ASSOCIATION OF BUSINESS TRIAL LAWYERS
SAN DIEGO

abtl REPORT

Volume XIII No. 1 *January 2006*

Get To The Point: *Ex Parte* Guidelines for San Diego Superior Court

By Robert J. Gralewski, Jr, Gergosian & Gralewski LLP (with The Hon. Linda B. Quinn and The Hon. J. Richard Haden (Ret.))

Recently, the Honorable Linda B. Quinn, Supervising Judge of the Civil Division of the San Diego Superior Court, and Retired Judge J. Richard Haden, an Independent Calendar Judge who retired after over 20 years on the bench (and who is now with JAMS), both provided their insights into what is effective for *ex parte* hearings and what is not, stressing two key points. First, the need for brevity and succinctness cannot be stressed enough in *ex parte* hearings. As Judge Quinn aptly noted, lawyers appearing for *ex parte* hearings should consider themselves advertising executives who have 60 seconds to convince and persuade. Second, counsel should not waste the limited amount of time that they do have complaining about the behavior of their adversaries. Judges only have time to focus on the core issue, rather than to get to the bottom of tangential disputes.

Hon. Linda B. Quinn

Hon. J. Richard Haden (Ret.)

Here are some tips from both Judge Quinn

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Meet the New Federal Magistrate Judge: The Honorable Cathy Ann Bencivengo

By Nancy L. Stagg, Partner
Fish & Richardson, LLP

Nine years ago, the Honorable Cathy Ann Bencivengo, the newly-appointed U.S. Magistrate Judge for the Southern District of California, attended the swearing-in of U.S. Magistrate Judge James F. Stiven. Judge Stiven was Bencivengo's partner at Gray Cary Ware & Freidenrich LLP when he was selected for the Federal bench. Bencivengo recalls that she was deeply impressed with Judge Stiven's decision to join the judiciary. She saw his appointment to the position of Magistrate Judge as a wonderful opportunity for him to combine his exceptional legal skills and talents with his personal commitment to public service. Bencivengo aspired to fol-

Hon. Cathy Ann Bencivengo

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Inside

President's Column

By Maureen Hallahan, Procopio Cory Hargreaves & Savitch LLP

As ABTL San Diego enters its 15th year, I am honored to serve as president. I joined ABTL many years ago and can honestly say that this organization and the people with whom I have been privileged to interact have greatly enriched both my professional and personal life.

Maureen Hallahan

ABTL members are among the best and the brightest state and federal court judges and trial lawyers. We are an organization that encourages productive and appropriate communication between the bench and the bar. A frank exchange of ideas is critical to our judicial system and to the understanding of our respective roles in it. Excellence, ethics, integrity and civility are this organization's core values. As a bonus, we all seem to know how to have a good time together.

This year is an exciting one for ABTL San Diego. Our retiring board members who have provided guidance and support to ABTL over the past three years have promised to stay actively involved. I must thank ABTL's immediate past president Charles Berwanger for his outstanding leadership, keeping with the tradition of all our past presidents.

We have a tremendous slate of new board members: Chief Judge of the Southern District of California Irma Gonzalez, Presiding Judge of the San Diego Superior Court Janis Sammartino, Judge Thomas Nugent, Justice Howard Wiener (ret.), and attorneys Fred Berretta, Marisa Janine-Page, Dan Lamb, Anna Roppo and Kent Walker. Additionally, Ninth Circuit Judge Margaret McKeown agreed to extend her term for another year. This all-star cast joins our prestigious returning board members and will continue to provide quality leadership to ABTL. The officers for this year are Magistrate Judge Jan Adler as Vice President, Robin Wofford as Treasurer and Ed Gergosian as Secretary. These individuals are proven leaders and have been dedicated to ABTL for many years.

Our plans for this year include unparalleled educational dinner programs, including our local "Mini-Seminar" in September and the statewide ABTL Annual Seminar in Maui, Hawaii in October. Our first dinner program, "The Pinocchio Response – How to Spot a Liar," will be held on February 6, 2006. Nationally recognized speaker Larry Helms will discuss how to tell if someone is not telling the truth (imagine that!) and what to do about it. It will be informative, educational and entertaining — a winning combination. Attendees will receive 1 hour MCLE credit and the chance to see old friends and meet new ones at the cocktail hour prior to the program.

On April 3, 2006 ABTL's dinner program will feature Thomas Girardi, a nationally renowned trial lawyer and a recipient of the Trial Lawyer Hall of Fame award. Another dinner program this year will feature Southern District federal judges in a candid discussion about what is and is not acceptable, appropriate and effective behavior in their courtrooms. So instead of sending an inquiring e-mail around to your firm or colleagues, you can hear for yourself the preferences and attitudes of the judges before whom you appear. Stay tuned for the remainder of the programs — we have many exciting ideas thanks to our program chair, Tom Egler, and the personal contacts of our board members. If you have comments or suggestions for our programs please contact either Tom or me.

The Mini Seminar sponsored by ABTL San Diego was the creation of retired San Diego Superior Court Judge Richard Haden, a Past President of ABTL. This is a program designed for all levels of practice featuring some of the most skilled trial lawyers in San Diego and judges from the state and federal bench. This year the one day seminar will be held on

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"What's to Prepare? It's only an Arbitration Scheduling Conference."

