ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO

abtl REPORT

Volume XVII No. 1 *Spring 2010*

Mohawk Industries v. Carpenter: The United States Supreme Court Limits Appellate Review of Orders Requiring Disclosure of Attorney-Client Privileged Materials

By Charles V. Berwanger and Matthew G. Kleiner
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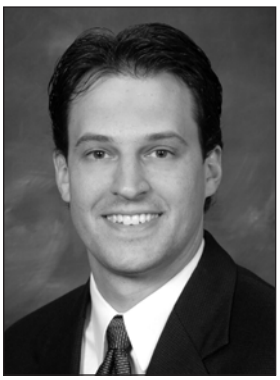
Charles V. Berwanger



Matthew G. Kleiner

The nightmare order arrives. It provides:

Defendants' argument that certain documents are attorney-client privileged is rejected and defendant is directed to produce such documents immediately.

Your thorough investigation to determine whether or not there has been widespread hiring of illegal workers in your client's factory is clearly labeled attorney-client privileged communication. The investigation, prompted by several lawsuits, includes in-depth employee interviews; discussion of relevant documents; and its conclusion that there had indeed been illegal hiring. The report also recommends curative measures as well as litigation strategy. In a word,

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Surprises—Some Observations and Thoughts on the Legal Profession

By Justice Howard B. Wiener (Ret.)

My California State Bar number is 26867.

Justice Howard B. Wiener

Non-lawyers who may have stumbled across this article are probably thinking "so what." But lawyers will react quite differently. Intuitively, they will place the number on a time line inferring that since most of the 170,000 active members of the California State Bar now have a 6-digit number, many years must have passed since I became a lawyer. They are right – I started in the legal field 50-plus years ago.

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Inside

President's Letter

By Mark Zebrowski, President ABTL San Diego

I would like to start my year as President by expressing my gratitude and asking for your assistance.

Mark Zebrowski

First, thanks to you all for participating in ABTL, thanks to the judiciary for their active involvement, thanks to those who came before me to establish and grow the organization, and thanks for the opportunity to serve as President.

Now the request for your help.

We are all fortunate to practice our profession in the American judicial system. As trial lawyers we are uniquely positioned and obligated to understand, support and protect the judicial branch. We are also aware that of the three government branches, the judicial branch is the least able to protect itself, particularly when it comes to its budget.

It is no secret that our state is experiencing financial hardship. As a result, state court funding has been significantly reduced to the point that service is being adversely impacted. We have all experienced monthly furlough days, reduced court office hours, extended periods to obtain hearing dates, and the reduced hours of operation for our the attorneys' entrance in the Hall of Justice. Most of us have not seen how hard our Superior Court judges, administrators and staff are working to keep up with the continuing workload in the face of mandatory days off, staff cuts and unfilled positions.

The San Diego Superior Court budget has been reduced to the point where any further cuts will result in significantly greater impacts on the court's ability to function, particularly in civil matters. The Superior Court needs not only sufficient operating funds, but also adequate funding for capital expenditures such as implementing an electronic Court Case Management System and building a new San Diego courthouse, both of which are at risk. This is bad for our profession, our clients and our system of justice. While we feel the impacts as litigators, the real impacts are on litigants, jurors and others whose businesses and personal lives are directly impacted by the courts on a daily basis.

On behalf of the ABTL San Diego Chapter, I urge you to speak up whenever and wherever you can to protect our Superior Court from further budget cuts in the next budget cycle, including expressing your concerns to your state legislative representatives and the governor's office. While ABTL is not a political organization, this is an important issue for our profession, our clients and our system of justice. Therefore, ABTL will be doing what it can to protect funding for the San Diego Superior Court and will appreciate your help along the way. ▲

Setting the Stage: Making the Most of Pre-Mediation Communications

By Hon. Leo Papas (United States Magistrate Judge, Ret.) and Gregg Relyea, Esq.

Pre-mediation contacts between a mediator and the party representatives can be an enlightening experience. Exchanges before the scheduled mediation provide opportunities to learn about a dispute, underlying issues and interests, and options for agreement. Since many practicing mediators are coming to utilize pre-mediation discussions to learn more about the full dimensions of a dispute, attorneys should consider how to make the best use of the opportunity.

Hon. Leo Papas

Gregg Relyea, Esq.

Pre-mediation contacts could lead to significant benefits, while they may also pose some risks. Attorneys and mediators who decide to engage in pre-mediation contacts should carefully consider whether the case is appropriate, the advantages and potential pitfalls, and the wide range of methods they can use to make the most of pre-mediation communications.

What is a Pre-Mediation Communication?

The traditional model suggested mediation begins at the scheduled session, whether joint or separate. However, statutes that define the commencement of the mediation process are not as confining and include initial communications between a party and a mediator.[1] Increasingly, lawyers and mediators are engaging in communications prior to the first mediation session to bring the issues into focus, to confirm authority, and to address any administrative issues.

As a practical matter, a mediator often will have an exchange that initially focuses on scheduling and coordination of a mediation date. That contact may lead to a discussion about the nature of the dispute and may expand into additional exchanges about other aspects of the case. Mediators customarily confirm mediation dates in writing and may have other written correspondence with participants, which also constitute pre-mediation communications. Occasionally, parties and attorneys will initiate a discussion with a mediator about extra-administrative issues, including settlement goals, client issues, and confidential information. In this sense, it may be fairly said that attorneys/parties and mediators all engage in some form of pre-mediation communications with each other.

