ASSOCIATION OF BUSINESS TRIAL LAWYERS

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Objections: The Moment of Truth

After weeks of briefing, your summary judgment motion is about to be heard. It's a big case, and you've prepared carefully. Leaving nothing to chance, you had the firm's smartest first-year lawyer prepare 15 pages of objections to your opponent's declarations, with a few objections to his points and authorities and notice of motion thrown in for good measure.

Hon. Paul Turner

The courtroom is packed — 30 matters on the calendar today — but you're among the first and the tentative is in your favor. When the court calls the matter, it announces it wants to hear from your opponent first. Things are going well.

The judge isn't buying what your opponent is trying to sell. Visibly more than ready to conclude the argument and move the calendar, the judge turns to you and brusquely asks if you have anything to add. Of course, the judge already knows the answer. Recalling the rule you learned on your first day at the firm — "When you're winning, shut up and sit down!" — you try to suppress your elation while responding "No, your honor." The hammer falls. Motion granted. You eagerly volunteer to give notice as you rush for the door to call your expectant client and share the good news.

A year or so and some tens of thousands of dollars later, you're at oral argument in the court of appeal. You're expecting to nail the case closed for good.

But there's a danger signal — even though you're the respondent, the court wants to hear from you first. The presiding justice asks, "Counsel, what about that October 15 letter? Doesn't that create a triable issue of fact?"

A softball? "No, your honor. That letter is rank hearsay."

"Really? Did you object to it?"

"Certainly," remembering your 15 pages of objections.

"Did the trial court rule?"

A pregnant pause. "Does that matter?"

"It certainly does."

Another uncomfortable moment of silence. The justice continues.

"Now, then, doesn't this letter create a triable issue of fact?"

What's the court talking about? Simple. In *Ann M. v. Pacific Plaza Shopping Center*, 6 Cal. 4th 666, 670, n.1 (1993), the Supreme Court said:

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> In the trial court, defendants made a series of objections to evidence submitted by *Ann M.* in opposition to the summary judgment motion. The trial court did not rule on the objections. Because counsel failed to obtain rulings, the objections are waived and are not preserved for appeal.

Houston, we have a problem. The judgment is going to be reversed. You're about to go back to where you started over a year ago.

And your client is about to be really unhappy.

But since this is just a story, let's assume you can simply re-file the motion and try again. This time when the trial judge asks if you have anything to add, you're ready.

"Your honor, we've filed objections. I'd like to ask the court to rule on them."

Robin Meadow

A pregnant pause.

"Counsel, I've got 30 cases on the calendar today. How many objections did you file?"

"Well, your honor, I felt that most of plaintiff's evidence was inadmiss — ".

"I counted them. You filed 167 different objections. Do you think I'm going to keep 30 cases waiting while I rule on every objection?"

"Well, your honor, *Ann M.* says that — "

"I know what the cases say. But I've got a calendar to run. Look — I'm only going to consider admissible evidence. Isn't that good enough?"

"Uh, yes, I guess so."

Round Two in the Court of Appeal.

"Counsel, what about that October 15 letter? Doesn't that create a triable issue of fact?"

Confidently: "No, your honor. That letter is rank hearsay."

"Really? Did you object to it?"

"Certainly."

"Did the trial court rule?"

No problem. "Yes, it did. The trial court said it would only consider admissible evidence."

"But was there a ruling on your hearsay objection?"

"That was the ruling."

"What about *Ann M.*?"

This time you're ready. "Your honor, in *Biljac Associates v. First Interstate Bank of Oregon*, N.A., 218 Cal. App. 3d 1410, 1419 (1990), the court said that '[n]othing in the statute or rules requires a written or other formal ruling for the record.' The court also said, 'We review summary judgments de novo [citation], and the parties remain free to press their admissibility arguments on appeal, the same as they did in the trial court.' So, your honor, this court can evaluate the objections itself, even if there wasn't a formal ruling."

You await the court's compliment on your preparedness.

"Counsel, with all due respect to our colleagues in the First District, *Ann M.* is crystal clear Supreme Court authority. You've got to get a ruling. Without a ruling, the objection is waived. Now let's talk about that October 15 letter."

