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Media Coverage of Court Proceedings: Lights, Camera...Action or Distraction?

Picture this: You are days away from beginning a major trial. A media coverage request has been filed in the trial court asking for permission to televise the trial. Is your 15 minutes of fame about to commence? Will coverage in some way skew the jury process? If you represent plaintiffs, is this a major marketing opportunity, or does it presage embarrassment if this is not your strongest case? If you represent the defendant, will even a stunning defense verdict be offset by negative publicity about your client's product or service? Can you and should you endorse the request, oppose it, or remain neutral? What are the implications for you and your client if the coverage request is granted? Will colleagues back in the office watching the coverage besiege you with second-guessing tactical suggestions? All good questions. The answers and some related practice tips follow, based on recent coverage during trials in the Alameda County Superior Court Complex Litigation Departments.



Hon. Robert B. Freedman

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Disclosing Legal Strategy to Outside Auditors

Outside auditors frequently demand access to documents prepared by a company's counsel, placing companies in the difficult position of possibly waiving attorney-client and work-product protections for confidential legal opinions in order to obtain an unqualified audit opinion. For instance, auditors often demand disclosure of information gathered and conclusions reached during an internal investigation. They also routinely seek information about the legal analysis of company counsel in evaluating the sufficiency of a company's litigation reserves. Although disclosing attorney advice to outside auditors will generally result in a waiver of the attorney-client privilege, the work-product doctrine may still shield against discovery. Two recent federal circuit court decisions — *Textron* and *Deloitte* — illustrate the challenges involved in maintaining work-product protection for information disclosed to outside auditors.



Carol Lynn Thompson

The Work-Product Doctrine in Federal Court

The Supreme Court established the work-product doctrine in *Hickman v. Taylor*, 329 U.S. 495 (1947) and it has since been codified at Rule 26(b)(3) of the Federal Rules of Civil Procedure. The doctrine generally protects "documents and tangible things that are prepared in anticipation of litigation." Fed. R. Civ. P. 26(b)(3)(a). Courts recognize two types of attorney work product: fact work product and opinion work product. Fact work product is discoverable upon a showing of "substantial need" and an inability to procure equivalent information without "undue hardship." *Id.* In contrast, opinion work product — reflecting

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the mental impressions of an attorney — has been described as “virtually undiscoverable.” See, e.g., *United States v. Deloitte*, 610 F3d 126, 135 (D.C. Cir. 2010). In contrast to the attorney-client privilege, disclosure to a third party generally does not waive work-product protection unless the third party’s interests are potentially adverse to the client’s interests in litigation. Where documents disclosed to outside auditors have been discoverable, it is often because the documents did not qualify for work-product protection in the first place, and not because disclosure effected a waiver.

United States v. Textron

In *U.S. v. Textron*, 577 F3d 21 (1st Cir. 2009), the First Circuit sat *en banc* to decide whether work-product protection extended to Textron’s tax-accrual work papers used to calculate the reserves necessary to cover its contingent tax liabilities. The work papers included spreadsheets created by in-house attorneys listing disputable items on Textron’s tax returns, the potential amount in controversy, and the odds of a successful challenge by the IRS. Before certifying the company’s financial statements, outside auditors reviewed the work papers to assess whether the reserves were adequate. Because the work papers assessed litigation risk, Textron argued that they were protected work product. The government argued that



Naomi Igra

Textron created the work papers for the business purpose of obtaining a clean audit and so did not qualify for protection. In a 3-2 decision, a majority of the court agreed with the government. In so doing, the dissent argued, the majority unsettled the foundation of First Circuit law on dual-purpose work product.

A majority of circuits approach dual-purpose work product by asking whether the work product was created “because of” litigation; if so, protection applies even if the work product *also* is used for non-litigation purposes. A minority of courts apply a “primary motivating purpose” test; if the work product was created for more than one purpose, the court will extend work-product protection only if litigation was the primary motivating purpose for its creation.

Until *Textron*, it seemed clear that the First Circuit applied the broader “because of” test for dual-purpose work product. Although the majority purported to follow circuit court precedent, the court’s analysis did not focus on whether the tax-accrual work papers were created “because of” litigation, but whether the work papers were “prepared for” or intended “for use” in litigation. *Id.* at 29. The majority also was concerned with the impact on IRS enforcement if the work papers were protected. *Id.* at 31. Ultimately, the court concluded that the tax-accrual work papers did not qualify as work product. Because the majority determined that the documents did not qualify as

work product, *Textron* did not address the question of whether disclosing the information to the outside auditors would have effected a waiver.

The dissent in *Textron* fiercely criticized the majority’s analysis as “blatantly contrary” to First Circuit law and “simply stunning in its failure to even acknowledge” that it was introducing a new standard for work-product protection. *Id.* at 34. According to the dissent, the work papers reflect precisely the sort of mental impressions that the Supreme Court sought to protect in announcing the work-product doctrine. Without confidence that their assessments would be protected, the dissent argued, attorneys will be constrained in their ability to discuss litigation risks associated with their client’s business decisions. The dissent predicted that the majority’s decision “will be viewed as a dangerous aberration in the law,” and announced that “the time is ripe for the Supreme Court to intervene and set the circuits straight on this issue which is essential to the daily practice of litigators across the country.” *Id.* at 43. Nevertheless, the Supreme Court declined to grant *certiorari*.

United States v. Deloitte

In *United States v. Deloitte, LLP*, 610 F3d 129 (D.C. Cir. 2010), the D.C. Circuit reviewed a district court order refusing to compel the production of three documents from Deloitte & Touche LLP (“Deloitte”), the outside auditor for Dow Chemical (“Dow”), in ongoing tax litigation between Dow and the United States government. The documents involved were: (1) a memorandum prepared by a Deloitte auditor summarizing a meeting with Dow employees and Dow’s outside counsel discussing possible tax litigation and how to account for such litigation; (2) a memorandum and flow-chart prepared jointly by Dow’s in-house attorney and accountant; and (3) a tax opinion prepared by Dow’s outside counsel. According to Dow, Dow only shared the latter two documents with Deloitte because Deloitte had refused to provide an unqualified audit opinion if it was not granted access to such documents. The District Court denied the government’s motion to compel on the grounds that the three documents were subject to work-product protection.