By Hon. Raymond F. Zvetina (Ret.), former Superior Court Judge, now with JAMS

Not so fast, counsel. The arbitration scheduling conference, or, more properly, the Preliminary Conference, involves much more than simply comparing calendars and booking dates for the arbitration hearing. Here's a list of topics you should be prepared to discuss, initiate, or respond to in this important first conference.

The arbitrator may not be inclined or able to deal with all these matters in the initial conference, and may order them addressed in a follow-up conference. However, by raising those issues that are applicable and most affect your client, you will help assure that they get addressed promptly, and you will essentially set the agenda for any supplemental conferences.

1. What Rules Apply?

Many arbitration clauses do not specify the procedural rules that will govern the arbitration. Some simply say that the arbitration shall be conducted in accordance with C.C.P. §1280 *et seq*. (the California Arbitration Act). While the Act is specific as to a few procedural aspects, it is by no means a comprehensive set of procedural rules. If the clause provides for administra-

Hon. Raymond F. Zvetina (Ret.)

(See "Arbitration Scheduling" on page 9)

Punitive Damages: A Chronicle of *Campbell* in California

By Harvey R. Levine, Esq. of Levine, Steinberg, Miller & Huver

In 2003, the United States Supreme Court revisited the constitutionality of punitive damage awards in *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408. Reversing its long history of deference to state law on this subject, the Court in *Campbell* imposed due process standards to be utilized by both state and federal trial and appellate courts and provided a due process template for determining whether punitive damages verdicts are excessive. The mandated standards appear to require concurrent focus on the nature and degree of the reprehensible conduct that characterizes the defendant's tortious conduct and the quantum of punitive damages that would punish and/or deter such conduct, within permissible limits imposed by the Due Process Clause of the U.S. Constitution.

Harvey R. Levine

In one respect the *Campbell* holding galvanized the law of punitive damages and provided states with criteria to be utilized in determining the constitutionally permissible limits of punitive damage awards. However, appellate courts throughout the country, and specifically in California, have rendered conflicting and varied interpretations of *Campbell* and of the due process standards invoked by the U.S. Supreme Court with regard to the appellate review of punitive damage awards. This article highlights the California Supreme Court's review and interpretation of the U.S. Supreme Court's holding in *Campbell*.

I. The *GORE/CAMPBELL* GUIDEPOSTS REAFFIRMED

The U.S. Supreme Court in *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, identified three guideposts to be considered by trial and appellate courts when deciding whether a punitive damages award violates due process principles:

1. The degree of reprehensibility of the defendant's misconduct;

2. The disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and

3. The difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Id.* at 575.

The *Campbell* court reaffirmed these guideposts and mandated their use by reviewing courts as a means of determining whether a punitive damages award is constitutionally excessive. *Campbell*, 538 U.S. at 418.

The majority of courts have largely ignored or discounted the third guidepost, particularly in cases involving common law causes of action. This article therefore focuses on how the appellate courts have applied the first two factors.

A. Reprehensibility Factors

In *Gore* and *Campbell*, the Court identified significant determinants in assessing the reprehensibility of the defendant's conduct. Reviewing courts are directed to consider whether:

1. The harm caused was physical as opposed to economic;

2. The tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others;

3. The target of the conduct had financial vulnerability;

4. The conduct involved repeated actions or was an isolated incident; and

5. The harm was the result of intentional malice, trickery or deceit, or mere accident. See *Campbell*, 538 U.S. at 419; *Gore*, 517 U.S. at 576.

B. Ratio Guidepost

In addition to due process requirements that

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and Judge Haden to help lawyers decide whether to go in *ex parte*, how to put together an effective written presentation, and how to achieve the relief they seek.

Judge Quinn

RJG: What are your *ex parte* procedures?

JQ: Well my *ex parte* procedures follow the Rules of Court, and I don't vary from that. I have *ex parte*s four days a week - Monday through Thursday.

RJG: Recognizing that you follow the Rules of Court, are there any procedures that you find work particularly well and conversely any that you don't?

JQ: Because there is such limited time between notice of the hearing and the hearing itself, I tend to be very strict about what issues are addressed. If I perceive a situation where the person responding to the *ex parte* may not have had clear notice about what was going to be asked of the court, I will postpone the hearing. But other than that, I use the *ex parte* process liberally. I often ask the parties if they'll stipulate to using the *ex parte* papers as the moving papers, letting the other side have three or four days to respond with five pages, and limiting the reply to two to three pages. In that way, we can resolve many matters quickly and efficiently and in a condensed manner. The key is making sure that everybody agrees to such a program because it is pretty self-styled.

RJG: Are there any types of matters that you don't really think are appropriately handled in an *ex parte* manner?

JQ: Other than those matters that by Code or by Rule of Court require a noticed motion, just about anything that's long and complex isn't well suited for an *ex parte* hearing. Judges simply don't have to time to parse through a 15 page brief in an *ex parte* setting. In those instances, I don't even try to read such a brief.

RJG: I think its fair to say that lawyers need to keep their submissions short and to the point?

