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Training the Next Generation: Do it! Get Out There – Be an Advocate

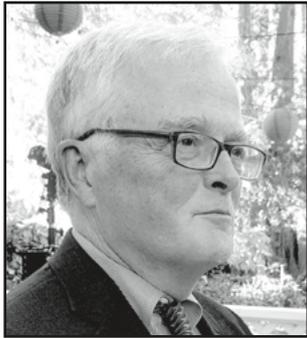
An Ever-Mounting Need

Since the 1940s, opinion polls in the United States have consistently shown that our federal courts rank very high on the public confidence scale, second only to the Supreme Court. This is because, I submit, our cases are decided on the merits — without regard to whether someone is rich or poor. No lobbying. No bags of money. No politics. Both sides are heard out, and the verdict is on the merits. The same is true for our state court systems, especially here in California.

The success of our merits-based system depends critically on effective advocacy. Advocates must excel in the give and take of arguments and the rough and tumble of witness examinations. To maintain public confidence in the nation's court system, we must continue to produce superb oral advocates, not just "litigators."

But are we? Shouldn't we be doing a better job in training the next generation of courtroom advocates?

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Judge William Alsup

Attorney Fee Awards In Mixed Result Cases

By the time an action reaches judgment after trial, the reality of fee-shifting can mightily affect the risk assessment for each side going forward. Each side has accrued substantial attorneys' fees and hopes to recover them from the other side and dreads being forced to pay its adversary's fees. Looking forward to an appeal, parties often assess fee-shifting as an all-or-nothing proposition but the reality is not so simple.

Many cases do not result in an unqualified victory for either side, either at trial or after appeal, leading to difficult determinations of who, if anyone, should be considered the prevailing party and what amount of fees should be awarded in light of a mixed result. When we dealt with this recently in the post-appeal context, we found the treatises and case law to present an unhelpful tangle regarding how to assess mixed-result cases. In this article, we share some lessons we learned after grappling with a complicated body of fact-specific decisions.



Sean M. SeLegue

The Basics

California courts follow a three-step process to decide whether to award contractual attorneys' fees and, if so, in what amount. The court first determines if there is a prevailing party on the contract. If so, the second step is determining the prevailing party's "lodestar," *i.e.*, the number of hours reasonably expended multiplied by the reasonable hourly rate." *PLCM Grp. v. Drexler*, 22 Cal. 4th 1084, 1095 (2000). The third step is to "consider whether

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Training the Next Generation

At the center of this issue rest our preeminent law firms. Not only do they tend to have the largest number of young lawyers, they also tend, regrettably, to provide the least advocacy experience to young lawyers. A main reason is that they concentrate on “bet-the-company” cases where clients seem reluctant to see young attorneys handle anything. This reluctance stems from high billing rates assigned to associates and the perceived need to have a partner handle everything in a bet-the-company case. The problem rates less severe at smaller law firms because their business model and their clients’ economics often encourage them to turn over more court appearances to young attorneys.

What to Do?

For many decades, we have had a shortage of trials. But in the last twenty years, a new shortage has emerged — a shortage of opportunities for young lawyers even to argue motions in court and to take depositions. Again, this is due, in large part, to clients insisting on partners taking depositions and appearing in court.

In the 1970s and 1980s, our leading law firms remained vigilant in giving opportunities to young lawyers and insisting to clients that young lawyers could handle important responsibilities in court. They also took on smaller commercial matters as training opportunities for associates, even at the cost of write downs. This vigilance has gone slack. Firms should reinvigorate this tradition, writing down associate time to accommodate client reluctance to pay the high billing rates assigned to young associates. They should impress upon their clients the wisdom of providing these opportunities.

It helps when a judge affirmatively encourages lead counsel to turn over court arguments, depositions, and witnesses at trial to newer lawyers. When the judge affirmatively encourages the participation of young lawyers, the responsible partner has a further argument to make to the client in support of sending young lawyers forward. It also removes the suggestion that the judge somehow views it as a concession of weakness when a young lawyer argues a motion.

For the last sixteen years, my own stated practice has been to guarantee oral argument on any matter (rather than submit it on the papers) when a lawyer within her first four years of practice will perform. At least one hundred young lawyers have had an opportunity to argue in court or try cases as a result of this encouragement. Although I never insist that a young lawyer must perform, I affirmatively encourage it. Without question, partners may need to handle key dispositive motions, but young attorneys can do some of them and can routinely handle non-dispositive motions. In my experience, young lawyers have performed at least satisfactorily and, more commonly, very well during oral argument because they have typi-

cally prepared the papers (and, if the truth be told, may know the record and the case law better than their seniors).

What Should Young Lawyers Do?

Fight for opportunities. Young lawyers should go to mentors and partners in charge of their caseload and insist on front-line opportunities. During their first year of practice, I tell my departing clerks, young attorneys should carry out all assignments, not complain, and do them cheerfully, including reading many thousands of pages of documents in a cold warehouse in Chicago. But, in their second year of practice, young lawyers should explain to the partners that they also want front-line opportunities and that they want to develop as advocates.

Young lawyers should also form and be a part of associate committees that set training and experience milestones. For example, an associate committee might set a milestone such as “Associates should have taken a minimum of two depositions and argued at least two motions in court by the end of their second year of practice.” The milestones should be calibrated to what is required to make partner so that associates can qualify on schedule. The committee should regularly remind management of the need to send associates forward.

What Should Law Firms Do?

Taking pro bono cases from the Federal Pro Bono Project or other sources of pro bono work can provide much-needed experience for young lawyers (and earn the gratitude of our judges for helping on a different problem — providing representation to the poor). To sign up as a volunteer for the Federal Pro Bono Project in the San Francisco and Oakland divisions please contact Manjari Chawla, Supervising Attorney, at (415) 626-6917 or mchawla@sfbar.org. For volunteer opportunities in the San Jose division, contact Kevin Knestrick, Legal Help Center Attorney, at (408) 297-1480 or kevin.knestrick@lawfoundation.org.

