ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO

abtl REPORT

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Imminent Changes to San Diego Superior Court System Due to Budget Cuts

By David J. Aveni

David J. Aveni

Jeffrey Barton, San Diego Superior Court's Civil Supervising Judge, recently advised the legal community of imminent changes to the San Diego Superior Court system due to the sizeable budget cuts the court is currently facing. These changes will have a considerable impact on the litigation practices of ABTL members.

Seven Independent Calendar Judicial Reassignments

First, the court is reducing the number of independent calendar departments from 22 to 15. One of the departments affected is Judge Gonzalo Curiel's, who was appointed to the federal bench. The other six judges affected by this change (Judge Lorna Alksne, Judge Barton, Judge Kenneth Medel, Judge Thomas Nugent, Judge Luis Vargas, and Judge Joel Wohlfeil) will continue to serve in an overflow capacity, and will remain available to try cases and conduct settlement conferences, but will no longer serve as independent calendar judges.

The department transitions will occur as follows: On November 16, the cases assigned to Judge Medel's department in South County were reassigned to departments located downtown. On the same day, Judge Wohlfeil's caseload in East County was reassigned to Judge Eddie Sturgeon, who will be the only remaining independent calendar judge in East County. On November 30, all of Judge Vargas' construction defect cases will be reassigned to Judge Ronald Styn, except those where Judge Styn has served as the settlement judge. Additionally, the cases assigned to Judges Vargas, Alksne, and Barton will be reassigned to the remaining downtown departments (except Judge Styn). Judge Nugent's caseload in North County also will be reassigned. One effect of these transitions is that the

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Laid-off court reporters form coalition to cover civil proceedings.

SAN DIEGO – On September 25th, San Diego Superior Court officials issued a press release indicating that, effective November 5, 2012, official court reporters will no longer be available to report civil and probate proceedings. Additionally, as of December 28, 2012, official reporters will only be available for family law matters for domestic violence restraining order hearings, contempt hearings, and request for order hearings of 40 minutes or less. This is due to the court's decision to eliminate a total of 38 court reporter positions due to ongoing state budget issues.

However, those court reporters aren't disappearing. A group of layoff candidates have gotten together to form the San Diego

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A Conversation With U.S. Supreme Court Justice Ruth Bader Ginsburg

Justice Ruth Bader Ginsburg

SAVE THE DATE

You won't want to miss our February 8th luncheon with Justice Ruth Bader Ginsburg of the U.S. Supreme Court.

Ruth Bader Ginsburg, Associate Justice, of the United States Supreme Court was born in Brooklyn, New York, March 15, 1933. She married Martin D. Ginsburg in 1954, and has a daughter, Jane, and a son, James. She received her B.A. from Cornell University, attended Harvard Law School, and received her LL.B. from Columbia Law School. She served as a law clerk to the Honorable Edmund L. Palmieri, Judge of the United States District Court for the Southern District of New York, from 1959–1961. From 1961–1963, she was a research associate and then associate director of the Columbia Law School Project on International Procedure. She was a Professor of Law at Rutgers University School of Law from 1963–1972, and Columbia Law School from 1972–1980, and a fellow at the Center for Advanced Study in the Behavioral Sciences in Stanford, California from 1977–1978. In 1971, she was instrumental in launching the Women's Rights Project of the American Civil Liberties Union, and served as the ACLU's General Counsel from 1973–1980, and on the National Board of Directors from 1974–1980. She was appointed a Judge of the United States Court of Appeals for the District of Columbia Circuit in 1980. President Clinton nominated her as an Associate Justice of the Supreme Court, and she took her seat August 10, 1993.

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Location to be announced

President's Letter

Judge Judy?