JQ: They have to be or I can't read them and all of the papers associated with regularly noticed motions. I don't get *ex parte* papers before 3:30 in the afternoon the day before the hearing. If I get something that I can't read between 7:30 and 8:30 in the morning, or I can't read after I get out of trial at 4:30 and before I go home, I can't read the material, unless it's a true emergency situation. In that case, I will go out of my way to read those papers. But counsel better not cry wolf.

RJG: What types of matters will you rule on on an *ex parte* basis as opposed to seeking an agreement to treat the matter as a noticed motion?

JQ: Many deal with discovery. I won't decide discovery disputes on *ex parte* papers alone, but I do require that I set all motions to compel. I think the majority of the departments require that. For me to adequately calendar discovery motions, I need to understand the scope of the dispute and if the parties have adequately met and conferred, which unfortunately isn't always the case. Very often great chunks of the discovery disputes can get resolved at these *ex parte* meetings. Then, I only need to set a motion to compel on issues where there might be legal objections. For example, the attorney-client privilege is often litigated on a motion to compel, which I think is appropriate. But, if there is an objection to making an order on an *ex parte* appearance relative to discovery, I don't do it, because you are entitled to a noticed motion.

RJG: What types of matters do you generally not decide on an *ex parte* basis?

JQ: I just recently did a seminar on Receivership, and I asked around, and I didn't find any judge that had ever granted the appointment of receiver on an *ex parte* basis even though such requests are frequently brought. It also seems that people expect more often than not that temporary restraining orders will be granted *ex parte*, but that is such an extraordinary remedy. However, what I do do is try to attempt to broker a resolution.

RJG: In your experience, how can counsel best frame the issues for you, given the limited time you have?

JQ: If it's necessary to present a lot of documentary evidence, which it may very well be, it's very helpful to clearly point out in a declaration or in a summary what the priority is and what I

(See "Ex Parte" on page 6)

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should look at first.

RJG: Do you prefer letter briefs or pleadings?

JQ: A pleading. We get off the procedural track if we receive letters, so some sort of a short pleading is what should be submitted. And lawyers need to keep in mind that the goal is to convey their information in the same way that an advertising person would convey it. I'm in charge of a 60 second ad. What is my main point? How can I best get that message across in a limited amount of time and really make an impact?

RJG: Anything else you wish to add?

JQ: I'll put it bluntly. I often can't assess behavior or the cause of bad behavior. *Ex parte*s often come about because one counsel or the other is behaving badly. But because *ex parte*s are so short, it's better not to let me know about it. This is a real blast from the past, but it's like Eddie Haskel on "Leave It To Beaver." Eddie Haskel was this really rotten kid but whenever he was with Mrs. Cleaver, it was all, "good afternoon Mrs. Cleaver," and "what a lovely dress you have on Mrs. Cleaver," and that sort of thing. In an *ex parte*, I have seconds to assess what the issue is and make a ruling, and I'm just not going to be able to assess which one is the negative player here. Sometimes it's important to assess that, but it's very hard to do in an *ex parte*.

Judge Haden

Judge Haden agreed to the points made by Judge Quinn, and had these four straightforward points for lawyers "going *ex parte*" to consider:

1. The *ex parte* process works best when counsel cut to the chase. Given the number of other cases waiting, including a trial or two and many law and motion matters, the judge simply does not have a lot of time to spend on one *ex parte*.

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Ex Parte

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It is also unrealistic to expect the Court to read lengthy papers. Keep the papers short and succinct. Think Hemmingway, not Tolstoy.

2. *Ex parte* hearings, in appropriate circumstances, can help head off needless discovery motions and unproductive demurrers. Sometimes the *ex parte* hearing can even move a case toward settlement.

3. Notice to the other side is critical.

4. It is essential the lawyer attending the hearing know the case and trial counsel's schedule if either party is planning to juggle dates. Generally, an uninformed lawyer is unhelpful. "I just got the file and I'm here to get a continuance of the trial date" is not a persuasive or helpful presentation, without more elaboration or information. ▲

Bencivengo

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low his example, but had no idea she would literally follow in Stiven's footsteps and be selected to take Stiven's position upon his retirement.

"Jim Stiven was a great role model for me. He embodies community involvement and public service," said Judge Bencivengo. "I recall thinking at his swearing-in that I would like to be in the same position some day. It is a little daunting to move into his old chambers and join the Magistrate Judge bench as his replacement. It is also a great honor."

It has also been a big adjustment for Judge Bencivengo, who, until November 30, 2005, was a partner in the San Diego office of DLA Piper Rudnick Gray Cary US LLP, and National Co-Chair of the firm's Patent Litigation Group. Just a couple of months ago she was overseeing several patent litigation cases and managing 70 attorneys in six offices. Now she's busy running Early

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Neutral Evaluation Conferences and settlement conferences, resolving discovery disputes and presiding over criminal arraignments.

Raised in New Jersey by a close-knit family that valued public service, Judge Bencivengo obtained an undergraduate degree in Journalism and Political Science and a Masters degree in Political Science from Rutgers University. After working at Johnson & Johnson for 4 years, she attended law school at the University of Michigan, obtaining her J.D. *magna cum laude* in 1988. Bencivengo was a summer associate at Gray Cary Ames & Frye in 1987 and started there as a full-time litigation associate in the Fall of 1988.