But associates also must excel in the “bread-and-butter” work of their firms, such as commercial cases, patent cases, and class actions. Firms should assign young lawyers to front-line opportunities within their core, paying work and avoid reliance on pro bono work as the main training ground. This is important — very important — to professional development.

Shouldn’t a young lawyer who works on a motion be permitted and encouraged to come to court to sit at counsel table, even if she only observes? This would give her the opportunity to learn from partners’ performance. And shouldn’t the young lawyer’s time be written off to training — not charged to the client?

By encouraging contact between clients and young lawyers, clients will be more receptive to letting young lawyers carry their banner into court.

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To be sure, I recognize that young lawyers must work on many cases in which they get no client contact, no courtroom experience, no deposition experience, and all will be limited to research and writing. But if young lawyers become tethered to laptops, as seems to be the trend, they will never make partner, much less learn the skills public confidence requires.

What Should Our Media Do?

Shouldn't our law-related media shine a light on this problem? Shouldn't the media in California conduct regular surveys to rate various law firms on how well they train junior associates? To encourage law firms and to assist young lawyers in choosing a firm, our California legal newspapers, I propose, should conduct periodic surveys of law firms to facilitate comparison as to how well they train young lawyers. (This is just as important, isn't it, as publicizing and comparing profits per partner?) I recommend questions such as the following:

- By what associate year can associates in your firm expect to have argued two motions in court and examined two witnesses (either in deposition or in court) for paying clients?
- How many hours of training count towards an associate's billable hour credits per year?
- To what extent does your firm provide full billable credit for all pro bono hours worked?
- In what associate year does your firm offer deposition and trial training?
- Does your firm have an associate development committee, and if so, what does it do with respect to training?

Our legal press could enlist the aid of associate committees in framing survey questions designed to elicit probative and comparative information. Then, the surveys could be directed to management as well as associate committees for answers.

The American Lawyer conducts an excellent annual survey of job satisfaction among mid-level associates at 100 firms across America. My proposal, however, focuses exclusively on professional development. The goal of my proposed survey is to learn how well we are doing in training the next generation of lawyers, putting aside factors such as compensation, total hours worked, and prospects for joining the firm's partnership. And, it would look beyond just mid-level associates.

Our Attitude on Our Bench

For this article, I conducted an informal survey of our district judges within the Northern District of California and received responses from about ten district judges.

All of the responding district judges expressed enthusiasm about young lawyers arguing motions. One way in which the judges differed is the extent to which judges

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Jury Pools: The Obstacles to Diversity

Without a doubt cause and peremptory challenges impact the final composition of a trial jury, but long before these challenges are exercised other factors shape the composition of the pool and determine who actually enters the jury box for voir dire. In a "minority-majority" state like California, and in an increasingly diverse nation, jury pools often do not adequately reflect the population. This article will focus on jury pool composition — not on the final jury empaneled after voir dire and the exercise of peremptory challenges. Jury pool composition is impacted by five factors: the qualifications for jury service; the source lists used and how often they are updated; the economic burden of jury service and the inadequacy of juror compensation; English language requirements; and the disproportionate impact of felon disenfranchisement.

Source Lists

Illustrations of the 1925 jury in *The State of Tennessee v. John Scopes*, commonly known as the Scopes Monkey Trial, show an all-white, all-male jury, and certainly since those days when jury pools were assemblies of white, male property owners, most American juries are now more diverse. The Jury Selection and Service Act of 1968 put an end to the "key man" and "blue ribbon" juries in which jury commissioners typically hand-selected names of "key men" in the community. As late as 1967, a majority of federal courts still used the key man system.

While most state court jury selection systems require the use of particular source lists, four states have no mandatory list requirement (Indiana, Massachusetts, Nevada, and Utah). Typically the mandatory lists start with voter registration, and most states and many federal courts now supplement this with DMV lists of holders of drivers' licenses and state-issued identification cards for non-drivers. The addition of DMV lists to voter registration lists (so-called "Motor-Voter" lists) is a step toward broader inclusion. However, research has shown that these two sources alone systematically under-represent minorities.

Some state courts have made significant improvements by utilizing additional source lists such as income tax filers, unemployment and/or public assistance benefit recipients, and utility records (in New York, Connecticut, Rhode Island, Vermont, North Dakota and the District of



Lois Heaney

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Jury Pools

Columbia, among others). Alaska's reach has broadened through its use of the Permanent Fund list which provides annual dividends to state residents. The National Center for State Courts recommends that source lists should reach 85% or more of the jury-eligible population, and these additional lists go a long way toward fulfilling that objective.

The frequency with which the master wheel is updated also impacts the reach of jury lists. The practice in many federal jurisdictions is to construct jury lists every four years. If the list is not updated during the term, then by the third or fourth year it includes virtually no one under the age of 20. New residents are likewise excluded, and people who move frequently are typically lost. People who rent rather than own their homes tend to be people of color, poorer, younger, and move much more often than homeowners, causing them to slip through the cracks of the jury list, especially in jurisdictions which do not update their lists annually and fail to follow up on non-deliverable or non-responsive jury qualification questionnaires.

Economic Hardship

Economic hardship is the biggest reason people are excused from jury duty, especially in long trials. This has a profound impact on diversity — economic or class to be sure, along with its nexus to race and ethnicity. While an employer is forbidden from terminating an employee for jury duty, living paycheck to paycheck does not allow for the lost income of even a few days, let alone extended jury service. Much of the job growth in recent years has been among low-paid hourly wage earners who receive few benefits, and rare among them is paid time for jury duty. With few people employed in jobs that provide extended paid jury duty, jury service on long trials is left to the retired, the well-off, spouses in well-off dual income families, government workers and employees of the few large corporations that provide ample paid jury service. Whereas union contracts frequently include paid jury duty, the decline in union membership in private sector employment to under 8% has taken a toll on the number of people available to serve on longer trials. Although federal government employment is usually a good source of jurors available for long trials, probationary and temporary employees are not always guaranteed to be paid for extended jury service.

