FBA LAWYER

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Los Angeles Chapter

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Summer 2021

FBA-LA – Challenges and Opportunities of Litigating During Covid And Where We Go From Here: A Judicial Perspective

By Jesse-Justin Cuevas, Esq.

On April 15, 2021, the Los Angeles Chapter of the Federal Bar Association presented The Challenges and Opportunities of Litigating During Covid, And Where We Go From Here: A Judicial Perspective, which was moderated by Susman Godfrey L.L.P. partner Davida Brook. Panelists from the Central District bench—Judge Andre Birotte, Judge Christina Snyder, Magistrate Judge Alka Sagar, Clerk of Court Kiry Gray, and Chief Deputy of Administration Cristina Squieri Bullock—gave a first-hand account of their experience overseeing and administering justice during the global pandemic. The webinar's timing was perfect, as the U.S. District Court for the Central District of California issued a Notice from the Clerk regarding the Phased Reopening of the Court that same day.

Before the presentation began, attendees reported their experiences litigating during Covid: of the participants in attendance, 80% reported having participated in a remote hearing, 33% in a bench trial or evidentiary hearing, and 5% in a remote jury trial.

The Future of Remote Proceedings

The esteemed panelists mostly spoke positively about the transition to remote proceedings, recognizing the positive aspects for litigants and their attorneys, as well as court staff. Remote technology allows multiple attorneys from all over the country to attend and participate without incurring the costs of travel or down-time between hearings. Zoom and other web platforms have allowed court administration to operate more efficiently by removing the logistical difficulties of scheduling large meetings and check-ins across Central District offices and courthouses. Panelists reported an openness to continue remote proceedings even after the world reopens, with the caveats that each judge would have discretion whether to transition to in-person proceedings, continue with remote proceedings, or permit a hybrid model, and that certain proceedings are better suited for in-person hearing, such as those that involve a document-heavy record. Ms. Gray emphasized that Central District operations team is prepared and excited to take on the task of continued remote work.

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Upcoming Event:

October 7, 2021: Annual Program featuring Hon. Barry Russell Awards and Dean Chemerinsky's Supreme Court Review

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PRESIDENT'S MESSAGE

Jeff Westerman
FBA CHAPTER PRESIDENT

The end of September marks the end of our FBA-LA Chapter Bar year, and this warrants a quick look backward and forward.

Our Chapter has survived the pandemic so far with stable finances, membership only slightly off and poised to rebound. By the time of the combined annual Supreme Court Review with Dean Chemerinsky and swearing in of the new Officers and Board on October 7, we will have put on 16 programs over the past year with speakers from all over the country. All but one program was on the web. All were either free or at reduced cost to members, and free or a small cost for non-members. They provided current and useful information, such as the program to meet the four new Central District Judges, the State of the Circuit/District webinar, and the COVID impact program highlighted in this Issue's articles. The total program sign-ups for the past two years, including during the tenure of my predecessor, the Hon. Michael W. Fitzgerald, exceeded 6,000 people. This was the result of a very hardworking Program Committee chaired by Patricia Kinaga. We continue to invite program suggestions from anyone with a topical idea.

There have also been significant strides to ensure that the leadership of the LA Chapter more closely mirrors those who appear and practice before the Court.

If one looks at the list of upcoming officers, you will see diversity and opportunity unique in the history of this Chapter. Three women of different backgrounds and practice areas are poised to become President in succession. A quick glance at the list of 66 Past Presidents on the right side of the web page shows how significant this is.

In addition, this past year we added Liaisons to our Board from up to 10 affinity Bars, which includes officers and directors from those associations and enhances our connections and common interest in promoting good practices and relationships in the District. Those groups, and others, also graciously co-sponsored many of our programs.

These activities and the strength of the LA Chapter are the result of the work of our dedicated Officers, Board members, Liaisons and my 66 predecessors who laid the groundwork. I thank you all for the opportunity to serve the Los Angeles Chapter.

Everyone is encouraged to become a member and follow our upcoming programs. In joining the Federal Bar Association national organization, you check the box for the LA Chapter and obtain the National and Local benefits of membership for the single National price. Our Chapter information, programs, and the membership link are at:
http://www.fbala.org/index.php

Jeff Westerman
President, Federal Bar Association-Los Angeles

Federal Bar Association

Message from the Clerk's Office

By Kiry Gray

I always find it a privilege to write on behalf of the court. However, I struggled this time around given the fact that we all have spent the last year and a half talking and dealing with COVID-19 related issues. I had to remind myself that we do have plenty of things in life to be grateful for and not to mention, a vaccine that's available to combat this horrible virus.

A positive thing that happened in late 2020 was the confirmation of four new article III judges – Stanley Blumenfeld, Jr., Mark C. Scarsi, John W. Holcomb, and Fernando L. Aenlle-Rocha. In addition, we had Magistrate Judge Margo A. Rocconi join our illustrious bench in March 2021.

The pandemic has had a profound effect on how we provide services to the judges, staff, attorneys, pro se litigants, and the public. Our IT department has worked tirelessly over the past eighteen months to keep us connected and think outside the box for solutions. As a result, we developed the Court's Electronic Document Submission System (EDSS) that allows people without lawyers who have pending cases in our court or who wish to file a new case to submit documents electronically to the Clerk's Office. We also enhanced the online Bar Membership Renewal Fee program to allow the payment of multiple fees in a single transaction. None of these things would have happened if the court was not determined to find innovative ways to serve the public with the primary focus on everyone's safety.

In addition, I'm proud to announce that I was honored by the John M. Langston Bar Association at their annual Judicial Reception for my 36 years of service to the courts and as the first African American woman to ever serve as Clerk of Court for the largest district in the country. This was only made possible because of the judges who highlighted and tracked my career path. As I stated during the ceremony, I work for some of the finest judges in the country and I do not take my position for granted.

