ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

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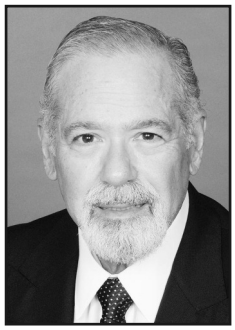
SELECTING PARTY ARBITRATORS



Richard Chernick

It is common in U.S. based commercial arbitrations with tripartite panels that the parties each select one arbitrator and the selected arbitrators then choose a third. The typical clause in an arbitration agreement might provide: "Each party shall select an arbitrator and they shall select the third [or the chair]." This is obviously an important step in the process, and it is fraught with risks and ethical land mines.[1]

Determining the Status of the Party Arbitrators. The first issue one confronts when reading such a clause is whether the parties intended the party arbitrators to be neutral or non-neutral.[2] Arbitration clauses rarely express clearly the

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— INSIDE —

DURAN, DUE PROCESS, AND THE CLASS ACTION DEVICE

Blaine H. Evanson

On May 29, 2014, the California Supreme Court in *Duran v. U.S. Bank National Association*, No. S200923, unanimously affirmed the reversal of a classwide judgment for plaintiffs in a wage-and-hour misclassification class action that was tried based on an assessment of a statistical sample of class members. *Duran* represents a significant victory for class action defendants in California, as it unanimously rejected as inconsistent with due process and California law attempts by class action plaintiffs to use statistical sampling and other procedural shortcuts to deprive defendants of an opportunity to present individualized defenses. In rejecting use of "the class action procedural device ... to abridge a party's substantive rights," *Duran* brings California class action law closer in line with federal law and recognizes that due process principles reflected in federal class action procedural rules have important implications for similar state procedure.

Brandon J. Stoker

Due Process Principles Imbued in Federal Class Action Procedures

Federal class certification law has undergone dramatic transformation in recent years. The Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes* introduced a mandate to engage in "rigorous analysis" during class certification to ensure that a plaintiff "seeking class certification [has] affirmatively demonstrate[d] his compliance" with Rule 23. 131 S. Ct. 2541, 2551 (2011). *Dukes* also condemned "Trial by Formula"—a procedure whereby liability would be determined based on an assessment of the claims of a sample of the class,

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PRESIDENT'S MESSAGE

Credibility. Civility. Camaraderie.

Three qualities that make the ABTL the best business bar organization in the State.

Credibility with the legal community and the judiciary is ensured in large part by our balance. Like the legal scales of Justicia, our membership is comprised of the most esteemed plaintiff and defense trial lawyers in the community (and frankly in the nation). Both sides of the equation matter equally. Continuing to protect that balance is critical to ABTL's mission. And we are blessed that our new Board reflects that balance.

Our credibility also is enhanced by our diversity. Maya Angelou said, "In diversity there is beauty, and there is strength." Variety is the spice of life. In our membership efforts, programming choices, and our Board leadership, we are focused on reflecting the community in which we practice. As an example, it is no small matter that women have earned more than half of our Board Committee positions this year.

Civility is the result of the communication that the ABTL fosters. The judge in charge of the Civil Trial Departments of the Los Angeles Superior Court, the Honorable Daniel Buckley, recently wrote: "[If] I could enact only one rule to deal with the challenges faced by the civil courts, it would be a simple one: All attorneys must have a cup of coffee with their adversaries at the outset of the case."

The ABTL goes beyond coffee – it creates the opportunity to break bread together. Sharing experiences and the vagaries of life fosters mutual respect. ABTL lawyers value being professionals. We may represent different interests on behalf of adverse clients, but we know that the surest way to a proper result is through mutual integrity. We are pleased that the ABTL was the first organization in the State to participate in adopting civility guidelines many years ago with the guidance of the Honorable Pamela Rymer, and I am pleased to announce that we will be revisiting them this year to improve upon them further.

Camaraderie is a hallmark of the ABTL. We treasure the contribution and commitment of our state and federal jurists, federal and state, trial and appellate. Their insights guide us. Their exchange of ideas inspires us. And their friendship makes us proud to serve in the profession we have chosen. We are pleased that we have doubled the active participation of judges and justices in the Los Angeles Chapter of the ABTL with the creation of the Judicial Advisory Council this year. Increased interaction amongst the bench and bar, and between the plaintiff and defense bars, make us stronger than ever before.

I would be remiss if I did not invite you to join us for our Annual Seminar on October 15-19 at the JW Marriott Ihilani, in Oahu, Hawaii. We will be having a celebratory dinner on the deck of the USS Missouri, where the surrender ending WWII was achieved, with a speech by the Commander of the Pacific Fleet. It will be an historic occasion for the ABTL. (You may find more information on our website at abtl.org, or by emailing our Executive Director, Linda Sampson, at abtl@abtl.org.).