As Paula Hannaford-Agor of the National Center for State Courts wrote, "Our entire jurisprudence concerning the right to trial by jury is premised on the ideal of juries that reflect the broadest possible cross-section of their communities. One might reasonably doubt the ability of a jury to be fair and impartial if it was selected from a jury pool consisting only of people with the wherewithal and inclination to serve." ("The Laborer is Worthy of His Hire and

Jurors are Worthy of Juror Fees," *The Court Manager*, Vol. 21, Issue 2.)

Juror fees are generally insufficient to make up the difference. The Jury Selection and Service Act of 1968 doubled federal jury fees to \$20/day, at a time when the median annual income in the United States was \$7,750 (versus \$52,250 in 2013), the median home price was \$26,000, and gas was 34 cents a gallon. If 1968 jury fees of \$20/day were adjusted for inflation, they would be \$134/day in 2015 dollars, according to the CPI Inflation Calculator, Bureau of Labor Statistics. But today, the federal courts pay jurors \$40/day, six states pay \$41-\$50/day, seven states pay \$40/day, 13 pay \$25-\$35/day, three states pay \$20/day, while 21, including California pay \$16/day or less. Under all of these arrangements jury pay is below the federal minimum wage and, in most cases, makes jury duty an economic hardship for any working person not paid by their employer for jury duty.

New Mexico and Arizona lead the list of states making a real effort to compensate people for jury service and thereby increase participation. New Mexico matches the federal minimum hourly wage for each hour of service, while Arizona has implemented a "Lengthy Trial Fund" that comes into play after the fourth day of jury service and reimburses lost income up to \$300 a day for jurors who serve on trials of ten days or longer.

An innovation to allow for increased jury pay includes no pay for the first day of service — when typically large numbers of people are present and do not serve — allowing that money to be redistributed as higher daily rates to those who do serve as trial jurors.

Even among those people who receive paid jury duty from their employers or are willing to serve by using vacation time or savings, many fear that an extended absence from work will result in missed promotions or make them an easy target later in the event of a reduction in force. Innovations in trial schedules can alleviate some of this burden and allow more people to serve. Trials conducted from 8:30 a.m. to 1 p.m., with two short breaks and no lunch, allow four hours of courtroom time in a compact manner and allow many jurors to work part-time at their jobs throughout the trial. The old tradition of running trial days from 10 a.m. to noon with a morning recess, followed soon after with a lengthy lunch break and an afternoon session running from 1:30 (or 2) to 4:30 p.m. with an afternoon break offers little more actual trial time per day — and leaves many jurors waiting with little to do over an extended lunch period.

Disenfranchisement: Language Barriers

According to the U.S. Census, "The size of the foreign-born population has increased over the last three decades, from 14.1 million in 1980 to 40.0 million in 2010. In 2012, the foreign born numbered 40.8 million." ("English-Speaking Ability of the Foreign-Born Population in the

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United States: 2012,” American Community Survey, U.S. Department of Commerce.) In 2012, 40% of the nation’s foreign-born population lived in Texas, California and Illinois. The Census estimates that 44% of the foreign-born population are U.S. citizens.

That a significant proportion of American residents is foreign-born is not a new phenomenon; the foreign-born population was slightly larger, in percentage terms, between 1870 and 1920 than it was in 2010. What is different is that the majority of immigrants are now from Latin America and Asia, whereas before 1960 the majority were from Europe. Citizenship rates have also changed. In 1970 the Census reported 64% of the foreign-born population were naturalized U.S. citizens; in 2010 they reported 44%.

The Census figures show that the proportion of the foreign-born population that speaks a language other than English at home has increased from 70% to 85% since 1980, with almost half stating that they speak and understand English “Not Well” or “Not At All.” California and Hawaii were among the seven states in which limited or no English language ability was higher than this national average.

In response to the significant percentage of U.S. citizens (including both foreign born and those born in the U.S.) who have limited English language ability, the United States Election Assistance Commission now publishes voter guides in 10 languages (Cherokee, Chinese, Dakota, Japanese, Korean, Navajo, Spanish, Tagalog, Vietnamese, and Yupik). But while voter registration addresses all the other qualifications for jury duty — e.g. citizenship, resident of the county, over the age of 18, and someone who has not lost rights due to a felony conviction — English proficiency remains an obstacle to jury service in every state except New Mexico, where today almost half of the state’s population is Latino. Courts in New Mexico are required to provide interpreters for non-English speaking jurors, which has customarily meant Spanish speakers. Juror qualification questionnaires are available in English and Spanish. Going still further, in a case involving Navajo speakers in 2002, the New Mexico Supreme Court ruled that inconvenience alone was not a sufficient reason to excuse a non-English and non-Spanish speaking juror, and held that a trial should be delayed a reasonable amount of time to secure an interpreter for the juror.

On the other end of the spectrum is the federal court in Puerto Rico, where 90% of prospective jurors are excused because of insufficient English language ability, although everyone born in Puerto Rico is a U.S. citizen, and typically nearly everyone involved in the case — judges, lawyers, litigants and witnesses — speaks Spanish fluently. English language ability in Puerto Rico is tied directly to race and class, and the language requirement largely results in the exclusion of Puerto Ricans of color and the poor.

Disenfranchisement: Felon Status

“Felons” may not serve on juries in federal court or in 31 states. In federal court, a person convicted of a felony is precluded from serving on a federal jury unless his/her civil rights have been restored (28 U.S.C. § 1865 (b) (5)). A person can seek to have his/her civil rights restored through a presidential pardon or “some affirmative act recognized in law...” (*U.S. v. Hefner*, 842 F.2d 731 (4th Cir.) cert. den. 488 U.S. 868 (1988)).

The rate of felon disenfranchisement has grown enormously. In 1976 there were 1.17 million people who had been disenfranchised due to a felony conviction; by 1996 that number had grown to 3.34 million, and by 2010 to 5.85 million. One in every 13 African Americans of voting age is disenfranchised, approximately six times the rate of the non-African American population.