On appeal, the government argued that the Deloitte memorandum could not constitute work product because it was neither prepared by Dow or its representative, nor generated in anticipation of litigation, but rather was created as part of the routine audit process. Rule 26(b)(3) expressly protects only those documents “prepared by or for another party or its representative.” The government argued that Deloitte could not be Dow’s representative because auditors owe “ultimate allegiance” not to the company but to its “creditors and stockholders, as well as the investing public,” citing *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984). The D.C. Circuit, however, found that Rule 26(b)(3) does not provide an “exhaustive definition of what constitutes work product” and that under *Hickman*, the question was “not who created the document or how they are related to the party asserting work-product protection,” but whether the document contained “the thoughts and opinions of counsel developed in anti-

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pation of litigation.” *Deloitte*, 610 F3d at 136. The fact that Deloitte prepared the document did not “exclude the possibility that it contains Dow’s work product.” *Id.*

In evaluating whether the memorandum was prepared “in anticipation of litigation,” the D.C. Circuit stated that “like most circuits, we apply the ‘because of’ test, asking whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.” *Id.* at 137. The government argued that the First Circuit’s *Textron* decision and the Fifth Circuit’s decision in *United States v. El Paso Co.*, 682 F2d 530 (5th Cir. 1982) established that “when a document is created as part of an independent audit, as the Deloitte Memorandum was, its sole function is to facilitate that audit, which means that it was not prepared in anticipation of litigation.” *Deloitte*, 610 F3d at 138. The D.C. Circuit, however, found that this approach erroneously focused on the “function” of the document divorced from its “content.” *Id.* at 137. The court further distinguished *Textron* and *El Paso*, noting that *El Paso* was decided under the “primary motivating purpose” test, and that the dissent in *Textron* “made a strong argument” that the majority, while apparently applying the because of test, “actually asked whether the documents were ‘prepared for use in possible litigation,’ a much more exacting standard.” *Id.* The D.C. Circuit concluded that “material developed in anticipation of litigation can be incorporated into a document produced during an audit without ceasing to be work product.” *Id.*

As to the two remaining documents created by Dow, the government conceded that they were work product, but argued that disclosing that work product to the company’s independent auditor constituted a waiver. The D.C. Circuit noted that the test for waiver was whether there had been a voluntary disclosure of attorney work product to an adversary or a conduit to an adversary. In rejecting the government’s argument, the D.C. Circuit observed that an independent auditor, by definition, cannot be the client’s adversary since even “the threat of litigation between an independent auditor and its client can compromise the auditor’s independence and necessitate withdrawal.” *Id.* at 140. Moreover, the relevant inquiry was limited to “whether Deloitte could be Dow’s adversary in the sort of litigation the Dow Documents address.” *Id.* Because in preparing those documents Dow anticipated a “dispute with the IRS, not a dispute with Deloitte,” the answer was “no.” *Id.* The D.C. Circuit also found that Deloitte was not a conduit to Dow’s adversaries and that Dow could reasonably expect it to maintain confidentiality, noting that auditors have an obligation under AICPA standards not to disclose confidential client information. Moreover, as a policy matter, the court recognized that “independent auditors have significant leverage over the companies whose finances they audit. An auditor can essentially compel disclosure by refusing to provide an unqualified opinion otherwise.” *Id.* at 143. Thus, finding a

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Decoding Electronic Data During Deposition

Suppose your adversary has just produced a disk of data that may hold the key to winning your case. Perhaps it consists of data extracted from the company’s accounting records, or perhaps it shows results of testing on a prototype product. Or, as sometimes happens, your opponent’s expert may produce from his working files indecipherable data that requires specialized software to access.

You notice a deposition of the witness who can explain the data. But how do you prepare for and conduct the deposition to get the answers you need in a form you can use?

If the data can be printed in recognizable pages, for example as bates-labeled “.pdf” or “.tiff” images, preparing deposition exhibits is easy. Time-honored techniques for deposing the witness and preparing for the deposition apply. But if the data is in a form not susceptible to easy extraction onto the printed page, you need a new approach. This article suggests several techniques. Which is best for a particular case depends on the complexity of the task at hand.



Alison Tucher

Where You Can Find the Data You Need Before the Deposition

Suppose you or your expert has the software necessary to read the data and can locate what you need in the produced files. Extracting the data and presenting it on a printed page prepared before the deposition may not be difficult, but you will need to anticipate the witness’s response that he or she does not recognize your exhibits.

First, figure out what exhibits you need. Where an entire dataset is relevant, but too voluminous to introduce in its entirety, you might print a sample of the data. As examining attorney you can then use this sample, or multiple samples, to ask the deponent about the structure and content of the database. The deponent can be asked to explain, for example, how the results of product testing on a printed exhibit were generated and recorded, and how the rest of the data is similar to, or different from, the sample captured in the exhibit.

Sometimes separate exhibits should be prepared to capture the data and the equations used to derive the data. For example, if the metadata in a spreadsheet contains formulas that are important, you might print one copy of the spreadsheet showing the formulas themselves and a second copy showing the values they generated. See The Sedona Conference, *The Sedona Con-*

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ference Commentary on ESI Evidence & Admissibility 19 (March 2008).

Once you know the exhibits you need, find an appropriate person to prepare them. You may need that person to serve as a witness later, authenticating the exhibits if the deponent does not. Properly authenticated, extractions and summary charts are admissible to prove the contents of the voluminous dataset from which they are drawn. See Fed. R. Evid. 1006 (summaries); Cal. Evid. Code § 1521 (secondary evidence rule).

The person preparing the exhibits should carefully record the steps taken to create each exhibit. For example, what software was used to access the data? Where in the dataset was the printed data found? It is also helpful if the extracted data includes as many column headings, row numbers, or other signposts as possible, to assist the deponent in recognizing what has been printed.

