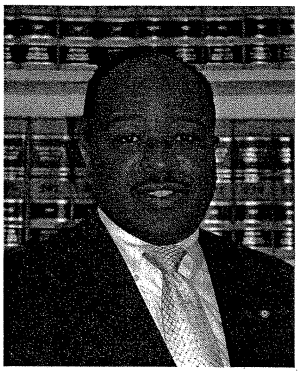
January 2011

Volume 42, Issue 1

The Marin Lawyer

An Official Publication of the Marin County Bar Association



PRESIDENT'S MESSAGE

By Otis Bruce

It is with great pleasure that I assume the office of Marin County Bar Association (MCBA) President during 2011. I am indeed humbled and empowered at the same time. I am humbled to be elected by our esteemed colleagues to be the 64TH MCBA Bar President, the first African-American and ethnic minority lawyer in Marin to be honored since our association was founded in 1934 by attorney Carlos Freitas. I am empowered because as a Marin county prosecutor I get to continue my community and public service work in collaboration with all the talented and diverse lawyers in Marin. I also get to carry forward the great work of our capable Past President, Beth Jordan.

In preparing for 2011, I thought about what efforts our board of directors and staff could put forth to better serve our members, the legal community and the Marin community-at-large. What does it mean to be "The Marin Lawyer". How can we expand the vision of justice in Marin County? The platform has been laid by our past bar presidents and board members who have been true stewards, advocates, ambassadors and facilitators. It has been their leadership, commitment and vision that brought our small bar association to a more financially secure and vibrant 700 member organization dedicated to MCBA's Mission Statement: "To involve, encourage and support bar association members, to serve as a liaison to the Marin County courts, and to educate the community and enhance access to legal services."

(Continued on page 10.)

Calendar of Events

INSTALLATION of OFFICERS AND DIRECTORS 2011
JAN 8, 2011
6 – 10 pm

Jan 19th
ADR Section Meeting
12 – 1:30 pm

Jan 19th
Labor and Employment Section Meeting
12 – 1:30 pm

Look for details each month in *The Marin Lawyer*

In This Issue

How to do Property Title Research 2
MCBA Holiday Party 3
Brokers Beware 4
Revised Judicial Assignments 5
Criminal Law & Diversity Sections 5
Spotlight on Scott Rogers 6
Small Claims Trials Temporary Judge .. 7
Helping Homowners 7
Calendar Details 13
CLE Compliance 14
New Members/Change of Scene 14
Marketplace 15

Kate Rockas is Series Editor for 2011.

PRESERVING THE LIFE OF EVIDENTIARY OBJECTIONS IN THE WAKE OF *REID V. GOOGLE, INC.*

By Sara B. Allman © 2010

Introduction

As most lawyers already know, in determining whether or not a triable issue of material fact exists on a summary judgment motion, the trial court must consider any evidence "except that to which objections have been made and sustained." (Code of Civ. Proc., § 437c, subds. (b)(5), (c), (d).) Until now, parties risked waiving those objections on appeal if they did not demand rulings from overburdened trial judges who were understandably disinclined to rule

(Continued on page 8.)

(Preserving the life, continued from page 1.)
on voluminous evidentiary objections.

The California Supreme Court recently addressed how to make and preserve evidentiary objections in the context of a motion for summary judgment in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512 (*Reid*). In a long-awaited opinion, filed August 5, 2010, the California Supreme Court unanimously decided that a party makes an effective evidentiary objection either by filing written objections before the motion hearing or by orally objecting at the hearing. The trial court must then rule on the objections. In the event the trial court does not do so, the objections are preserved for appeal.

In the opinion, authored by Associate Justice Ming Chin, the Court ruled that "a finding of waiver does not depend on whether a trial court rules expressly on evidentiary objections" and that the defendant's "filing of written evidentiary objections before the summary judgment hearing preserved them on appeal." (*Id.* at p. 517.) The Court agreed with the Court of Appeal for the Sixth Appellate District that "if the trial court fails to rule expressly on evidentiary objections relating to a summary judgment motion, the court's silence 'effects an implied overruling of all objections, which are therefore preserved for appeal.'" (*Id.* at p. 525.)