This article focuses on the active use of pre-mediation contacts to develop information that goes beyond scheduling and administrative information about a dispute and the parties. Instead, effective pre-mediation contacts initiated by either an attorney or a mediator may significantly expand the mediator's ability to advance the process at an earlier stage in the proceedings because of enhanced knowledge of the background of a dispute, the dynamics between the parties, and the parties' underlying interests. Armed with that background information, the mediator will be able to start the mediation session with a fuller and deeper understanding of the nature of the dispute and its possible resolution. This article is not intended to be prescriptive. Instead, the focus is on the existing pre-mediation paradigm utilized by many mediators. Also, it will identify several key topics that attorneys should be prepared to discuss in the pre-mediation process.

Why Use Pre-Mediation Communications?

Information about a dispute that is typically generated from the mediation intake and scheduling process is often cryptic, incomplete, and highly positional. In some cases, the parties provide only the names of the parties, the names of the attorneys (if any) and the general nature of the dispute. Sometimes the informa-

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Tips From the Trenches: Controlling The Courtroom: An Interview With Harvey Levine

By Mark Mazzarella, Mazzarella Caldarelli LLP

Mark Mazzarella

I always enjoy the opportunity to talk to the very best at our craft about what they do so well, and why. But I looked forward even more than usual to my interview with Harvey Levine for this installment of Tips From the Trenches. Why? Because Harvey, while always a gentleman, in court can be an aggressive, "in your face," mix of equal part street fighter and cardiac surgeon, who looks and sounds like the guy central casting sends to play the role of the tough guy lawyer from the Bronx. Yet somehow it seems he always ends up charming every life form in the courtroom into giving him seemingly anything he asks. That's what made him one of the handful of lawyers ever inducted into the California State Bar Litigation Section's "Trial Lawyer's Hall of Fame," as well as the recipient of just about every other award a trial lawyer can receive.

It might not come as a surprise given Harvey's slim frame and athletic appearance, coupled with an obviously tenacious disposition, that he's run close to 100 marathons over the years. But lacking the large stature and booming voice of a Joe Cotchett, you wouldn't necessarily expect him to fill a room with his presence the way he does. But he does; and he does without "taking control" of the courtroom. It's given

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The more important question, however, is not how many years have passed, but what I may have learned during the time I practiced law or served as a trial and appellate judge that may have relevance now to lawyers confronted with the financial and professional challenges inherent in the practice of law.

There is no question but that learning never ends, with the means of that process varying from person to person. My learning process includes a number of surprises. It is those surprises and what I consider only as minimum standards of conduct required by California's Rules of Professional Conduct and Civility Guidelines, which trigger these comments. In my view, in addition to the prescribed standards, additional vigilance and greater independence and courage by the lawyer is required to ensure that the justice system functions in a fair and appropriate manner.

My initial surprise was in my first job following graduation from law school. I obtained a position as a law clerk for Benjamin Harrison, a United States District Judge in Los Angeles. When I started with Judge Harrison I knew little about his background other than the fact he had previously been the United States Attorney in Los Angeles before President Franklin Roosevelt appointed him to the federal bench in 1940.

After a short time, I noticed Judge Harrison did not have the usual certificates or diplomas from college or law school displayed in his office. When I discreetly inquired from his secretary as to where he had gone to school, I was informed he had never attended college or law school, but had studied independently in San Bernardino, California as permitted by the California State Bar. In recently verifying this fact, I went to the website of the Federal Judicial Center for Benjamin Harrison, which states: EDUCATION: "Read law, 1914."

Judge Harrison served first as United States Attorney in Los Angeles and then as United States District Judge. From my observation, he performed the latter role in an exemplary fashion and my clerkship was an exceptionally valuable experience for me. I recall quite clearly Judge Harrison's succinct advice to me : "Always tell the truth and never take a mining claim in lieu of a fee."

Another surprise I had following my graduation from law school occurred during my job-hunting efforts. I had arranged an appointment with a partner of a small, well-respected firm in Los Angeles. At the beginning of my interview he asked me whether I had interviews with other law firms. After identifying the firms I planned to visit, I was taken aback by his direct and categorical statement that I was wasting my time if I went to those firms as each had a non-stated policy of not hiring a Jewish lawyer. He then gave me an alternative list of firms to contact. Not surprisingly, each of the firms on his list contained one or more Jewish lawyers as a name partner. I thanked him for his candid advice and revised my job search accordingly.

After my clerkship I joined another lawyer in Covina, California and started to practice law. Because I wanted to obtain as much jury trial experience as possible I volunteered to represent defendants in criminal cases in both the state and federal courts. As a result of these efforts I represented a number of defendants in the Citrus Municipal Court in West Covina. Although I obtained considerable trial experience, many of the cases were resolved by plea agreements.

For reasons I did not understand at the time, the sole judge at the Citrus Municipal Court would commence proceedings considerably later than the announced 8:30 or 9:00 a.m. starting time, taking the bench after virtually all of the cases had been satisfactorily negotiated. When the judge finally took the bench he would accept the guilty pleas and impose sentence. What the judge did differently in the Citrus Municipal Court is that the judge would instruct his clerk to impanel a jury before taking the pleas.