I love the ABTL and what it represents. It is your organization. You own it. It will be my distinct honor to serve you and to share it with you this year.

With kindest regards,

David A. Battaglia
ABTL President 2014-2015, Los Angeles Chapter

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Selecting Party Arbitrators…continued from Page 1

intent of the drafters, and parol evidence is usually unavailable or unhelpful. The rules of arbitral institutions ease this likely ambiguity in clause drafting by providing that unless there is a clearly expressed intent that the party arbitrators are to be non-neutral, they are presumed to be neutral. AAA Commercial Arbitration Rules R-13, R-18, JAMS Comprehensive Arbitration Rules and Procedures, Rule 7(c).[3] One clue in some clauses is a reference to the chair as the "umpire," which is an indication that the party arbitrators are intended to be non-neutral. Reference to the chair as the "neutral arbitrator" would carry the same implication.

When a party arbitrator is first contacted it is expected that counsel will discuss with the candidate his or her status; counsel will often consult with the client on this subject and sometimes with the other side. If there is a consensus, the neutrality or non-neutrality can be determined at that point; if there is disagreement, the practice is for both sides to proceed as if the party arbitrators are neutral until the panel or the arbitral institution is able to resolve the issue. Code of Ethics, Canon IX.

Communications with party arbitrators at this stage of the proceedings are conducted *ex parte*, as allowed by the Code of Ethics, Canon IX. Parties are free to discuss with the candidate his or her experience, suitability to serve, availability, possible disclosures, fee requirements and general knowledge of the subject matter of the dispute or the industry or the technology or the area of law involved. They may also discuss the selection of the chair and the names and qualifications of possible candidates for chair. They may not discuss the substance of the issues in dispute or the candidate's views about any disputed issue of fact or law. Code of Ethics, Canon III.

These discussions usually occur by telephone but can be conducted in person. They are usually only between outside counsel and the candidate, but a party representative will sometimes participate. Some arbitrators will not meet in person for this interview process, some will not meet with a party and some put strict time limits on the interview process in order to control the scope of the discussion. On occasion, a candidate will express a preference for a joint interview with both sides present or will make a recording of the meeting in order to document what was discussed.[4]

The Disclosure Process. Party arbitrators, whatever their status, are required to make disclosures to the parties once the appointment has been made. A party may disqualify a neutral party arbitrator based on these disclosures but may not seek to disqualify a non-neutral party arbitrator. The disclosures a non-neutral party arbitrator makes are informational only, primarily for the benefit of the chair and the other participants.

The College of Commercial Arbitrators' *Guide to Best Practices in Commercial Arbitration* says the following about disclosures:

Generally, an impartial arbitrator is one who is open-minded and neither biased in favor of nor prejudiced against a particular party or its case. An independent arbitrator is one who has no close financial, personal, or professional relationship with a party and will not profit from the arbitration's resolution. *See generally*, International Bar Association (IBA) Rules of Ethics for International Arbitrators, Art. 3(1) (1987). Although codes and statutes such as the revised AAA/ABA Code and the RUAA do not clearly delineate the differences between these concepts, they do identify the general factors that neutral arbitrators should consider in determining whether they are impartial and independent. Both the AAA/ABA Code and the RUAA emphasize that in making such determinations, arbitrators should consider any financial or personal interest in the

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[1] JAMS recommends the following:

Within 15 days after the commencement of arbitration, each party shall select one person to act as arbitrator, and the two so selected shall select a third arbitrator within 30 days of the commencement of the arbitration. If the arbitrators selected by the parties are unable or fail to agree upon the third arbitrator within the allotted time, the third arbitrator shall be appointed by JAMS in accordance with its rules. All arbitrators shall serve as neutral, independent and impartial arbitrators.

Alternately, to avoid the party arbitrators knowing who appointed them, the clause might provide:

Each party shall communicate its choice of a party-appointed arbitrator only to the JAMS Case Manager in charge of the filing. Neither party is to inform any of the arbitrators which of the parties may have appointed them.

See also JAMS International Rules Model Clause and Submission Agreement.

[2] These are the terms used by the Code of Ethics for Arbitrators in Commercial Disputes (AAA/ABA Code, 2003) ("Code of Ethics") which sets out the generally accepted standards of ethical conduct for commercial arbitrators, including standards relating to appointment, disclosure, and disqualification of arbitrators. The Code also addresses the procedure the parties must follow in communicating with candidates for appointment as party arbitrators and ascertaining whether the party arbitrators will be neutral or non-neutral. Code of Ethics, Canon III.B(4).