By Hon. M. Margaret McKeown
United States Circuit Judge, Ninth Circuit Court of Appeals, President ABTL San Diego

Hon. M. Margaret McKeown

Some time ago I took a group of Girl Scouts on a tour of the Ninth Circuit Court of Appeals courthouse in San Francisco. On a wall outside one of our courtrooms, we have the photographs of distinguished justices who have served as our circuit justices. I pointed to one of the photos and asked, "Do you know who that is?" One of the girls quickly blurted out, "Yes, that is Judge Judy." Well, of course it was Justice O'Connor, not Judge Judy. And humorous though it was, I was reminded that the public's view of the judiciary is often informed by television and the Internet.

The little girl's answer was not surprising: two-thirds of Americans cannot name a single U.S. Supreme Court justice. Nor can two-thirds of Americans name the three branches of the federal government. Almost a third of the public believes that a U.S. Supreme Court ruling can be appealed, and nearly a quarter think a 5-4 decision is referred to Congress for resolution. These facts are alarming not as a "gotcha," but because they highlight a threat to judicial independence. If we do not communicate the distinct role of the judiciary, the public cannot appreciate why it functions differently from the political branches. As Justice David Souter explained, a "populace that has no inkling that the judicial branch has the job it does and no understanding that judges are charged with making good on constitutional guarantees, even to the most unpopular people in society" will not understand why "judges who stand up for individual rights against the popular will" should not be impeached. Judges must be free to decide cases according to the law without fear of recrimination for unpopular decisions.

We are reminded of founding principles: "The complete independence of the courts of justice is peculiarly essential in a limited Constitution," wrote Alexander Hamilton. Independence does not mean that judges run amok or lack all accountability, but that the public can expect fair and impartial justice. Of course, an independent judiciary is only one part of the equation. Our system also depends on lawyers who advocate vigorously and ethically for their clients and provide another set of checks and balances.

It has been my privilege to serve as ABTL president this year alongside so many dedicated lawyers and judges. I look forward to attending ABTL's many excellent programs in the future and to seeing the best of legal advocacy in the courtroom.

Thank you for a great year,

M³

Laid-off court reporters

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Courtroom Reporters Coalition. This referral agency will provide a contact point for civil attorneys seeking courtroom-experienced reporters to report their trials and other proceedings. The reporter members of the coalition will be reporters approved by San Diego Superior Court, meaning that the parties don't have to stipulate to using them. The courts will provide this list of approved reporters on their Web site once the layoffs begin.

"Courtroom reporting and freelance deposition reporting are entirely different animals," says Russell Walker, an official reporter at the Chula Vista courthouse and layoff candidate. "To be a courtroom reporter, you have to understand the environment, working with the judges, and be aware of appellate procedures for preparation and filing of transcripts. Attorneys can save themselves a lot of time and stress by using one of our laid-off officials who understand all of these factors."

Following the lead of Los Angeles official reporters who have also suffered cutbacks, formation of the coalition began in late summer this year, as it became apparent that the courts were going to follow through with layoffs. Interested reporters have been meeting regularly to make decisions on setting up the group, preparing to start reporting proceedings on Monday, November 5.

"We are the best reporters for the courtroom. The courts know us, and we know where to go and what to do, in the proceeding and after, with transcripts. We'll be ready to serve the civil law community come November," says Walker.

They now have established a Web site, www.sd-crc.com, and attorneys and parties looking for courtroom reporting can contact them at (619) 810-7622.

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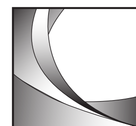

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A Judge's Ten Tips for Effective Written Advocacy in a Civil Case in Superior Court

by William R. Nevitt, Jr., Judge of the Superior Court

William R. Nevitt, Jr

From my years of practice as a civil litigator and, more recently, as a judge overseeing and trying civil cases in Superior Court, I have distilled the following list of ten tips that members of the civil litigation bar may find of use when engaged in written advocacy before the Superior Court:

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1. Before you write anything, identify your goal(s), organize your thoughts, and consider preparing an outline to guide your writing.
2. Tell the judge, at the beginning of your brief, specifically what you want the judge to do.
3. Use your best arguments and evidence, or at least a summary of them, early in your brief.
4. Although it is not always feasible (because of the need to make a record for possible appeal), consider conceding points of law or fact that might otherwise be disputed, but on which you have little or no chance of prevailing – because of the resulting gains in (a) focus and (b) your credibility with the judge.
5. In an opposition or reply brief, either address every relevant point in the other side's brief or state why you are not.
6. Be concise.
7. Don't weigh down your brief with unnecessary boilerplate – because that boilerplate may diffuse the focus of your brief, and it consumes pages that (if needed) can be put to better use.
8. Cite only relevant legal authority and evidence, and be accurate when you do so.
9. Know and follow the pertinent California Rules of Court; and educate your legal assistant regarding the proper formatting of briefs and pleading. (See, e.g., CRC 3.1110 et seq.)
10. Ensure your papers are timely filed and served.

Judge Nevitt was appointed to the bench in 1995 by Governor Pete Wilson. He currently sits in Department 52 of the San Diego Superior Court.

Protecting Your Client From Enforcement of the Judgment Before and During an Appeal

By Kate Mayer Mangan

Kate Mayer Mangan

You just lost a trial and entry of a large money judgment is looming. You and your client are already thinking about the appeal and how you are going to turn things around. Before you perfect your appellate strategy, make sure you protect your client against the enforcement of the judgment. *Here's how.*

Before Entry of Judgment

Judgments are enforceable upon entry, even if post-trial motions or an appeal will be filed.[1] All too often, clients are surprised when—despite their plans to appeal—judgment is enforced even before the appeal is over (or even filed).

You should consider requesting the trial judge delay entry of judgment.[2] Unless the judge grants such a request, the judgment must be entered within twenty-four hours of when it is rendered.[3] Temporary stays often are granted to provide the appellant with time to obtain the security required for a more lasting stay on appeal (discussed further below).

After Entry of Judgment

After the judgment has been entered, consider seeking a temporary stay of enforcement.[4] For money judgments, the trial judge has the authority to stay enforcement up to ten days after the last date you could file your notice of appeal, or seventy days.[5] Obtaining a temporary stay protects your client while your client investigates the cost of bonding and decides whether an appeal is worthwhile.

To the surprise of many clients, many judgments, including money judgments, are not automatically stayed by the mere filing of an appeal. A bond, undertaking, or stipulation is required to stay enforcement.

It is a good idea to try to stipulate with the respondent to waive the bond or accept a reduced bond.[6] The respondent's waiver must be in writing, and your stipulation should be approved by the trial court. Sometimes respondents can be persuaded to stipulate if you point out that you will be able to recover the cost of obtaining the bond if you win the appeal.[7] Appellants also sometimes agree to set aside in a joint safe deposit box or in some other manner negotiable securities or other assets sufficient to cover appellant's potential liability. Such an offer can persuade the respondent that it will be able to collect the judgment.

If a stipulation is not possible and your client decides to appeal a money judgment, the client will have to file a bond or undertaking to stay enforcement of the judgment during the appeal.[8] The bond or undertaking is filed in the superior court, not in the court of appeal. There are a few different ways to post the required security, the most common of which are discussed below.

An admitted surety insurer—a company issued a certificate of authority to provide surety insurance by the California Insurance Commissioner—can provide the security, and must post one and one-half times the amount of the judgment or order being appealed.[9] Admitted surety insurers frequently require significant collateral, often covering the entire amount of the bond. Bond premiums can vary from company to company, so it is worth encouraging your client to shop around.

(see "Kate Mayer Mangan" on page 7)

Kate Mayer Mangan

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Many smaller litigants use personal sureties, usually friends or relatives.[10] Personal sureties must post twice the amount of the judgment.[11] Personal sureties also must file affidavits establishing their qualifications.[1]2 This article has covered the high points for staying enforcement of the most common type of judgment, money judgments. A word of warning, though: stays and bonds are a procedural minefield. The exceptions often swallow the rules. Please consult the relevant statutes for your particular case. Perhaps the one constant is that you must think about how to prevent the judgment from being enforced before and during the appeal.