After several months or so, I quizzed the right person who explained to me the judge wanted the appointment of additional judges as well as a decent sized courthouse. I was surprised to learn the way he was accomplishing his goal was to report to the Administrative Office of the Courts that each case in which a jury had observed the defendant entering a guilty plea was actually a jury trial. This strategy was designed to create a statistical basis to support the appointment of additional judges and a facility adequate to deal

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Surprises

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with the seeming large number of cases being processed by this extraordinarily hard working judge. I have no idea whether the personnel at the Administrative Office of the Courts treated the data supplied to it as accurate. I do know, however, additional judges were appointed and a new courthouse was constructed.

In 1972, I was elected to the California State Bar Board of Governors. It was a wonderful experience having the opportunity to meet and work with exceptionally talented professionals. A unique experience during that time was the Board's consideration whether to accept the resignation from the State Bar of former President Richard M. Nixon who had State Bar disciplinary matters pending against him at that time. The debate on whether to allow the matter to be resolved by resignation was both fascinating and dramatic, and his resignation was ultimately accepted.

I was surprised, actually shocked, when in June 1996 I heard about the 21 count indictment against a San Diego attorney and two San Diego Superior Court judges. The charges were based in part on allegations the defendants had conspired to conduct the affairs of the Superior Court through a pattern of racketeering activity consisting of multiple acts of bribery and extortion. (People v. Frega (1999) 179 F. 3d 793.)

One would think that in light of my awareness of criminal conduct by highly placed persons in the executive and judicial branches of government, I would not have been surprised by the indictment of William Lerach, perhaps the most successful securities/class action lawyer in the country. Lerach pled guilty and was later sentenced to prison for conspiracy to commit obstruction of justice and making false declarations under oath.

One need only read the September 2008 lengthy decision by United States District Judge in Houston, Melinda Harmon, to appreciate his capability. Judge Harmon's decision (issued after Mr. Lerach had left the firm) emphasizes the fee award was not a windfall, but "a reasonable fee earned by an extraordinary group of attorneys who achieved the largest settlement fund ever despite the great odds against them."

Even now I ask myself how could these well-known and successful persons committed these offenses. Notwithstanding the passage of time, I am still surprised – and disheartened - these events occurred.

And what about the moral failures of those law firms that were content to engage in discrimination that I referred to above, which at times also included women, African-Americans, Latinos and others? What about the failures of those in high places empowered by either status or wealth, ultimately resulting in the evaporation of huge firms almost overnight? How did that happen and what should be learned from those events? Perhaps I should know that surprise is part of the learning process and anything can happen, but I would never have expected that at the present when the demands on the judicial system are increasing, that because of budgetary issues the system would respond by closing the courts at least one day a month and furlough court employees on specific days to save money. I never thought I would have a conversation with a neighbor discussing what she should do as the court was to be closed on the day her case was scheduled for trial. I also would not

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have thought it possible that California judges whose compensation is protected under California's State Constitution would be donating part of their compensation to achieve parity with the court employees' reduced compensation. Surprising still while this is occurring in the public sector, the private resolution of disputes continues to grow in a robust fashion. Is it possible that California will really have two systems of justice?

"[W]hat I have taken away from these personal experiences is that day to day hard work, diligence to detail, creative thinking, intellectual energy and an unwavering moral compass are essential for the practitioner."

In recent years there has been considerable dialogue and literature discussing lawyer civility. In 1995 the Commission on the Future of the Legal Profession and the State Bar of California recommended the legal profession should consider adopting a statewide code of professionalism containing a broad list of aspirational goals and precatory duties, which would define the desired goals and aims of the legal profession. Since that time many local committees, including one in San Diego, have adopted civility guidelines, as has the ABTL. In May 2007, the California State Bar adopted its own version of these guidelines. The ensuing 21 sections of the guidelines describe how the lawyer should act in different settings, e.g. dealing with the client, communications, service of papers, discovery, etc. Yet I believe these guidelines should only serve as the foundation for a lawyer's conduct. Each lawyer should enhance these rules with the degree of courage and independence necessary for the fair, efficient and proper administration of justice.

Clearly, lawyers should be keenly observant as to aberrations in conduct and forthright to speak up and complain when they see such events. "Going along to get along" is wrong. Improper conduct should be identified, characterized and confronted. If and or when a lawyer becomes aware that another lawyer is acting in a manner that violates the Professional Rules or other standards of proper conduct, the lawyer should speak up and address the issue, and there are vehicles for doing so at both the state and federal levels. If a lawyer has a reasonable basis to believe that a judge is skirting his or her judicial obligations, the lawyer's failure to act may only be an invitation for the judge to continue that improper conduct. The lawyer must have the courage to remain independent, guided by his or her value system and not turn away in order to generate additional fees or protect their job.

I feel quite strongly, particularly in light of the above cited "surprises," that more is required than simply complying with the technical mandate of prescribed rules. California's Rules of Professional Conduct and Guidelines fail to emphasize the need for the lawyer's independence, courage and firm, unyielding moral compass. Lawyers should appreciate that each obtained the same ticket to practice law following admission to the bar. Credentials from prestigious law schools and membership of selective honorary societies may reflect excellent academic performance. They are not the tickets, however, to a successful legal career.