The impact of felon disenfranchisement is most acute on communities of color, and most especially African Americans who are disenfranchised at rates above 20% of their Voting Age Population in three states: Florida, topping the list at 23.3%, followed by Kentucky at 22.3% and Virginia at 20.3%; and above 5% throughout much of the rest of the country.

Jury Composition Studies

Jury composition studies are a painstaking but important tool for investigating whether there is a systemic problem in the manner in which the pool is assembled. Their impact can be far reaching beyond the individual case. Sometimes the problem lies in the frequency with which the list is composed, the inadequate follow-up on jurors who do not respond to the summons, the scope with which hardship excusals are granted, or the source lists being used. As described above, New York, New Mexico and Arizona have attempted to address the problem in a variety of ways with some success. A guide to conducting a composition study and the motion work involved is contained in National Jury Project’s book *Jurywork: Systematic Techniques* (edited by E. Krauss & S. Chopra), published by Westlaw and updated annually.

Other sources used in this article or providing further analysis include: Fukurai, Butler & Krooth, *Race and the Jury*, Plenum Press 1993; Fukurai & Davies, “Affirmative Action in Jury Selection: Racially Representative Juries, Racial Quotas and Affirmative Juries of the Hennepin Model,” *Virginia Journal of Sociology, Policy and Law* (1997); Kairys, Kadane & Lehoczky, “Jury representativeness: A mandate for multiple source lists,” *California Law Review* (1997); and Chavez, Edward, Chief Justice of the Supreme Court of New Mexico, “New Mexico’s Success with Non-English Speaking Jurors,” *Journal of Court Innovation*, Vol. 1, No. 2 (Fall 2008).

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Attorney Fee Awards

the total award so calculated under all of the circumstances of the case is more than a reasonable amount and, if so, . . . reduce the . . . award so that it is a reasonable figure.” *Id.* at 1096. “The trial court makes its determination after consideration of a number of factors, including the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case.” *Id.* Our focus is on the first step (prevailing party) and adjusting the lodestar for the degree of “success or failure” that party has achieved. (In some cases, of course, the lodestar can also be adjusted upward, usually to account for risk taken in a contingency matter.)



Amanda Semaan

To Prevail or not to Prevail?

In mixed-result cases, when “neither party achieves a complete victory on all the contract claims, it is within the trial court’s discretion to determine which party prevailed on the contract or whether, on balance, neither party prevailed sufficiently to justify an award of attorney fees.” *Scott Co. v. Blount, Inc.*, 20 Cal. 4th 1103, 1109 (1999). Where one party “receives only a part of the relief sought” and “the opposing litigants [can] each legitimately claim some success in the litigation” (*Hsu v. Abbara*, 9 Cal. 4th 863, 875 (1995)), “the trial court is to compare the relief awarded on the contract claim or claims with the parties’ demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources.” *Id.* at 876 (internal quotation marks omitted). In *City of Emeryville v. Robinson*, 621 F.3d 1251, 1267-68 (9th Cir. 2010), for example, the Court of Appeal affirmed the trial court’s determination that there was no prevailing party under Section 1717 where the plaintiff won one contract issue and lost a second. Civ. Code § 1717. Obviously, a determination that there is no prevailing party is a show-stopper and seeking such a ruling is the best method to defeat a fee award.

Allocating Fees

Once one side has been declared the prevailing party, the cases demonstrate diverse approaches to assessing how the lodestar should be adjusted in light of a party’s less than complete success. The clear and overarching theme is that the trial courts have a great deal of discretion in this area. In general, the trial court is charged with evaluating a party’s success by comparing the result ultimately obtained against the party’s litigation goals. See *Hsu*, 9 Cal. 4th at 877 (“[I]n determining litigation success, courts should respect substance rather than form, and to this extent should be guided by ‘equitable considerations.’ For

example, a party who is denied direct relief on a claim may nonetheless be found to be a prevailing party if it is clear that the party has otherwise achieved its main litigation objective”) (emphasis omitted).

When considering whether and by how much to adjust the lodestar for a party’s limited success, courts do not typically focus on legal constructs such as causes of action or theories of recovery. Instead, they usually examine “the relative extent or degree of the party’s success in obtaining in *the results sought*.” *Sokolow v. Cnty. of San Mateo*, 213 Cal.App. 3d 231, 247 (1989) (emphasis added). Success is not judged by whether a party has prevailed on a cause of action or theory in the abstract but “by comparing the goals or objectives of the plaintiff’s litigation with the relief ultimately obtained.” *Envtl. Prot. Info. Ctr. v. Cal. Dep’t of Forestry & Fire Prot.*, 190 Cal.App. 4th 217, 240 (2010) (“EPIC”) (emphasis added). Indeed, of the several factors considered in adjusting the lodestar, “the most critical. . . is the degree of success obtained.” *Sokolow*, 213 Cal.App. 3d at 247 (emphasis added). “[A]n upward or downward adjustment from the lodestar figure will be far more common under California law than federal law.” *Chavez v. City of Los Angeles*, 47 Cal. 4th 970, 985 n.6 (2010).

Strictly applied, this approach would not take account of either parties’ victory or loss in various battles along the way such as trial, appeal, remand and retrial — only who wins the war would count. That is in fact the general approach. However, in practice, the courts recognize that awarding fees for specific unsuccessful tasks would not be appropriate even if a party prevailed overall. In *Harman v. San Francisco*, 158 Cal. App. 4th 407 (2007), for example, the court denied fees for specific appellate proceedings that were unsuccessful. And in *United States v. Bell*, No. 1:95-cv-05346 OWW SMS, 2009 WL 113794 (ED Cal. Jan. 15, 2009), the court slashed the lodestar by 60%, noting that the plaintiff spent 60% of trial time on unsuccessful theories. (It probably didn’t help that the plaintiff’s claimed fees were double the amount of damages obtained, although there is no rule that fees must in all cases be proportional to damages obtained. *Bernardi v. Cnty. of Monterey*, 167 Cal.App. 4th 1379, 1397 (2008)).

