ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

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Q&A with the Hon. David O. Carter (Part II)

By Christina Von der Ahe

[*Editorial Note: Judge David O. Carter is a United States District Judge in the Central District of California, Southern Division. He is a "Double Bruin," having received both his B.A. and J.D. from UCLA. He served in Vietnam in the United States Marine Corps where he received both a Bronze Star and a Purple Heart. Judge Carter started his legal career as an Assistant District Attorney with the Orange County District Attorney's Office until he joined the Orange County Superior Court bench in 1981. President Clinton nominated Judge Carter to the District Court in 1998. The Senate quickly confirmed. The first part of Judge Carter's interview ran in the ABTL Report Spring issue.*]

Q: You are known as one of the hardest working judges. How do you make time for your caseload? Do you sleep?

A: When I joined the bench, I thought that there were three things I could be as a judge. I could be stupid and lazy, which is an extraordinarily bad combination. I could be bright and hardworking,

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Telling a Winning Story at Trial

By Gerald A. Klein

INTRODUCTION

Everyone loves a good story – especially juries. A good story transcends age, race, economic condition, and gender. If you think your jury trial is just about the facts or the law, then you will probably lose. A winning case is ***always*** about a winning story. It is your job as a trial attorney to find the story of your case and bring it to life in a way ordinary people will understand.

THE IMPORTANCE OF FINDING YOUR STORY

From the first day you open your file, you should be thinking about the story you want to tell. A winning case is not about the theft of trade secrets. Your case will never be about a breach of contract, a securities violation, or an overburdened easement. Your jurors do not care whether the pork bellies arrived in Chicago on time. Instead, the story may be about trusted employees who cheated and took shortcuts by stealing business their former employer spent millions of dollars building over many years. You ***must*** find the story that keeps jurors interested in your case and motivated to give your client a verdict.

FINDING YOUR THEME

Your story should include a compelling theme. A theme is the simple "hook" that people will hopefully remember during the case presentation and throughout deliberations. A good theme is your story distilled down to a single sentence and, sometimes, a single word. In a

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Mediation — Joint Session or No Joint Session? That is the Question.
By William J. Caplan

Some mediators favor beginning mediations without a joint session that includes discussion of the issues, facts and law involved in the dispute. Mediators and mediation advocates sometimes take the position that because mediation briefs have been supplied (often confidentially), the disputed issues are addressed and a joint session is either a waste of time, or "counter-productive" to a successful mediation.

I hold the contrary view. I believe that the usual course should be to hold a joint session including a discussion on the merits. Mediating a business case without a joint session may rob the mediator of important information to be effective and prevent mediation advocates (trial lawyers) from reaching their real intended audience: the decision-maker on the other side. Lawyers representing clients in mediation should think carefully before jettisoning the joint session as a matter of course, and, instead, elect to use it or not on a case-by-case basis.

Particularly in a business case, the benefits of a joint session can be substantial. Mediation is a time when the attentions of the lawyer and client are focused on the dispute to the exclusion of everything else. This means that the lawyer can focus his or her client on the dispute and give the client the opportunity to really assess the strengths and weaknesses of the litigation. While this kind of focus can happen in private caucus, the information flow in private caucus is decidedly one-sided and therefore can be incomplete.

Joint session is an opportunity to have the client evaluate both the lawyer and the decision-maker on the other side of the dispute. A lawyer and his or her client may also have the opportunity to assess the potential trial credibility of a primary adverse witness and get better insight into the positions, needs and

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A Matter of Consequence
By Trevor O. Resurreccion

Introduction

One of the most important contract provisions from the standpoint of affecting a plaintiff's scope of damages recovery is a waiver of consequential damages provision. In construction cases, for example, an enforceable waiver of consequential damages provision can effectively eliminate all claims for damages other than the cost of repair. In practical terms, a plaintiff's settlement analysis can be greatly affected by the waiver provision's ability to bar the recovery of damages for alleged lost profits, delay damages, loss of goodwill and other consequential damages. For this reason, litigators should identify any waiver of consequential damages provision at the onset of the litigation and posture the case for a judicial determination of the provision's enforceability.

This article examines a recent construction case to demonstrate how a standard construction industry form contract was effectively used to limit the majority of an owner's claimed damages in a construction defect lawsuit where the owner sought to recover $88 million in consequential damages.

