the time involved to create, set up, and proficiently present the technology. Additionally, the ability of the lawyer to present his or her case in an interesting, comprehensible and memorable fashion with nothing but low tech methods varies considerably form lawyer to lawyer. But it certainly can be accepted as true that as cases get longer and issues get more complex and difficult to remember, the use of multi-media presentations becomes more beneficial.

The most compelling, and irrefutable, argument favoring the use of multimedia technology at trial, is its undeniable impact on retention. Studies going back a century have verified that individuals retain somewhere between 50% and 80% more information if the information is delivered visually and orally, more so if delivered visually and orally at the same time, as opposed to simply delivered orally.

Thus, high tech, multimedia presentations generally will be remembered better than the alternative. This, of course, assumes that they do not distract from the presentation of the intended message. Multimedia presentations that

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Budget

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The panel does expect San Diego courts to make it through this fiscal year with little impact on services, but after that the court needs to find a way to operate with an additional 20 percent budget cut. There are already 270 fewer employees working for the court system than there were just five years ago. The additional cuts are going to make it extremely challenging to meet the court's goal of avoiding staff furloughs, court closures, or further reduced hours.

Real World Challenges

Judge Barton answered the question on everyone's mind by providing his view of the "real world" challenges faced by the court system. The severe staff reductions are going to mean delays in getting filings and court papers processed. This delay will almost inevitably impact the court's ability to move cases through system. The system is currently at capacity and further cuts, Judge Barton fears, will be the "straw that breaks the camel's back." The cumulative stress of the cuts over the last five years and the fact that all efficiencies possible have already been realized lead to worry about the future.

Judge Lewis expressed her concern that the cuts, and resulting delays, are going to create even longer waits for motion dates on civil calendars. As of the date of the program in mid-September, civil departments were setting law and motion dates into December and January. The individual civil departments are reaching their absolute breaking point for motion workload. The budget and staffing problems are compounded by the fact that lawyers are getting more creative, and cases are getting more complicated resulting in difficult and time consuming motions. Judge Lewis is grateful that she doesn't have to deal with many discovery motions because practitioners in San Diego are relatively good about working out their discovery differences. The real difficulty is the work on substantive and dispositive motions. In any given week Judge Lewis has eighteen motions to decide, half of which are motions for summary judgment. One thing practitioners in San Diego can do to help is to apply the spirit of cooperation and compromise seen in discovery matters, and apply it to substantive motions by taking a hard look at the issue and see if there is a way to work it out informally with the other side. Judge Lewis suggested that demurrers are a particularly good candidate for this type of approach.

Judge Barton and Judge Lewis agree that the San Diego courts want to keep the current delay reduction initiative in place and maintain the stellar results of the initiative, which currently sees 75 percent of all civil cases resolving within one year. This will be extremely challenging if budget cuts result in further staff reductions. Currently, each civil independent calendar judge maintains a caseload of between 580-700 cases. The departments are managing relatively well, but the real tension point is dealing with the incredible civil motion workload and getting dates set for those motions. The first place civil practitioners are going to see the impact of the reduced court staff will be longer and longer waits for motion dates. Judge Barton likened it to the episode of *I Love Lucy* where Lucy and Ethel try to keep up with the chocolates on the conveyor belt and are eventually overwhelmed. The motions just keep coming faster and faster, and the courts are doing their best to try to keep up.

Possible Solutions

In response to an inquiry about the court's ability to raise fees to help mitigate the impact of budget cuts, Mr. Roddy shared with the audience that individual courts have no independent latitude to raise fees to what the market will bear for that geographic area. Any court fee increases must be statewide. While the issue of raising fees is certainly being explored, there is tension between having fees high enough to keep the courts running, but low enough that they do not bar access to the courts.

What about the court's popular mediation program? Mr. Roddy said that everything is on the table, but there is little appetite for eliminating the mediation program. As Judge Barton pointed out, cutting the mediation program would likely be penny wise but pound foolish. The court may save some money cutting the program, but would then have to bear the costs associated with the 30 to 40 percent of cases still in

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the system that would have settled if the mediation program were available.