[3] In international practice, the party arbitrators are always neutral and independent of the parties who appointed them. *See*, e.g., *IBA Guidelines on Conflicts of Interest in International Arbitration*, Part I (1) General Principles; *IBA Rules of Ethics for International Arbitrators*, Rule 1.

[4] It is not inappropriate to reimburse a candidate for actual travel costs to attend an interview; it is less clear whether the candidate may be reimbursed for his or her time.

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outcome of the arbitration and any past or existing relationship with any of the parties, their lawyers, witnesses, or the other arbitrators. See *Code of Ethics*, Canon II(A); RUAA §§ 11(b), 12(a).

Guide to Best Practices in Commercial Arbitration at 9-10 (3d Ed.).

Selecting a Party Arbitrator. The value of a party-selected arbitrator, whether neutral or non-neutral, is that the party may unilaterally appoint someone with expertise in the subject matter of the dispute or special knowledge of the industry or the technology involved, or special expertise in an area of the law or with the arbitration process. Non-neutral party arbitrators are likely to have some additional or more direct connection with the subject matter of the dispute or special knowledge of the parties or the industry. Industries that continue to use non-neutral arbitrators routinely, such as insurance or maritime, routinely appoint arbitrators based on their industry or subject matter experience and their familiarity with the arbitration process.

The agreement to use party arbitrators usually directs the process for selecting the chair. It is most common for the party arbitrators to select the chair, with or without the participation of the parties. Usually party arbitrators consult with the parties who appointed them about the suitability of candidates for that position. *See* Code of Ethics, Canon III.B(2). This process is rarely defined in the arbitration clause other than to say that "the party arbitrators shall select the chair." *See* n.1, *supra*. Some party arbitrators believe that such language gives them the discretion to make a selection without consulting the party, and certainly without the party exercising actual control over the selection process. Most party arbitrators regard the process as a collaborative one. Some party arbitrators regard themselves as mere intermediaries for the party that appointed them. This issue is usually addressed as part of the process of interviewing and selecting the party arbitrator.

The delicate balance between the concept of neutrality and the role of the neutral party arbitrator requires that the neutral arbitrator candidate be familiar with the selection process and be comfortable with the limits of *ex parte* communications prior to the appointment of the panel and thereafter proceeding as a fully independent arbitrator. Chairs of tripartite arbitrations are sensitive to the possibility that a neutral party arbitrator sometimes does not completely embrace the concept of neutrality. In that circumstance, it is likely that the chair will discount the input of the "neutral" arbitrator; were that to occur, the party who appointed that arbitrator might be adversely affected. Thus, it is important to select a neutral arbitrator who understands and is capable of fulfilling that unique role.

Compensating Party Arbitrators. Arbitrators are free to set the terms of their professional services.[5] Rates and terms of compensation vary considerably among arbitrators. Typically arbitrators also require reimbursement for reasonable and necessary travel expenses (and sometimes travel time). Some arbitrators also charge a cancellation fee when a hearing is continued or cancelled within a prescribed period prior to the hearing and where those days cannot be rebooked by the arbitrator. These arrangements should be disclosed and agreed upon prior to appointment where the parties are dealing directly with the arbitrator or through the institution in administered cases.[6] (It is common for arbitral institution to require disclosure of the terms of arbitrators' compensation in cases they administer.) Usually arrangements are also made for advance deposit of fees and expenses.

Neutral party arbitrators are most often paid through the administering institution although the parties can agree to direct billing and payment as an exception to the "no *ex parte* contact" rule. Non-neutral party arbitrators are most commonly paid directly by the party who appointed them.

Ethical Conduct of the Non-Neutral Party Arbitrator. Non-neutral arbitrators have the same obligation as the neutral arbitrator to provide the parties with a fundamentally fair hearing. Thus, although non-neutral arbitrators may be "predisposed" to the side that appointed them, they must act fairly to both sides. Code of Ethics, Canon X. For example, the non-neutral arbitrator should not interfere with an orderly arbitration process or with the presentation of a party's case and should refrain from conducting "cross-examination" of the other side's witnesses, as distinguished from asking questions that were not answered in a witness' testimony.

The Unique Role of Non-Neutral Party Arbitrators. In addition to the functions performed by neutral party arbitrators, non-neutral party arbitrators are often expected to communicate *ex parte* with their parties prior to the hearing on such issues as how to effectively frame the issues, legal theories, presentation of witnesses and other evidence and appropriate expert testimony. The non-neutral party arbitrator

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[5] Many international arbitral institutions set the compensation of arbitrators without regard to their customary rates of compensation, such as the International Chamber of Commerce and the Japan Commercial Arbitration Association. All domestic providers permit arbitrators to set their own terms of compensation.