Factual Background

The owner of a mid-rise apartment building in Los Angeles sued the general contractor, the subcontractors, the design professionals and many of the material suppliers alleging a host of construction defects, including leaks in the below grade parking garage, cracks in the concrete garage and upper level floors of the apartment, among other claims. The owner asserted the following damages claims: costs of repair; future lost rents; loss of goodwill and reputation; loss of revenue due to lost storage areas because of water intrusion; diminution in value of the premises; liquidated (delay) damages; interest; costs related to hiring experts to investigate the claimed damages and develop repair protocols; interference with the owner's relationship with its construction lender; loss of right to convert the apartments into condominiums;

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More recently, on September 24th, ABTL sponsored a lunch hour program in Judge Gail Andler's courtroom on "The Lost Art of Mentoring". The panel for the program was not only well-known and accomplished in the practice of law, but also respected for their mentoring skills: Judge Andrew Guilford, John Hurlbut, Dean Zipser, and Michele Johnson. The program was well-attended with a number of senior lawyers in the audience who also contributed their perspectives to the presentation.

In October, Orange County was the location of this year's ABTL Annual Seminar at the Ritz-Carlton Laguna Niguel. Orange County chapter attorneys and judges figured prominently in the program "The Art of Storytelling" including Wylie Aitken, Hon. Kim Dunning, Gerald Klein, Mark Robinson, Jr., and Hon. Josephine Tucker. Mark your calendar now for next year's Annual Seminar which will be hosted by the Orange County chapter at the JW Marriott Ihilani Ko Olina Resort on the island of Oahu, October 15-19, 2014.

We conclude our dinner programs for 2013 with a program about preserving your trial record for appeal entitled "When Error Occurs—Preserving the Record for Appeal, Tales from Bench and Bar". Justice Raymond Ikola, Judge Franz Miller, Jennifer Keller, and M.C. Sungaila will share their opinions and experiences to attendees. We will also collect monetary donations and stuffed animals for the Orange County Superior Court adoption program, as well as donations to the Armed Services YMCA for bikes destined for children of enlisted service members serving overseas.

♦*Mark D. Erickson is a litigation partner at Haynes and Boone LLP in Irvine.*

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interests that will form the basis of negotiations. The advocates and clients can also assess the emotional attachment the other side may have to particular issues, deal points and interests. This can lead to creative trading during the negotiation process.

One experienced litigator interviewed for this article pointed out what should be obvious. Not only is a mediation an opportunity for the mediation advocate to influence the other side, but it is an excellent time to ***listen*** to the other side and evaluate whether the adversary might actually be right on some issues, and, in that case, re-assess your own position. Evaluation can be more complete than just comparing the mediation briefs because a good joint session not only compares opening positions, but the responses to the positions, and counter-responses. This permits a sifting down of the positions of the parties and can result in a focus on the kernels of important issues that will make the difference in the case. Negotiations in light of these more clearly identified issues can produce an agreement that might otherwise have been missed. Moreover, in cases that involve more than a zero-sum negotiation, the parties can choose to engage in problem solving, rather than fighting, in order to come up with a solution to the dispute.

There is no litigation moment other than a joint session where such give-and-take happens. In a deposition, the questioning is one-sided and the other client, if they are present, usually sits silently. If the deponent asks a question, the questioning attorney generally says, "this is not my deposition." At trial, each side puts on evidence and closing arguments are made; but these are long monologues - there is no opportunity for give-and-take. In a joint mediation session major issues can be discussed with give-and-take from both sides. This leads to new insights, and, potentially, to creative solutions that would not otherwise have been developed. It also permits more meaningful negotiations because the give and take can help in formulating offers and counter-offers that include reasons for the concessions generated by the information learned in the give and take (sometimes referred to as "principled negotiations). (Fisher, R., Ury, W. and Patton, B. (1991). *Getting to Yes: Negoti-*

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ating Agreement Without Giving In. Second Edition. New York: Penguin Books.)

A competent litigator should have no difficulty advocating his or her position and responding to the challenges made by the other side. Mediation participants generally waste time trying to persuade the mediator of the virtue of their position. In reality, the audience that means something is the client on the other side. A mediation advocate should not quickly or easily discard the opportunity to make the case in front of the other side.