Judge Enright pointed out that in every difficulty, there is opportunity and that all is not gloom and doom. The court is making tremendous progress digitizing court records and getting the e-filing system up and running. These moves are expected to result in significant costs savings for the court and increase convenience for practitioners.

By November 2 of this year, all downtown civil departments were to be digitized. Judge Barton expects that by the middle of next year, e-filing services will be made available to practitioners on a rolling basis until all departments support the service. The courts realize a huge cost savings when papers are filed electronically. Your friendly neighborhood attorney service may not like it, but e-filing is much easier on the court. Since many practitioners are already familiar with e-filing in federal court, the convenience and cost savings for both the court and practitioners should mean e-filing will catch on quickly.

What You Can Do

Judge Barton ended the program by thanking San Diego's legal community for being an outstanding group of people, and offering one more way the legal community can help the courts. The judiciary has no constituency to call upon to fight for the cause of the courts, so it needs practitioners to mobilize on its behalf. Judges encouraged practitioners to lobby the California Legislature to make funding the courts a priority. If you have contacts with the state legislature, reach out to them and get the word out. If you don't have contacts with the legislature, Judge Enright suggests, "make them!" San Diego is not in circumstances quite as dire as some other courts in the state, and Judge Enright believes San Diego courts will meet this challenge, but the court needs the help of the legal community to make it happen.

Jessica A. Chasin is an Associate with Wilson Turner Kosmo LLP. She specializes in defense side employment law.

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are interesting and captivating, but don't really communicate the message needed to persuade the jurors, can do more harm than good. Likewise, high tech presentations which are not made proficiently will not only lead the jury to question the presenter's competence and credibility generally, but will cause the intended message to be lost amidst the confusion that will be created if equipment isn't working, or the operator doesn't know how to use it properly. (The moral, of course, is whatever means you use to present your case, make sure it is presented smoothly and without the distraction caused by equipment failure, operator error, or anything else that impairs the lawyer's ability to quickly locate and put the evidence before the jury, whether a exhibit board, or a computer simulation.)

It is also reasonable to conclude, as the research does, that multi-media or other high tech presentations are more likely to capture and retain the jurors' attention. But it will do no good if the jurors are spellbound by a presentation which, in the end, leaves them wondering, "What was the point of that?" The trial lawyer must not think that the use of technology will somehow carry the day, independent from the facts or arguments the technology is intended to communicate. And it is a mistake to believe, as many trial lawyers do, that a PowerPoint presentation containing 100 or more slides is going to keep the jurors' attention, or for that matter, effectively communicate the key facts, law and arguments. The essential points are easily lost within a lengthy Power Point presentation and may leave the jurors so overwhelmed with information that the presentation has not done what it was intended to do—help the jury focus on whatever the trial attorney believed was most important.

All of this leads me back to where I began, those closing arguments of Ken Sullivan and e bob wallach, and in particular to wallach's closing argument in which he showed the jury a single piece of paper by holding it up for the jury to see as he walked it back and forth in front of the jury box. What was he thinking, I wondered? So I asked. And wallach's answer made me realize what virtually all of the research ignores—what is it that really wins or loses lawsuits? And, how does a trial lawyer best present his or her case to achieve that objective?

Anyone who knows wallach, who has practiced law for more than 50 years, knows it would be a mistake to assume his decision not to use technology in his closing argument was the result of a lack of computer savvy. The fact is, wallach doesn't go anywhere without his Mac laptop in hand, and types into it as feverishly as any new associate during meetings and similar occasions. Likewise, wallach's decision to employ the ultimate low tech approach in his closing argument wasn't because he was unaware of the statistics regarding the increased retention that flows from the use of visual or oral and visual presentation techniques. After teaching trail advocacy for decades, he knows the studies and their conclusions well.