Prior Case Law Created Tension between Lawyers and Trial Court Judges.

In *Biljac Associates v. First Interstate Bank* (1990) 218 Cal.App.3d 1410 (*Biljac*), plaintiffs filed a vast number of evidentiary objections opposing summary judgment. The trial court declined to make rulings, referring to that job as "a horrendous, incredibly time-consuming task." (*Id.* at p. 1419, fn. 3.) The Court of Appeal for the First Appellate District held that a trial court is not required to make express evidentiary rulings to summary judgment evidence and reasoned that, because appellate review is de novo, "the parties remain free to press their admissibility arguments on appeal." (*Id.* at p. 1419.) Subsequently, the Supreme Court in *Ann M.*, without any discussion of *Biljac*, held in a footnote that "because counsel failed to obtain rulings, the objections are waived and are not preserved for appeal." *Sharon P.* followed, confirming the waiver rule—also by way of a footnote. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670, fn. 1; *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1186-1187, fn. 1.)

After *Sharon P.*, some trial courts followed the waiver rule, others did not. There was discord between trial court judges, who were saddled with voluminous objections to summary judgment evidence, and trial lawyers, who were required to "yell and scream and stamp" to demand rulings on the objections at the motion hearing in order to avoid waiving them. (See *Gallant v. City of Carson* (2005) 128 Cal.App.4th 705, 714 (M. Vogel, J., dissenting and noting that "lawyers ought not to be put in the position of haranguing the very judges whose favorable rulings they seek.") The waiver rule also resulted in inconsistency in the practices of the Courts of Appeal. While some appellate courts considered the evidentiary objections waived, others ruled on the objections anyway—even though the trial court had not made evidentiary rulings.

Mr. Reid's Case

Mr. Reid, a former executive, filed a complaint for age discrimination (among other claims) against Google, his former employer. The trial court granted Google's motion for summary judgment but refused to give formal rulings on 31 pages of objections that Google had filed in advance of the hearing to Reid's evidence. Instead, the trial court simply noted that it had considered only competent and admissible evidence, following *Biljac.*

The Court of Appeal concluded that the trial court's failure to rule on the evidentiary objections did not waive those objections on appeal, finding that Google's filing of written evidentiary objections before the summary judgment hearing was sufficient to preserve the objections for appellate review. The appellate court then reviewed and rejected Google's objections to Reid's evidence. The appellate court relied on age-based "stray remarks" submitted on Mr. Reid's behalf as sufficient, in the context of other evidence, to raise a triable issue of material fact. The Court of Appeal reversed the summary judgment, holding Reid had produced sufficient admissible evidence of age discrimination to reach a jury.

The Scope of Review

The Supreme Court granted review in *Reid*, in part to address state court application of the federal "stray remarks doctrine" but also to decide the following issue: "Are evidentiary objections not expressly ruled on at the time of decision on a summary judgment motion preserved for appeal?"

Prior to oral argument, the Court noted that the waiver provisions of Code of Civil Procedure section 437c, subdivisions (b)(5) and (d), require the evidentiary objections to be "made at the hearing" and ordered supplemental briefing from the parties on the following questions: "Would written objections filed before the summary judgment hearing be sufficient to preserve evidentiary objections?"; and, "If not,

(Continued on page 9.)

(Preserving the life, continued from page 8.)
when and how must the evidentiary objections be made to be deemed made at the hearing?"

The Opinion

The Supreme Court reviewed the case law, the legislative history of the summary judgment statute, and the rules regarding objections to evidence in support of, and in opposition to, summary judgment motions. First, it observed that Code of Civil Procedure section 437c, subdivision (b)(5), provides that evidentiary objections made "at the hearing" are preserved for appeal. (*Reid, supra*, 50 Cal.4th at p. 521.) Then, the Court looked at the terms "waiver" and "forfeiture" and distinguished them. Waiver is the "intentional relinquishment or abandonment of a known right," whereas forfeiture is the '"failure to make the timely assertion of a right." (*Id.* at pp. 521-522, fn. 3.) The Court examined California Rules of Court rule 3.1352, which provides how objections can be made: either in writing pursuant to rule 3.1354 or by arranging to have a court reporter present at the hearing. The Court also noted that rule 3.1354 requires that a party that submits written objections must also submit a proposed order, to allow the trial court to indicate whether it is sustaining or overruling an objection. (*Id.* at p. 531.)