[6] Absent extraordinary circumstances, arbitrators should not request increases in the basis of their compensation during the course of a proceeding. Code of Ethics, Canon VII.B(3).

RECENTLY SIGNED BILL SOLVES INCONSISTENCIES IN POST-TRIAL MOTION DEBRIEFING DEADLINES

John A. Taylor, Jr.

For so long as there have been lawyers, there has undoubtedly been a vast divide between the plaintiff and defense sides of the bar. But in a feat of cooperation that should create hope for eventual world peace, the Consumer Attorneys of California (CAOC) and the California Defense Counsel (CDC) have co-sponsored a bill to eliminate a longstanding inconsistency between statutes governing post-trial motions. For years, those inconsistencies have caused unnecessary logistical problems for practitioners, and confusion for pro per litigants. The bill, which Governor Brown signed on July 8, will at last align the deadlines for filing all three types of post-trial motions.

By way of background, once a judgment has been entered a trial court generally loses any power to modify or alter the judgment in a way that materially affects the rights of the parties. But three statutory exceptions to that general rule allow a trial court to grant a motion for new trial (Cal. Civ. Proc. Code § 657 (West 1976)), a motion for judgment notwithstanding the verdict (JNOV) (Cal. Civ. Proc. Code § 629 (West 2011)), and a motion to set aside and vacate the judgment and enter a new judgment (Cal. Civ Proc. Code § 663 (West Supp. 2013)). After an adverse judgment, the losing party will often file more than one of these motions.

The longstanding problem for attorneys has been that the deadlines for filing post-trial motions are inconsistent. For example, to make a new trial motion a party must file a "notice of intention to move for new trial" within 15 days after service of notice of entry of the judgment by the clerk or a party. (Cal. Civ. Proc. Code § 659(a)(2) (West Supp. 2013).) But the memorandum of points and authorities, supporting declarations, and affidavits are not due until 10 days later. (Cal. R. Ct. 3.1600(a).) Thus, a losing party generally has a total of 25 days to marshal all its arguments regarding why a new trial should be granted.

Motions for JNOV (Cal. Civ. Proc. Code § 629 (West 2011)) and to vacate judgments (Cal.Civ. Proc. Code § 663a(a)(2)) must likewise be filed within 15 days of service of entry of the judgment. But in contrast to new trial motions, the statutes governing these other two post-trial motions do not provide for additional time to file the supporting legal memorandum and other documents. Thus, for example, a party seeking JNOV and in the alternative a new trial must prepare and file its entire JNOV motion no later than 15 days after service of notice of entry of judgment—ten days before the legal memorandum supporting the new trial motion needs to be finalized and filed. That not only creates logistical difficulties, but can result in inconsistencies between the two motions as legal arguments continue to evolve after the JNOV is on file but the new trial motion is still a work in progress.

One way around this problem has been to ask opposing counsel to agree to a post-trial motions briefing schedule, and stipulate that the memorandum in support of the JNOV motion (or, in a bench trial, the motion to vacate) can be filed at the same time as the memorandum in support of the new trial motion—i.e., 25 days after service of notice of entry of judgment, rather than 15 days. But trial lawyers tend to be suspicious of anything the other side wants, especially when it has to do with a motion that threatens a judgment obtained after a hard-fought trial in which emotions have run high. Consequently, it is usually difficult to obtain such an agreement.

The only other option has been to seek ex parte relief from the trial court, requesting permission to file the supporting legal memoranda for all post-trial motions simultaneously—that is, at the later date when the new trial memorandum is due. Sometimes that works, but more often (especially if the ex parte application is opposed), the trial court's response is that the parties should just follow the schedule specified in the Code of Civil Procedure.

Fortunately, to paraphrase Gerald Ford, it appears that our long post-trial motions procedural nightmare will soon be over. Assemb. B. 1659, 2013-2014 Reg. Sess. (Cal. 2014), the bill co-sponsored by the CAOC and the CDC, will bring an end to these inconsistent deadlines. As the Assembly Committee synopsis for the bill states, the "non-controversial bill prudently seeks to conform the filing deadlines and procedures for three post-trial motions—motion for a new trial, motion for a judgment notwithstanding the verdict (JNOV), and motion to vacate the judgment . . . The changes proposed in this bill helpfully align the deadlines for these three motions." As the Assembly Committee synopsis for the bill states, the "non-controversial bill prudently seeks to conform the filing deadlines and procedures for three post-trial motions—motion for a new trial, motion for a judgment notwithstanding the verdict (JNOV), and motion to vacate the judgment . . . The changes proposed in this bill helpfully align the deadlines for these three motions." Assembly

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with the results extrapolated across the remainder of the class. *Id*. at 2561. Subsequently, in *Comcast Corp. v. Behrend*, the Court applied the rigorous analysis standard to Rule 23(b)(3)'s predominance requirement, recognizing that causation and the measure of damages must be susceptible to measurement on a classwide basis and observing that "[q]uestions of individual damage calculations" may preclude a finding of predominance by "overwhelm[ing] questions common to the class." 133 S. Ct. 1426, 1433 (2013).