During the deposition, if the deponent is unable or unwilling to authenticate the exhibits, the examining lawyer can represent to the deponent how each exhibit was prepared. The testimony elicited about the data will then be relevant and likely admissible at trial or on summary judgment, provided that the exhibits are separately authenticated.

In certain courts such exhibits may be self-authenticating. In California state courts, “[a] printed representation of computer information...is presumed to be an accurate representation” of the computer information it purports to represent. Cal. Evid. Code § 1552. If the accuracy of an exhibit is challenged, or in a court where one does not have the benefit of this presumption, the testimony of the person who prepared the exhibit can authenticate it.

“Courts considering the admissibility of electronic evidence frequently have acknowledged that it may be authenticated by a witness with personal knowledge.” *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 545 (D. Md. 2007) (collecting cases). The person preparing exhibits in cooperation with the examining attorney has personal knowledge that the exhibits authentically capture the data contained in the dataset from which the exhibits are drawn. Chain of custody or other evidence may also be necessary to establish that this larger dataset is authentic. For example, “hash values” function as an electronic bates stamp that can be used to authenticate electronic evidence. See *Lorraine*, 241 F.R.D. at 546-47.

One final caution: since depositions can be unpredictable, it may be prudent for the exhibit preparer to be on call during the deposition, with access to the data. That way, if the deponent testifies that data not extracted in advance is important, exhibits can be generated on the fly. Where such surprises are a serious concern, it may be worth planning in advance to have access to the data in the deposition room itself.

If You Need Real-Time Access to the Data During Deposition

Real-time access to the data during a deposition is not

difficult to achieve if you have the hardware and software necessary to access the data in the deposition room. For example, a laptop running Excel allows the examining attorney to illustrate questions about an over-sized spreadsheet that the deponent produced electronically.

To facilitate real-time access, it is helpful if the image on the monitor can be projected on a large screen, so that the witness and the attorneys are all viewing the same information. The examining attorney can then illustrate his or her questions and the witness's testimony by displaying the relevant data on the screen. For example, if the questions go to a spreadsheet that captures product-by-product sales volumes on a quarterly basis over a period of years, the data may not print on a manageable page size, but the examining attorney can display the relevant portion of the spreadsheet on the screen during the deposition.

One challenge, where the examination concerns electronic data accessed in real-time, is to record the proceedings accurately. A simple solution is for the examining attorney to narrate carefully what he or she is displaying on the screen (e.g., “Showing you columns A, G, and H of the first spreadsheet in file xxx, please answer the following...”). It is also helpful to have at the ready software that can print a screenshot, so that an image can be printed, labeled with an exhibit number, and authenticated by the witness once it has been identified as significant during the examination.

The Sedona Conference suggests an alternative method for capturing electronic data displayed during a deposition: “a second video camera can be used to record the ESI appearing on a monitor while the first camera records the deponent.” *The Sedona Conference Commentary on ESI Evidence & Admissibility* at 18. Because this technique requires two video cameras, it may be more expensive and the two cameras will have to be carefully synchronized, but in a complex examination over visual data it may also be less disruptive of the flow of cross-examination.

These approaches work where the examining attorney has the necessary hardware and software, and real-time access to the data is possible even if the deponent has to supply it. If the data can only be read with specialized software that the examining attorney does not have or know how to operate, familiar discovery tools must be employed in new ways.

If You Need the Deponent to Supply Real-Time Access to the Data During Deposition

The subpoena *duces tecum* and the “show me” question are conventional discovery tools that can be put to use in examining a witness about obscure electronic data. If you need the deponent to provide real-time access to the data in order to conduct a proper deposition, you can subpoena the deponent to bring the necessary hardware and software and then ask the deponent to operate it during the deposition.

A subpoena *duces tecum* requires a witness to bring to the deposition specified items. See, e.g., Cal. Code Civ.

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Proc. § 1987.5; Fed. R. Civ. P. 45(a)(1)(C). The language of the California statute is broad. It requires “the production of matters and things at the taking of a deposition.” Cal. Code Civ. Proc. § 1987.5; *see also id.* § 2025.220(a)(4) (deposition notice must specify “any materials or category of materials to be produced by the deponent”). Hardware and software necessary to access data a deponent has produced are items that fit easily within this broad description.

If the data is accessible from the deponent’s laptop, arranging the deposition is straight-forward. The deponent can bring to the deposition his or her laptop with the appropriate software loaded. With current technology, a laptop and an internet connection may even provide access to necessary software stored on a remote server. As when the examining attorney provides the laptop, it will aid examination if the laptop is hooked up to a projector so that everybody in the examination room can see what displays on the monitor.

In an extreme case, physical presence in the deponent’s facility may be the only way to get access to hardware and software capable of reading the data. You may be dealing with information that for security reasons is not accessible remotely, or with a legacy system where an old machine on site is the only one configured to read the data. If real-time access to this data is necessary, you may seek to conduct the deposition in the deponent’s building.

Should your opponent object, you may have grounds for a motion to compel. “If a deponent fails to answer any question or *to produce any document or tangible thing under the deponent’s control that is specified in the deposition notice or a deposition subpoena*, the party seeking discovery may move the court for an order compelling that answer or production.” Cal. Code Civ. Proc. § 2025.480(a) (emphasis added).

At least one federal court has confronted — and overruled — a party’s objection to a deposition notice of this kind. In *J.B. Hunt Transp., Inc. v. Adams*, 2007 U.S. Dist. LEXIS 17577, *6 (E.D. Mich. 2007), a Rule 30(b)(6) deponent was requested to “bring with him J.B. Hunt’s mainframe or the ability to access the mainframe at the time of the deposition.” When J.B. Hunt objected that “to bring the mainframe to a deposition is unduly burdensome,” the party noticing the deposition indicated its willingness “to hold the deposition at the place of the mainframe.” *Id.* at *6.

Based on this concession and because the information from the mainframe was indeed discoverable, the court denied J.B. Hunt’s motion for a protective order. *Id.* at *7. *See also* Dianne E. Barry, *A Matthew Bender Practice Guide: California E-Discovery and Evidence*, vol. 1-5, at 5A.29 (“Counsel May Take Deposition at Place Where System Can Be Demonstrated”). It decided that the intrusiveness of being required to host the deposition on-site was justified by the examining party’s need to obtain evidence that was not otherwise accessible. *J.B. Hunt* at *7.