Most surprising are cases ruling that a plaintiff can appropriately recover for time spent on pursuing a series of unsuccessful theories if the plaintiff eventually pulls a rabbit out of the hat with a last-minute theory that pans out. In *City of Sacramento v. Drew*, 207 Cal.App. 3d 1287, (1989), for instance, the plaintiff spent the early phases of a case raising unsuccessful challenges to a city assessment. The plaintiff eventually developed a successful theory and prevailed. The city complained that awarding all of the plaintiff’s fees would encourage protracted litigation, but the court was unsympathetic. To the contrary, the court seemed to endorse a trial-and-error approach to litigation: “As a practical matter, it is impossible for an attorney to determine before starting work on a potentially meritorious legal theory whether it will or will not be accepted by a court years later following litigation. It must be remembered that an award of attorneys’ fees is not a gift. It is just compensation for expenses actually incurred in vindicat-

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PEGGY OTUM

On ENVIRONMENTAL LAW

Using the Unfair Competition Law to Enforce Environmental Laws

California's Unfair Competition Law — in Section 17200 of the Business and Professions Code — has long offered litigants an alternative avenue for addressing violations of environmental laws. For example, courts have looked favorably on cases brought under Section 17200 by plaintiffs alleging that defendants were able to underbid their competitors because they improperly disposed of hazardous wastes (*Southwest Marine, Inc. v. Triple A Machine Shop, Inc.*, 720 F.Supp. 805, 808 (N.D. Cal. 1989)) or their plant discharges violated the Clean Water Act (*Citizens for a Better Env't v. Union Oil of Cal.*, 996 F.Supp. 934 (N.D. Cal. 1997)). Section 17200 also provides a mechanism for public enforcement agencies to enforce environmental laws.

The use of 17200 by law enforcement to address environmental violations appears to be on the rise. In 2015, public enforcement cases have been brought under the Unfair Competition Law in connection with transportation of hazardous materials, storage and disposal of hazardous waste, certification of vehicle emissions control systems, and discharges into state waters (including one alleging improper discharge of wine waste into storm drains). At least one district attorney has sued Volkswagen and Audi for their use of “defeat devices” that allowed their diesel engines to emit more pollutants than allowed by emissions standards. Earlier this year, the district attorney for Santa Barbara County commenced a civil investigation in connection with the May oil pipeline spill near Refugio State Beach, citing its belief that there may have been a violation of Section 17200.

What makes the Unfair Competition Law an attractive means of enforcing environmental laws? One reason may be that the statute defines “unfair competition” broadly to include “any unlawful, unfair or fraudulent business act or practice.” The “unlawful” prong can include a defendant’s violation of environmental laws.

Other characteristics of Section 17200 also shed light on why public enforcers are increasingly using it to pursue environmental violators instead of — or in addition to — the substantive environmental statutes. Its remedies and penalties are cumulative with penalties and remedies available under other state laws. Moreover, penalties — which cannot exceed \$2,500 per violation — go directly to the

treasury of the county (if the action is brought by a district attorney or county counsel) or the city (if the action is brought by a city attorney or city prosecutor), to be used for enforcement of consumer protection laws. Section 17200 cases may therefore serve as revenue sources for local governments.

In addition, the attorney general, district attorneys, and in some cases county and city attorneys or prosecutors can directly seek to enjoin violations of an environmental statute, even where that statute does not authorize them to bring an action. The public enforcers therefore can act against alleged violators without obtaining a referral from the California Environmental Protection Agency (CalEPA).

In addition to such strategic litigation advantages, political and policy reasons may prompt local governments’ use of the Unfair Competition Law to address environmental issues. For example, making use of section 17200 can provide counties a mechanism to tackle specific environmental issues or target specific companies or facilities if they believe state regulators may be lagging or reluctant in bringing environmental enforcement actions. This is consistent with the strong tradition in California of local governments regulating environmental matters, exemplified by recent laws in Alameda County and elsewhere requiring pharmaceutical companies to establish programs to take back expired or unused drugs.



Peggy Otum

It is important for businesses to be aware of Section 17200 because it increases the fronts on which they face exposure to potential liability for environmental violations. If, for instance, the Department of Toxic Substances Control or another CalEPA agency issues a notice of violation to a business, the company also needs to be thinking about whether a district or city attorney might be considering an enforcement action by means of Section 17200. Businesses must gauge whether preemptively reaching out to local enforcement officials would make sense. If seeking to resolve violations with a state agency, businesses should consider whether they can also address potential Section 17200 claims by other parties. On its own, a settlement with the state agency cannot shield a business from independent claims under Section 17200, but it may be desirable to bring other enforcement authorities into the negotiation to resolve potential liability under the Unfair Competition Law.

Peggy Otum is a partner at Arnold & Porter who represents clients in complex environmental litigation.



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Attorney Fee Awards

ing a public right. To reduce the attorneys' fees of a successful party because he did not prevail on all his arguments, makes it the attorney, and not the defendant, who pays the cost of enforcing that public right." *Id.* at 1303-04 (internal citation omitted). And in *Akins v. Enterprise Rent-A-Car, Co.*, 79 Cal. App. 4th 1127 (2000), the court held that the trial court did not abuse its discretion in awarding fees for the plaintiff's pursuit of unsuccessful claims. It held that it would be "too narrow[]" to restrict awards only to the work involved in pursuing successful claims that shared a common factual issue with unsuccessful claims. *Id.* at 1333.

It's Not Always about the Money

In appropriate situations, the courts will consider the non-monetary aspects of a plaintiff's success, but that is most common in civil rights cases as opposed to contract cases. For example, in *Harman*, plaintiffs sued the City of San Francisco for alleged discrimination against white employees at the airport. Although the plaintiffs obtained just 5% of their settlement demand of \$600,000, the court awarded the plaintiffs about half of their claimed fees as 1.1 million out of \$2.2 million. The Court of Appeal affirmed, noting the wide latitude afforded the trial court in this area. And in *Sokolow v. County of San Mateo*, 213 Cal.App. 3d 231 (1989), plaintiffs who sued a county sheriff's department and a mounted Patrol for sex discrimination succeeded in getting an injunction restraining the Patrol from excluding women from Patrol membership. They did not, however, succeed in actually gaining admission to the Patrol, as they sought. In a rare reversal of a fee order, the Court of Appeal held the trial court erred in denying fees altogether because the plaintiffs did achieve part of their goals.