While people both within and outside the legal profession will draw their own conclusions from my "surprises," what I have taken away from these personal experiences is that day to day hard work, diligence to detail, creative thinking, intellectual energy and an unwavering moral compass are essential for the practitioner. Resting on one's perceived laurels is not enough. Lawyers and law firms, however respected they may be, must remain sensitive to the tug of wealth or status on that moral compass and remain unyielding to that pressure. And, perhaps most important, we must all educate the public of the need to fully support our justice system, or the system that we take for granted may diminish significantly in importance. ▲

After almost 35 years of having served as a business trial lawyer, a trial judge and an appellate judge in the Fourth Appellate District, Justice Wiener has been engaged in private dispute resolution since 1994 (www.howardwiener.com).

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tion may also reference claims and defenses and the general settlement history. If briefs are exchanged among parties, they ordinarily contain only public information that is presented in the light most favorable to the party submitting the brief. In other cases, the initial information about a dispute is provided in the form of a brief voice mail or e-mail. Without more, a mediator may have to start a mediation session with only a bare outline of a dispute.

Pre-mediation communications enable a mediator to obtain information valuable to the parties' strategic objectives, including more about the factual background of a dispute, the intensity level of the conflict, and the parties' settlement goals. Talking with the mediator ahead of time provides an opportunity to establish a level of rapport, particularly if there has been little previous contact with the mediator. Likewise, important transactional information can be provided about decision makers, authority for making final settlement decisions, time constraints, and related insurance issues. In these ways, pre-mediation contacts are not unlike a written patient questionnaire and health history that are standard forms in a physician's office. An even more appropriate analogy is a pre-surgical consultation. Virtually all successful surgeons meet with a patient to discuss the prospective surgery, examine them, generate comprehensive information about their health history and status and, at the same time cultivate a sense of competence and trust. By analogy, mediators may be said to be conducting a form of surgery on a dispute--they are examining the problem, opening and treating the issues, and, with the parties' consent and direct participation, helping them mold a solution that allows them to move on with their lives in a more productive and constructive way. When used effectively by an attorney, pre-mediation communications arm the mediator with a deeper understanding of the facts, the parties, their interests, and the fundamentals of the dispute.

"Pre-mediation communications enable a mediator to obtain information valuable to the parties' strategic objectives, including more about the factual background of a dispute, the intensity level of the conflict, and the parties' settlement goals."

Who Initiates Pre-Mediation Communications and When?

Parties and attorneys typically initiate contact with a mediator for scheduling and other administrative issues but seldom initiate an extensive discussion on extra-administrative matters. The scheduling process provides the mediator with an opportunity to develop rapport with the parties prior to delving into matters more deeply. Once the administrative matters are complete, an attorney or a mediator then has the option of actively touching on extra-administrative matters at the appropriate time and with the consent and cooperation of the parties. Generally, neither an attorney nor a mediator should inquire about extra-administrative matters until the scheduling process is well underway or finalized.

Is It Ethical for a Mediator to Engage in Pre-Mediation Communications with the Parties/Attorneys?

It has become customary for pre-mediation communications between a mediator and the parties to take place and there do not appear to be any ethical constraints prohibiting such communications. See, e.g., Model Standards of Conduct for Mediators, Association for Conflict Resolution (also adopted by the American Bar Association and the American Arbitration Association). Several distinct features of the mediation process safeguard against possible abuse of pre-mediation contacts, each of which enhances the integrity of the process. Unlike a judge or arbitrator in an adjudicative process, a mediator does not impose a decision upon the parties because mediation is not a fact-finding or formal evidentiary process where exclusionary rules preclude consideration of some information. The structure of the mediation process allows all par-

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ties to be fully heard, without artificial or formalistic restrictions. Most importantly, the parties in mediation have control over the outcome. They may terminate the process at any time if it is unproductive or if they lose confidence in the neutrality of the mediator or in the integrity of the process.

Pre-mediation communications, essentially, are in the nature of a pre-mediation caucus. Since the parties will likely meet with the mediator in private caucus during the mediation, pre-mediation communications merely advance the timing and sequence of those meetings. A similar process is used in complex negotiations, where, before commencement, the parties engage in extensive discussions regarding the details of the process, including location, size and constituency of delegations, ratification processes, agency issues, and other away from the table moves.

What Are the Risks of Engaging in Pre-Mediation Contacts?

Overly aggressive and poorly-timed pre-mediation inquiries or discussions can present a number of risks. Parties or mediators may question such inquiries as premature and out of sequence. The neutrality of a mediator might be questioned if there is extensive pre-mediation contact with the parties. In addition, pre-judgment and excessive narrowing (rather than expanding) options for agreement may result from a mediator learning a significant amount about a dispute prior to the mediation session. Also, over-use of pre-mediation exchanges may result in a shift in the center of the mediation process--from the parties to the mediator. Rather than interaction between the parties being the centerpiece of the mediation, over-use of pre-mediation contacts moves the focus to the interaction between the mediator and the attorneys. Thus, undue concentration on the intermediary (mediator) may result in corresponding role shifts in the mediation process and the sense of responsibility for decisions and actions. Finally, if excessive active pre-mediation inquiries are viewed as a departure from traditional practices, the parties may view a mediator with skepticism and distrust.

As with many mediation practices, the degree to which an attorney uses pre-mediation contacts with the mediator is largely a matter of judgment and discretion. When used appropriately, pre-mediation contacts can be helpful in understanding a dispute; when used prematurely or excessively, they may be viewed as a fundamental deviation from the mediation process model with a corresponding shift in the roles of the mediator and the parties.