The Court affirmed the judgment of the Court of Appeal and decided that neither Code of Civil Procedure Section 437c (b)(5) nor California Rules of Court 3.1352 and 3.1354 require the trial court to make specific rulings on objections. Rather, these provisions only describe *how* objections are to be made *by an objecting party*, and impose a waiver only when the objecting party does not follow them.

The Court specifically held:

"We agree with the Court of Appeal's conclusions. Regarding the waiver issue, the Court of Appeal correctly determined that a finding of waiver does not depend on whether a trial court rules expressly on evidentiary objections and that Google's filing of written evidentiary objections before the summary judgment hearing preserved them on appeal. (Code Civ. Proc., § 437c, subds. (b)(5), (3).) After a party objects to evidence, the trial court must then rule on those objections. If the trial court fails to rule after a party has properly objected, the evidentiary objections are not deemed waived on appeal." (*Id.* at p. 517.)

The Court disapproved its own precedent in *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670, footnote 1, and *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1186, footnote 1. (*Reid, supra*, 50 Cal.4th at p. 527, fn. 5.) The Court also disapproved of *Biljac*, to the extent that it permits a trial court to avoid ruling on evidentiary objections, and encouraged attorneys to limit their evidentiary objections. (*Reid, supra*, 50 Cal.4th at p. 532, fn. 8.) The Court "recognize[d] that it has become common practice for litigants to flood the trial courts with inconsequential written evidentiary objections, without focusing on those that are critical." (*Reid, supra*, 50 Cal.4th at p. 532.)

In a nod to *Biljac*, and in an apparent gesture to help alleviate the extreme burden on trial court judges, the Court encouraged "parties to raise only meritorious objections to items of evidence that are legitimately in dispute and pertinent to the disposition of the summary judgment motion. In other words, litigants should focus on the objections that really count. *Otherwise, they may face informal reprimands or formal sanctions for engaging in abusive practices.* At the very least, at the summary judgment hearing, the parties — with the trial court's encouragement — should specify the evidentiary objections they consider important, so that the court can focus its rulings on evidentiary matters that are critical in resolving the summary judgment motion." (*Reid, supra*, 50 Cal.4th at pp. 532-533.)

The Court intimated that a de novo standard of review would apply when the trial court does not make evidentiary rulings —consistent with the general standard of review applicable to summary judgment rulings. The Court noted that, because there had been no exercise of discretion by the trial court when it refused to rule on the objections, the Court of Appeal had no occasion to determine whether the trial court had abused its discretion. (*Reid, supra,* 50 Cal.4th at p. 535.) The Court also left open the possibility that a party may request remand to the trial court to secure rulings on evidentiary objections, rather than have the Court of Appeal rule on them for the first time on appeal. (*Ibid.*)

(Continued on page 10)

(Preserving the life, continued from page 9.)

Comment

Reid effectively eliminates the risk of waiver of objections where a party objects to specific evidence either in writing before, or orally at, the summary judgment hearing. If the trial court fails to rule on the objections, then "it is presumed that the objections have been overruled, the trial court considered the evidence in ruling on the merits of the summary judgment motion, and the objections are preserved on appeal." (*Reid, supra*, 50 Cal.4th at p. 534.) This relieves stress for trial lawyers (who no longer have to yell, scream and stamp their feet to preserve evidentiary objections) and thus helps the parties whom they represent.