Your client is really, *really* unhappy. So are your partners when the client decides it's time to look elsewhere.

Pure fiction? Hardly. True, such an extended sequence of mishaps is pretty unlikely — at some point a realistic or sympathetic court will probably decide that you've done as much as you need to do to preserve your objections, and it will reach the merits. But as to the governing rules, the Court of Appeal was right both times.

The General Rule: Lack of a Ruling Waives the Objection

At first blush, *Ann M.* might seem like an anomaly. Since review of summary judgments and summary adjudications is de novo, *AARTS Productions, Inc. v. Crocker National Bank*, 179 Cal. App. 3d 1061, 1064-65 (1986), why should it matter how the trial court ruled? But the fact is that *Ann M.* — explicit Supreme Court authority — says that it does. And far from being an anomaly, *Ann M.* is only one of many decisions that say the same thing. (See below.) One of the cases *Ann M.* cites, *Haskell v. Carli*, 195 Cal. App. 3d 124 (1987), discusses the subject in detail and has been repeatedly cited with approval by both the Supreme Court and the courts of appeal. There, the court of appeal reversed a summary judgment in part on the basis of evidence to which the moving party had properly objected, because the party waived the objection by not obtaining a ruling on it. Undertaking a detailed analysis of the summary judgment law, the court held that "[f]ailure of counsel to secure such a ruling [*i.e.*, a ruling on the objections] waives the objection." *Id.* at 129. Observing that "the waiver rules did not apply to summary judgment proceedings prior to the 1980 amendment of Code of Civil Procedure, section 437c," *Id.*, the court noted two important changes:

> [S]ection 437c, subdivision (b), now provides "[evidentiary] objections not made either in writing or orally at the hearing shall be deemed waived." Section 437c, subdivision (c), further sets forth that the trial court must consider all evidence unless an objection has been raised and sustained: "In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained...."

Id. at 129-30; *see Golden West Baseball Co. v. Talley*, 232 Cal. App. 3d 1294, 1301, n.4 (1991) (same). (Note that the 1990 amendment changed the language of subdivision (b) to eliminate the phrase "either in writing or orally.")

This is not a new concept — getting a ruling has historically been essential to preserving an evidentiary objection. *E.g., Fibreboard Paper Products Corp. v. East Bay Union of Machinists*, 227 Cal. App. 2d 675, 698 (1964) (objection during trial; "Counsel for defendants did not request a ruling nor did he press his objection when the offer was subsequently renewed. Under the circumstances the objection was abandoned and waived."). But the summary judgment statute makes the common-law principle explicit: Since under subdivision (b) the court *must* consider evidence *unless* it has sustained an objection, and since the objection can't have been sustained unless the trial court actually ruled, without a ruling there's no basis for arguing that the trial court should not have considered the evidence. The result: Inadmissible evidence may defeat your client's position. Justice Mosk put it succinctly in *People v. Rowland*, 4 Cal. 4th 238, 259 (1992), discussing a trial objection:

No ruling was made below. Accordingly, no review can be conducted here. "[T]he absence of an adverse ruling precludes any appellate challenge." [Citation.] In other words, when, as here, the defendant does not secure a ruling, he does not preserve the point. That is the rule. No exception is available.

Biljac and its Progeny: An Escape?

The *Biljac* decision does appear to permit a trial court to decline to rule on specific evidentiary objections and to simply disregard inadmissible evidence in determining whether to grant or deny a summary judgment motion, without creating a waiver of objections. In *Biljac*, "[p]laintiffs filed voluminous evidentiary objections and a request that the court give written rulings on all objections." *Biljac Associates*, 218 Cal. App. 3d at 1419. The trial judge's unsurprising reaction was that "[i]t would be a horrendous, incredibly time-consuming task that I think would serve very little useful purpose." *Id.* at 1419, n.3. Accordingly, he concluded, "I am going to disregard all those portions of the evidence

that I consider to be incompetent and inadmissible." *Id.* As noted above, the Court of Appeal concluded that because appellate courts review a summary judgment de novo, "the parties remain free to press their admissibility [of evidence] arguments on appeal" when the trial judge declines to specifically rule on evidentiary objections. *Id.*