What Are Methods for Engaging in Pre-Mediation Communications?

Typically, pre-mediation issues are discussed over the phone with parties/attorneys. Direct, person-to-person communications are generally the most effective, while e-mail and correspondence can be used to supplement voice communications. Occasionally, face-to-face pre-mediation communications may be used in multi-party complex matters.

How Do You Get the Most Out of Pre-Mediation Contacts As a Party/Attorney?

Once the decision is made to participate in a pre-mediation discussion, attorneys and parties need to consider such things as who to include, what to discuss, how deep to delve into issues, and what, if any, sensitive or confidential information to disclose. While there is no uniform standard to make those decisions easier, previous mediation or litigation experience, information gained from colleagues, and the skill of the mediator will often help. A mediator is almost always well served with more and, importantly, better information and insight into the issues. A low-key conversation with a mediator should provide the mediator with more creative tools with which to help the parties craft a solution to their problem.

Below are pre-mediation topics that could be, and often are, used by mediators to stimulate further discussion and the development of significant information about a dispute --- attorneys should be prepared to discuss some or all of them:

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Pre-Mediation Information

1. Who will be present (will the client be present) during mediation?
   - Who are the decision makers?
   - Who has the authority to make final settlement decisions?
   - Does a ratification process need to be discussed?

2. What is the procedural status of the dispute/case?
   - When was the case filed?
   - Has a trial date been assigned?
   - Are there any motions pending?
   - What is the status of discovery?

3. What information in your brief (if confidential) can the mediator discuss with the other party/parties?
   - Do you wish to share any confidential information about your settlement goals, client issues, etc.?
   - Are there any particularly sensitive matters the mediator should know about (proprietary information, trade secrets, etc.)?

4. Who is the judge in your case (if litigation has been filed)?
   - Which court has jurisdiction over the case?
   - Which judge is presiding over the case?

5. What is the status of any prior settlement discussions?
   - Have the parties attempted to negotiate the dispute?
   - What are the pending offers by the parties?
   - When were the last communications regarding settlement?

6. Have you dealt with opposing counsel before?
   - If so, what's the nature of the relationship?

7. Is there any insurance? If so, any issues?
   - Coverage
   - Reservation of rights
   - Duty to defend/indemnity

8. What are your thoughts about starting the mediation session together/separately? (Is there anything between the parties that would suggest being together would be a problem?)

9. As a result of the pre-mediation caucus, should one side or the other delay arrival so the mediator can meet with the other party and not have one side waiting unnecessarily?

10. Does anyone have to leave early?
    - Scheduling issues
    - Witness issues or other administrative issues?

Pre-mediation contacts with the mediator, when conducted appropriately, can be very helpful in providing information about the full dimensions of a dispute. While pre-mediation contacts present certain risks, they can also produce a number of benefits, including a deeper understanding of the true nature of a dispute, a more efficient mediation session, and a greater awareness of underlying interests and possible options for agreement. By participating in pre-mediation contacts, attorneys and mediators would be well-served to carefully consider the timing, tone, and content of pre-mediation disclosures and to be ever mindful that the center of the mediation process remains the parties and their interests. ▲

Judge Papas is a mediator with Judicate West. Gregg Relyea, Esq., is an instructor at the University of San Diego School of Law and University of California, San Diego (UCSD) and offers mediation training programs locally and nationally.

Model Standards of Conduct for Mediators may be found at: http://www.acrnet.org/pdfs/ModelStandardsofConductforMediatorsfinal05.pdf

1 See, e.g., California Evidence Code Section 1119.

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the ordered disclosure will be catastrophic.

The client's response is predictable. After bemoaning the sorry state of the judiciary that requires the production of such privileged documents, the client inquires: "Can we appeal and is there some mechanism to avoid having to disclose the documents as ordered?"

The answer in the ninth circuit before December 8, 2009 was yes. However, on that date the United States Supreme Court in *Mohawk Industries, Inc. v. Norman Carpenter*, ___ U.S. __, 130 S.Ct. 599 (2009) rejected the circuit's then applicable rule that immediate appellate review was available.

This article discusses *Mohawk*, its rationale, its implications, and post-*Mohawk* considerations in federal court. It also discusses the counterpart California judicial treatment of privilege claims and appellate remedies.

Background of *Mohawk*

Plaintiff, Norman Carpenter, sued Mohawk for wrongful termination claiming that when he refused to recant his charge that Mohawk had hired illegal immigrants Mohawk fired him under false pretenses. Unbeknownst to Carpenter, at the time of his interview by Mohawk's counsel, there was another lawsuit pending against Mohawk brought by Mohawk employees charging Mohawk with conspiracy to drive down the pay of its legal employees' wages by knowingly hiring undocumented workers.

During the interview Carpenter refused to recant his charge and he was thereupon terminated. In the employees' proceeding the court held an evidentiary hearing to determine the merits of the employees' claims. The employees offered Carpenter's contentions in support of their position. In response, Mohawk described Carpenter's accusations as fantasy; asserted Carpenter had engaged in improper conduct himself; and an investigation had determined Carpenter was not to be believed.

Carpenter, in his action, moved to compel production of Mohawk's counsel's notes. The trial court, in response to Carpenter's motion determined that the notes were attorney-client privileged, but that Mohawk had impliedly waived the privilege.

Mohawk sought relief from that order. Mohawk filed a petition for mandamus and an appeal under the collateral order doctrine.