"Gray Cary offered a broad civil litigation practice and encouraged new associates to gain a wide variety of experience in different types of litigation matters. Early in my career, I worked on personal injury actions, property damage cases, and environmental tort cases. I also handled a variety of business litigation matters. In 1990, David Monahan and John Allcock tried Gray Cary's first patent infringement case, and I was one of the associates supporting them. After that, Monahan formed Gray Cary's intellectual property group – it consisted of 7 attorneys. I was the only female in the group. I concentrated on developing an intellectual property practice, particularly patent litigation. I also did trademark and copyright work for Dr. Seuss Enterprises and eventually became the partner managing the Dr. Seuss enforcement team. Over time I took on management responsibilities for the Intellectual Property Group, and after Gray Cary's merger with DLA and Piper Rudnick in January 2005, I was named National Co-Chair of Patent Litigation. It was a great experience."

Judge Bencivengo's intellectual property background is already being put to good use. She was an attorney representative on the Southern District of California's Patent Local Rules Committee and now continues on the Committee as a judicial representative. Given the amount of patent litigation in the Southern District, there is great interest in developing a set of Local Rules to assist in the management of these cases. The committee, chaired by U.S. District Court Judge Dana Sabraw, has drafted local rules for patent cases, which will be circulated to the District Judges for comment and further consideration.

Judge Bencivengo has been involved in various Bar, community and charitable organizations during her legal career. She served as a Director of the San Diego County Bar Association, the San Diego County Bar Foundation and the San Diego Mediation Center. She was a committee member and chair of the Lawyer Referral and Information Service. She is a Master in the Welsh Inn of Court, and has served as a Small Claims Judge Pro Tem. After she was diagnosed with and successfully treated for breast cancer in 2002, Judge Bencivengo also became active in the Susan G. Komen Breast Cancer Foundation, serving as a Director and Grants Chair.

In her "off" hours, Judge Bencivengo and her husband, Dante, spend lots of quality family time with their two daughters, Dana, 15 and Lauren, 12, at their home in Poway. Both girls have been involved in team ice skating competitions, and have competed nationally. Judge Bencivengo has been Dana and Lauren's chauffeur, cheerleader and "team mom," chaperoning the girls' teams to skating events all over the country. "Despite my busy practice, it has always been a priority to carve out time with my family."

Judge Bencivengo's advice to attorneys who aspire to a judicial appointment? "Be the best attorney you can be – there are no shortcuts. Be mindful of your reputation in the legal community and your ethical obligations. Be involved in the community – your resume should reflect a genuine, deep and ongoing interest in public service and access to justice." commented Judge Bencivengo. Sounds like good advice for all attorneys. ▲

President's Column

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September 16, 2006 and is entitled "Masters of the Art: Building to the Close." It is modeled after the 2005 ABTL Annual Seminar at the Loew's Ventana Canyon Resort. This seminar takes you through jury selection, opening statement, direct examination and cross-examination of witnesses (percipient and expert), not in isolation but in a concerted effort to "build to the close." The closing argument is the finale for the lawyer and then the matter goes to the jury — what will they decide?

ABTL San Diego is part of a state-wide organization, with chapters in Orange County, Los Angeles, San Joaquin Valley and Northern California. These chapters unite for several functions during the year, but the most visible, educational and entertaining is the statewide ABTL Annual Seminar. The Annual Seminar has a long history of excellence, and this year is no exception. This year's Annual Seminar is entitled "When Things Go Wrong." Frankly, many programs educate you on how to do things right — but what happens and what do you do when things go wrong? Not only will it be a great seminar but also it is at the Grand Wailea Resort in Maui Hawaii from October 19-22. Mark your calendars — this one is not to be missed.

A special thank you to Alan Mansfield, the editor of the ABTL Report. He consistently gathers informative articles from our membership on relevant topics. Thanks to Alan and our many contributors, this publication is a great benefit to our members.

I have always been proud to be a lawyer and of the work that lawyers and judges perform. I appreciate our profession and the talented people in it. This organization offers an opportunity for the bench and members of the business litigation bar to enhance our skills, promote effective relations between the judiciary and lawyers and emphasize the importance of honesty, integrity and civility in the legal profession. If you are not already a member I encourage you to join today. If you are already a member, I ask you to encourage younger members of your firm, or others whom you know, to join ABTL and be a part of our continuing professional development. ▲

Arbitration Scheduling

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tion of the arbitration by an institutional ADR provider, such as AAA or JAMS, it is presumed that organization's rules will apply. Regardless of what the arbitration clause says, however, the parties are free to modify their agreement and adopt any set of rules they wish. AAA and JAMS have various sets of rules to fit different types of arbitration cases. You can download them from their respective websites (www.adr.org and www.jamsadr.com). You should review the potentially applicable rules in advance and, if possible, confer with opposing counsel to see if you can reach agreement on what rules may apply. Otherwise, the applicable rules may be determined or even created *ad hoc* as the arbitration progresses.

2. Status of Claims.

Are the claims complete, or do they need to be amended? Has a response been filed? If not, by when? Are there or will there be counterclaims? Deadlines addressing these matters should be set so that all parties know what are the issues to be presented in the arbitration. In addition, it is imperative to determine at the outset whether there is a dispute regarding the arbitrability of any claim. If so, a hearing date should be set and a briefing schedule established to address this jurisdictional issue.