Because a number of leading cases arise in the civil rights context such as FEHA and the anti-SLAPP statute, a business case that produces a mixed result can present a particularly challenging analysis. While courts may look to civil rights decisions in contract cases, caution must be exercised because the policy considerations are very different. In civil rights statutes, the fee-shifting provisions are often weighted in favor of a prevailing plaintiff — who is entitled to fees as of right — whereas a prevailing defendant may be entitled to fees only if the plaintiff's claim was weak or frivolous. *See, e.g.*, Code Civ. Proc. § 425.16 (anti-SLAPP); Gov. Code §§ 12900-12996 (FEHA). Contractual attorneys' fees are, by contrast, subject to a legislative policy of reciprocity. Code Civ. Proc. § 1717; *Milman v. Shukhat*, 22 Cal. App. 4th 538, 545 (1994) ("[O]ne purpose of [S]ection 1717 was to establish mutuality of remedy when the contract makes recovery of attorney fees available for only one party."). As a result, while fee decisions in civil rights actions may have some persuasive value in contract cases, the divergent policy considerations must be borne in mind. That is particularly the case with decisions that view an intangible, such as vindicating a

right, as a part of a party's success in the case, by contrast to the typical contract case in which success is measured in dollars.

Unreasonable Refusal to Settle

The Courts of Appeal are split on whether a party's decision not to settle can be a factor in deciding the amount of fees due the prevailing party. The court in *Greene v. Dillingham Construction N.A., Inc.*, 101 Cal.App. 4th 418 (2002), concluded for a variety of reasons that settlement negotiations should not be considered in a court's fee determination. *Id.* 424-25. The court concluded, among other things, that considering settlement negotiations in connection with fee awards would undermine Code of Civil Procedure Section 998's dictates, which impose specified consequences for a party's failure to accept an offer of settlement but afford procedural protections. However, two subsequent cases have taken a different view. As noted earlier, the court in *Harman* took settlement positions into account in deciding what amount of fees to award. While *Harman* did not belabor the issue, the earlier decision in *Meister v. Regents of Univ. of Cal.*, 67 Cal. App. 4th 437 (1998), discussed and rejected *Greene's* analysis in some detail. In *Meister*, the Court of Appeal found the trial court did not abuse its discretion in considering the amount of attorney time spent *after* plaintiff rejected a settlement offer in determining the amount of a fee award. *Id.* at 450 (emphasis added). The court reasoned that the policy underlying Section 998 of "encouraging parties to accept reasonable settlement offers" "is not inconsistent with permitting a trial court to consider informal settlement offers in cases where [S]ection 998 does not apply and the trial court has the discretion to set the amount of a reasonable attorney's fee award." *Id.* at 452. In addition, the appellate court concluded that allowing trial courts to consider informal settlement offers in setting the amount of a reasonable fee award "is not so rife with potential for abuse that" trial courts cannot be trusted "to continue to exercise their discretion in the interests of fairness and justice." *Id.* at 452-53.

Because appellate courts generally defer to a trial court's decision about what amount of fees to award, it can be hard to draw lessons from the case law other than that the trial court has a good deal of discretion. In any particular case, a wide range of outcomes could be within the scope of non-arbitrary results that could withstand the deferential standard of review. But in general, parties who prevail to some extent tend to come out better than parties seeking to reduce the fees incurred by a partially successful plaintiff. Consider adding this to the mix when advising clients about possible fee-shifting at the end of the case — it's often not an all-or-nothing proposition.

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JOSEPH V. MAUCH

On TRADEMARKS

In the coming days, the long-standing IP fight between Apple and Samsung will finally arrive at the U.S. Supreme Court. Samsung's deadline to file a writ of certiorari falls in late December, and it is a near certainty the Korean company will do so. The two heavyweights in the fight will get all the mainstream press, but the real story will be the rise — and fall — of the two underappreciated and underutilized instruments of IP law that they are fighting with: design patents and trade dress.

Design Patents and Trade Dress: What Are They?

Trade dress is a form of trademark right. Just as a word or design can be a trademark, the packaging or appearance of a product can be protected trade dress. Like trademarks, trade dress identifies the source of the product. The quintessential example is the Coca-Cola bottle — its unique shape immediately tells the consumer that this is a Coca-Cola product. Importantly, not any aspect of a product's packaging or appearance is subject to trade dress protection; only “non-functional” features qualify.

Design patents protect unique *aesthetic* features of products. Like the more common utility patents, inventors apply for design patents with the USPTO. Like trade dress protection, design patents are not available for the functional features of claimed inventions. Unlike trade dress — which effectively provides a monopoly as long as the design is used — design patents do not have to have “source identifying function.” But they do expire, usually in less than 17 years.

The Jury Verdict and Increased Interest in Trade Dress and Design Patents

In 2011, Apple sued Samsung in federal court in the Northern District of California, alleging that Samsung smartphones infringed Apple utility patents, design patents, and trade dress covering Apple iPhones. In 2012, a jury returned a verdict finding 23 different Samsung smartphones violated Apple patents and trade dress. The original award exceeded \$1 billion but after a retrial and appeal was reduced to \$548 million.

The jury found that certain aspects of the iPhone, including the rounded corners, the bezel (i.e., the rim around the perimeter of the phone), and the arrangement and graphic design of icons on the screen were protectable trade dress and that Samsung phones infringed this trade dress. The

jury further found that three design patents owned by Apple covering similar aspects of the iPhone were valid and infringed by Samsung.

The Apple-Samsung trial was followed closely by the general public, but even more closely by the IP bar. Patent prosecutors and litigators had, of course, always been aware of design patents and trade dress, but these usually took a back seat in infringement actions. Apple-Samsung helped change that, and applications for design patents and trade dress protection increased significantly in 2012 and the years following.