The eleventh circuit quickly disposed of the petition for writ of mandamus by dismissing it. It concluded Mohawk failed to show the extraordinary circumstances necessary to surmount the high hurdle necessary for such relief and that Mohawk had not shown the lower court's privilege ruling was a judicial usurpation of power, a prerequisite to writ relief.

Justice Sonia Sotomayor, in her maiden opinion on the U.S. Supreme Court, concluded that the eleventh circuit was correct in determining it lacked jurisdiction because an appeal as a matter of right under the collateral order doctrine does not lie.

The collateral order doctrine permits immediate appeals where the court order (1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from the final judgment. The Court determined that the third element had not been satisfied. The Court reasoned that a privilege claimant either has remedies that are available to undo the disclosure should the claimant determine to disclose or adequate remedies on appeal from final judgment after disclosure of the privileged matter.

Mohawk's Reasoning:

The Court concludes that judicial institutional issues raised by allowing interim appeals outweigh whatever harm may be suffered by those who are erroneously forced to disclose attorney-client privileged materials. The Court concludes: "[i]n short, the limited benefits of applying the blunt, categorical instrument of [28 U.S.C.] section 1291 'collateral order appeal' to privilege-related orders simply cannot justify the likely institutional costs."

The Court commences its analysis with its acknowledgement of "the importance of the attorney-client privilege, which 'is one of the oldest recognized privileges for confidential information.'" The privilege encourages clients to make full and frank disclosures to their attor-

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neys and more candid and effective representation; and allows attorneys in turn to be candid and thorough in their analysis and responses. The importance of the attorney-client privilege, however, is the starting point of the analysis and not the end.

Weighed against the privilege are the values attendant the one final judgment rule and 28 U.S.C. section 1291 that in general appeals may only be taken from judgments that terminate an action and that the narrow exception contemplated by the collateral order doctrine must "never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered." This rule reflects a healthy respect for the virtues of the final-judgment rule. Permitting piecemeal, prejudgment appeals undermines "efficient judicial administration" and encroaches upon the prerogative of district court judges, to play a "special role" in the management of ongoing litigation. This enables the trial court to operate more effectively by appellate courts not repeatedly intervening to second-guess prejudgment rulings.

Returning to factor number three, concludes the Court, an appeal from the final judgment as well as other remedies available to the party ordered to disclose attorney-client materials "generally suffice to protect the rights of litigants and ensure the vitality of attorney-client privilege." Appellate courts can remedy improper disclosure in the same way they remedy other evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence.

The Court gives short shrift to Mohawk's argument that the privilege does not simply bar use of the protected information at trial but pro-

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vides a right not to disclose that information.

Moreover, the Court concludes that attorneys and clients have options other than appellate review. First a party may request certification of an interlocutory appeal under 28 U.S.C. section 1292(b). Second, a party may seek mandamus; and third, a party may disobey a lower court's ruling and suffer court imposed sanctions and appeal those sanctions.

California Law By Comparison

California law is similar to Mohawk by refusing to allow an appeal from an order to compel production of documents. Generally, in the interest of expediting trial of the action, discovery orders are reviewable only on appeal from a final judgment in the action. (*Pacific Tel. & Tel. Co. v. Super. Ct. (Duke)* (1970) 2 Cal.3d 161, 169.) Writ relief is not favored because the delay causes greater harm than the enforcement of an improper discovery order. Writ relief is only available in exceptional circumstances.

California differs from Mohawk as to the availability of writ relief from the forced production of attorney-client privileged communications. California courts recognize that forced production of attorney-client privileged documents generally constitute "exception circumstances." (Id.) The attorney-client privilege "deserves a particularly high degree of protection" because it provides the "only adequate remedy to prevent attorneys from forced disclosure of client confidences. . . ." *(Titmas v. Super. Ct. (Iavarone)* (2001) 87 Cal.App.4th 738, 744, fn. 4.)

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Mohawk's Remedies Are Illusory

In the real world, attorney-client communications, even if excluded at a follow up trial, nonetheless once disclosed substantially prejudice the disclosing party. Communications often identify witnesses, anticipated testimony, documents, recommendations and strategies. It is true that discovery may require the disclosure of witnesses and documents generally. However, a thorough analysis by counsel of an issue may very well highlight a particular witness or document and provide guidance to opposing counsel on what to look for, what questions to ask, and other such details. Moreover, attorney-client privileged documents often disclose strategy which once disclosed cannot be undisclosed. In the words of the ninth circuit in *In Re Naptster, Inc. Copyright Litigation*, 479 F.3d 1078, 1088 (9th Cir. 2007), "[o]nce privileged materials are ordered disclosed, the practical effect of the order is often 'irreparable by any subsequent appeal.'"

"The Court suggests that there are plentiful remedies to parties ordered to disclose attorney-client materials. In actuality, those remedies are ineffectual at best and dangerous at worst."

In addition, requiring the disclosure of attorney-client privileged material bearing on litigation may effectively coerce a client into settlement. Moreover, given Mohawk, one can envision clients being both reticent to disclose information and not to put such information into written form.

The Court suggests that there are plentiful remedies to parties ordered to disclose attorney-client materials. In actuality, those remedies are ineffectual at best and dangerous at worst. For example, the Court suggests that a permissive appeal under 28 U.S.C. section 1292(b) provides an option to avoid disclosure. This option requires the trial court to determine that there is a novel legal issue and an appeal may materially advance the ultimate determination of the litigation--criteria most difficult to satisfy.