These decisions were animated, in part, by due process principles underlying Rule 23. Although the Court's rejection of "Trial by Formula" in *Dukes* relied on the Rules Enabling Act's prohibition against use of procedural rules to "abridge, enlarge or modify any substantive right" (28 U.S.C. § 2072(b)), that principle reflects a fundamental due process norm that is binding on all courts. Federal class action procedure is "grounded in due process," and the procedural convenience of class treatment cannot displace the "deep-rooted historic tradition that everyone should have his own day in court." *Taylor v. Sturgell*, 553 U.S. 880, 892–93, 901 (2001); see also *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (class certification should not "sacrifice[ ] procedural fairness"); *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) ("The fundamental requisite of due process of law is the opportunity to be heard"). This is, in part, because "'[d]ue process requires that there be an opportunity to present every available defense.'" *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quoting *Am. Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932)).

California's Adoption of Federal Due Process Standards in Duran

The California Supreme Court's decision in *Duran* marks an important step in state judicial recognition that due process protections guaranteed by the U.S. Constitution—including the right to be heard in court and present defenses—must factor into state class certification procedures.

The Court followed federal class action law, including *Dukes*, to hold that "the class action procedural device may not be used to abridge a party's substantive rights," including its right to litigate individualized defenses—a precept that "derive[s] from both class action rules and principles of due process." Slip op. at 30–31. It also raised the bar for plaintiffs who seek to prove classwide claims via statistical evidence by requiring courts to analyze proffers of statistical proof with "sufficient rigor," and to "consider *at the certification stage* whether a trial plan has been developed to address" the use of statistical evidence. *Id.* at 27 (emphasis added)

The trial court in *Duran* certified a class of 260 "business banking officers" who claimed they had been misclassified as "exempt" outside salespersons and thus were owed overtime pay. Slip op. at 1–2. The court limited the bench trial to an assessment of an unrepresentative sample of 21 class members (including the two named plaintiffs), and determined that all class members had been misclassified as exempt on the basis of the sample group's testimony. It then extrapolated the average amount of overtime reported by the sample group to enter a $15 million judgment for the entire class. The trial court repeatedly rejected the defendant's attempts to introduce evidence regarding the experiences of class members outside the sample group.

In a unanimous opinion authored by Justice Corrigan, the California Supreme Court rejected this procedure as "profoundly flawed." Slip op. at 2. The Court explained that "[a]lthough courts enjoy great latitude in structuring trials, … any trial must allow for the litigation of affirmative defenses, even in a class action case where the defense touches upon individual issues." *Id*. at 29. The "class action procedural device may not be used to abridge a party's substantive rights," including its right to litigate individualized defenses, a "principle [that] derive[s] from both class action rules and principles of due process." *Id*. at 30–31 (citing *Dukes*, 131 S. Ct. at 2561; *Lindsey*, 405 U.S. at 66; *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007)).

"Class certification is appropriate only if...individual questions can be managed with an appropriate trial plan," and any such "class action trial plan, including those involving statistical methods of proof, must allow the defendant to litigate its affirmative defenses" Slip op. at 22, 38. And the Court cautioned that "[s]tatistical methods cannot entirely substitute for common proof." *Id*. Instead, "[t]here must be some glue that binds class members together apart from statistical evidence." *Id.; see also Dukes*, 131 S. Ct. at 2552. Any "statistical plan for managing individual issues must be conducted with sufficient rigor," and "[i]f statistical evidence will comprise part of the proof on class action claims, the court should consider at the certification stage whether a trial plan has been developed to address its use." Slip op. at 27.

Potential Implications of Duran. *Duran* recognizes that "principles of due process" imbued in federal class certification standards and guaranteed by the federal constitution necessarily limit the types of cases that may be

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certified for class treatment under state law. At a minimum, the class action device may not be used to abridge a party's right to litigate individualized defenses. Although the Court indicated that "[d]efenses that raise individual questions about the calculation of *damages* generally do not defeat certification," it emphasized that "a defense in which *liability itself* is predicated on factual questions specific to individual claimants" poses significant manageability challenges that could preclude class certification. *Id*. at 25.