The Federal Circuit Decision

Samsung appealed the trial court decision. In May 2015, the Federal Circuit affirmed the portion of the trial court decision dealing with Apple's design patents, including the findings of validity and infringement and the award of Samsung's entire profits on its infringing smartphones. But the Federal Circuit reversed the decision as to Apple's trade dress, finding that Apple had not established that the asserted features were non-functional. The Court's holding here was less a change in the law than an affirmation of the exacting legal standard and a warning to district judges — particularly those in the Ninth Circuit — to be circumspect regarding trade dress.

As explained above, the key to trade dress protection is whether the claimed feature is non-functional. Apple had successfully argued at trial that the claimed features of the iPhone were worthy of protection because they had been developed for their “beauty” not for “superior performance.” The Federal Circuit focused on the test for determining non-functionality set forth in *Disc Golf Ass'n v. Champion Discs, Inc.*, which provides that “a product feature need only have *some* utilitarian advantage to be considered functional.” 158 F.3d 1002, 1007 (9th Cir. 1998) (*italics in original*).

Calling the Ninth Circuit's Disc Golf standard a “high bar,” the Federal Circuit found Apple's showing to be lacking. Even if Apple was primarily focused on aesthetics, “the evidence showed that the iPhone's design pursued more than just beauty.” Again, this was not new law — *Disc Golf* was decided in 1998 — but the Federal Circuit's articulation and application of this law effectively eliminated any wiggle room that district courts might have had.

Samsung's Appeal to Supreme Court

Samsung is apparently not content with this partial victory at the Federal Circuit which leaves the \$548 million award intact. Post-opinion briefing has made clear Samsung's intent to petition for certiorari and provided a



Joseph V. Mauch

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On Trademarks

glimpse into the arguments it will raise.

First, Samsung will question whether a party asserting a design patent is entitled to a damage award based on the infringer's "total profit" from the product, even if only a particular feature of the product is infringing. This limitation, known as apportionment, has significantly altered the damages landscape for utility patents in recent years. Not so for design patents, because the federal statute currently provides that the infringer of a design patent "shall be liable to the owner to the extent of his total profit." 35 U.S.C. § 289.

Second, Samsung will argue that unlike the district court, which instructed the jury to compare the "ornamental design" claimed in Apple's design patents to Samsung's phones, a court must, through claim construction and jury instructions, explicitly exclude any and all functional elements from the comparison of design patent to product to determine whether infringement has occurred.

Whither Design Patents and Trade Dress?

There is no question that the district court decision dramatically raised the profile of trade dress and design patents, and incited a marked increase in applications for and assertions of those rights. But what now, after the Federal Circuit opinion, and if the Supreme Court takes up Samsung's appeal?

The answer appears different for trade dress and design patents. The Federal Circuit opinion slammed the door on an expansive view of trade dress rights, especially as related to "product configuration" rather than packaging. As for design patents, much depends on whether the Supreme Court limits damages in some manner. That seems unlikely given the express language of the statute, and we can expect a continued increase in design patent infringement claims from parties seeking the purported infringer's "total profits."

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Training the Next Generation

should or should not be proactive in encouraging lead counsel to provide young lawyers with stand-up opportunities. Some judges (like me) are proactive. Others merely wish that young lawyers would argue more motions in court but do not view it as their role to so suggest.

With possibly one exception, all of the judges who responded to the survey rejected the idea that it was a sign of weakness when a young lawyer argues a motion in court. Instead, they viewed it as a sign that the young lawyer did the majority of work on the motion. For example, Judge William H. Orrick III stated: "I enjoy it when young lawyers argue. I never see it as a sign of weakness. I see it as a sign that they did most of the work on the motion, and I prefer it when the person who has done the work makes the argument." In addition, the judges expressed that young lawyers seem to be more prepared than at least some seasoned lawyers because the young lawyers know the record and the law, having prepared the motion or opposition.

The judges also offered several ideas about ways to further increase a young lawyer's opportunities for oral argument. One judge encouraged participation in the Federal Pro Bono Project and said it is a "fantastic experience." Another, Judge Vince Chhabria, recommended working for the government to gain oral argument experience. Judge Chhabria further said: "If the younger lawyer who actually wrote the brief is allowed to argue, I consider that a sign of wisdom, not weakness. But if you are a junior lawyer and you really want to get argument experience, go work for the government." Another judge recommended opening up her own shop as a way for a young lawyer to get oral argument and deposition experience.

Regarding depositions, however, one judge offered a word of caution. Unlike at law and motion, young lawyers may not have enough experience to follow up adequately on points of inquiry at depositions (and the judge sometimes saw the shortfalls in the record as a result). Therefore, a young lawyer should not attend her first or second deposition alone. Instead, the junior lawyer should be accompanied by a more senior attorney who can provide guidance during deposition breaks or notes as to what further questions to ask.

The main takeaway from the survey is this: Whether they proactively encourage it or not, judges in our district remain very receptive to young lawyers arguing motions in court and taking depositions.

Kudos to my excellent former law clerk Laura Hurtado, now at Pillsbury Winthrop Shaw Pittman LLP, for her assistance in preparing this article.

The Honorable William Alsup is a District Judge of the United States District Court, Northern District of California.



GUEST COLUMNIST
WENDY WALKER

Keep It Confidential: The Importance of NDAs in Third-Party Litigation Funding

Every plaintiff in civil litigation needs access to capital to fund a lawsuit. Increasingly, and in all areas of the law, plaintiffs and their attorneys are looking for litigation financing, which can be viewed as a plaintiff's solution to a defense insurer. (See generally Anthony J. Sebok, *Should the Law Preserve Party Control? Litigation Investment, Insurance Law, and Double Standards*, 56 Wm. & Mary L. Rev. 833 (2015)).