The second remedy offered by the Court is mandamus. It is equally unavailable and unavailing. Mandamus is granted quite rarely and only where a disclosure order "amount[s] to judicial abuse of power or a clear abuse of discretion" or otherwise works a manifest injustice. It is noteworthy that given the Court's expressed attitude on the adequacy of an appeal to deal with an erroneous order requiring disclosure that such would appear to make such an interim order as a matter of law not a "manifest injustice" because an erroneous order which if reversed on appeal can be rectified at a new trial – at least per Mohawk.

Another unsatisfactory remedy offered by the Court for the party who wishes to avoid disclosure is to defy the order and incur "court imposed sanctions." Such sanctions may include a court order striking pleadings; directing that certain matters be taken as fact; prohibiting the disobedient party from offering certain claims; and the list goes on. (F.R.C.P. 37.) In other words, the Court is inviting parties to effectively bet their case on whether they are correct on the privilege issue and that the court of appeals will agree.

Finally, the Court suggests that parties may risk contempt and appeal from any sanction imposed. Such a disagreeable option is not attractive. First, one cannot predetermine what a trial court will do if an order is defied. Second, appeal lies only from a criminal contempt order. Civil contempt is not a basis for immediate appeal. The trial court has the discretion to determine which to impose. That leaves the trial lawyer and the client with an unattractive choice: risk contempt and be prey to the judge's determination of whether or not to impose civil or criminal sanctions? Who will be led away in handcuffs? The client? The lawyer? Both?

The U.S. Supreme Court by its decision has effectively made federal trial court rulings on attorney-client privilege claims final. The trial court having ruled that a matter must be disclosed, a client must decide whether to disclose or not to disclose and, that in turn is driven by the impact of the disclosure on the litigation. Very often a disclosed attorney-client privileged communication will change the analysis of the

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litigation substantially to the disadvantage of the disclosing party. It is almost impossible to envision a trial lawyer who would believe that the appeal remedy has any potential and that the interim remedies proposed by the Court have any merit. In other words, having disclosed significant and devastating attorney-client privileged materials in litigation does not encourage clients to continue to incur expense in the litigation with the odds stacked against the client in the lawsuit based upon the hope and the dream that the court of appeals will determine that the order was improper and thus remand the matter back to the trial court for a new trial excluding the privileged documents and its fruits. Such a scenario has absolutely no appeal. ▲

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to him willingly by all.

Undoubtedly, Harvey was blessed with an extra large portion of God-given talent that he cannot pass on to the rest of us. But, as he tells his "secrets," it becomes clear that the roots of his success are not just genetic. His God-given talents have been honed by a lifetime of study and practice, mixed with an unsurpassed intensity and dedication to his clients, topped with healthy portions of credibility and sincerity.

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Update to: **Employers Are Gaining Traction In Enforcing Restrictive Covenants to Protect Trade Secrets**

The penultimate paragraph of "Employers Are Gaining Traction in Enforcing Restrictive Covenants to Protect Trade Secrets," which appeared in the Fall 2009 issue, referred to *Dowell v. Biosense Webster, Inc.*, 179 Cal. App. 4th 564 (2009), as an "unpublished opinion." Although the *Dowell* opinion was initially unpublished, the court of appeal certified it for partial publication on November 19, 2009.

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My first question to Harvey was: Why don't judges and juries get put off by your sometimes brutally aggressive cross-examination and closing arguments that would offend everyone in the courtroom if most of us did the same thing?

Harvey: I don't just start out with rugged cross or aggressive argument. I have to work up to it. From pre-trial focus groups and mock trials until the end of trial, I'm looking for those jurors who have values and qualities that will make them relate to the theme or themes I want to present at trial. During trial, I feel my way, slowly, methodically, until I have either an objectively verifiable, or more often, an intuitive, sense of what the jurors would do if they were standing at the podium instead of me. I won't mount an aggressive assault until I feel the jurors believe it is deserved.

Mark: But aren't there times when you just never reach that point?

Harvey: Sure. I'll start off with a witness slowly, gently, and if they concede what they should, I won't attack them. I'll bring them into the fold. If they admit to the conduct that I believe will offend the jury and they seem remorseful, depending upon where I know the inquiry will lead, I might ask them, "Did you tell anyone at the company that you were uncomfortable following the company's policies?" Or, "Are you telling us that in your 30 years with the company, no one else in the company ever expressed any concern whatsoever that the company's policies or practices were wrong?" But if a witness buys into and defends policies, practices or conduct that I believe will offend the jury's sense of right and wrong, a witness gives me the green light to get rough with them.

Mark: When you believe the jury will be offended by the position a witness takes, do you always attack aggressively?

Harvey: No. If I'm going to have the judge, jury and court staff's respect, I can't just be a pit bull all the time. They have to see that I am not wild man with one speed. Plus, often the most effective attack isn't loud, fast, or aggressive. I may want to slowly and quietly pose a question, pausing for a moment before I complete it to let everyone in the courtroom fully appreciate its significance. If the jury is with me, and the question is one that the witness can't answer without either conceding damaging facts, or looking like a liar or a creep, that can be much more effective than if I hammer the point home myself. And, asking a question that jury wants asked, and letting the jury draw its own conclusions from the answer, helps me bond with the jurors.