3. Substantive Law.

Another important threshold issue for discussion is whether the parties agree on what jurisdiction's substantive law governs the arbitration. If the parties disagree, this may be another matter for an early briefing schedule and hearing.

4. Discovery.

The California Arbitration Act can be misleading if not carefully read. C.C.P. §1283.05(a) seems to give the parties in arbitration virtually the entire panoply of discovery rights available in a civil trial. The very next section however (C.C.P. §1283.1), deems that broad discovery provision to be incorporated only into agreements to arbitrate per-

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sonal injury and wrongful death claims. It is not deemed part of other arbitration agreements unless the parties so provide.

Case law has nonetheless created reasonable discovery rights in employment discrimination cases under FEHA. *Armendariz v. Foundation Health Psychcare Svcs. Inc.* (2000) 24 Cal.4th 83, 104-106. This has been expanded to nonstatutory claims such as wrongful termination in violation of public policy. *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.App.4th 1064, 1076. In the absence of agreement, however, there generally is no right to discovery in arbitration. TRG, *California Alternative Dispute Resolution*, at 5:385.

Under the AAA Commercial Arbitration Rules, the arbitrator may direct "the production of documents and other information, and … the identification of any witnesses to be called." (R-21(a)). Rule 17 of the JAMS Comprehensive Rules provides for a voluntary exchange of all relevant, non-privileged documents on which the parties rely and the names of witnesses, including experts. Further, JAMS Rule 17(c) allows one deposition as a matter of right and others in the discretion of the arbitrator.

It is common for arbitrators to ask the parties to meet and confer and present a stipulated discovery plan. You should be prepared to articulate your views on the discovery that will be necessary and appropriate for the size and nature of the case.

5. Expedited Motion Procedure.

Counsel may wish to suggest that discovery and procedural disputes be subject to an advance meet and confer requirement and that motions be done in simplified fashion, such as by letter briefs and conference calls. If the case involves a three-arbitrator panel, it is strongly recommended that the parties agree to allow the panel chair to handle and decide discovery issues. Assembling all three arbitrators to hear and decide motions can be very time-consuming and expensive.

6. Dispositive Motions.

In *Schlessinger v. Rosenfeld* (1995) 40 Cal.App.4th 1096, 1105-1109, the court held that arbitrators have implicit authority to hear and decide motions for summary judgment or summary adjudication where the governing procedural rules allow for such motion and the responding party has a fair opportunity to present its position. JAMS Comprehensive Rule 18 specifically allows for a motion for summary disposition of a claim or issue. The AAA Commercial Rules are less explicit but were held in *Schlessinger* to allow for dispositive motions. *See* R-30(d), R-32(a).

Many arbitrators believe that the power to grant dispositive motions should be exercised very cautiously and sparingly, since refusal to hear relevant evidence is a ground for vacating an arbitration award and since arbitration discovery is generally restricted. Whether any party intends to bring such a motion should be inquired into during the initial conference since it may affect the timing of the arbitration hearing date. The arbitrator is not required to follow the expansive time parameters of C.C.P. §437(c), however.

7. Bifurcation.

The parties will invariably want to bifurcate the issues of costs and attorneys fees (if applicable) and the amount of any punitive damages from the primary arbitration. They may also wish to consider bifurcating liability and damages, though such a request, if granted, will probably create a substantial hiatus between arbitration phases. Where there is a dispute over the construction of a crucial term of a contract that is ambiguous, it might make sense to have that issue decided early on (with appropriate parol evidence) so that the case can proceed based on the settled interpretation.

8. Hearing Duration and Schedule.

a. Length of Arbitration Hearing.

Underestimation is the bane of many an arbitration. Ironically, it often turns out to be

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a false economy, because if additional hearing time proves necessary, the inevitable conflict in the schedules of the arbitrator(s), counsel, parties and witnesses results in a lengthy hiatus of weeks or months between hearing sessions. The consequent loss of continuity (and perhaps recollection) far outweighs any potential savings from low-end estimating. The better practice is to schedule liberally and cancel unneeded days before the cancellation deadline. Even if booked time is not used in hearing, the arbitrator can employ this unused time in reviewing exhibits and notes, doing research and tentative drafting, thus expediting the timng of any ruling. Be realistic, but err on the side of more rather than less.

b. Schedule.

Most arbitrations follow the conventional schedule of 9-5 or 5:30. However, innovative schedules of 8 a.m. to 1 p.m. or other variants have sometimes been employed. An arbitrator is more likely to acquiesce in a departure from the norm if both counsel are in accord and urge it persuasively early on in the process.

c. Deadlines.

Either in this conference or in a follow-up discussion, it will be beneficial to establish deadlines for various key events such as the exchange of exhibits and lists of witnesses, filing of motions for summary disposition, designation of experts, discovery cutoff (if necessary), the filing of arbitration briefs and the submission of joint exhibit binders. This is also an excellent time to inquire if the arbitrator has any personal preferences on any of these points or how he or she would like to have the evidence presented.

9. Form of Award.

Be prepared to state yor positon on the form of the award at this initial conference, or at least consider raising the issue. JAMS Comprehensive Rule 24(g) provides that "unless all parties agree otherwise, the Award shall also contain a concise written statement of the reasons for the Award." AAA's Commercial Rule 42(b) provides that "the arbitrator need not render a reasoned award unless the parties request such an award in writing prior to the appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate."