Getting the deponent to bring the necessary hardware

and software may be only the first challenge. The examining attorney may also confront objections to questions requiring the deponent to manipulate the data during the deposition. But “show me” questions designed to elicit a non-verbal response from the deponent have long been allowed in examining witnesses.

For example, in *Emerson Elec. Co. v. Superior Court (Grayson)*, 16 Cal. 4th 1101, 1104 (1997), the California Supreme Court held that a deponent could be ordered in a videotaped deposition to show, as well as to tell, how his injury occurred. The plaintiff allegedly injured himself using a saw but during the deposition refused, at his counsel’s direction, to draw a diagram of the accident scene or to re-enact how the injury occurred. The Supreme Court held that this refusal was improper.

Requiring “nonverbal as well as verbal responses at a videotaped deposition...serves one of the legislative purposes of the discovery statutes: principally, to educate the parties concerning their claims and defenses so as to encourage settlements and to expedite and facilitate trial.” *Id.* at 1107. In light of this legislative purpose, a deponent who refuses to comply with an order compelling a non-verbal response during deposition can be sanctioned, including by the preclusion of evidence at trial. *Id.* at 1104.

The same principles apply to questions requiring a deponent to manipulate electronic data during deposition. Where the law requires a deponent, upon request, to draw a diagram or to re-enact his movements when using an allegedly defective product, by implication it also requires the deponent to comply with a request to open a computer file and direct the examining attorney to certain data in it. For example, an expert must comply with requests to show how he or she generated data and used it to reach discoverable opinions.

A Note on Getting Electronic Data Produced Before Deposition

The discussion above assumes that the party noticing the deposition has already received an authentic copy of the relevant dataset. If the data has not been produced or its authenticity is in doubt, other provisions of the rules apply.

Under California and federal rules, a party may request the production of Electronically Stored Information (ESI) and may request permission “to inspect, copy, test, or sample” it. *See* Fed. R. Civ. P. 34(a)(1), 45(a)(1)(C); Cal. Code Civ. Proc. § 1985.8, § 2031.010.

These provisions enable litigants to examine closely another’s ESI. They do not allow litigants to ask what the ESI means. Indeed, Rule 45 expressly acknowledges that someone subpoenaed to provide access to ESI “need not appear in person at the place of production or inspection unless also commanded to appear for a deposition...” Fed. R. Civ. P. 45(c)(2)(A). A deposition with access to ESI provides what an inspection without deposition does not.

Introducing a lengthy discussion of the admissibility of electronic evidence, one federal court sensibly

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observed: “considering the significant costs associated with discovery of ESI, it makes little sense to go to all the bother and expense to get electronic information only to have it excluded from evidence or rejected from consideration during summary judgment because the proponent cannot lay a sufficient foundation to get it admitted.” *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 538 (D. Md. 2007). It makes equally little sense for the value of electronic evidence to go unrealized because the data files proved unwieldy during cross-examination. If your adversary’s data makes your case, it will be because you planned ahead to secure the insights and admissions that only witness testimony can supply.

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waiver in such circumstances would “discourage companies from seeking legal advice and candidly disclosing that information to independent auditors.” *Id.*

Work-Product Protection in the Ninth Circuit

While the Ninth Circuit has not directly addressed the issue of whether disclosure to an outside auditor waives work-product protection, the Ninth Circuit applies the more liberal “because of” test — not the stricter “primary motivating purpose” test — in evaluating whether a document constitutes work product. *See United States v. Torf*, 357 F.3d 900, 907 (9th Cir. 2003). The Ninth Circuit likely would adopt the D.C. Circuit’s reasoning in *Deloitte* which arguably represents a more faithful application of the “because of” test.

Lower courts in the Ninth Circuit have hewn more closely to the analysis set forth by the D.C. Circuit in *Deloitte*. In *SEC v. Roberts*, 2008 U.S. Dist. LEXIS 64615 (N.D. Cal. Aug. 22, 2008), Judge Patel concluded that disclosure to an outside auditor did not waive work-product protection. In that case, a former McAfee executive sought interview notes from Howrey, LLP, the law firm hired by a Special Committee to conduct an internal investigation. There was no question that the notes were work product; the issue was whether disclosures to McAfee’s Board, government entities, and outside auditors effected a waiver. The court held that disclosure of information to the government or the full Board of Directors waived work-product protection because the Special Committee did not share a “common interest” with either. *Id.* at **16-17. In contrast, disclosures to outside auditors did not effect a waiver because “the Special Committee and the auditors have a common goal — correct past wrongdoings that occurred at McAfee — and a common body whose interests they represent — the shareholders of McAfee.” *Id.* at *32. The court explained that “its holding furthers the strong public policy of encouraging critical

self policing by corporations. Indeed, sanctioning a broad waiver here would have a chilling effect on the corporation’s efforts to root out and prevent corporate fraud and disclose the results as necessary to its auditors.” *Id.* at *31.

Similarly, in *In re JDS Uniphase Corp. Sec. Litig.*, 2006 U.S. Dist. LEXIS 76169, at *11 (N.D. Cal. Oct. 5, 2006), the plaintiff sought Board meeting minutes containing attorney opinions that had been disclosed to an outside auditor. Magistrate Judge LaPorte noted that while there appeared to be “a split as to whether disclosure to an outside auditor constitutes a waiver,” she was persuaded by those decisions finding against an automatic waiver. She then noted that the Ninth Circuit applies the “because of” litigation test and not the “primary motivating purpose test,” and after *in camera* review, determined that almost all of the material the defendant sought to protect qualified for work-product protection. *Id.* at **12-15.