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.

FOOTNOTES

1 Cal. Code Civ. Proc. § 683.010
2 Cal. Code Civ. Proc. § 664
3 Id.
4 Cal. Code Civ. Proc. § 918(a), (b)
5 Id.
6 Cal. Code Civ. Proc. § 995.230
7 Cal. Rule of Court 8.278(d)(1)(F)
8 Cal. Code of Civil Proc. § 917.1
9 Cal. Code Civ. Proc. § 917.1(b)
10 Cal. Code Civ. Proc. § 917.1(b)
11 Id.
12 Cal. Code Civ. Proc. § 995.520(a)

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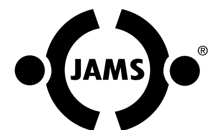

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New and Noteworthy

The Ninth Circuit Holds That The TCPA Prohibits Automated Calls Even When They Do Not Refer To Any Specific Good Or Service

By: Lai L. Yip, Anna S. McLean and Shannon Z. Petersen

Chesbro v. Best Buy Stores, LP, No. 11-35784, 2012 WL 4902839

In *Chesbro v. Best Buy Stores, LP*, No. 11-35784, 2012 WL 4902839, 2012 U.S. App. LEXIS 212594 (9th Cir. Oct. 17, 2012), the ninth circuit reversed the Western District of Washington's grant of summary judgment in favor of Best Buy Stores, LP (Best Buy) on claims that Best Buy placed automated telephone calls to plaintiff Michael Chesbro's home in violation of the Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. § 227 and Washington statutes. The TCPA prohibits "any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party." However, the FCC has exempted automated calls that do not adversely affect the consumer's privacy rights and do not include any "unsolicited advertisement," pursuant to 47 U.S.C. § 227(b)(2)(B)(ii) and 47 C.F.R. § 64.1200(a)(2)(iii). An "unsolicited advertisement" is defined as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. § 227(a)(5). Here, the ninth circuit rejected Best Buy's argument that its automated calls to Chesbro were not "unsolicited advertisement[s]," holding that such calls need not explicitly mention a good, product, or service, but can nonetheless violate the TCPA if they encourage the listener to make future purchases.

Chesbro purchased a computer from Best Buy in July 2008. According to Best Buy, Chesbro enrolled in its Reward Zone Program (RZP) and consented to the terms of the RZP Privacy Policy, which authorizes Best Buy to contact members with RZP-related communications. Chesbro contended that even if Best Buy had obtained his signature to enroll in the RZP, he did not know he was being enrolled or what the RZP was. Chesbro estimated he received "more than five, less than a dozen" automated calls from Best Buy following his purchase.

He first received a call reminding him to use his Reward Zone certificates before they expired. He filed a complaint about this call with the Washington Attorney General (AG), after which Best Buy agreed to place Chesbro on its Do Not Call (DNC) list. Chesbro maintained, however, that before filing his AG complaint, he had requested to opt out using Best Buy's automated touchtone dialing system. He also contended he called the Best Buy store and requested to be put on Best Buy's DNC list, but the customer service representatives with whom he spoke stated they did not know what phone calls he was talking about. He also asserted he was registered on the national DNC list.

Seven months later, Chesbro received another automated phone call from Best Buy explaining that Best Buy was making security updates and changing the RZP in certain respects. He filed a class action complaint; the trial court granted summary judgment in favor of Best Buy.

On appeal, Best Buy argued that its automated calls were informational calls and did not expressly refer to any "property, goods, or services." The court noted that an informational call that includes a marketing component is still a prohibited "dual purpose" call. If an automated call includes a marketing component, "additional information provided in the calls does not inoculate them."