In closing, I know we all have our own opinions about wearing masks and getting vaccinated or not, but I certainly hope that you consider taking the necessary precautions to keep you and your family safe from the new variant and COVID-19 complications.


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FBA-LA – Challenges and Opportunities of Litigating During Covid And Where We Go From Here: A Judicial Perspective

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Best and Worst Practices

All three judges provided their insights into the best—and worst—advocacy techniques they observed over the last year. Lawyers who stay organized and know where to begin and, most importantly, where to end during argument fare best, as do attorneys who can bring attributes of the courtroom into the remote space. The panel warned, however, that remote proceedings are still court proceedings, and advocates are expected to dress and act accordingly despite the virtual nature of litigation. Ad hominem attacks on the other side are no more helpful during remote hearings than they were during in-person proceedings, and a suit jacket is still expected (even if donning shorts from the waist-down).

Benefits and Disadvantages of Remote Work

"It was the best of times, it was the worst of times." Although the Central District was not excited about telework last March, most people's views turned around relatively quickly. Panelists welcomed spending more time at home with their families and spoke warmly of the "ice breakers" introduced by the pandemic, from the shared experience of discovering where Wifi works best in the home to recognizing shared furniture in someone's Zoom background. At the same time, however, everyone appears to be working longer hours, and the Court has observed an increase in workflow. Judicial panelists also lamented Covid's impact on the clerkship experience. Across the board, clerks have voiced an eagerness to get back inside the courthouse.

Looking Ahead

Court operations has been working hard to prepare the Central District's courthouses for reopening safely, from installing plexiglass and social-distancing demarcations to equipping courthouses with facial shields and masks. Jury trials began in the Southern Division on May 10, 2021, and on June 7, 2021 in the Eastern and Western Divisions. Given the significant case backlog, panelists strongly encouraged civil litigants to consent to trials before the District's magistrate judges to keep justice moving forward timely, and for all litigants to be prepared to move forward on the scheduled trial date regardless of who is presiding. Because of social distancing requirements, juries will be empaneled in the ceremonial courtrooms rather than in each judge's courtroom. Panelists urged attendees to be patient and flexible throughout the phased reopening and welcomed feedback as the process continues.

Jesse-Justin Cuevas is an attorney at Susman Godfrey LLP. She represents both plaintiffs and defendants in high stakes, complex commercial litigation across the country.

FBA-LA's 2021 State of the Circuit and District

By Lakesha M. Adeniyi Dorsey, Esq.

On Thursday, August 12, 2021, the Los Angeles Chapter of the Federal Bar Association hosted a timely webinar on the State of the Ninth Circuit and the Central District of California. The webinar also spotlighted the Substance Abuse Treatment and Reentry Program (S.T.A.R.) and webinar attendees had the unique opportunity to hear from S.T.A.R. graduate, Elvie Chapelle.

Circuit and District Updates

Updates from Judge Kim McLane Wardlaw (*United States Court of Appeals, Ninth Circuit),* Chief Judge Philip S. Gutierrez (*United States District Court, Central District of California*), Chief Magistrate Judge, Paul L. Abrams (*United States District Court, Central District of California*) and Chief Judge Maureen A. Tighe, (*United States Bankruptcy Court, Central District of California*), reported that our Circuit and District haven't missed a beat despite the unprecedented and unanticipated obstacles presented by Covid-19.

State of the Ninth Circuit

Judge Wardlaw kicked off the webinar with an update regarding the Ninth Circuit. The recent surge in Covid-19 cases thwarted plans for judges to resume sitting together and hosting in-person hearings for the first time since January 2020. The current plan is to continue to host virtual hearings through October while remaining flexible and adaptable to the needs of Ninth Circuit staff and attorneys, including attorneys practicing with young children. Per Judge Wardlaw, the Circuit surveyed over 2000 attorneys who have indicated they prefer to appear virtually at this time.

Despite the obstacles presented by Covid-19 and four vacancies on the Ninth Circuit, the Circuit has still managed to substantially reduce the notorious backlog of cases incurred prior to the pandemic. Additionally, the number of filings in 2020 and 2021 has decreased.

State of the Central District of California - District Courts

Following Judge Wardlaw's update, Chief Judge Gutierrez provided an update regarding Central District Court operations. Of note was the extension of the CARES Act through October 15, 2021, and the limitation of jury trials in accordance with state and local healthcare guidelines. Among other provisions, the CARES Act extension permits judges—with authorization from the parties—to continue to conduct proceedings remotely. Prior to the recent surge of Covid-19 cases, the District had started normalizing operations, including resuming jury trials. Our District was able to conduct 34 jury trials (18 criminal trials and 16 civil trials) between May and July. Trials are still occurring in the District in a limited capacity.

State of the Central District of California - Magistrate Courts

Chief Magistrate Judge Abrams provided the update on behalf of the magistrate courts. At the onset of the pandemic, the magistrate judges were at the forefront of setting up the technology for virtual appearances and meetings between individuals arrested in our District and their attorneys. This effort facilitated virtual hearings consistent with health directives and due process rights. At the expiration of the CARES Act, the magistrate judges expect all duty cases in Los Angeles to be conducted in person at the First Street Court House because of ongoing construction at Roybal.

Chief Judge Abrams also highlighted the "Magistrate Judge Consent Program." There are two ways civil litigants can participate in this program. Through one avenue, civil litigants consent to proceed before the magistrate judge initially assigned to their cases for all purposes. Or, litigants choose a magistrate judge from a list of available magistrate judges to preside other the case. Chief Judge Abrams encouraged federal civil practitioners to take advantage of these programs. Magistrate judges may have more flexibility in scheduling proceedings and may provide speedier trials than District Court judges—especially during these unprecedented times.