10. Scheduling Orders.

Most arbitrators will memorialize the salient points of the preliminary conference in a scheduling order. You might tactfully inquire whether the arbitrator intends to do so and, if not, volunteer to circulate a letter summarizing the dates set and issues decided at the conference. Unmemorialized matters are often forgotten or misrecollected.

Conclusion

The preliminary conference is in many ways a more important event in the arbitration process than its counterpart, the Case Management Conference in a civil lawsuit. It is the parties' opportunity to help shape the process to fit the size, nature and needs of the dispute. The more you analyze in advance and anticipate, the more influence you can expect to have in shaping its structure.

Most arbitrators are deferential to joint recommendations of the parties. It is worthwhile conferring with opposing counsel before the preliminary conference, either to arrive at agreed positions or at least to find out where the fault lines are. Either way, you are better prepared, which is an advantage in any endeavor, from basketball to bar exams. ▲

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abtl

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a defendant have fair notice of the specific conduct that is the subject of punishment, the Supreme Court has further held that a defendant should also have notice of the "severity of the penalty that a State may impose." *Campbell*, 538 U.S. at 418 (quoting *Gore*, 517 U.S. at 575). To that end, *Campbell* mandates that reviewing courts compare the ratio of harm suffered by the plaintiff to the punitive damages awarded when determining whether the amount of the award is constitutionally permissible.

At first glance, the Court appeared to instill the ratio guidepost with a degree of resilience by stating:

> Turning to the second *Gore* guidepost, we have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. *Gore*, supra, at 582, 116 S.Ct. 1589 ("[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award"); *TXO Production*, 113 S.Ct. 2711. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. . . .
>
> . . . [T]here are no rigid benchmarks that a punitive damages award may not surpass . . . .

Campbell, 538 U.S. at 421.

However, while rejecting "rigid benchmarks," a "simple mathematical formula," or a "bright-line ratio," the Court nonetheless provided a relatively succinct numerical measure intended to define constitutionally permissible ratios: "[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* (emphasis added). Citing *dictum* from an earlier decision, the Court also identified a potential proportionality ceiling: "In *Haslip*, in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." *Id.* Yet, in the same parenthetical breath, the Court stated: "While these ratios are not binding, they are instructive." *Id.*

Concurrent with its effort to infuse the ratio test with relative certainty, the Court recognized the need for, and articulated, clear exceptions to the single-digit test. "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where":

1. A particularly egregious act has resulted in only a small amount of economic damages;
2. The injury is hard to detect; or
3. The monetary value of noneconomic harm might have been difficult to determine. *Id.*

Some courts and defendants, relying on the ratio language in *Campbell*, contend that the holding mandates that:

- Punitive damages awards must not exceed a single-digit ratio to satisfy constitutionally permissible due process limits; and
- If punitive damages awards exceed the ratio of 4 to 1, they rise to the level of constitutional impropriety.

Conversely, plaintiffs rely upon *Campbell's* pronouncements that "there is no simple mathematical formula," "no bright line ratio" and "no rigid benchmark" in arguing that ratios exceeding a single digit, or, at least, greater than four to one, are constitutionally permissible. In appropriate cases, plaintiffs have also contended that ratios exceeding single digits should be affirmed because the evidence established that the egregious act resulted in only a small amount of economic damages, the injury was hard to detect and/or the monetary damages were difficult to determine.

II. CALIFORNIA'S INTERMEDIATE APPELLATE COURTS RESPOND TO *CAMPBELL*

California's intermediate appellate courts have responded to the *Campbell* ratio "rule" with varied and, at times, conflicting interpreta-

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tions of the due process mandates articulated by the U.S. Supreme Court. A sampling of some of the post-*Campbell* California intermediate appellate court rulings demonstrates the degree of discretion afforded courts when drawing upon the language of *Campbell* as a means of setting punitive damages awards within constitutionally permissible limits.

In *Henley v. Philip Morris Inc.* (2004) 9 Cal.Rptr.3d 29, the First District Court of Appeal remitted a $25 million punitive damages award to $9 million. In so doing, the court declared that *Campbell* suggested "several concrete numerical guidelines for considering whether a particular award violates constitutional restraints" and that a "double-digit ratio will be justified rarely, and perhaps never in a case where the plaintiff has recovered an ample award of compensatory damages." *Id.* at 72-73 (emphasis added).

The Fourth District Court of Appeal, in *Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 Cal.App.4th 1020, remitted a $5.5 million punitive damages award to $1 million based on its strict interpretation of *Campbell*: "With regard to the ratio of punitive damages to compensatory damages . . . we have no doubt that anything exceeding four to one would not comport with due process under *Campbell*." *Id.* at 1055 (emphasis added).

In contrast, the Fifth District Court of Appeal, in *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, while reducing a $290 million punitive damages award to approximately $23 million, declared the following: "Although the need to limit most punitive damages awards to a single-digit multiplier was obvious to the Supreme Court, there was not a particular single digit that appeared appropriate in all cases, according to the court." *Id.* at 751. Moreover, the court held that malicious conduct causing death was an example of the type of "extraordinary

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case" contemplated by *Campbell,* "in which a single-digit multiplier does not necessarily form an appropriate limitation upon a punitive damages award." *Id.* at 761 (referring to estate's action for damages under C.C.P. §377.34, which limits compensatory damages to the decedent's losses before death).