Importantly, courts across the country are recognizing the importance of alternative financing in today's ecosystem of litigation. New York Supreme Court Justice Eileen Bransten wrote in *Lawsuit Funding LLC v. Lessoff*, "litigation funding allows lawsuits to be decided on their merits, and not based on which party has deeper pockets or stronger appetite for protracted litigation." (2013 BL 343470, No. 650757/2012 (N.Y. Sup. Ct. Dec. 4, 2013)). And courts continue to make it clear that attorneys and funders must be able to share certain confidential information to secure financing, and protect those communications as attorney work product. This is good news for plaintiffs, but it is critical that attorneys and funders remember one critical threshold matter: Execute a written non-disclosure agreement.

The majority of cases funded by third parties will never result in a discovery dispute related to the funding documents. Documents related to how a plaintiff is financing the suit are usually irrelevant. For example, the court in *Kaplan v. S.A.C. Capital Advisors, L.P.* denied defendants' attempts to "fish" for information within documents that the class plaintiffs shared with third party funders, because "defendants did not show that the requested documents are relevant to any party's claim or defense." (2015 WL 5730101 (S.D.N.Y. Sept. 10, 2015)).

But the first and best defense against any discovery attempt is to operate under the strict confines of a written confidentiality agreement. The work product doctrine has been specifically extended to protect the legal theories, opinions and conclusions discussed between attorneys and funders, so long as the parties have a written non-disclosure agreement in place. Opinion work product pre-

pared in anticipation of litigation and shared with potential funders does not trigger a waiver. (Other than in perhaps the patent area, where a common interest exception has been found to exist between attorneys and funders, attorney-client privileged communications should not be shared nor the exception relied on as against waiver of the privilege.)

Litigators routinely engage consultants, such as forensic accountants or jury selection experts. Courts use the same analysis as they do with respect to any other consultant to determine whether the work product doctrine protects documents shared with litigation funders. The threshold questions are: 1) was the document created in anticipation of litigation, and 2) did the disclosure to the third party "substantially increase the likelihood that an adversary would come into possession of the materials." (See *Carlyle Inv. Mgmt. L.L.C. v. Moonmouth Co. S.A.*, 2015 WL 778846 (Del. Ch. Feb. 24, 2015)). Negotiations with a potential litigation funder necessarily arise in anticipation of, or perhaps during, litigation, and so the first question should always be satisfied.

The inquiry related to increasing the risk of disclosure to the adversary is resolved swiftly when there is a well-written non-disclosure agreement. If the parties have committed that they will keep information confidential, then there is no substantial likelihood that the sharing increased the chances the documents would fall into an adversary's hands. This has been confirmed in a series of cases facing the issue since *Miller v. Caterpillar*, Case No. 10 C3770 (N.D. Ill. Jan. 6, 2014). (*Carlyle, Doe v. Soc'y of Missionaries of Sacred Heart*, 2014 WL 1715376 (N.D. Ill. May 1, 2014); *Charge Injection Technologies, Inc. v. E.I. Dupont De Nemours & Co.*, (Del. Super. Ct. March 31, 2015)). As a result, the attorney's mental impressions and strategies that may be revealed in those documents should remain protected as work product,

As the cost of litigation continues to rise, plaintiffs and attorneys will increasingly look to third parties for funding. These funders provide valuable consultative and financial support and provide access to the justice system for plaintiffs that might otherwise be left in the cold. But securing funding requires sharing information, including the lawyers' impressions and strategies, that must be kept confidential. A non-disclosure agreement is the appropriate and essential tool for that job.

Wendy Walker is legal counsel at Law Finance Group, where she heads the firm's Estate Funding Group. wwalker@lawfinance.com



Wendy Walker



Letter from the Editor

It has been an honor and a pleasure to serve as the Editor of the ABTL Report-Northern California these past three years. The ABTL continues to provide excellent programs and an opportunity for business trial lawyers at all levels to learn from each other and our colleagues from the bar and bench. Over the past three years, we've had programs featuring lead trial counsel from cases such as *Pao v. Kleiner Perkins*, we've heard from state and federal court judges (including Justice Antonin Scalia), and we've had in-depth examinations of developments in case law that shape all of our practices. And next year promises another great year of programs and an excellent Annual Meeting in Hawaii.

I hope that the Report has played a valuable supporting role for our chapter's programs, and that we have provided interesting, timely, and helpful content for all of our membership. I thank all of the authors and columnists who contributed to the Report over the past three years, and particularly thank Stan Bachrack, our Managing Editor, for his work on the Report, and Michele Silva for all of the work she does for the Report and for ABTL overall.

Next year, Ragesh Tangri, a founding partner of Durie Tangri, will take the reins as Editor of the Report. I have no doubt that the Report, under Ragesh's leadership, will continue to provide articles and columns that are useful and informative to our membership. And as my final word, I encourage all of our members to consider contributing articles on subjects of interest to them. The purpose of the Report is to provide information and guidance on matters of interest to the members of this Chapter, including developments in the substantive law, changes in the legal landscape, and ways to improve our practices. I encourage every member of ABTL Northern California to consider how he or she can add to this discussion.

I would also like to extend a special thanks to all of our columnists who have contributed to the Report. While we have worked with and continue to appreciate many of our long-time contributors, over the past few years, we have tried to bring in new columnists from ABTL member firms to contribute regular pieces on issues within their areas of practice. Going forward, I expect there will be annual columns from all of the following: Amy Briggs (On Insurance), Frank Cialone (On Trust & Estate Litigation), Roger Heller (On Class Actions), Joseph Mauch (On Trademarks), Caroline McIntyre (On Litigation Skills), Peggy Otum (On Environmental Law), Howard Ullman (On Antitrust), and James Yoon (On Patents). We have also occasionally included shorter "guest columns" from contributors who are interested in submitting shorter pieces, which I hope will continue as an avenue to include more authors in the Report.



Frank Cialone

Many thanks, and best wishes for a joyful and peaceful holiday season!

Frank Cialone is a partner at Shartsis Friese LLP, who represents clients in fiduciary litigation including trust and estate litigation and disputes concerning closely-held businesses.



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