The Court eschewed "a sweeping conclusion as to whether or when sampling should be available as a tool for proving liability" (slip op. at 38), but warned that "[s]tatistical methods cannot entirely substitute for common proof" and emphasized that a "plan for managing individual issues"—including defenses to liability—"must be conducted with sufficient rigor" and should be satisfactorily proven before a class is certified for class treatment. *Id*. at 27. As a practical matter, *Duran* suggests that flawed statistical methods will rarely be sufficient to establish liability.

Duran is a big win for defendants, as it ensures many of the same procedural protections guaranteed by Federal Rule 23 will be available in California state class actions as well. What remains to be seen is whether other federal standards for class certification—including the "rigorous analysis" standard and robust requirements for proving that class claims are susceptible to common proof after *Dukes* and *Comcast*—are likewise incorporated as state procedural law, given that they too are animated by constitutional principles of due process.

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might be asked by the party to assess the tactics which will be most persuasive to the chair. (The process of chair selection thus may involve consideration of the likely rapport the party arbitrator will have with the chair.)[7] Any agreement as to *ex parte* communications beyond the first preliminary conference should be documented in the first scheduling order.

Non-neutral arbitrators should never disclose to a party or counsel the substance of any deliberations of the panel. Code of Ethics, Canon X. In *Northwestern National Insurance Company v. Insco, Ltd.* 2011 USDist LEXIS 113626 (SDNY 2011), the court determined it lacked power to remove party-appointed arbitrator but disqualified the attorney who had received and concealed communications from the arbitrator who had disclosed panel deliberations.

Generally, non-neutral party arbitrators are not subject to disqualification (Code of Ethics, Canon X.B), but there are some limits on who is eligible to serve. They often have specific industry knowledge or familiarity with the subject matter of the dispute (factual or legal). They often also have some relationship with the party or counsel. A potential financial interest in the dispute would cause most courts to question a non-neutral arbitrator's ability to ensure a fair hearing. In *Aetna Casualty & Surety Co. v. Grabbert*, 590 A.2d 88, 92 (R.I. 1991), the court found that a contingent fee arrangement between a non-neutral party-appointed arbitrator and the party appointing him was "absolutely improper," but the court denied *vacatur* of the award because it was unanimous.[8] Non-neutral arbitrators who are potential witnesses or partners of counsel or have a present business relationship with a party have also been challenged.[9]

Conclusion. Parties have embraced the party arbitrator process. The ethical pitfalls are easily avoided, and the value of being able to make one appointment unilaterally is unmistakable. Knowing the applicable rules enables counsel to benefit by the selection of a panel of arbitrators well-suited to hear that particular case.

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[7] *See Employer's Insurance of Wausau v. National Union Fire Ins. Co.*, 933 F.2d 1481 (9th Cir. 1991) (rejected a challenge to an award where a non-neutral arbitrator had performed consulting services with counsel on the issues in dispute and ex parte communications had occurred throughout the matter by both party-appointed arbitrators); *Sunkist Soft Drinks, Inc. v. Sunkist Growers*, Inc.,10 F.3d 753 (11th Cir. 1993) (pre- and post- appointment communications between party and party-appointed arbitrator are consistent with the commonplace predisposition of party-appointed non-neutral arbitrators toward the party appointing them and with prevailing ethical rules); *Sphere Drake Ins. Ltd. v. All American Life Ins. Co.*, 307 F.3d 617, 622 (7th Cir. 2002) (rejecting challenge to non-neutral arbitrator who arguably provided incomplete disclosure regarding past representation of a party); *Delta Mine Holding Co. v. AFC Coal Props.*, 280 F.3d 815, 822 (8th Cir. 2001) (when parties have agreed to non-neutral party-appointed arbitrators, the award should not be vacated "unless the objecting party proves that the party arbitrator's partiality prejudicially affected the award").

[8] *See* Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 497-514 (1997).

[9] *Metropolitan District Commission v. Connecticut Resources Recovery Authority*, 130 Conn.App. 130, 142, 22 A.3d 651 (2011); *Barcon Associates, Inc. v. Tri-County Asphalt Corp.*, 86 N.J. 179, 430 A.2d 214 (1981) (substantial and ongoing business relationships, including services rendered during the arbitration); *Borst v. Allstate Insurance Company*, 291 Wis.2d 361,

DID YOU KNOW? APPEALABILITY DEPENDS ON THE LEGISLATURE

David M. Axelrad

Your client wants to know if immediate appellate review is available to challenge an adverse trial court ruling. Where do you look to find the answer? The place to start is not with the appellate courts but with the Legislature because "the California Legislature has *complete* control over the right to appeal." (Eisenberg, Horvitz & Wiener, Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2013) ¶ 2:17, p. 2-14 original emphasis; see *Dana Point Safe Harbor Collective v. Superior Court* (2010) 51 Cal.4th 1, 5 ["The *right* to appeal is wholly statutory" (emphasis added)].) This means that the right to appeal can differ depending upon the statutory scheme that has been adopted.