Joint session is the best way to focus the case on the disputed issues that matter. Without a joint session where the mediation advocates debate the issues, the mediator is placed in a position of advocating the positions of each of the sides to the other in private caucus. No matter how good the mediator is, the mediator has generally lived with the case for only a day or so. There is no way the mediator knows the case as well as the advocate lawyer, and therefore, the mediator cannot be as persuasive on the issues as that lawyer can be. If you rely on the mediator to present your case in private caucus, the mediator will generally be able to make the first level of argument, but the mediator does not have the deep background on the issues or evidence to respond to a series of challenges. This results in the mediator inefficiently moving back and forth between the parties - first marshalling the response, then communicating it, just to be met with another challenge from the adverse advocate. This is a most inefficient use of mediation time.

There is a second downside to having the mediator make the advocates' arguments. It puts the mediator in the role of a quasi-advocate, detracting from the mediator's ability to develop the rapport necessary to be an effective advocate for settlement, which is what both sides generally want. The mediator works best when perceived as truly neutral, and is most successful in being persuasive when the mediator can build friendly rapport with the parties. People are more likely to be influenced in negotiations by people they like, rather than someone who they see as an adversary. (Dr. Robert Cialdini, *Influence, Science and Practice* (4th Ed., Allyn & Bacon). Forcing the mediator to make your arguments for you detracts from the mediator's ability to develop the proper rapport.

The joint session is even more useful to the mediator than it is for the parties. The mediator is trained to watch the parties during joint session, and look for the reactions from the parties and their lawyers. A mediator can assess the conviction a lawyer has on a particular issue in a way that will not show up on paper. The mediator can think along with the parties and develop counters to the positions taken during joint session. This will help the mediator engage in effective reality testing during private caucus. The give-and-take in joint session can help the mediator devise creative ways of satisfying the underlying interests that come out in joint session. The dialogue provides the mediator with clues on how to build consensus. It also gives the mediator the opportunity to demonstrate the mediator's preparedness on the issues which can add to the mediator's credibility. A skilled mediator can guide ("referee") the parties through the joint session process in a way that reduces discord and demonstrates neutrality, which can help engender the trust necessary to help the parties to the settlement finish line.

A joint session also lends an element of "due process" formality to the proceeding. The joint session dialogue will be the parties' only equivalent of a day in court (before their actual day in court). A party's opportunity to be heard can add an element of satisfaction that aids in getting the case resolved. This also leads to satisfaction with the mediation process and the resulting settlement. As the presider at the joint session, the mediator is placed in the position of "authority figure" during joint session. Studies show that parties are more willing to make concessions to an authority figure than they would otherwise. (Robert B. Cialdini, *Influence: The Psychology of Persuasion* (1993) Harper Business p. 213.)

Moreover, there are ways to overcome most of the objections to the joint session:

1. Objection*: Joint session is a waste of time.* The parties have already submitted mediation briefs so the issues are already in play.

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Response: In comparison to the time spent in the rest of litigation, and in relation to the amount in controversy, spending an extra hour or so hashing out the issues and assessing the other side is a grain of sand on the beach of the lawsuit. As previously noted, mediation briefing is frequently confidential - not shared. Mediation briefing does not generally include a back-and-forth discussion of the issues that brings the key facts or arguments that are going to matter into focus. The briefs generally contain the same competing monologues that the parties have been exchanging in court. The time that is saved by avoiding an hour or so of joint session dialogue is frequently used up with the mediator trying to support the arguments of both sides in private caucus when there has been no joint session. The mediator has to shuttle back and forth with counter arguments, then the counter to the counter, and so forth. Also, time wasting does not seem to be a big concern in many mediations. Much more time is wasted in exchanging tiny settlement concessions during mediation without worrying about that time than is wasted in joint session. The benefits of the dialogue and exchange usually outweigh this negative by a wide margin.