State of the Central District of California - Bankruptcy Courts

Judge Tighe rounded off the updates from the Bankruptcy Court. The Bankruptcy Court continues to operate 90-100 percent remotely, including trials and evidentiary hearings. The Bankruptcy Court took the initiative to create a training for litigants on how to conduct trials and evidentiary hearings remotely. The Central District of California continues to lead the nation in the most bankruptcy filings despite having the lowest number of filings in years.

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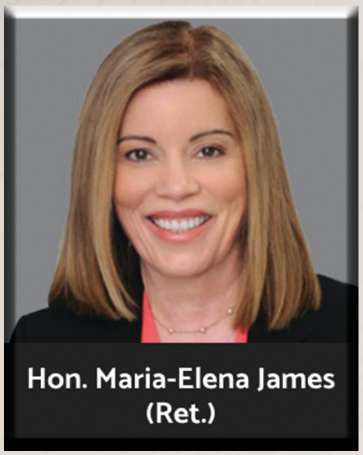
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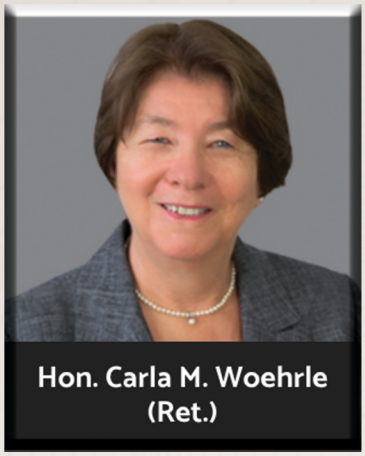
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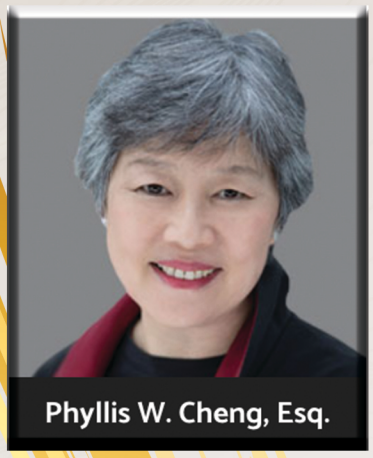
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FBA-LA's 2021 State of the Circuit and District

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S.T.A.R.

Attendees left the webinar inspired following remarks from S.T.A.R. Co-founder, Judge Otis D. Wright, S.T.A.R. graduate, Elvie Chappelle, and Deputy Federal Public Defender, Erin Murphy.

It is no secret that our penal institutions in this country unfortunately serve as the largest "treatment" facilities for individuals suffering from mental health disorders and substance use disorders (SUD). According to the National Center on Addiction and Substance Abuse (CASA) at Columbia University, nearly 1.5 million incarcerated individuals meet the Diagnostic and Statistical Manual or Mental Disorders (DSM-IV) medical criteria for SUD.

In 2010, Judge Wright and Judge Audrey B. Collins started the S.T.A.R. Program. This program is a post-conviction program designed to provide structure, accountability and tools to individuals suffering from SUD.

Elvie Chapelle is a beneficiary and an example of the life changing possibilities available to individuals who successfully graduate from the STAR program.

Ms. Chapelle vulnerably shared an inspiring and raw account of her life before and after participating in the STAR program. She described herself as a "dope fiend of the hopeless variety." Prior to STAR, all she knew was how to "get busted and stick dirty needles in [her] arms." She told the audience that she didn't know what a real relationship was or how to respect herself as a woman. She indicated that "the best thing that could have happened to [her] was [being] sentenced to a program and given an opportunity to be separated" from that life. Through this separation, she was able to get clean and sober and participate in the S.T.A.R program with a clear mind. She indicated that she'd reached a point where she was tired of the life she was living but did not have the tools to do otherwise. S.T.A.R gave her those tools. S.T.A.R gave her the structure and the accountability that she needed to completely change course.

Today, Ms. Chappelle describes herself as a "grateful, recovering, alcohol addict." She is a mother, a wife, and a tax-paying, productive citizen who currently works in the re-entry field to help others who also suffer with SUD.

Lakesha M. Adeniyi Dorsey, Esq. is a Deputy Federal Public Defender, Office of the Federal Public Defender, Central District of California

Statement by the Federal Bar Association-Los Angeles Chapter Condemning Attacks on Members of The Asian American Pacific Islander Community

The Los Angeles Chapter of the Federal Bar Association (FBA-LA) joins with the Los Angeles and San Diego United States Attorneys and their FBI Special Agents in Charge to condemn hate crimes and racism targeting members of the Asian American Pacific Islander (AAPI) Community.

There has been a marked increase in attacks against members of the AAPI community since the onset of the global pandemic. The most recent events, including beatings around the country and the shooting tragedy that unfolded in Atlanta, are reflective of a dangerous undercurrent of anti-Asian sentiment. These repugnant acts have targeted members of our community because of their race. This is wrong.

Unfortunately, there is a history of racist discrimination against Asians in this country. The latest acts of violence against the AAPI community did not occur in isolation or without larger historical and social contexts of invidious discrimination under color of federal and state laws. The upholding of the Chinese Exclusion Act by the United States Supreme Court in the 19th century and the imprisonment of Japanese Americans during World War II are but two examples. It is important that we not only prevent physical violence, but that we stay vigilant and counteract racial discrimination in any form.

Los Angeles County is home to one of the nation's largest Asian populations, many of whom serve our country, serve as healthcare providers and front-line workers who risk their own well-being to care for others, and serve our collective interest in many ways. Our communities are enriched by the diversity of the AAPI community and their rich traditions and perspectives. The Federal Bar Association-Los Angeles Chapter remains committed to upholding the legal rights of AAPI persons and others, and ensuring that each person can live freely and without fear or discrimination.