Division Two of the Court of Appeal in San Francisco has adopted the *Biljac* approach. In *Gatton v. A. P. Green Services, Inc.*, 64 Cal. App. 4th 688, 692 (1998), the same Court of Appeal division that issued *Biljac* eight years earlier discussed the concept of an "implicit" sustaining of an evidentiary objection to deposition testimony:

> Summary judgment contemplates the use of deposition transcripts (§ 437c, subd. (b); *Villa v. McFerren* (1995) 35 Cal.App.4th 733, 749 [41 Cal.Rptr.2d 719]) subject, however, to admissibility objections made and sustained by the court (§ 437c, subd. (c)). Green objected to the Woodrow deposition transcript as inadmissible hearsay, and the court implicitly sustained the objection. We independently review the deposition's admissibility (*Biljac Associates v. First Interstate Bank* (1990) 218 Cal.App.3d 1410, 1419-1420 [267 Cal.Rptr. 819]) and the legal effect of facts properly presented (*Parsons v. Crown Disposal Co.* [(1997)] 15 Cal.4th 456, 464).

Gatton, with its references to an implicit order sustaining an objection to a portion of a deposition transcript and the de novo standard of review for summary judgment rulings, appears to be consistent with the *Biljac* analysis.

But if *Biljac* and *Gatton* really do stand for the proposition that failing to obtain a ruling on an evidentiary objection does not waive the objection on appeal, they are directly at odds with a veritable legion of cases dating back well over a century. In addition to the decisions cited above, *Ann M., Haskell, Golden West Baseball Co., Fibreboard Paper* and *Rowland* and the venerable decisions in *People v. Stanford*, 43 Cal. 29, 32 (1872) and People v. Westlake, 62 Cal. 303, 309 (1882), overruled on another ground by *People v. Conkling*, 111 Cal. 616 (1896), these include cases involving both trial objections, *People v. McPeters*, 2 Cal. 4th 1148, 1179 (1992); *Goodale v. Thorn*, 199 Cal. 307, 315 (1926); *Campbell v. Genshlea*, 180 Cal. 213, 220 (1919); *Smith v. Smith*,163 Cal. 630, 631 (1912); *People v. Staver*, 115 Cal. App. 2d 711, 723 (1953); *People v. Pratt*, 77 Cal. App. 2d 571, 578 (1947); *People v. Rhodes*, 212 Cal. App. 3d 541, 554 (1989), and objections raised in connection with summary judgment and other motions, *Valenzuela v. GAB Business Services*,__ Cal. App. 4th __, 99 Daily Journal DAR 3983, 3984 n.6 (Apr. 30, 1999); *Laird v. Capital Cities/ABC, Inc.*, 68 Cal. App. 4th 727, 736 (1998); *Cheyanna M. v. A. C. Nielsen Co.*, 66 Cal. App. 4th 855, 858-59, fn.2 (1998); *Stevenson v. Baum*, 65 Cal. App. 4th 159, 163 (1998); *California State Electronics Assn. v. Zeos Internat. Ltd.*, 41 Cal. App. 4th 1270, 1275 n.4 (1996); *Hagen v. Hickenbottom*, 41 Cal. App. 4th 168, 175 (1995); *Jane D. v. Ordinary Mutual*, 32 Cal. App. 4th 643, 654 n.2 (1995); *Knight v. City of Capitola*, 4 Cal. App. 4th 918, 924 n.2 (1992); *Ramsey v. City of Lake Elsinore*, 220 Cal. App. 3d 1530, 1540 (1990); *Howell v. State Farm Fire & Casualty Co.*, 218 Cal. App. 3d 1446, 1459 n.9 (1990); *Imperial Casualty & Indemnity Co. v. Sogomonian*, 198 Cal. App. 3d 169, 178 n.7 (1988); *People v. Obie*, 41 Cal. App. 3d 541, 554 (1974), disapproved on another ground by *People v. Rollo*, 20 Cal. 3d 109, 120 n.4 (1977).