In California, Code of Civil Procedure section 904.1, subdivision (a)(1), permits an appeal to be taken "[f]rom a judgment . . . ." This provision embodies the " 'final judgment' " rule, "the essence of which is that an appeal lies only from a final judgment [citation], i.e., a judgment which 'terminates the proceeding in the lower court by completely disposing of the matter in controversy' [citation]." (*Kinoshita v. Horio* (1986) 186 Cal.App.3d 959, 963.)[1] California favors this limitation on the right to appeal because "piecemeal disposition and multiple appeals tend to be oppressive and costly," and "[i]nterlocutory appeals burden the courts and impede the judicial process" by "clog[ging] the appellate courts with a multiplicity of appeals" "produc[ing] uncertainty and delay in the trial court" and preempting further trial court proceedings which may obviate the need for appellate review and/or provide a more complete record for the appellate court. (*Kinoshita,* at 966-967.)[2]

One flick of the legislative wrist, however, and the entire philosophy of the right to appeal can change dramatically. Take, for example, the state of New York.

Under section 5701 of New York's Civil Practice Law and Rules, there is a right of appeal to the intermediate appellate courts (known as the "appellate division") not only from a final judgment but also virtually any interlocutory order that "affects a substantial right . . . ." (N.Y.C.P.L.R. 5701(a), (a)2(v).) As the practice commentaries to section 5701 note, "[a]ppealability to the appellate division is broad. As a general rule almost anything can be appealed to the appellate division on the authority of CPLR 5701, . . ." (Practice Commentaries, McKinney's N.Y.C.P.L.R. (1999 ed.) foll. § 5701, 1997 C5701:1) "So broad is the appealability of nonfinal determinations in New York practice that one must sometimes scratch hard at the caselaw to come up with a few examples of the nonappealable ones." (Id. 1997 C5701:4; see, e.g., *Sholes v. Meagher* (2003) 100 N.Y.2d 333, 335 [794 N.E.2d 664] [appeals generally may be taken from any order deciding an interlocutory motion where the order affects a substantial right].)

So, when you want to find out if your client has a right to appeal, start with the statutory scheme governing appeals, and go from there.

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[1] Of course, there are exceptions, e.g., "when the case involves multiple parties and a judgment is entered which leaves no issue to be determined as to one party" (*Justus v. Atchison* (1977) 19 Cal.3d 564, 568, disapproved on other grounds in *Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 171), or when a judgment or order is final as to a "collateral" matter (*Marsh v. Mountain Zephry, Inc.* (1996) 43 Cal.App.4th 289, 297-298).

[2] California generally consigns interlocutory appellate review to the discretionary realm of relief by extraordinary writ. (See *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743 ["The California judicial system provides another, more efficient avenue" in the form of a petition to the appellate court for discretionary writ relief].)

Signed Bill to Solve Inconsistencies.....Continued from Page 5

Committee Bill Analysis, Assemb. B. 1659, 2013-2014 Reg. Sess. (Cal. 2014), http://goo.gl/QA1TQ8. The synopsis further notes that "[t]here is no known opposition to this bill." *Id.*

Assemb. B. 1659 amends the two statutes governing a motion for JNOV and a motion to vacate a judgment to provide that the "moving, opposing, and reply briefs and any accompanying documents shall be filed and served within the periods specified by Section 659a [governing new trial motions] and the hearing on the motion shall be set in the same manner as the hearing on a motion for new trial under Section 660." (Emphasis omitted.) Thus, for all three types of post-trial motions, the moving party will file its notice of motion on the 15th day after service of notice of entry of the judgment, and then have an additional 10 days to file the supporting memorandum of points and authorities.

Now that Governer Brown has signed the bill, it will take effect on January 1, 2015.

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ABTL YOUNG LAWYERS DIVISION REPORT

Jeanne A. Fugate

The ABTL Young Lawyers Division ended its successful 2013-2014 year with an informative, hands-on panel featuring advice from experienced judges and practitioners for dealing with unruly opposing counsel at depositions.

About 30 YLD members attended the event, which was held at Jones Day on May 22, 2014. The panel featured the Honorable Jay C. Gandhi, a Magistrate Judge for the United States District Court of the Central District of California; the Honorable John Shepard Wiley, Jr., a Judge for the Superior Court of California, in the Los Angeles County Superior Court's Complex Division; Mary Haas, the partner in charge of the Los Angeles office of Davis Wright & Tremaine; and Tobin Lanzetta, a partner at Greene, Broillet & Wheeler.