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Los Angeles U.S. Attorney link: https://www.justice.gov/usao-cdca/pr/top-federal-prosecutor-los-angeles-and-head-fbi-field-office-denounce-hate-crimes-and

San Diego U.S. Attorney link: https://www.justice.gov/usao-sdca/pr/san-diego-law-enforcement-leaders-condemn-anti-asian-hate-crimes

In response to these anti-Asian hate crimes and incidents, the FBA-LA Chapter is planning a webinar during Asian Pacific American Heritage Month in May to examine possible solutions on the Federal level. The webinar will include, among other things, an analysis of President Biden's January 26, 2021, Executive Memorandum and pending Federal legislation (including HRes. 151, re-introduced by New York Congresswoman Grace Meng). Panelists will include Ronald Cheng, Assistant U.S. Attorney, Chief, Criminal Division, U.S. Attorney's Office for the District of Nevada. This special webinar will be moderated by Central District Judge, the Honorable Dolly M. Gee. Details to come at http://www.fbala.org/Events.php.

The Los Angeles Chapter of the Federal Bar Association issues this statement in its name only and not that of the Federal Bar Association, any judicial member of the Association, or any other member of the Association for whom participation in the formulation of the position would conflict with that member's official or other professional responsibilities.

This statement was authorized by the attorneys serving on the Board of Directors of the Los Angeles Chapter of the Federal Bar Association. Members of the Judiciary and employees of the US Government, including the US Attorney's Office and Federal Public Defender's office who serve on the Board did not participate in the decision to issue this statement. The FBA LA Chapter seeks to promote the sound administration of justice and the integrity, quality and independence of the federal judiciary. See http://www.fbala.org/

2021 Central District of California Civics Contest Virtual Awards Reception

By Jessica Garibay, Project Specialist

As a society, how should we strike the appropriate balance, within the framework of our Constitution, between safeguarding our rights and fulfilling our responsibilities to each other? Hundreds of high school students sought to answer that question by writing essays and producing videos as part of the 2021 Central District of California Civics Contest (CD Contest). The theme of this year's contest, which was held in conjunction with the 2021 Ninth Circuit Civics Contest (9th Circuit Contest), was "What Does Our American Community Ask of Us?"

The Central District received nearly 200 essay and 6 video submissions, representing approximately 29 percent of all submissions to the Ninth Circuit. Each year, a subcommittee of Central District lawyers review and rank the submissions to identify the top ten in each category. A committee of Central District judges then conduct their own review of the top ten submissions and select the first, second, and third place essay and video winners and honorable mentions in each category. The students who were selected as winners of the CD Contest received sizable cash prizes. In the essay category, first place winner Nefertari Hammant of Magnolia Student Center-Springs Charter School in Riverside, received $1,000; second place winner Laura Pham of Oxford Academy in Cypress received $750; and third place winner Grace Yue, also of Oxford Academy received $500. In the video category, first place winner Ariana Perez of Troy High School in Fullerton received $1,000; second place winners, which was a team of Simone Chan, Yixi Chen and Shihui Huang of Arcadia High School in Arcadia split $750; and third place winner Viren Mehta of Oxford Academy in Cypress received $500. The winners and honorable mentions also received certificates, signed by Chief District Judge Philip S. Gutierrez and Chief Bankruptcy Judge Maureen A. Tighe, recognizing their accomplishments.

On June 25, 2021, the CD Contest winners and honorable mentions were honored at a virtual awards reception hosted by the U.S. District and Bankruptcy Courts for the Central District of California. Although the event was held virtually, the excitement was evident through the computer monitors as the students, their families, and their teachers, as well as Central District judges, lawyers, and other legal professionals gathered to honor the students and celebrate their accomplishments. As a special treat, all students who participated in the virtual reception received a GrubHub gift card so that they could enjoy a special celebratory lunch and festive red, white and blue balloon bouquets..

(*Continued on page 12*)

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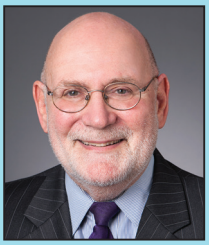

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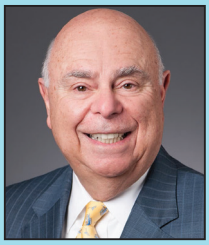

Hon. Dickran M. Tevrizian (Ret.)

Hon. James Ware (Ret.)

2021 Central District of California Civics Contest Virtual Awards Reception

(Continued from page 10)

Judge Sandra R. Klein began the reception by welcoming the participants. Chief Bankruptcy Judge Maureen A. Tighe then introduced the other judges and special guests in attendance: District Judge Stanley Blumenfeld Jr.; Chief Magistrate Judge Paul L. Abrams, and Magistrate Judges Pedro V. Castillo and Autumn D. Spaeth; Bankruptcy Judges Martin R. Barash, Sheri Bluebond, Sandra R. Klein, and Robert N. Kwan (Ret.); U.S. Bankruptcy Court's Chief Deputy of Administration John C. Hermann and Administrative Services Manager Steve Hill; and Loyola Law Professor Kimberly West-Faulcon, a Constitutional Law scholar, who was the Central District's guest speaker during our Law Day event, which focused on the theme of the 9th Circuit Contest.

Following Chief Judge Tighe's remarks, Judge Klein recognized the students and teachers in attendance. She thanked the lawyers who served on the preliminary selection committee and the judges who helped select the winners. She also recognized the Attorney Admission Fund and the Central District Lawyer Representatives, who contributed funding for the students' and teachers' prizes. The attendees were delighted to hear first place essay winner Nefertari Hammant read her essay with her mom beaming proudly at her side. First place video winner Ariana Perez' mom, dad, grandmother and uncle were with her as her video was displayed and the look of pride on their faces was priceless. Judge Klein then thanked all of the District Court and Bankruptcy Court staff who made the event possible. The event concluded with a few photos, which captured the joy on the students' and their families' faces.

Jessica Garibay is a Project Specialist.