2. Objection: *Joint session just revs up antagonism*.

Response: The parties in a business dispute already know that they disagree, and that there are differences in recollection of the issues. Experienced negotiator-clients frequently deal with disagreeable parties and know how to handle them. If the parties cannot bear to hear these disagreements in mediation, imagine how they will deal with them at deposition or trial when it counts. If nothing else, hearing things the client does not like to hear will prepare the client for the more stressful times in the litigation. Hearing the other side make statements with which clients disagree might produce some short term negative reactions, but this can be minimized by having the mediator ask that the statements be directed to the mediator rather than to each other. The mediation advocate can also take some of the sting out of joint session by explaining the process to the client in advance, preparing the client for the things the client will not like and explaining the benefits to their side of joint session. In cases where clients might have difficulty listening to the other side without getting upset, it may be a good idea to have a pre-mediation telephone call or meeting with the mediator. The mediator can explain the benefits of the joint session and advocate considering and evaluating what the other side has to say. The mediator can also explain how the joint session helps the mediator do the mediator's job, so that the client gets the most "bang" for the mediation buck.

During the joint session a capable mediator can reframe the arguments made to remove the "blame" or "insult" out of them, so that the stated issue remains and the characterization is discarded. (Fisher & Ury, "*Getting to Yes: Negotiating Agreement Without Giving In*." (2d ed. Penguin Press, 1991).) Further, the mediator can take the blame for the airing of the issues by saying that the mediator has asked for the exchange, thus taking some of the sting out of it. Revving up antagonism is a valid reason not to have a joint session. However, it must always be compared with the benefits of a joint session in a particular case. This element alone rarely justifies elimination of a joint session.

3. Objection: *Lawyers do not like the extra preparation required to get ready for a joint session.*

Response: This objection is theoretical only. In order to evaluate their positions for settlement, lawyers necessarily prepare their cases with or without a joint session. Mediation advocates generally come fully prepared, and need very little additional preparation for a joint session. However, one local litigator confided that when that lawyer knows there will be a joint session, he is more careful in preparing for the mediation, which, in his experience has always resulted in a more productive mediation.

4. Objection: My client may say something harmful to our case in the joint session.

Response: It is the client's case. If the client has been counseled against free communication during the mediation, and still chooses to speak, the client's wishes should generally be honored. However, there is nothing wrong with the lawyer saying, "let me do all the talking in joint session" and instructing the mediator not to ask questions directly to the client. One local attorney

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suggested that if a litigation advocate has a concern about client control during the joint session, the parties could agree that only the lawyers would participate in the dialogue, allowing the mediator to control that situation. The mediation advocate can thus get much of the benefit of the joint session without any detriment. In the rare case where it is the lawyer's judgment that the client will "give away the store" in joint session, the lawyer can hold a joint session without the client present or with another client representative present while keeping the problem client waiting in the private caucus room.

5. Objection: *Joint session will cause my client to have to relive the emotional harm caused to the client by the other side*.

Response: A mediation should not be a time or place where anyone suffers harm. If there is a risk of harm, joint session should be eliminated. There are certain cases such as sexual harassment or abuse cases where there should never be a joint session. Sometimes family or partnership disputes are so emotional that a joint session will never be productive and will likely devolve into a shouting match. In those cases, a joint session including both/all clients may be eliminated. This is one reason why having joint session or not should be determined on a case by case basis.

6. Objection: *The weak case will be exposed in joint session.*

Response: In rare instances, a litigation advocate should avoid joint session where his or her side is so weak (or the client will perform so poorly) that the weakness will be exposed during joint session, and result in the other party taking a settlement position that will make settlement impossible. In such a case, the dispute is unlikely to settle in any event, unless the other side has mis-evaluated its position. Nevertheless, eschewing joint session in this context would be rational, because you *might* be able to settle the case without it.

The real negotiating work usually begins in private caucus with the mediator shuttling between conference rooms to deliver offers and counter-offers, and the justifications for them. In private caucus the mediator can allow a party to vent," develop personal rapport with the parties, and, if needed, engage in "reality testing." The mediator can also assist in developing effective negotiating positions that place the parties on a better path to agreement. However, in most cases the most effective private caucuses should generally take place after a complete joint session. Think twice before eliminating the joint session.

♦ *William J. Caplan is a full-time mediator operating out of the offices of Rutan & Tucker, LLP in Costa Mesa and serves as an adjunct professor at Chapman University School of Law.*

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and disgorgement of monies paid to the contractor.

The contract between the owner and general contractor was a standard form American Institute of Architects (AIA) form contract that had been heavily modified by the parties and their respective counsel during the negotiation of the contract. However, the parties did not alter the waiver of consequential damage provision, which provided:

> **§4.3.10 Claims for Consequential Damages.** The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes:
>
> 1. damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
>
> 2. damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit

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