The YLD's focus over this past year has been to provide practical tips and training for the ABTL's more junior members, and to try to do so in an interactive manner. The May panel followed this format. The speakers used the first half of the session to talk about conduct that they had observed at depositions, either as judges deciding discovery disputes or as counsel trying to address them. The second half of the presentation involved mock depositions where the advice was put into practice.

Both Judge Gandhi and Judge Wiley emphasized that many disputes could be resolved without motion practice (whether the cumbersome Joint Filing under the Local Rules for the Central District of California, or the lengthy process for state court motions to compel) by the more expedient procedure of requesting an informal telephone conference with the court. Both judges also noted that it is important for both sides in a discovery dispute to behave with professionalism. As Judge Wiley noted, when he is reviewing a discovery motion, he looks to whether there is one bad actor, or if both sides are acting badly.

Haas and Lanzetta also shared some of their experiences with unruly counsel and tips for dealing with them. They both emphasized the importance of knowing the case, preparing the witness (if defending), and being knowledgeable about what objections could be made. One particular area of importance is knowing the contours of attorney-client privilege and work product, and how far a questioning attorney can reach given those privileges.

Both also noted the importance of exercising control over the room and unruly opposing counsel. Haas suggested that lawyers be ready to quote from the Los Angeles Superior Court's Guidelines for Civility in Litigation (http://www.lasuperiorcourt.org/courtrules/CurrentRulesAppendixPDF/Chap3Appendix3A.PDF) which sets forth 11 specific guidelines for proper conduct of a deposition. These include: "[c]ounsel for all parties should refrain from self-serving speeches during depositions" and "[c]ounsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer."

The session closed with two mock depositions, where this year's YLD Co-Chairs Edward Andrews, of Bingham McCutchen LLP, and Jason C. Wright, of Jones Day, acted as witnesses in a hypothetical personal injury case. Haas and Lanzetta took turns acting as the obstreperous counsel and the counsel employing the recommended tactics to deal with that counsel.

The deposition panel was the last event of the YLD calendar, which featured a number of similar events. "The YLD had another productive calendar year," said Wright, whose term as YLD Co-Chair ended this year. "The group continues to build on the Advisory Committee, which is made of YLD Members who are committed to help move the YLD forward." Wright noted that in the past year, the YLD held two attorney-panels, a judicial mixer, and several brown bag lunches.

Andrews, who will co-chair the YLD for the 2014-15 year with Aaron Bloom, of Gibson Dunn & Crutcher, said that ABTL members with less than ten years of practice can look forward to a similar line-up next year. "Our hope is not only to provide opportunities for junior ABTL members to grow as lawyers," he said, "but also to put them in contact with each other, and encourage more active participation in ABTL both today and when they grow into the judges and senior lawyers in the organization."

The YLD Board has planned its next meeting for August 2014, where the YLD will set its schedule for 2014-2015. The YLD Board anticipates that there will be several openings available on the Board. To the extent you, or someone at your firm, is interested in applying to join the Board, please contact Edward Andrews or Aaron Bloom for further information.

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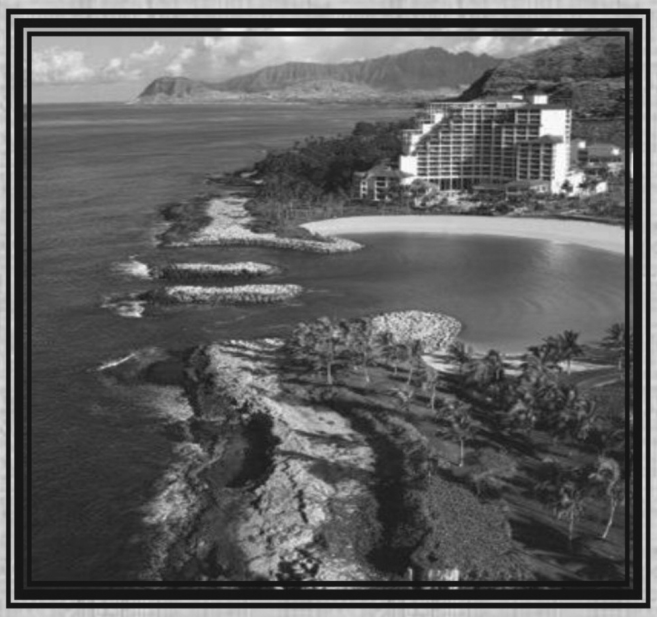

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