Guidance for Clients in Disclosing Documents and Information to Outside Auditors

In light of the conflicting rulings in *Textron* and *Deloitte*, attorneys should advise their clients of the risks inherent in disclosing legal opinions to outside auditors, while recognizing that even after the attorney-client privilege is destroyed, the work-product doctrine might prevent the discovery of such documents by potential adversaries. When a company’s outside auditor demands confidential and sensitive legal documents, a company should consider undertaking the following measures to preserve work-product protection:

- Provide the outside auditors with only the precise information needed to obtain an audit opinion. Do not assume that the auditor needs to know everything about potential litigation or an internal investigation.
- Consider providing redacted excerpts of existing documents originally created in anticipation of litigation and labeled as confidential attorney work product, instead of preparing new materials solely for the auditor.
- Enter into an agreement making clear that the auditor may not share the company’s documents with other entities. A court may consider such an agreement evidence that the auditor will not disclose to a company’s adversaries.
- Request that the auditor maintain attorney work product in a separate file for the audit, and not among general audit work papers. The company also should request that the auditor not summarize the confidential work product in the audit work papers.
- Require the auditor to advise the company if a third party seeks disclosure of the material so that the company can seek a protective order.
- When providing support for litigation reserves, bear in mind that case-by-case litigation assessments are more likely to be protected work product than aggregated reserve information. *See, e.g., Simon v. G.D. Searle Co.*, 816 F.2d 397, 401-02 (8th Cir. 1987); *In re Pfizer Sec. Litig.*, 1993 U.S. LEXIS 18215, at **13-18 (S.D.N.Y. 1993).

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JAMES YOON

On PATENTS

Can your client be guilty of inducing infringement of a patent it did not know about? A recent Federal Circuit decision on appeal to the United States Supreme Court suggests that it might.

Traditionally, defendants in patent cases can often be placed into one of two categories: (1) alleged “direct” infringers and (2) alleged “indirect” infringers. An alleged direct infringer is someone who practices each element of the patent claim. An alleged indirect infringer is typically someone who supplies a key component (e.g., software, semiconductor chip, mechanical module) of the product that allegedly infringes the claim. One of the ways a plaintiff can prove that such a supplier indirectly infringes a patent claim is by showing that the supplier induced infringement of the plaintiff’s patent.

To prove induced infringement, a plaintiff must show that a supplier “knew or should have known” that its actions would induce others to directly infringe the patent. This knowledge requirement can be a difficult burden of proof for a plaintiff to overcome. In 2006, in the *DSU Medical* case, the Federal Circuit appeared to make it an insurmountable burden in many cases. *DSU Med. Corp. v. JMS Co., Ltd.*, 471 F3d 1293 (Fed. Cir. 2006). The Federal Circuit declared that the “requirement that the alleged infringer knew or should have known his actions would induce actual infringement necessarily includes the requirement that he or she knew of the patent.” *Id.* at 1304 (emphasis added). In other words, a plaintiff could not prove induced infringement absent a showing that the supplier company knew of the plaintiff’s patent at the time it sold the component to the alleged direct infringer. If the supplier was not aware of the patent, it could not be found to actively induce infringement of the patent.

The “bright line” rule of *DSU Medical* made it very easy to assess the merits (or lack thereof) of an induced infringement claim. Indeed, the rule appeared so clear that many patent litigators believed that induced infringement was not a viable theory of infringement in cases where the defendant first received notice of a patent through the filing of the complaint. This all changed in February 2010.

In February 2010, the Federal Circuit issued its decision in the *SEB S.A.* case where it declared that “a claim for inducement is viable even where the patentee has not produced direct evidence that the accused infringer actually knew of the patent-in-suit.” *SEB S.A. v. Montgomery Ward & Co., Inc.*, 594 F3d 1360, 1377 (Fed. Cir. 2010). The Federal Circuit further ruled that the “knowledge” requirement for induced infringement can be met by a showing that the defendant “deliberately disregarded a known risk that SEB had a protective patent.” *Id.* This “deliberate disregard” or “deliberate indifference” test in *SEB S.A.* appears to be a much lower bar than the “knowledge” test in *DSU Medical*. It allowed the plaintiff, in *SEB S.A.*, to meet its

burden by showing that (1) the defendant copied the plaintiff’s product; (2) the defendant was familiar with patents; and (3) the defendant understood that plaintiff was also “cognizant of patent rights” and, thus, should have known that the copied product was protected by patents. The *SEB S.A.* decision created enormous uncertainty in the law of induced infringement.

Many of the acts that supported a finding of “deliberate indifference” commonly occur in today’s highly competitive world. It is very common for companies to (1) reverse engineer or analyze their competitors’ products; (2) file patents to cover their own inventions; and (3) understand that their competitors are also filing their own patent applications to protect their products. Given this common situation, the *SEB S.A.* case appeared to open up a Pandora’s box of potential liability for suppliers. The standard practices and understandings of many companies would support a finding that companies met the “knowledge” requirement for induced infringement. As a result, the *SEB S.A.* case put companies in a “no win” scenario. In order to avoid a finding of “deliberate indifference” to a competitor’s patent, a supplier would arguably be required to do a patent search to establish — as articulated in the *SEB S.A.* decision — “that he actually believed that a patent covering the accused product did not exist.” Of course, if such a search were actually conducted, the search would provide the supplier with actual, affirmative knowledge of the competitor’s patents. In short, no search equals “deliberate disregard” of patent rights. Performance of a search establishes actual knowledge of the patents owned by a potential plaintiff.

Not surprisingly, faced with the new standard set forth in *SEB S.A.*, the losing party at the Federal Circuit filed a petition for *certiorari* with the United States Supreme Court. The petition asked the following questions:

Whether the legal standard for the state of mind element of a claim for actively inducing infringement under 35 U.S.C. 271(b) is “deliberate indifference of a known risk” that an infringement may occur, as the Court of Appeals for the Federal Circuit held, or “purposeful, culpable expression and conduct” to encourage an infringement...?

In October 2010, the United States Supreme Court granted *certiorari*. The case will be briefed and argued by early 2011 and decided by summer 2011. The Supreme Court’s decision on the inducement issue will have wide-ranging impact on how companies and lawyers conduct business in the future. If the *SEB S.A.* decision is affirmed, patent litigators, counselors and in-house attorneys will need to develop “best practices” to rebut potential claims of induced infringement from companies (and individuals) that have not yet provided the supplier with notice of their patents. Such practices could theoretically include “opinion letters” that the company operates its business in a manner respectful of third party patents.