The court found that the calls were prohibited "dual purpose" calls. Under 47 C.F.R. § 64.1200(f)(10) (2011) (amended 2012), "tele-

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marketing" is defined as "encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person." The court found that Best Buy's automated calls "encouraged" recipients to make future purchases at Best Buy, and stated that "[n] either the statute nor the regulations require an explicit mention of a good, product, or service where the implication is clear from the context."

Finally, the court rejected "[a]ny assertion that Chesbro either consented to receiving these communications or that the communications were not unsolicited," as he "repeatedly and expressly asked not to be contacted." Notably, the ninth circuit did not reverse and remand to the trial court, but reversed the grant of summary judgment and ruled as a matter of law in plaintiff's favor.

After *Chesbro v. Best Buy Stores, LP*, businesses should be aware that an automated call not expressly referring to goods, products, or services may still fall within the TCPA's prohibition against "unsolicited advertising" if the call can be construed as encouraging the consumer to engage in future purchases from the company.

Lai L. Yip, Anna S. McLean, and Shannon Z. Petersen are business trial litigators at Sheppard Mullin where they frequently defend businesses against consumer class actions.

US District Court Clerk's Office Moving

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dockets of the remaining independent calendar departments will increase from approximately 500-600 cases to around 900 cases per department (except for Judge Sturgeon, whose caseload will double).

Existing Dates And Independent Calendar Clerks

While the court initially planned to vacate all existing dates for the reassigned cases, the court currently intends to handle dates and deadlines as follows: Existing dates for reassigned cases in North County and East County will not be vacated. Instead, all scheduled dates will remain on calendar and the new department will reschedule any dates as needed. For cases assigned to downtown departments, the court is preparing a standardized stipulation which will be placed on the court's website. The parties will be able to submit the stipulation to retain all dates, or alternatively, to propose new dates for the court's approval. If the parties propose new dates, it will be on the condition that any delay will not result in further law and motion filings. The court's goal is to limit disruption and to ensure that reassigned cases are not subjected to delays in getting to trial.

Eliminating seven independent calendar departments will result in a considerable reduction in the number of independent calendar clerks. Going forward, each independent calendar clerk will be shared by two departments. Since the caseload of each department will increase substantially, the workload of the independent calendar clerks will be even heavier going forward.

No New Civil Case Originations In South County Or East County

In addition, on Monday November 5, the South County and East County locations will stop accepting new civil case originations other than certain elder abuse and restraining order matters. Those new case originations will now be filed downtown.

No Orders to Show Cause

Another change impacts orders to show cause. This change is designed to help alleviate the increased workload on independent calendar clerks. Currently, the independent calendar clerks are responsible for scheduling hearings for automatically generated orders to show cause, such as when a certificate of service has not been filed, or when a party fails to respond to a complaint. To reduce the clerks' workload, the court will no longer issue such orders to chow cause. As a result of this change, parties and their counsel will have more responsibility to keep cases moving forward on their own.

Automatic CMC Notices Will Now Be Issued At Time Of Filing Suit

Yet another change that will reduce the independent calendar clerks' workload relates to the scheduling of case management conferences. Effective January 1, 2013, the court will issue a case management conference notice at the same time that it issues the notice of department assignment. Plaintiffs will then be responsible for serving the CMC notice on other parties. While this change is designed to streamline court operations and to help lower the clerks' workload, it is not the direct result of the budget cuts. Rather, this change was a revision to the local rules that had already been planned.

The Court Will No Longer Provide Court Reporters

Finally, as has been widely reported, the court will no longer provide court reporters. Parties are responsible for arranging their own reporters if they want a transcript of any hearing. As a result, parties should consider in advance whether they will need a hearing transcript, particularly for any hearing that could be the subject of an appeal. The court-approved list of official reporters pro tempore is available on the court's website at: www.sdcourt.ca.gov.