Mark: What do you mean by that; and how does that lead to your 'control' of the courtroom?

Harvey: The less a trial lawyer makes the case about what the lawyer wants it to be, and the more he or she makes it about what the jurors want it to be, the better. For example, in a personal injury case, what may be paramount to the lawyer is the amount of damages the plaintiff should receive; whereas, what the jurors may really care about is whether the defendant is likely to repeat the conduct, and thus expose others (that is, them) to damage in the future. If the lawyer is trying a case the jurors don't want tried, and is neglecting the case they do want tried, they aren't going to turn over control to the lawyer. If I'm to assume the leadership role in the courtroom, I better move in the direction the jury wants to go.

Mark: When you refer to 'the leadership role' how does that relate to the judge's role?

Harvey: The courtroom ultimately is controlled by the judge. The jury expects that, and you can assume the judge demands it. So, if you try to wrestle control of the courtroom from the judge, it will backfire. I always show judges the utmost respect and deference, both in front of the jury, and when the jury is not present. I also treat the court's staff as an extension of the judge. Most judges have been with their court reporter, clerk and bailiff for a long time. They talk. If you are discourteous to court staff, you can bet the judge is going to hear about it; and you can be assured that the judge won't like it. Likewise, the jury will sense what kind of relationship you have with the court staff. If court staff shows you respect and affection, the jurors more than likely will follow suit—and vice versa.

Mark: What else can trial lawyers do to influence whether judge, staff and jurors perceive them as in control?

Harvey: It's not hard to predict who will be respected, and therefore deferred to more, the lawyer who fumbles with exhibits, doesn't fol-

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low the court's procedures and otherwise shows a lack of competence, or the lawyer who shows he or she is well versed with the process, knows and follows all the rules, and is organized and efficient. Have your exhibits organized for every witness. Keep your examination focused. Don't make unnecessary or inappropriate objections. If you do, the judge and jury will learn to trust and respect you. If you don't have their trust and respect, you can't expect them to give you much

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New & Noteworthy Case Decisions

United States Supreme Court Clarifies Federal Diversity Jurisdiction Standard for Removal Purposes

***Hertz Corp. v. Friend* (2010) __ U.S. ___, 2010 LEXIS 1897 (February 23, 2010)**

For a variety of reasons, parties may prefer to defend lawsuits in federal court rather than state court. Defendants may remove suits initially filed in state court to federal court on the basis of federal question or diversity jurisdiction. Under 28 U.S.C. 1332 corporations are considered to be citizens in both the state where they are incorporated and where they have their "principal place of business." Federal courts have historically used three different tests to define "principal place of business," and applied those tests inconsistently. In a unanimous decision, the United States Supreme Court adopted the "nerve center" test which may provide more clarity generally and may make it easier for companies with multi-state operations to remove to federal court based upon diversity jurisdiction.

In this case, employees of Hertz filed a wage and hour class action in California state court against their national employer alleging unpaid overtime and meal and rest period violations. The employer removed to federal court on diversity grounds contending it was a citizen of New Jersey because it was incorporated in and had its principal place of business (its corporate headquarters) in New Jersey. The federal district court and the Ninth Circuit Court of Appeals remanded to state court, concluding that under the "place of operations" test, the employer was a California citizen because it conducted its highest level of business activity in California. The United States Supreme Court reversed, concluding that a corporation's principal place of business is determined under the "nerve center" test rather than the "place of operations" test. The Court noted that, absent evidence of "jurisdictional manipulation," the "nerve center" will normally be where the corporation maintains its corporate headquarters, provided that the headquarters is the actual center of direction, control and coordination (i.e., the nerve center) and not simply an office where the corporation holds its board meetings. Thus, for purposes of determining federal diversity jurisdiction, a corporation's principal place of business is where its "high level officers direct, control and coordinate the corporation's activities."

- Michael S. Kalt, Lois M. Kosch, Wilson Turner Kosmo LLP

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slack.

Mark: Looking back over my notes, I'm not sure how everything we've been talking about relates to "Controlling the Courtroom," which is the topic of this article. Did I get you off topic somehow?

Harvey: Absolutely not. When I think about "controlling the courtroom," I think about; (1) the trial lawyer positioning himself or herself to have maximum latitude to present the case he or she wants to present; (2) the respect and credibility that will cause the judge and jury to accept, and in fact, welcome, the lawyer's view of the evidence; and (3) the desire to achieve the same result the lawyer advocates. To achieve these goals, I, like any trial lawyer, have to become a facilitator, in effect, trying the case the jurors want tried, and asking for a result that will empower them and allow them to feel that their purpose as a juror has been meaningful and will have an impact in the future. I must become an extension of judge, jury and court staff. I must be in step with them, helping each of them fulfill their respective roles in the process. That means I can attack when they think aggression will further the interests of justice. But I must be compassionate and understanding when compassion and understanding is deserved. I must be confident if they are to trust that I am furthering our joint objectives. But I must be humble, or they will believe I have overstepped my bounds, and have my own objective. And, of course, I must be competent. No one will turn over the reigns to anyone who isn't.

Mark: Thanks Harvey. You've given us all a lot to think about, and to incorporate into our approach as we prepare for our next trial. ▲

Mark C. Mazzarella is a trial attorney with Mazzarella Caldarelli LLP, and is a former President of ABTL San Diego.

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