Despite this overwhelming authority, only one Court of Appeal opinion has explicitly addressed the *Ann M.* requirement where the trial court made a *Biljac*-type of ruling. In *Laird*, 68 Cal. App. 4th 727, the trial court ruled, "The objections to Plaintiff's declaration, where inconsistent with the deposition testimony, are sustained. Other than this specific ruling, the court has relied only on admissible evidence." *Id.* at 736. After criticizing both sides for failing to "deal adequately" with the trial court's evidentiary rulings, *id.*, the Third District, albeit without citing the decision,

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rejected *Biljac's* rationale and created a middle-road approach. It concluded that the trial court's silence on certain objections had to be construed as an implied *overruling* of them:

> Cap Cities appears to argue, contrary to the clear holding of our Supreme Court, that this court may rule on those of its objections which the trial court did not expressly sustain. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670, fn. 1, 863 P.2d 207.) The trial court's statement that it had considered only admissible evidence was not an implied ruling sustaining unspecified evidentiary objections. On the contrary, *Ann M., supra*, teaches that we must take this statement as an implied overruling of any objection not specifically sustained. Thus we must deem the substance of paragraphs 2 through 4 of Laird's declaration, as to which the trial court did not expressly rule, admissible and may not consider Cap Cities' renewed objections thereto.

Although *Laird* seems more in line with *Ann M.* and the many other decisions cited above — and directly in conflict with Biljac and *Gatton* — it creates problems of its own. An "implied overruling" is a ruling nonetheless. If the trial court *should* have sustained an objection, then a party should be able to challenge the "implied overruling" on appeal. That result is not consistent with the *waiver* of the objection required by *Ann M.*

Cap Cities was lucky in *Laird* — despite the language quoted above, the Court of Appeal ultimately affirmed Cap Cities' summary judgment. But *Laird* remains an unmistakable warning to law and motion practitioners who fail to secure evidentiary rulings: They risk reversal in the later appeal when the reviewing court considers otherwise inadmissible evidence.

What Counsel Can Do

Smart evidence. The place to start avoiding this problem isn't actually with the objections, but with the evidence. If lawyers paid more attention to the rules of evidence in framing declarations, their opponents would be less tempted to object at every turn, and the whole process would become more focused and meaningful.

Smart objections. Our example above is probably not too far from the truth: A junior lawyer assembles the objections, which a senior lawyer then hurriedly reviews for the single purpose of being sure the junior lawyer covered everything. Given the junior lawyer's likely fear of leaving anything to chance, he or she has probably been extravagantly over-inclusive. But drafting intelligent objections is an art; it takes an experienced lawyer's hand, or at least close supervision, not only to make the judgment of what is worth objecting to but also to make the right objections. Shed the attitude that it can't hurt to be over-inclusive; it can be. One reason you don't object to every objectionable piece of evidence at trial is that a lot of it just doesn't matter. Don't do it in law and motion matters either.

Request a ruling. The judge may not welcome this, but if you've made smart objections you have a lot more credibility and you've made a lot less work for the judge — who is also more likely to have considered your objections already. Be sure there's a reporter, and be sure your request for a ruling gets on the record. If the judge refuses, explain your reasons and cite *Ann M.* At the very least you'll make a record that may persuade the Court of Appeal to excuse the absence of a ruling.

Don't rely on Biljac. Biljac can't be squared with controlling Supreme Court authority or with the summary judgment statute. The fact that several cases have followed Biljac doesn't mean the court of appeal will do it in your case. The correct answer to the question posed above — "I'm only going to consider admissible evidence. Is that good enough for you?" — is this: "Your honor, I'm concerned that the court of appeal may not consider that an adequate ruling." Again, you won't make the judge happy and you

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probably won't persuade the judge to rule, but by this point you've probably done all you can at oral argument. Of course, if you've done your job well by filing narrowly focused objections and you understand the case well enough to know what really matters, another response to the judge's question could be, "Your honor, I'd like a ruling on all of our objections, but I'm most concerned that the record be clear with respect to the October 15 letter."