It soon became apparent that the California Supreme Court would need to reconcile the varied and sometimes conflicting rulings by California appellate courts when considering the ratio determinant in the due process calculus.

III. CALIFORNIA SUPREME COURT'S "RATIO GUIDEPOST" INTERPRETATION

In *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, the California Supreme Court analyzed, interpreted and applied the ratio analysis outlined in *Campbell*. Although the focus of this article is the permissible ratio of compensatory and punitive damages, *Simon* also addressed other issues relevant to the constitutionality of punitive damages awards (*e.g.*, defendant's wealth, reprehensibility of defendant's conduct, etc.). The California Supreme Court also decided the companion case of *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191.[1] *Simon*, however, addresses the ratio guidepost in greater detail and is therefore the focus of this article.

The parties in *Simon* executed a nonbinding letter of intent for the sale of an office building. Before an enforceable agreement could be reached, the defendant-seller terminated negotiations with Simon and sold the property to a third party. Simon sued defendant for breach of contract and promissory fraud. In the trial and appeal of the action, Simon contended that he incurred compensatory damages of $5,000 by hiring an attorney in anticipation of opening escrow and $400,000 in profit he would have obtained had defendant sold the property to him at the agreed price. The jury found the parties had no "binding and enforceable agreement," but awarded Simon $5,000 in compensatory and $1.7 million in punitive damages on his fraud cause of action. The California Supreme Court held that the maximum punitive damages award constitutionally permissible under the circumstances was $50,000, or a 10:1 ratio.

A. Potential Harm

The *Simon* court, in reviewing the $1.7 million punitive damages award, specifically recognized and relied on *Campbell* and other U.S. Supreme Court decisions that have referred to the proportionality between punitive damages and the "harm or potential harm" suffered by the plaintiff – *i.e.*, that the actual compensatory damages award may not always be the appropriate measure of punitive damages. *Simon*, 35 Cal.4th at 1173. More specifically, the California Supreme Court stated:

> *State Farm's* reference to potential harm echoed the high court's earlier decision in *TXO Production Corp. v. Alliance Resources Corp* [citation], a business tort case in which the court approved a $10 million punitive damages award on compensatory damages of only $19,000. The plurality opinion relied heavily on the economic injuries the defendant's scheme to cheat the plaintiff of oil and gas royalties could have caused had it succeeded, injuries estimated in the millions of dollars … . *"It is appropriate to consider the magnitude of the potential harm that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded … ."*

Simon, 35 Cal.4th at 1173-1174 (emphasis added in part).

In further recognition of the dynamic of potential harm as an integral element of the ratio calculus, the *Simon* Court cited a multitude of state and federal appellate court decisions that have included potential harm (or uncompensated harm) as a determinant in calculating ratios pertaining to punitive damages awards. *See, e.g.*, *In re Exxon Valdez* (D. Alaska 2004) 296 F.Supp.2d 1071, 1103 (potential spilling of entire tanker load of crude oil into Prince William Sound represented additional and extensive economic and noneconomic losses

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to plaintiffs); *Craig v. Holsey* (Ga. App. 2003) 590 S.E.2d 742, 748) $200,000 in punitive damages not grossly excessive although only $8,801 awarded in compensatory damages since defendant's driving under the influence could have killed plaintiff)[2]; *In re New Orleans Train Car Leakage Fire Litigation* (La. App. 2001) (795 So.2d 364, 383, 386) ($850 million punitive damages award not constitutionally excessive where chemical leak and fire involving railroad tank car had potential to cause death, injury and destruction for miles across city); and other cases cited in footnote 3 of *Simon* (35 Cal.4th at 1174).

Under the circumstances of the case, however, the *Simon* Court held that the $400,000 Simon claimed as potential harm (*i.e.*, the gain he would have made by purchasing the building) could not be considered as part of the multiplier in the proportionality calculus because Simon had no contractual right to buy the property. Applying a "foreseeability" test, the Court held that the "potential harm that is properly included in the due process analysis is 'harm that is likely to occur from the defendant's conduct.'" *Id.* at 1177. *See also Exxon Valdez*, 296 F.Supp.2d at 1090 (reviewing court must look at actual harm and "potential harm which a defendant's reckless conduct could foreseeably have caused"). As the Court held:

> A potential injury that was foreseeable from the defendant's conduct – whether because it constituted an unintended but reasonably likely risk or because it was a goal of the tort-feasor's conduct – is properly considered because a tort-feasor had notice of the likelihood of such an injury. Considering such injuries in assessing punitive damages therefore comports with the due process mandate that "a person receive fair notice . . . of the severity of the penalty that a state may impose." *BMW*, supra, 517 U.S. at p. 574, 116 S.Ct. 1589.

Simon, 35 Cal.4th at 1177.

In the absence of any contractual obligation to sell Simon the property, defendant's false promises to negotiate exclusively with Simon and proceed to escrow caused Simon only $5,000 in actual economic harm, and therefore was the only appropriate damage amount to take into consideration in awarding punitive damages.