Central District Annual Bar Membership Renewal Fee

On May 28, 2020, the United States District Court for the Central District of California issued General Order No. 20-07, which instituted an annual renewal fee of $25 for all members of this Court's Bar. See General Order No. 20-07, available at www.cacd.uscourts.gov/court-procedures/general-orders. You can pay your fee online at: https://apps.cacd.uscourts.gov/registration/Home/BarRenewal

FBA-LA Program: Meet the New Central District Judges

On March 3, 2021, the Los Angeles Chapter hosted a webinar event, "Meet the Four New U.S. District Court, Central District of California Judges," featuring the Honorable Fernando L. Aenlle-Rocha, the Honorable Stanley Blumenfeld, Jr., the Honorable John W. Holcomb, and the Honorable Mark C. Scarsi. The program was moderated by the Honorable Josephine L. Staton.

Fun Facts About the New Judges:

- Judge Aenlle-Rocha is a former state and federal prosecutor, and his page on the Court's website includes the phonetic pronunciation of his name ("Ah-N-Jay / Row-Cha").
- Judge Blumenfeld has a Master's degree in Spanish from NYU and enjoys traveling in Central America.
- Judge Holcomb is a former FBA Chapter President (Inland Empire Chapter).
- Judge Scarsi worked as a software engineer before becoming a lawyer; he is a dedicated New York Yankees fan and enjoys surfing.

Tips from the Judges:

- Read judges' procedures and standing orders carefully.
- Pay attention to the local rules, including Rule 7-3's meet-and-confer requirement.
- Abide by page limits; consider filing a brief under the page limit.
- Be respectful and limit rhetoric in briefing.
- Include all arguments that you plan to make in your papers.
- A showing of good cause is needed even if the parties agree to a continuance; citing the pandemic or a planned mediation without more is unlikely to be sufficient.
- Diligence is another key element for securing a continuance.
- Request a continuance before your deadline elapses.
- Expect a trial date to be set about 12 to 18 months after the scheduling conference.
- Spend time on your Rule 26(f) report to help the assigned bench officer learn about your case
- Use oral argument to address the Court's questions.

Panelists:

- **The Honorable Mark Scarsi**
- **The Honorable Stanley Blumenfeld**
- **The Honorable John Holcomb**
- **The Honorable Fernando Aenlle-Rocha**

Moderator: The Honorable Josephine Staton

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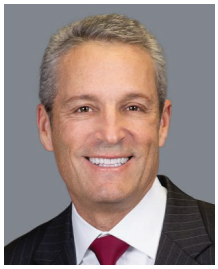
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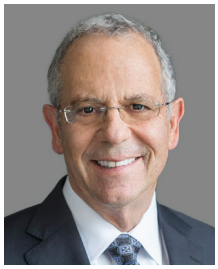
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Mediating Employment Discrimination Cases

By Angela J. Reddock-Wright, Esq., Mediator/Arbitrator – Judicate West

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Introduction

This article describes factors to consider regarding the mediation of employment discrimination cases, including timing and mediator selection. The discussion then moves onto tips for mediation preparation and client management, as well as a breakdown of strategies used by mediators to facilitate settlement. Some key drivers that may motivate one or both sides to favor settlement are presented. Finally, it outlines important terms to include in settlement agreements.

The background

Each year, 70,000 to 100,000+ discrimination charges are filed with the Equal Employment Opportunity Commission ("EEOC"). In California, over 22,500 charges were filed with the Department of Fair Employment and Housing ("DFEH") in 2019, two-thirds of which requested immediate right-to-sue letters. From 2010 through 2020, more than 1 million employment discrimination cases have been filed. Given the increasing backlog in the court systems, these cases may be pending for years. [Sources provided upon request.]

Meanwhile, national sentiment towards discrimination issues has been evolving over the past year:

- The #MeToo movement has empowered people, and particularly women, to voice complaints of workplace harassment and discrimination.
- The #BlackLivesMatter movement has called attention to systemic racism, leading to a rise in social equity cases.
- Many businesses are becoming more aware of issues surrounding diversity, equity, and inclusion ("DEI"). As a result, they have been establishing infrastructure and best practices to introduce change in the workplace.

These developments have cast a spotlight on discriminatory workplace practices. Many of these conflicts arising out of workplace discrimination are ripe for mediation. The availability of employment practices liability insurance (“EPLI”) may also motivate parties to engage in mediation, which can reduce litigation costs and contain exposure. Further, because there is statutory fee-shifting, employers realize they risk bearing all the attorneys' fees, which also incentivizes settlement.

Arranging to mediate

When to mediate: The first decision to explore with your client is when to entertain mediation. Each stage of litigation can present an opportunity to mediate – revisiting the cost-benefit analysis intermittently is worthwhile:

- Pre-litigation, after a demand letter has been sent
- Early in litigation, after a formal complaint has been filed
- Before or after a significant motion, such as a motion for summary judgment ("MSJ") (or while it is pending)
- Leading up to trial

As part of this evaluation, consider the perspective of the other side as well as any insurance – the more attractive the timing to your adversary, the more likely settlement can be reached.

In general, because fee-shifting is such a driving component of exposure faced by defendants, there is often an opportunity to explore mediation early, before fees dwarf the potential liability. Sometimes, however, defendants may not appreciate the extent to which expenses may mount until they have begun to pay substantial legal and expert fees and costs.

Certain points in litigated cases are particularly conducive to mediation. For instance, discovery can be expensive when there is significant motion practice. A defendant may be more eager to explore mediation when they may be required to devote internal resources to gather more data or documents in discovery. If there are significant active discovery disputes that would soon be presented to the court for determination or a series of depositions on the horizon, there may be a settlement window.

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Likewise, the timing of mediation may hinge on a deadline or MSJ hearing. If an MSJ has already been filed, the likelihood of success in ending or narrowing the case will have a significant bearing. Often, some issues will remain even after a successful MSJ, in which case, the chance that the employer will prevail at trial on those surviving issues will be a motivating factor. In some instances, the parties will prefer to have the pending MSJ resolved first, but at other times, the uncertainty of how the Court will rule on the MSJ itself presents an opportunity to mediate. If the employer is contemplating filing an MSJ soon, that can also invite mediation, before investing in preparing MSJ papers.