Follow up. If you still haven't yet gotten what you feel you need, try to have the statement of reasons, Cal. Code Civ. Proc. § 437c(g), include rulings on the objections. File objections to the form of that order if your opposing counsel refuses to include rulings. File a supplemental pleading that reminds the court to rule on the objections, or write a letter to the court (although sometimes letters like this don't get filed). There are appellate justices who faithfully apply *Ann M.* but who also believe that if counsel requests a ruling on evidentiary objections at the summary judgment hearing or in writing afterwards, the objections are preserved.

What Should Judges Do?

Trial judges universally agree that lengthy sets of evidentiary objections are rarely necessary and that the parties who file them create an impossible situation, particularly in busy law and motion courts. Experienced and dedicated judges, juggling heavy calendars while they try to find a modicum of time to be a parent or a spouse, will candidly admit that they simply do not have the time or even the strength to rule on hundreds of objections. These are the sincere expressions of many judges and they reflect a real problem.

But there are several things judges need to keep in mind.

1. Most importantly, there is no more fundamental duty than the duty to rule in an appropriate manner when litigants have submitted matters for disposition. Litigants come to a judge for a ruling; they are not looking for an opportunity to have summary judgment reversed two or three years later because of a failure to rule on objections. Code of Civil Procedure section 170 states, "A judge has a duty to decide any proceeding in which he or she is not disqualified." Similarly, canon 3(B)(1) of the California Code of Judicial Ethics states, "A judge shall...decide all matters assigned to the judge except those in which he or she is disqualified." Among the matters submitted to a judge for decision in summary judgment litigation are questions of admissibility of evidence. Cal. Code Civ. Proc. § 473c(b) & (d); Cal. R. Ct. 343-45. In the final analysis, every evidentiary objection triggers a duty premised on the judicial obligation to see that the laws of the State of California are faithfully executed. Discharging this obligation may be wearying for the trial judge, but it is nonetheless something that must be done.

The failure to rule on specific objections can end up costing the parties tens of thousands of dollars in legal expenses just to have a reversal of a summary judgment that would have been affirmed had evidentiary rulings been made. Putting the parties through such a needless exercise is antithetical to a fundamental purpose of a judicial system, which is to resolve rather than prolong disputes.

2. Many judges believe that the duty to rule does not extend to evidence that does not affect the ultimate decision. For example, if two sentences in a declaration opposing summary judgment are inadmissible but the decision to grant summary judgment is based entirely on discovery admissions, the declaration doesn't need to figure in the decision at all. So why rule? There is a simple, solid reason: The Court of Appeal may not see the case the same way. Suppose it concludes that the discovery admissions were not, in fact, sufficient to warrant summary judgment. In that case, the two apparently irrelevant sentences in the declaration might end up becoming the turning point for the decision — and without a ruling on the objection, they could compel reversal despite their inadmissibility. This kind of situation presents issues of discretion and degree. While truly irrelevant evidence should not trigger the duty to rule on objections, the judge must have a high degree of confidence about the evidence's relevance before subjecting the parties to the risks of declining to rule.

3. Since the court can direct the prevailing party to prepare a proposed statement of grounds for the ruling under Code of Civil Procedure section 437c(g), the court can also direct that party to include appropriate evidentiary rulings. This is particularly true where the court has stated its rulings from the bench, and it is essential if there was no court reporter.

4. The waiver-of-objections rule is not holy writ. *Ann M.* correctly states the law that has developed over the last 125 years, but no historical imperative requires its continuance. Judges (and lawyers, too) can urge the Judicial Council to adopt responsible amendments to the California Rules of Court that can reduce the risk of reversals based merely on the trial judge's reliance on *Biljac* or failure to rule on objections. For example, it would make sense to amend the California Rules of Court to permit an appellate court to remand the cause for a short period, say 30 days, to allow the trial court to rule on crucial evidentiary objections; perhaps the objections could be deemed sustained (or overruled) if the trial court failed to act within that limited time. Another possible rule change would be to permit appellate review of unruled-upon objections in the summary judgment context where the evidence would be inadmissible under any possible state of the facts. For example, if a declaration contains evidence that is so undeniably hearsay that it would be an abuse of discretion to admit it over objection, then the appellate court should be able to deem the evidence excluded even though the trial court failed to rule on the objection.