But, how does *Reid* help to ease the burden on the courts? Frankly, it doesn't. The impact of the Court's admonition to lawyers to step up and only make objections when they "really count" is uncertain. Who among us (after being told in the first place that we can sufficiently preserve evidentiary objections without risk of waiver by making the objections), is going to forego that opportunity in the zealous advocacy of our clients? We obviously all have an ethical obligation to raise only *meritorious* objections, and we appreciate that we could face sanctions and reprimands if we don't, but our primary duty plainly is to our client, not to the court. How can we accurately predict which objections will ultimately determine the outcome of an appeal? And might we risk waiving an evidentiary objection on appeal by not emphasizing that it is among those other objections, the ones that "really count?"

The Court's disapproval of *Biljac* withdraws a trial court judge's ability to manage the voluminous objections that are routinely raised in connection with summary judgment motions. The trial court judge must consider and rule on each and every objection. The California Supreme Court construes legislative intent—but it cannot create new law to force lawyers to stop making objections. More than "encouragement" is required to prompt lawyers to change their ways. There is only one body that can address the problem—the Legislature. If summary judgment proceedings are to remain truly *summary*, the Legislature must act to keep them that way. That includes coming up with procedural laws to appropriately streamline and control objections to summary judgment evidence. In the meantime, we need to strike a balance between making evidentiary objections that "really count" and zealously advocating for our clients. At least we can now rest assured that, if made at *or* before the hearing on the summary judgment motion, our evidentiary objections will be adequately preserved for appeal.

Sara B. Allman is president of Allman & Nielsen, P.C. She practices civil litigation in state and federal courts. She passed the Appellate Law Specialization Examination and is completing the remaining requirements for certification as an appellate specialist by the State Bar of California. She can be reached at Allman & Nielsen, P.C., 100 Larkspur Landing Circle, suite 212, Larkspur, CA 94939; telephone: (415) 461-2700; e-mail: all-niel@comcast.net.

(President's Message, continued from page 1.)

With this reality in mind, it is clear that the future and success of MCBA rest not in the vision of any specific leader but the commitment of the elected board members and current MCBA members to recruiting and developing future bar members and leaders, especially the future young lawyers in Marin County. Over the last few months, I shared a vision with our MCBA board that one way to develop MCBA and our future leaders is to establish a MCBA Legal Education Scholarship Fund. A legal academic scholarship fund, established and supported by MCBA members, will not only help our future Marin law students in their quest to become lawyers, but also inspire these students to stay connected to their Marin community. The students we support may very well be our future MCBA legal scholars, attorneys, judges and community leaders. I am very proud to announce that in October 2010, our MCBA board voted unanimously to allocate $50,000 as start up funds to establish the MCBA Legal Education Scholarship Fund. This scholarship fund has been set up as a 501-C 3 donor advised fund which will be administered through the Marin Community Foundation and 10,000 Degrees Foundation (formerly Marin Education Foundation). What a great legacy this MCBA scholarship fund can be for our bar association!

On December 4, 2010, we made our annual board retreat a true working session. We reviewed our MCBA's 2011 calendar year of scheduled meetings, events and projects with the input of a diverse range of board member perspectives. It was a very successful retreat! In 2011, we still have to address the challenges that may be social, economic or systemic. But as a local bar association, we can continue to benefit from our partnering with other organizations. In our endeavors to be successful and better the services and administration of justice in Marin, the cooperating organizations can leverage resources.

One collaborative pilot project in the works is the establishment of an Early Resolution Track Mediation Program for the Marin Superior Court. In a effort to reduce the backlog of civil cases in Marin County and to assist litigants in resolving matters more efficiently, the MCBA and the courts are working together to develop a proposal for an Early Resolution Track, with the goal of resolving appropriate cases through mediation as soon as possible after the date of filing. Another collaborative project being reviewed by MCBA, Legal Aid of Marin, Family & Children's Law Center and the Marin Superior Court is a proposed pilot project under the Sargent Shriver Civil Counsel Act (AB 590). The goal of this pilot program will be to improve case resolution and outcome for very low income Marin residents in their basic legal needs in the areas of housing, domestic violence, child custody, financial elder abuse, guardianship and conservatorships. Also in 2011, we will continue to support the independence of our Marin

(Continued on page 11.)