An employee may be eager to embrace early mediation to collect some money, put the situation behind them, and move on. However, sometimes it is very important for an employee who has faced discrimination to tell their story. This need for validation may motivate them to want to continue to a jury trial. But it may also be an opportunity for productive mediation after the plaintiff has been deposed – testifying might satisfy their need to express how they feel wronged.

When scheduling a mediation for an employment discrimination case, counsel should determine what information or discovery (formal or informal) is most essential to have a productive mediation and can condition participation in mediation on being provided with certain documents and/or data, potentially under mediation privilege. This can help balance the need for preparation with cost control.

Mediator selection: Private mediation panels include a robust selection of experienced practitioners and retired judges. When choosing a mediator for a discrimination case, a proposed mediator's expertise in employment law and prior mediation experience of similar discrimination cases is paramount. Mediators may offer references, and feedback from other attorneys can be insightful. Do not be too wary of attorneys who predominantly represented the other side when they litigated – these mediators understand the law and offer first-hand experience as to how parties in discrimination cases think as well as what motivates them to settle cases. Thus, their perspective is valuable and may help to establish rapport with the opposing party.

Additionally, as society becomes more diverse and DEI initiatives become a center of discussion in our workplaces, counsel may also consider diversifying their selection of mediators and consider whether certain mediators, based on their backgrounds and experiences, may bring a certain perspective, insight, or set of capabilities that may be helpful in connecting with clients and facilitating resolution.

Presenting your client's position:

The importance of mediation briefs: Mediation briefs in an employment discrimination case introduce the mediator to your client's claims/defenses and the history of the case. Vital details include:

- Procedural posture of the case; any pending hearings/deadlines;
- Alleged damages, including economic harm, emotional distress, and any punitive damages asserted; as defense counsel, speak to any alleged failure to mitigate and other potential causes of injury;
- Attorneys' fees and costs already incurred and those anticipated should litigation continue;
- History of settlement discussions to date, including the last demand/offer and an assessment of the remaining gap;
- Significant facts that help your client's position; and
- Background about the non-pecuniary goals of your client in terms of the working relationship and whether it can continue.

Generally, it is not necessary to detail basic legal arguments for a discrimination case, because an experienced mediator is already familiar with the governing cases. Instead, focus citations on recent, applicable legal developments and more nuanced aspects that distinguish your case. If there is an MSJ pending or anticipated, call attention to the legal issue(s) that would be determined by the court and how settlement is impacted by the risks.

Consider whether briefs will be exchanged. Many mediators encourage this practice because the exchange of briefs can expedite negotiation. The briefs assure that each side is familiar with each other's positions. Sometimes, it is advantageous to share just a portion of the brief but to reserve a supplement for the mediator's eyes only.

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Pre-mediation consultation with the mediator:

Many mediators in discrimination cases will schedule separate calls with each side before the mediation. This conversation provides an early opportunity for the mediator to gain a sense about pivotal aspects of the discrimination dispute and clarify questions the mediator has about facts or positions presented in the briefs. Generally, these calls do not include the clients. So, if there are client management dynamics or fragile client issues that would be helpful for the mediator to understand, a pre-mediation conversation is an excellent opportunity to discuss such sensitive issues with the mediator.

Joint sessions and caucusing

Before the mediation's first session commences, clarify with the mediator whether the mediator intends to use joint sessions, particularly at the beginning of the mediation. Having all parties together is generally *not* favored for most California employment law mediations. However, with the proper case, it may be beneficial for a former employee to meet with their former employer in a mutual setting.

If you and/or your client are uncomfortable with a joint session, convey this to the mediator in advance. If you plan for a joint session, it is imperative to prepare your client to face the employee or employer representatives and their lawyers, especially if the mediation is being conducted in person.

Generally, most mediation time is spent in caucus. When you share information with the mediator, make clear anything that you are not authorizing the mediator to present to opposing counsel.

Counseling the client

If your client is new to mediation, guide them on what to expect and how to present themselves, along with being prepared to discuss their story and engage with the mediator. Prepare your client as to what to anticipate in terms of opening demands and counteroffers, particularly if either is expected to be a surprise to either side. Additionally, the client should know if you want them to speak freely when the mediator is present or defer to you to privately share with the mediator the client's thoughts and feelings. Some attorneys prefer to have the mediator address all questions, comments, and offers only to themselves, but sometimes will invite the client to speak directly to the mediator. Many times, in discrimination cases, it may be wise for an attorney representing a plaintiff case to allow them to tell their story and the impact on them directly to the mediator. Curating the mediator's impression of the client and their credibility is crucial.

Virtual vs. in-person discrimination mediations

The virtual mediation has blossomed during the pandemic. Though largely successful, virtual participation may mean less investment and thus more of a willingness for either party to walk away. In some more emotional cases – which is not uncommon where discrimination and harassment allegations are central – the mediator will strive to build trust and rapport with the parties. That comfort may be harder to establish remotely.

Although a remote mediation may be expedient, the reduced ability to convey validation and establish connection could have a detrimental effect on some mediations and certain client personalities. When participating remotely, it becomes crucial – if counsel and client are not located together physically – for there to be channels for private communication outside of the platform.

However, many mediators have found great success in virtual mediations this past year, yielding settlement rates at levels similar to in-person mediations, if not greater. Virtual mediations reduce the time, expense, and stress of traveling and allow parties and their counsel to mediate from locations where they feel comfortable. This sense of ease sometimes allows the mediator to break the ice and get to know the parties and their counsel on a more personal level.