(see "Court Changes" on page 11

David J. Aveni
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What Can Litigants Do To Help Keep Their Case On Track? Avoid Unmeritorious and Non-Dispositive Motions

While the impact of the budget cuts is sobering, they need not increase the time to trial for most cases. Because the judges whose cases are being reassigned will remain available for trials, the court's trial capacity will remain undiminished. Instead, the primary impact of these cuts will be on law and motion practice, since the number of departments handling hearings is decreasing by about one-third. In cases where the parties limit their law and motion proceedings, cases will be able to proceed to trial as expeditiously as before.

As a result, attorneys will need to think critically about the necessity of each motion they file. Moreover, it will be even more important for opposing counsel to work cooperatively to resolve as many issues on their own as possible. Limiting motions to those that impact critical issues or that are outcome determinative will help alleviate the burden on the remaining independent calendar departments and help sustain the effectiveness of our local judicial system.

Thanks To The Court's Tough Decisions, The Independent Calendar System Is Saved

One piece of good news is that the court made these difficult changes to save the independent calendaring system. Judge Barton explained that the court considered reverting to a master calendar system due to the budget cuts, but decided instead to make these painful cuts so it could remain on the independent calendar system. The court reasoned that if it abolished the independent calendar system, it would be very difficult to restore the system in the future. By keeping the current system, the court can simply add more departments when the budget improves and thus restore the system's full functionality. By making this choice the court maintains the quality that litigants currently enjoy, and limits the impact of the budget cuts to the length of time it takes for cases to be resolved.

ABTL will continue to keep its members updated as further information on these changes is available from the court.

David J. Aveni is a senior associate with Foley & Lardner LLP and a member of the San Diego ABTL Board of Governors. His practice focuses on complex securities litigation and general commercial litigation matters.

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

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

Authors are responsible for Shephardizing and proofreading their submissions.

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

TIPS FROM THE TRENCHES: More Stolen Gold

By Mark Mazzarella

Mark Mazzarella

In the last installment of *Tips from the Trenches*, I extolled the virtues of blatant theft of great lawyers' ideas. Not only is it completely legal, the "victims" actually find it to be among the greatest compliments they can receive. And the best part is, these nuggets can be found everywhere. All you have to do is look.

For those of you who didn't read my last article, in it I suggested that trial lawyers of every vintage would be well advised to take every opportunity to watch the masters in action, record their best material (mentally at least) and use it as their own when the occasion arises; and it will. In that article, I gave only a handful of examples of golden nuggets I had stolen over the years and recycled in my own trials. But apparently I got the point across, because I was asked to give more examples in this issue.

Even if I were to write down every example I could recall, I wouldn't put a dent in the wealth of knowledge and creativity that is available as close as the nearest courthouse, and as accessible as the local law library. While the examples I gave last issue were taken from trials, either mock or real, there are literally thousands of books that contain wonderful examples of inspired lawyering, from Clarence Darrow's successful closing argument in his first bribery trial to Michael Lief's "Ladies and Gentlemen of the Jury: Greatest Closing Arguments in Modern Law." If you love what we do, I can guarantee once you start reading these arguments, you won't be able to put them down.

The first example is perhaps my favorite of all. Its creator, Gene Majeski of San Francisco, was licensed to practice law 72 years ago, and over that span, has tried over 200 cases to verdict. The case that spawned this trial jewel was a products liability case in which a recently retired and disgruntled former engineer from the manufacturer defendant's brake assembly unit was the plaintiff's expert and star witness. In his opening statement the plaintiff's lawyer described how his expert had applied all of his 30 years of education, training and experience to conclude the brakes on the vehicle malfunctioned, causing the accident. He claimed the expert was able to build a testing machine in his garage with which he was able to simulate the failure mechanism precisely.

When Majeski stood up he begin by describing the plaintiff's expert as a hardworking and productive member of the Defendant's brake assembly unit, who along with more than 50 other engineers, draftsmen and other employees, worked together to apply their collective 1500 years of education, training and experience to create the safest brake systems possible. And, Majeski continued, they had the benefit of more than $200,000,000 of the most advanced testing equipment and facilities on the planet. The company had spared no expense to equip its 50 member team of talented professionals with the best tools possible.