So, what was it that caused wallach to use a technique that he knows will result in the jury retaining only a fraction of the "facts" it would retain if he used other methods? And why didn't wallach worry about whether his approach would stimulate and entertain the jury as well as the more high tech methods of communication upon which he knows jurors rely in their everyday lives? wallach's answers caused me to stop and remember that, as has been true since man first begin presenting their disagreements to their peers, what wins or loses lawsuits is not reason, but emotion.

Research demonstrating jurors' expectations that they will be entertained, statistics proving that technology can increase retention, or similar research are informative, but they don't address the most important question, what will best achieve the trial lawyer's objective to make the jurors' emotionally committed to his or her client's cause? Wallach's reason for using the approach he did in his closing argument was very simple. When he sat down at the end of his argument, he wanted the jury to conclude that it would be unfair for his client to lose. If

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more information supporting the continuance that the parties provide in the stipulation and supporting declarations, the greater the likelihood that it can be granted on the papers without the necessity of an ex parte appearance.

Similarly, on default judgments, the plaintiff is encouraged to submit a complete default judgment package, with the plaintiff declaration, prove up, and other supporting evidence. Judge Dato does not rubber-stamp default judgments, so make sure that all support for the default judgment is submitted. Additionally, if seeking punitive damages, make sure the default judgment package contains admissible evidence of the defendant's net worth.

Finally, Judge Dato's general philosophy on alternative dispute resolution is that the parties should be pursuing it; and, if they are not, they should be ready to explain why not. Mindful of the rules precluding a judge from requiring an objecting party to spend money on private ADR, Judge Dato will general refer cases to the Court Mediation Program or a judicial settlement conference. Parties are encouraged to meet and confer in advance of the case management conference and to pre-select an agreed-upon mediator (this process is now available on the court's website: www.sdcourt.ca.gov).

Law & Motion

Like most of the IC departments, Judge Dato's law and motion calendar is scheduling about five months out. This is due to the increasing volume of motions generally, and complex motions in particular. Judge Dato's courtroom has made changes to increase law and motion capacity and is hoping those changes will provide some relief soon. To that end, parties who resolve motions by stipulation or withdrawal are encouraged to notify his department as soon as possible so that the hearing can be taken off-calendar, enabling the Judge to reallocate his resources to other matters.

Judge Dato's research attorney, Susanne Washington, shares a similar civil litigation and appellate practice background. The two collaborate on motions, discussing the cases and issues and tentative rulings before they are issued on Thursdays. They also agree that routine evidentiary objections are inefficient and a waste of resources. Parties are encouraged to dispense with the distracting, insignificant objections and focus on the particular items that are critical. Other tips for motion practice in Judge Dato's courtroom:

Attach important documents if referenced in your brief (including the complaint).

Submit a three-ring binder of exhibits to the department (rather than Acco-fastened exhibits).

Make sure that the separate statement and NOL evidence is cited accurately and thoroughly in the points and authorities.

Do not object if it does not matter.

Put all deposition excerpts for the same witness under the same exhibit tab and in page order.

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.

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Judge Dato and Ms. Washington have had no experience with electronic copies of points and authorities and/or separate statements with hyperlinks, but think they might be useful as the court transitions to electronic data storage this month.

Judge Dato understands the value in the demurrer process and will take the time and effort to issue a ruling that includes suggestions regarding necessary amendments. He then uses that ruling for the foundation of evaluating successive demurrers. If a party plans to file a successive demurrer, Judge Dato will look for that demurrer to specifically identify how the amended pleading did not comply with his ruling on the earlier demurrer.

On discovery motions, if the parties are truly at an impasse they are encouraged to schedule a meet-and-confer with the Judge, where he will give his tentative thoughts and possibly fashion a workable resolution. The parties can schedule an *ex parte* meet-and-confer with the Judge before or after filing their motion papers, but the parties should file a short statement in advance of the meet-and-confer *ex parte* that provides a focused preview of the key issues. Unfortunately, the vast majority of discovery disputes are not substantive but rather are due to the lawyers not getting along. Given the budget constraints and over-burdened court docket, these "sandbox fights" are frustrating to the judges. As such, Judge Dato pays particular attention to the meet-and-confer correspondence to ascertain who took the first unreasonable position. He strongly encourages lawyers to re-review meet-and-confer correspondence before sending it to the other side. The meet-and-confer process is supposed to be a cooperative process of resolution – not posturing for a motion to compel.