Another possibility would be to create a presumption that evidentiary objections are deemed to have been granted if there is no ruling or if the trial court follows the *Biljac* approach (*i.e.*, stating that it will only consider admissible evidence). Such a presumption might be at odds with what the trial court actually did; and, like all presumptions, it would substitute an assumption about what occurred for what actually may have been the judge's view of the evidentiary objections. But this is not really different from what *Ann M.* (and the body of law of which it is a part) does: *Ann M.* simply creates the opposite presumption, that the trial court did not exclude challenged evidence. Judicial silence in the face of objections and the application of waiver rules effectively require the Court of Appeal to presume the trial court considered the challenged evidence when it granted the summary judgment motion. But in most cases, a rule that presumed the objections were *sustained* would be more realistic, because it could avoid the a reversal based on evidence that the trial judge in fact disregarded because it was inadmissible.

Another potential solution would be to limit the number of evidentiary objections without a showing of good cause. This is not as unreasonable as it may seem at first blush. Within the past 15 years, local court rules and later the California Rules of Court set limits on the number of pages in summary judgment points and authorities. Cal. R. Ct. 313(d). Fifteen years ago, no such rules existed and the suggestion of page limits was met with considerable disdain and skepticism. Yet page limits on points and authorities are now an accepted fact of litigation life. In a similar vein, setting a limit on the number of objections will force lawyers to focus their objections on the crucial evidence, and lawyers will no longer feel obligated to object to everything. And, most crucial, law and motion judges will not be overwhelmed with an unreasonably extensive number of objections.

All of these proposals have problems and no doubt there are other sensible approaches to the inability or failure of law and

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motion judges to rule on evidentiary objections in summary judgment litigation. However, most judges and sophisticated litigators agree that the present system — which puts what some believe are impossible demands on the judiciary and creates the risk of unnecessary reversals because of inadvertent or deliberate refusals to rule on evidentiary objections — could benefit from reasonable modification by the Judicial Council. Some of the rule changes suggested in this article, particularly the concept of an appellate presumption that objections were sustained, are problematic; but they can serve as a springboard for an intelligent Judicial Council discussion aimed at making the *Ann M.* approach more helpful to the truth determination process. Likewise, both judges and lawyers can recommend that the Legislature amend Code of Civil Procedure section 437c to address this waiver problem.

One final comment is in order concerning potential changes in the law in this area. Summary judgment motions aren't the same thing as a trial. Objections at trial are usually made on the spur of the moment, and a lawyer may interpose an objection that moments later appears not to have been such a good idea. Sometimes, the argument of the non-objecting attorney or a question by the trial judge makes clear there was no merit to the objection. By contrast, evidentiary objections in the summary judgment context are almost always in writing pursuant to rule 345 of the California Rules of Court. Although many objections are not well taken, they are the result of preparation and — despite frequent appearances to the contrary — some thought. More to the point, the use of extensive evidentiary objections is a widespread practice. It is very difficult for a judge hearing motions to rule effectively on perhaps dozens of evidentiary objections, some of little consequence, in contrast to the typical single objection to a specific question during trial. Hence, it may make sense to have a different waiver rule for summary judgment litigation than for a trial. But such a salutary change must come from the Judicial Council or the Legislature. At this point, the decisional authority overwhelmingly requires waiver of an objection on appeal in the absence of a specific ruling.

Regardless of the solution to the current problem, the debate must begin now. Litigants in California courts are entitled to reasonable rules for insuring just rulings in summary judgment litigation now, not years from now.

How much does all of this matter? Our scenarios are admittedly worst-case. At least in the reported decisions, application of *Ann M.* rarely seems to have affected the outcome. But this small minority of decisions is no means a representative sample of appellate outcomes. In the vast body of unpublished decisions, *Ann M.* can and often does control the result.

This untoward result is relatively easy to avoid. If you do your job going into the motion, it's a lot more likely that the judge will do his or her job coming out.

— Hon. Paul Turner and Robin Meadow

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