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James Yoon

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Media Coverage of Court Proceedings

In-court media coverage of trial proceedings briefly came into focus in the public and legal arenas recently regarding the Proposition 8 trial proceedings in federal court. But the topic is not new, *viz.* the O.J. Simpson trial, CourtTV, and coverage of other high-profile trials. Indeed, as long ago as 1935, the sensational newsreel and other coverage of the Lindbergh baby kidnapping and murder trial contributed to an aversion for cameras in the courtroom. More recently, a combination of “market forces,” practitioners’ recognition of a potential new trial tool, and related developments in the law and technology for media have created a critical mass of attention about TV coverage of court proceedings.

With limited exceptions such as juvenile court proceedings, most matters heard in the courtroom are proceedings open to the public, including to members of the press who report on open court proceedings through media outside the courtroom. The issue is joined when in-court observers seek to use various technologies to record, transmit or broadcast in-court proceedings to the outside world. This encompasses a range of activities from (1) the surreptitious low-tech recording of court proceedings via a camera-phone over a cellular network; (2) the professional quality equipment operated by recognized news media; and (3) for-profit enterprises that provide a fee-based service “narrow-casted” through the Internet to paid subscribers or on-line for-profit intermediaries.

The first category — surreptitious use of electronic devices — merits only brief mention. It is largely governed by local rules or general orders and may be functionally more related to the use and misuse of social media in the larger culture. In short, a juror or other trial participant is not going to be permitted to record or transmit trial proceedings for the purpose of creating a digital diary, YouTube episode or fostering a twit-existential endeavor.

The familiar second, and emerging third, categories are governed by the California Rules of Court, specifically Rule 1.150, and implemented through California Judicial Council Mandatory Forms MC-500, “Media Request to Photograph, Record, or Broadcast” and MC-510, “Order on Media Request to Permit Coverage.” Under the existing rule, there is no presumption in favor of, or against, granting a coverage request. The court is mandated to consider 19 factors in ruling on the request:

1. Importance of maintaining public trust and confidence in the judicial system;
2. Importance of promoting public access to the judicial system;
3. Parties’ support of or opposition to the request;
4. Nature of the case;
5. Privacy rights of all participants in the proceeding, including witnesses, jurors, and victims;
6. Effect on any minor who is a party, prospective witness, victim, or other participant in the proceeding;
7. Effect on the parties’ ability to select a fair and unbiased jury;
8. Effect on any ongoing law enforcement activity in the case;
9. Effect on any unresolved identification issues;

10. Effect on any subsequent proceedings in the case;
11. Effect of coverage on the willingness of witnesses to cooperate, including the risk that coverage will engender threats to the health or safety of any witness;
12. Effect on excluded witnesses who would have access to the televised testimony of prior witnesses;
13. Scope of the coverage and whether partial coverage might unfairly influence or distract the jury;
14. Difficulty of jury selection if a mistrial is declared;
15. Security and dignity of the court;
16. Undue administrative or financial burden to the court or participants;
17. Interference with neighboring courtrooms;
18. Maintaining orderly conduct of the proceeding and
19. Any other factor the judge deems relevant.

In addition, when a media coverage request is granted, the existing rule precludes coverage of the jury or spectators, the jury selection process, conferences between or among attorneys, witnesses or staff and “sidebar” conferences at the bench or in chambers and, of course, any proceedings closed to the public. With or without media coverage, one must always be alert to intentional or accidental eavesdroppers, both inside and outside the courtroom.

Many of these factors are self-evidently more relevant to criminal than civil proceedings (note the use of the term “victim”); others apply universally. In civil trials, parties objecting to coverage requests tend to articulate a variety of objections. Typical express grounds for opposing coverage, and some commentary on the issues, are:

Coverage will undermine the prophylactic effect of a witness exclusion order. The premise is that the excluded witness could view the trial video and prepare in a fashion the exclusion order is intended to prevent. Of course, the court can expand the exclusion order to preclude this circumvention. The risk of violation is comparable to the risk that another trial participant will share a trial transcript or provide a summary of another witness’s testimony.

Effect on the jury. There are two aspects to this concern: (1) that the equipment and personnel involved in coverage might distract attention from the evidentiary proceedings and (2) that the fact of coverage might exalt the importance of the case in the mind of a juror over a trial not being covered. While the first element is theoretically legitimate, in actual experience, cases that are subject to media coverage requests tend to festoon the courtroom with so much computer and evidence presentation hardware and cabling that the jury is unlikely to distinguish the media equipment from that supplied by the parties or provided by the court. In the several media-covered trials at which the author has presided, there have been no questions from or indications by the jury indicating awareness of the coverage, likely because of the now routine use by lawyers of technology in the courtroom. The second argument — exaggerating the importance of the case — is more difficult to evaluate. The core of the concern overlaps with a more troublesome issue, juror access to case information on the Internet and media independent of video coverage. Of course, all jurors are instructed (CACI 100) and relentlessly admonished not to seek or receive information about the case outside of the courtroom. And in any event, jurors should not be of the mind that any

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MICHAEL W. SOBOL

On CLASS ACTIONS

Class action trials serve an important and unique role in our civil justice system, by shedding light on conduct that might not otherwise enter public awareness. They allow issues that affect many individuals to be presented and resolved in an efficient and fair manner. However, perhaps because class trials are viewed by many as messy and overly complicated, they rarely happen. While class trials do raise special considerations, neither judges nor practitioners should be intimidated by, or avoid, trying class cases.

Plaintiffs are increasingly offering a class trial plan with proposed jury verdict forms in support of class certification. These help demonstrate how the case is manageable as a class action, making class certification more likely and pre-conditioning the court to how the trial can and should be conducted. Over the long term it also provides an early opportunity for plaintiffs to seriously consider how they are going to try the case, and can act as a guide for the remaining discovery and other pre-trial litigation. Pay careful attention to the class certification order which, quite often, will contain far more than just a basic analysis of the standard certification factors. Where possible, use the court's language as a guide for structuring their presentation of evidence at trial.