At this point I think it is fair to say that almost everyone in the court room got his point(s): (1) plaintiff's expert's qualifications pale in comparison to the collective qualifications of the defendant's team; and (2) plaintiff's expert did not have anything approaching the equipment with which to do his testing as did the defendant's group. And those points were made clear. But it wasn't until the next few words came from Majeski's lips that it became very clear why he was an ABOTA trial lawyer of the year and an inductee into the California State Bar's Trial Lawyer Hall of Fame.

He continued, "Now I'm sure plaintiff's expert was well intended, and we won't be questioning those intentions. But the reality is that no one man can do what the defendant has found from decades of experience requires a large team of people with different skills and areas of expertise all working together to make sure nobody misses something and makes a mistake, which is what would happen. And while the brake as-

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

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sembly unit at the defendant's facility was using the best equipment in the world, plaintiff's expert was out tinkering in his garage while his wife was cooking pot roast for dinner." Only a true master could paint a picture like that which Majeski did with those last few words.

If you are like me, you probably wish you were able to introduce a little well timed humor into your trials without fear of bombing out like the stand-up comedian whose bad jokes leave his audience cringing out of embarrassment for him. There is no better way to achieve this objective than to steal someone else's joke that worked and use it like it was yours.

Raul Kennedy, also of San Francisco, used a line to introduce his closing argument in a multi-party case that I have incorporated several times in my own trial presentations. Kennedy was the last of seven lawyers to give closing; three other defense lawyers, had followed three plaintiffs' lawyers, and then came Kennedy. He knew the jurors were exhausted and bored and really didn't want to hear what he had to say; and he wanted to let them know that he was aware of that and would be sensitive to it. So, he began, "Standing up here in front of you at the end of a long day, the last of seven lawyers to talk to you today, I'm reminded of a statement attributed to Zsa Zsa Gabor's fifth husband, 'I know what I'm supposed to do, I just hope I can make it interesting.'" If his goal was to warm up to the jurors, and get them to want to give him the attention he deserved, he succeeded.

It's always better not to try out new material in front of an audience whose response is critical to your success. Thankfully I learned that lesson the easy way, at an ABTL Annual Meeting mock trial a decade or more ago. I was giving the plaintiff's opening and decided to try out something that the most prominent trial advocacy teacher of that time, Jim McEleney described in a lecture series I attended. So, I began, "I always wear this same suit the first day of trial because it was given to me by my wife for good luck. And this morning as I was leaving the house my seven year-old son, Cody, saw me and put two and two together and asked me if I was going to court today. I told him I was, and he asked, "What about?" I thought for a minute and realized I should be able to answer that question with very few words. I responded, "It's about two men who made promises to one another. One man did as he promised and when it came time for the other man to do what he was supposed to do, he refused." When I sat down I thought the opening had gone well.

James Brosnahan, who gave the defense opening statement, stood up and with his dry wit in full display began, "I have a son too. His name is Michael. But he's 27, so I tell him all the facts." I can assure you that at least half the lawyers who attended that conference found time in their busy schedule to tell me just how thoroughly Brosnahan had destroyed me with that remark. I've hoped in every trial since that I'd find a plaintiff's lawyer who had attended Jim McEleney's seminar as well. So far, no luck.

Once again, I could go on for much longer than I probably should telling stories like these. In many respects, that is what mentors have done in the past with their understudies. They have shared knowledge and experience that was accumulated over years and in doing so, not just educated the next generation of lawyers, but inspired them as well. If you don't have the benefit of a sage mentor to fill your quota of tips from the trenches, I urge you to find other ways of doing so. I've found there is only one sure way to appear much more intelligent and talented than you really are—steal from the truly smart and gifted folks and don't let anyone know.

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