Mediation strategies and techniques for discrimination cases

Mediators apply certain tactics to achieve a resolution. A mediator is seeking to identify what has been coined the Zone Of Possible Agreement ("ZOPA") – the range of outcomes that would be acceptable to both the employee and the employer. As part of this process, the mediator will evaluate and assist each party to recognize their Best Alternative To a Negotiated Agreement ("BATNA"), which is the course of action they would take if they do not reach an agreement at the mediation – in this context, generally continued litigation.

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BATNA analysis enables a mediator to assess each party's reservation point, or walk-away point, in the negotiation. If there is a set of resolutions that both parties would prefer to impasse and continued litigation, then a ZOPA exists, and the mediator should facilitate reaching a deal within that range. When preparing for a mediation, lawyers should give thought to the 'expected value' of the case continuing, factoring in monetary, mental, and emotional costs. Be ready to justify the analysis but also to adjust it at mediation.

One tool some mediators utilize to help clarify the ZOPA in discrimination cases and generate movement toward an agreement is 'bracketing.' Bracketing is a conditional proposal that seeks to create a realistic bargaining range by offering to make a certain move *if* the other side makes a corresponding move. This technique allows one party to make a more significant concession without the risk that it will not be reciprocated, because it builds the required response into the offer itself. When mediations stall with small 'tit for tat' moves, this strategy encourages more significant moves that can shift the focus toward identifying the real target range and generate positive momentum. As attorneys representing a discrimination client at mediation, it is important to think about the midpoint of any bracket being discussed. If you are proposing a bracket, it sometimes is productive to clarify to the mediator if your bracket's midpoint signals a number that would be acceptable or not – otherwise, the assumption may be that you are offering that amount.

When a mediation otherwise appears to be at an impasse, with the agreement of all parties, some more evaluative mediators will make a 'mediator's proposal', offered simultaneously to all parties on a take-it-or-leave-it basis. By responding confidentially, neither party is compromised – they are only told by the mediator whether a deal has been reached or not. Mediator's proposals often overcome posturing and force both parties to give realistic consideration as to whether the certainty and closure of the potential agreement are preferable to the risk of continued litigation.

Key drivers in employment discrimination mediations

The assessed strengths and weaknesses of a discrimination case will impact the reasonable expectations. A directive mediator will encourage both sides to evaluate analytically the likelihood that the discriminated employee could prevail at trial. Some key evaluation points in employment discrimination cases include:

- Has the employee established a strong *prima facie* case that they faced some adverse action or hostile conditions on account of their membership in a protected category? If the allegations do not survive the "equal opportunity jerk" defense, then the employer might rationally only be ready to offer 'nuisance value'. In other words, a complaint that the boss was tough, sarcastic, or demeaning, etc., often does not suffice to raise an actionable claim when this behavior was equally boorish to everyone.
- Can the employer provide a legitimate business reason for the decision at issue or the alleged misconduct?
- Is the employer adhering consistently to a clear progressive discipline policy?
- Can the employee demonstrate that the supposed reason offered by the employer is actually pretextual?

Venue considerations

Resolution at mediation should also consider where the case is pending: private arbitration or a court? Is confidentiality important, so that a settlement would avoid the publicity of a trial in court? It is also important to consider whether the case is in Federal Court – where unanimous jury verdicts are required to find liability and there are statutory caps that could limit damages for claims brought under Title VII (42 U.S.C. § 1981a(b)), or in, what tends to be a more plaintiff-friendly California Superior Court under California law – the Fair Employment and Housing Act ("FEHA"). If your case is in court, has either party requested a jury trial?

Anticipated jury makeup will also affect the settlement value of the case, as certain jury pools are viewed as being more diverse and liberal – and thus generally more receptive to discrimination claims.

Other venues may draw from a catchment that tends to be more pro-business and less likely to award large damages or even to entertain punitive damages.

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Well-prepared counsel often reviews recent jury verdicts and awards in similar discrimination cases in the same jurisdiction. This information can be helpful both to manage client expectations and risk assessment and to inform mediation.

On an even more granular level, listservs, and networks, among both plaintiff and defense counsel alike, may provide specific insights into the tendencies of the assigned judge or arbitrator. Familiarity with the assigned judge's or arbitrator's history with discrimination rulings in the case itself and other similar cases can help counsel predict more accurately the likely outcome of upcoming rulings. At mediation, this analysis can influence the process and impact the perceived settlement value of the case.

Witness credibility

When the factfinder is being asked to consider whether they believe the employer's offered basis for the alleged mistreatment is legitimate or pretextual, the credibility of the following key witnesses becomes significant:

- the plaintiff/employee
- accused manager/supervisor/co-worker
- the management / HR representative involved who may have been informed of the allegations and handled the employer's response
- other witnesses who may corroborate or dispute the testimony of either side
- potential expert witnesses.

To the extent that these witnesses have been deposed, the parties can reflect on how well they present. Video or transcripts might be used in discrimination mediation to highlight both key testimony and the impact certain witnesses might have at trial. A directive mediator may share an evaluation with the parties as to how well the plaintiff or other potential witnesses present themselves.

Potential exposure and expected costs of continued litigation

Potential exposure and ongoing costs will also be primary factors to weigh at mediation to guide the discussion of settlement value. The disparity between the risk analyses and costs faced by employment discrimination plaintiffs and defendants influences the settlement dynamics. Typically, the exposure assessment will include two main aspects:

(1) Plaintiff's alleged damages: The monetary damages sought by an employee will generally include general/economic damages, which would include lost wages both past and future, particularly where there is a wrongful termination charge. Employees also often seek special/emotional damages, where the discrimination alleged has purportedly led to emotional distress. Finally, under more egregious circumstances when the company purportedly endorsed or carried on the misconduct, Plaintiffs will also seek punitive damages. Depending on the expected dynamics and storyline presented, there could be a real risk that financial 'punishment' could be imposed, exposing the employer to very significant risk, particularly under California law.