At trial, plaintiffs' counsel in a class case will want to keep the focus on the defendant's conduct, while defense counsel will often want to focus on anecdotal circumstances and the individual conduct of the class representatives. These goals will inform the overall evidence to present at trial and the order and manner in which to present it.

Unlike in an individual action where it is typical to call the plaintiff as the first witness, plaintiffs in a class action should normally set the stage through evidence of defendant's common policy or conduct at issue, and then demonstrate through the class representatives how they are typical victims of such conduct. Financial or marketing analyses of the business practice at issue will typically and naturally reveal a broad impact. Plaintiffs' counsel should avoid overwhelming the finder of fact with excessive documentary evidence or witnesses, as this will make the case seem less manageable and more complicated than it is. Extra care should be exercised in a class case to identify a reasonable universe of the evidence that best tells your story. To counter a defense story of individual issues, the direct testimony of the class representatives should proceed in near identical fashion. Issues likely to be raised by defendant on cross-examination should be anticipated and addressed on direct examination, but not at the expense of presenting a homogenous story line. Expert witnesses on liability should be used judiciously, their testimony narrowly-focused on the defendant's common conduct.

Counsel defending the class trial should remain con-

scious of the fact that they are effectively trying two cases: the merits and the possibility of de-certifying the class at the trial or afterwards, including on appeal. Defense counsel may therefore want to focus in part on individual circumstances and events, and to use the trial to raise doubts about plaintiffs' claims of common conduct or common injury. One effective way to do this may be through testimony from class members sympathetic to the defense. Defense counsel will also be diligent to spot opportunities to argue that the case presented at trial is not the same as was certified. Defense counsel have various tools (e.g., decertification, *in limine*, and directed verdict motions) that they may be able to use to get the court to re-evaluate the viability of class treatment. In this regard plaintiffs ought to strive for consistency throughout the litigation in how they present the class theory of the case, as inconsistencies will be used to tempt the Court to take another look at certification. While some developments are inevitable post-certification, plaintiffs' counsel can best avoid this risk by presenting a realistic and sufficiently-flexible picture, at the certification stage, of their claims and how they will try them, and by ensuring that their theories remain consistent through trial.

Perhaps the most intimidating thing about trying a class case is the prospect of having to deal with voluminous records and data. Adjudicating class damages in a large consumer or employment class action, for example, often requires the parties to analyze millions of data entries and present corresponding evidence at trial. Counsel should give considerable thought early on about how they can present such evidence in an efficient, organized manner. Wherever possible, plaintiffs' counsel should strive to present a class damages analysis that can be neatly summarized while also identifying each class member's damages. Where this is impracticable, as when cost or time constraints are a significant factor, alternatives such as sample analyses may be an option. Where consequential damages are an issue, post-trial proceedings (e.g., mini trials) may be necessary, but that does not make a class action unmanageable. Workable options are available, and counsel should consider reasonable ways to streamline such proceedings.

Finally, special consideration should be given in the class trial context to whether a bench trial is preferable to proceeding before a jury. In addition to the normal factors considered for any trial, consider the complexity of the class action and whether an experienced judge may be better suited than a jury to balance the various factual, legal and procedural issues, and whether, after trial, court-entered findings of fact may be preferable to completed jury verdict forms.

Lawyers need not succumb to fear and avoid class trials by accepting or offering inappropriate settlements, because class trials can be readily tamed.

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Michael W. Sobol



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Media Coverage of Court Proceedings

case is unimportant.

Impact on subsequent proceedings. This concern focuses on the impact on selection of a jury for a retrial resulting from a mistrial, granted motion for new trial or remand for retrial upon reversal of an initial verdict and judgment. The premise is that the jury pool may be tainted if it includes individuals who viewed media coverage of the first trial. The analysis of this issue is no different than the impact of a prospective juror having read or viewed conventional media coverage (print or Internet equivalent) of the earlier trial. In the realm of idle speculation, one must ask if having viewed a broadcast accurately depicting some or all of any earlier trial could have any more deleterious effect on a prospective juror than having read the notoriously incomplete and frequently inaccurate conventional press reports of trial proceedings. Currently, it is almost unheard of for a jury to be selected in a civil case involving money damages without one or more prospective jurors expressing an opinion about the civil justice system based on their limited understanding of the notorious *McDonalds* spilled coffee case. Over time, perhaps, reliable statistical evidence will be developed as to the impact on the jury pool of coverage of actual trials. In the meantime, sound intuition informs that coverage of a full trial is far less harmful than the impact of *Judge Judy* and similar faux legal proceedings. A variation on this theme is anxiety about the impact on the jury pool in future trials of similar claims and defenses. For subscription-based coverage this is not likely to be a material concern since the “audience” is vastly smaller than the general broadcast/cable commercial television outlets. In any event, the parties retain the right to exercise cause challenges for jurors, and the court has the obligation to act on such challenges regardless of the impetus for any bias on the part of the prospective jurors.

There may be other motivations for opposition to media coverage at play that, while not expressly articulated, are evident from the nature of the case. Image-conscious defendants in product liability litigation understandably do not want to have negative information broadcast (literally or figuratively) about their products based on concerns about the effect on the marketplace or the possibility of adverse publicity leading to additional plaintiffs’ claims. Others may want to limit the opportunity of future opponents to observe, in real time, trial tactics and the performance of counsel and particularly expert witnesses who routinely appear in certain case types. At a more personal level, some trial participants, even experienced trial attorneys who do not want for self-esteem, may have concerns about broad-or-narrow casting of their performance to the outside-the-courtroom world. Anyone who has ever cringed in watching their own home movies or videos will understand this concern.

On the other side of the equation, counsel should consider some potential benefits from coverage that are not otherwise available. In major cases, the parties sometime employ “shadow juries” to observe the proceedings and provide feedback. Coverage permits the observation to take place remotely without congesting the courtroom or

disrupting the in-court proceedings. Similarly, remote “war rooms” may be established, again without congesting courtrooms that lack adequate seating capacity. Assuming the trial judge permits in-courtroom communication via counsel’s laptops or other devices, the trial process may be expedited, including arranging for prompt delivery of exhibits, case authority or other material triggered by an unanticipated mid-trial development.