Finally, Judge Dato appreciates good writing that concisely frames the key issues without

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legalese and jargon. He appreciates reading a good story in the briefs – but beware of fiction. If your story does not comport with the record or the facts, or stretches the facts too far, it will stigmatize you as disingenuous. Additionally, keep in mind that judges are generalists, so be sure to include specific applicable law and necessary factual explanations in specialized areas. Also, for oral argument, remember Judge Dato's appellate background. He enjoys dialogue with the lawyers, issues tentatives that focus on questions and concerns he may have, and offers hypothetical scenarios – so be prepared to engage at oral argument.

Facts at a Glance

- Appointed by Governor Gray Davis to the San Diego Superior Court in October 2003
- Presiding Judge, Appellate Division
- Assigned to IC Department 67
- Former appellate court staff attorney with Justice Howard B. Wiener of the California Court of Appeal, Chief Justice Rose E. Bird of the California Supreme Court, and Associate Justice Mathew O. Tobriner of the California Supreme Court
- Served as adjunct professor at University of San Diego School of Law and California Western School of Law, appellate practice and advocacy
- Certified Appellate Law Specialist in private practice
- A.B. from San Diego State University
- J.D. from the University of California at Los Angeles

Marisa Janine-Page is a partner at Caldarelli Hejmanowski & Page and the treasurer of ABTL San Diego. Her practice is primarily complex business and employment litigation with an emphasis on securities and class actions. (mjp@chplawfirm.com)

Tips

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the jurors' were emotionally committed to that proposition, they would find their way through the facts, law and arguments to the desired result. As any marketing expert knows, people buy on emotion and then rationalize their decision with whatever facts they need to cobble together to justify making it. Wallach believed in that particular case, in light of what that particular jury had seen and/or been told, he could influence the jurors' emotional response to the case and the parties by communicating to them as he did, conversationally, personally and simply. He wasn't concerned about what facts they would or would not retain and he could judge as he spoke to them whether he was boring them, and if so, react as needed. In other words, he ignored all the research and studies, and did what he knew he needed to do after trying 230 jury trials to verdict.

I realize now that I was mistaken when I wrote at the beginning of this article that I was not going to rely on the sage advice or wisdom of some very experienced mentor to provide "tips from the trenches" regarding the use of technology at trial. As it turned out I did. And that proves once again the importance of tapping into the experience of great trial lawyers like walach. For, without the benefit of his half of a century as a trial lawyer, I would have succumbed to the temptation to believe trying cases is a science that can be studied and diagramed and mastered by trial lawyers, as a computer would solve a math problem. It isn't. And all the technology in the world will never change that. ▲

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

Juvenile Delinquency and Dependency Incentive Program Donations

It's that time of year again! ABTL San Diego is pleased and excited to participate in the Juvenile Court's Juvenile Delinquency and Dependency Incentive Program.

Gift cards are given to program participants upon successful completion of the program's phases. Gift cards for movies, iTunes, fast-food chains, Target and WalMart have been requested by the court. The amounts requested for the cards are $10, $15, $20 and $25.

Let's make this effort a great success! Please bring your gift cards to the ABTL dinner program on December 5, 2011. If you're strapped for time, we'll be happy to do your gift card shopping for you. Just drop donation in collection basket at the ABTL Dinner on December 5, 2011.

You can also send your donation to ABTL San Diego, PMB #386, 1010 University Avenue #113, San Diego, CA 92103. If sending a check, please note in the memo section "ABTL Holiday Donation Program."
Please make donations no later than December 15, 2010, so we'll be able to get them to the Juvenile Court before the holiday.

Questions Please contact Pat Schmidt at (619) 948-9570 or abtlsandiego@yahoo.com

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