B. Punitive-to-Compensatory Damages Ratio: A Rebuttable Presumption

In undertaking the due process analysis set forth in *Gore* and mandated in *Campbell*, the California Supreme Court rejected the proposition that a punitive damages award can never exceed a single-digit ratio. Rather, according to the *Simon* Court, *Campbell* created a single-digit presumption, which is rebuttable by evidence of "special circumstances":

> We understand the court's statement in *State Farm* that "few awards" significantly exceeding a single-digit ratio will satisfy due process to establish a type of presumption. Ratios between the punitive damages award and the plaintiff's actual or potential compensatory damages significantly greater than nine or 10 to one are suspect and, absent special justification (by, for example, extreme reprehensibility or unusually small, hard-to-detect or hard-to-measure compensatory damages), cannot survive appellate scrutiny under the due process clause. As stated in *Williams v. Conagra Poultry Company* (8th Cir.2004) 378 F.3d 790, 799, a ratio significantly greater than single digits "alerts the court to the need for special justification." (See also *Bardis v. Oates*, supra, 119 Cal.App.4th at p. 22, 14 Cal.Rptr.3d 89 [42-to-one ratio "cannot stand unless extraordinary factors are present"]; *McClain v. Metabolife International, Inc.*, 259 F.Supp.2d at p. 1231 ["red flag goes up" when ratio exceeds single digit].)

Simon, 35 Cal.4th at 1182 (footnote omitted). Focusing on the U.S. Supreme Court's "quali-

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fication" that punitive damage awards are constitutionally suspect only when they exceed a single digit "to a significant degree," the *Simon* court also dismissed the idea that *Campbell* established a four-to-one ratio as the outermost limits of constitutionally valid punitive damages awards (as earlier held by the Fourth District Court of Appeal in *Diamond Woodworks, supra*):

> Multipliers less than nine or 10 are not, however, presumptively valid under *State Farm*. Especially when the compensatory damages are substantial or already contain a punitive element, lesser ratios 'can reach the outermost limit of the due process guarantee.' (*State Farm, supra*, 538 U.S. at p. 425, 123 S.Ct. 1513.) But we do not agree with the court in *Diamond Woodworks, Inc. v. Argonaut Insurance Company* (2003) 109 Cal.App.4th 1020, 1057, 135 Cal.Rptr.2d 736, that 'in the usual case' the high court's decisions establish an 'outer constitutional limit' of approximately four times the compensatory damages. Reviewing the history of double, triple and quadruple damages, the court in *State Farm* warned that 'these ratios are not binding,' but only 'instructive.' (*State Farm, supra*, at 425, 123 S.Ct. 1513 italics added.) Moreover, their instruction, what '[t]hey demonstrate,' is simply that '[s]ingle digit multipliers are more likely to comport with due process' than ratios of 500 to 1, as in *BMW*, or 145 to 1, as in *State Farm*.

Simon, 35 Cal.4th at 1182-1183.

The California Supreme Court ultimately determined that the $1.7 million punitive damages award, constituting a 340:1 ratio, was impermissible given that defendant's conduct was not highly reprehensible, the compensatory damages award was not nominal, potential economic loss was not foreseeable, and the $5,000 award accurately measured plaintiff's injury. Nevertheless, the Court held that a $50,000 punitive damages award – a 10:1 ratio – was "not extraordinary for fraudulent conduct." *Id.* at 1188-1189.

III. CONCLUSION

The holding in *Simon* establishes significant and relatively well-defined parameters that will govern appellate review of punitive damage awards, as was most recently applied just last month in the recent *Johnson v. Ford Motor Co.* remand decision. However, in order to preserve the intended deterrent effect of punitive damages awards, the California Supreme Court appears to have recognized the need to preserve a degree of resilience when considering the constitutionally permissible limits of a punitive damage award by stating that (1) potential harm is a proper consideration in appropriate cases, (2) a four-to-one ratio of compensatory to punitive damages is not the outermost limit of permissible awards (as earlier held by at least one intermediate appellate court), and (3) double-digit or higher ratios are constitutional when justified by special circumstances. ▲

Mr. Levine is founding partner of Levine, Steinberg, Miller & Huver in San Diego, California, and has litigated in excess of 1000 bad faith, product liability and other punitive damages actions in trial and appellate courts during the past 30 years. He has authored numerous books and law review articles on the topic of punitive damages and has presented numerous punitive damages seminars to lawyers and judges throughout the United States and Canada.

1 In *Johnson v. Ford Motor Co.*, 2005 Cal. App. LEXIS 1969, *20 (Dec. 23, 2005), on remand from the California Supreme Court, and citing to both *Simon* and *Romo*, the Court of Appeal remitted a $10 million punitive damage award to $175,000, or a 10:1 ratio to compensatory damages, and concluded "that the level of reprehensibility shown by the evidence in this case is not a 'special justification' that provides a constitutional basis for an award substantially in excess of the single-digit range."

2 The *Craig* court noted that awards for wrongful death in Georgia can easily approach or exceed the $200,000 punitive damages awarded to Holsey. See *Craig*, 590 S.E.2d at 748 (citing, e.g., *Williams v. Worsley* (Ga. App. 1998) 510 S.E.2d 46, in which the jury awarded $750,000 for full value of life).

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