(2) Plaintiff's attorney's fees: In California, under the Fair Employment and Housing Act ("FEHA"), Government Code §12965 (b) provides for one-way fee-shifting for the recovery of attorney's fees, costs, and expert witness fees and overrides the standard cost-recovery provision that applies in civil actions generally. *See Williams v. Chino Valley Independent Fire District* (2015) 61 Cal.4th 97, 115.

For prevailing plaintiffs, attorney's fees, costs, and expert witness fees are recoverable unless special circumstances would make the award unjust. For prevailing defendants, however, none of these items are recoverable unless the court finds that the plaintiff's action was frivolous. Thus, this statutory scheme means that employees do not face the threat of an adverse cost award by continuing to verdict whereas employer defendants feel significant pressure.

Meanwhile, the expense of continued litigation may also impact the two sides unevenly. Defendants must recognize that, win or lose, continuing to trial will be expensive. Not only are they footing the bill for attorney time, but there are also hard costs like depositions and filing fees. Moreover, the ongoing disruption to business caused by time-consuming discovery takes a toll.

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Typically, plaintiff's counsel is working on a contingency – they are not billing their client by the hour, so the plaintiff does not face a mounting attorney fee bill each month. The employee may therefore not face financial pressure to conclude the case. On the other hand, the plaintiff may not have ample resources, and receiving a settlement payment more quickly may be very attractive. At the same time, plaintiff's counsel continues to sink time and money into the case with no guarantee that they will ever be compensated.

Formalizing a discrimination settlement agreement at mediation:

One might think that if a discrimination mediation ultimately results in a monetary agreement then everyone's work is done. However, it is critical to reach a deal that addresses many terms beyond the bottom line. Sometimes, one or both parties can get hung up on another aspect of release agreement language.

It is not always feasible to reach an agreement on all terms at the mediation itself. A signed Memorandum of Understanding ("MOU") that memorializes what has been resolved along with an agreement to negotiate the remaining aspects within a specific time frame can ensure that the important progress is locked in.

Also, whatever agreement(s) come out of the mediation, make certain to include language that the deal is enforceable under CCP §664.6. For a helpful overview of section 664.6 and its import, *see Hines v. Lukes* (2008) 167 Cal. App. 4th 1174, 1182.

Without this term, neither side can reliably enforce the settlement in court, as the other party can assert mediation privilege. Further, if the court dismisses the case without granting a written request signed by the parties to retain jurisdiction, then there will be no recourse to enforce the agreement. *See Sayta v. Chu* (2017) 17 Cal. App. 5th 960.

Other specific terms to contemplate in discrimination settlement agreements:

1. General Release and Civil Code section 1542 Waiver – Defendants often insist on these terms; Plaintiffs can negotiate for consideration, particularly if there could be other known claims foreclosed. In some cases, having a mutual release is appropriate and effective, ensuring finality for all parties.
2. In Age Discrimination Cases – When the employee is 40 or over, federal law requires the inclusion of language that ensures that they have both 21 days to consider the proposed agreement and an additional 7 days to revoke it.
3. Neutral Employment Reference – Especially when an employee separates under controversial circumstances, it may be important that a 'neutral reference' be provided. This arrangement typically means that either an outside third party or Human Resources will communicate to potential employers only the plaintiff's dates of employment, last position, and (if agreed) final compensation, without any information about the terms under which employment ended.
4. Confidentiality and Non-disparagement – Consider if these terms are mutual and if they will be enforced with liquidated damages. Note also that in response to the 'Me Too' movement, California passed the Stand Together Against Non-Disclosure Act (STAND), which places limits on confidentiality clauses in discrimination and harassment cases. *See* CCP §1001, Civil Code § 1670.1, and Government Code §12964.5.
5. Liquidated Damages – Set at a certain amount, particularly as a mechanism to enforce confidentiality and non-disparagement clauses, this term can act both as a disincentive to breach the agreement as well as a mechanism for establishing the level of harm, which might otherwise be difficult or expensive to determine.
6. Payment and Tax Considerations – Often the settlement amount must be allocated based on the claims to be treated as wages, injury compensation, or attorneys' fees, etc. The designations may have significant tax consequences and may also trigger the employer subtracting withholdings from the gross amount. It is advisable to confirm a clear agreement as to what amounts can be deducted and what the resulting net payments would be.

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7. Mediator Assistance – When desired by all, the agreement can provide that the mediator will serve to resolve any dispute over effectuating the settlement.
8. Signatories – In addition to having all parties or designated representatives sign the final agreement, it is common for counsel to also sign, confirming that their client was represented and approving the document as to form.

By reaching an agreement on these key provisions, you can minimize the risk that the deal falls apart.

Conclusion

Resolving employment discrimination cases through mediation can be very effective but requires the right preparation and understanding of the impact of the statutory regime on the negotiation dynamics. Familiarity with the strategies employment lawyers and mediators tend to utilize will enable you to advocate effectively for your client to settle at mediation.

Biography:

Angela Reddock-Wright is a Mediator and Arbitrator with Judicate West, serving all of California. Reddock-Wright's mediation practice focuses on all aspects of employment and labor law, including discrimination, harassment, retaliation, wage and hour and other claims. She also mediates Title IX, hazing, bullying, government & public sector, sexual assault, some personal injury, and tort claims. Reddock-Wright is a graduate of UCLA School of Law and obtained her training as a mediator from the Straus Institute for Dispute Resolution at Pepperdine University School of Law. She is Adjunct Faculty in the mediation program at USC Gould School of Law and California State University Dominguez Hills. She is a past president of the Southern California Mediation Association and also serves as volunteer mediator for the United States District Court, Central District. Prior to beginning her career as a full-time mediator and arbitrator 10 years ago, Reddock-Wright was an employment litigator for the first 15 years of her career.

Chapter News

Congratulations to the Los Angeles Chapter for receiving a Presidential Excellence Award for Chapter Activity from FBA National!

The FBA-LA Newsletter was also honored with a Newsletter Award!