It is well to remember that the court reporter’s transcript is the official record for a variety of purposes including appellate review. However, the ability to record and playback trial proceedings may have other benefits, provided that all parties stipulate to their use or may be otherwise authorized by the court. These include playback of opening statements and trial testimony during argument or other phases of trial (noting of course that statements of counsel are not evidence, but attorneys routinely remind jurors in argument of unfulfilled assertions of opposing counsel in opening statements). With the stipulation of the parties, playback may also be utilized in lieu of readback of live trial testimony or the increasingly-utilized playing of video deposition testimony.

Videotaped trial proceedings also present a unique opportunity to handle a juror’s temporary absence. With the stipulation of all parties, a trial may proceed with a juror absent due to a medical or family emergency of brief duration with arrangements made for the juror to view the video coverage when he or she becomes available (with appropriate stipulations to confirm that the juror did indeed get “caught up.”). Properly employed, this resource could avoid expensive downtime, inconvenience for other jurors, parties, and witnesses, or a catastrophic mistrial.

Judges that permit media coverage in their courtroom can consult with colleagues that have increasing experience with such requests. Having had several cases with requests for limited broadcast — in addition to mainstream media, such requests are sometimes made by specialty providers who provide the feed on a per-subscription basis to interested parties — my court has developed a form of order to govern requests for broadcast. For the most part, the process is governed by practicality: the order specifies that the media equipment, and the broadcast of the proceedings, must not interfere with the trial proceedings, and that if it does so, the permission to broadcast will be revoked. Jurors and jury selection should not be covered, to preserve their confidentiality, as should side-bars. The judge should be provided with equipment enabling the court to terminate coverage instantly, if necessary (*i.e.*, a “kill switch”). And as mentioned previously, the order should be express that non-party witnesses who are subject to a witness exclusion order shall likewise be precluded from viewing the coverage until after they have been excused as a witness.

Media requests in complex civil cases are becoming more frequent. Practitioners should familiarize themselves with the process, and recognize that novel procedures can sometimes benefit — and not just distract from — the trial process.

The Honorable Robert B. Freedman is a judge on the Superior Court for the County of Alameda, and is a member of the Board of Governors of the Northern California chapter of ABTL.



HOWARD ULLMAN

On ANTITRUST

In July, the California Supreme Court decided *Clayworth v. Pfizer, Inc.*, holding that the so-called “pass-on” defense is generally not available to alleged price fixers under California’s Cartwright Act.

In federal civil actions alleging price fixing, only those who purchased directly from the defendants have the right to sue for damages. Under the holding of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), indirect purchasers cannot sue for damages. A corollary to this restrictive standing regime is that (except in very narrow circumstances) the direct purchaser may sue under federal law for the full amount of the alleged overcharge, even if that purchaser “passed on” that overcharge to its customers. See *Hanover Shoe, Inc. v. United Machinery Corp.*, 392 U.S. 481 (1968). Many states (including California) passed legislation in the wake of the *Illinois Brick* decision to allow indirect purchasers to sue alleged price fixers. See, e.g., California Bus. and Prof. Code § 16750(a). The issue of first impression before the *Clayworth* Court was whether California law, like federal law, denies accused price fixers a pass-on defense.

The Supreme Court first looked to the plain language of the Cartwright Act, and found that the words “damages sustained” did not clearly establish an intent to compensate only for damages that were not passed on. The Court then examined two amendments to the Cartwright Act — one following the enactment of the federal Hart-Scott-Rodino Act which, among other things, permitted state attorney general *parens patriae* suits on behalf of indirect purchaser plaintiffs, and one expressly permitting indirect purchaser suits following the U.S. Supreme Court’s decision in *Illinois Brick* — and found that these amendments were consistent with application of the federal *Hanover Shoe* rule barring a pass-on defense.

The Court turned to antitrust policy, and held that the Cartwright Act’s purpose of deterring antitrust violations outweighs concerns that some private plaintiffs might receive a windfall — an award of treble damages when they had suffered no actual out-of-pocket loss. It also echoed *Hanover Shoe*’s concerns with “minitrials” to trace “every penny” of an overcharge and to seek to measure the further ramifications that an overcharge might have in the form of lost sales and other tertiary consequences. The Court also rejected the defendants’ argument that the plaintiffs were not damaged at all and therefore would receive a windfall if the pass-on defense were not allowed.

Although a pass-on defense generally may not be asserted under the Cartwright Act, the Court identified a few instances where it will still be available. These include

“cost-plus” contracts, and indirect purchaser cases raising the prospect of duplicative recovery. “In instances where multiple levels of purchasers have sued, or where a risk remains they may sue, trial courts and parties have at their disposal and may employ joinder, interpleader, consolidation, and like procedural devices to bring all claimants before the court. In such cases, if damages must be allocated among the various levels of injured purchasers, the bar on consideration of pass-on evidence must necessarily be lifted....”

The Court’s decision generally may be seen as a victory for plaintiffs and a defeat for defendants, who now may be faced with paying multiple windfall recoveries and defending against expensive lawsuits brought by plaintiffs who suffered no losses. The first of these concerns, at least, exists because the decision leaves unanswered some potentially troubling questions.

For example, exceptions to the general rule that a pass-on defense is not allowed are not well defined. The Court has allowed, in theory, consideration of pass-on evidence in “instances where multiple levels of purchasers have sued, or where a risk remains they may sue....” However, the Court has not articulated how substantial the risk of suit must be, nor has it specified how various “procedural devices” can actually be used to avoid windfall recoveries and an unfair result. For example, suppose defendants are sued by a direct purchaser class, but no indirect purchaser case has yet been filed. If the statute of limitations has not yet run, is there a sufficient risk of a suit to justify allowing a pass-on defense — and at what point in time does that risk materialize? If not, and the case proceeds to trial and judgment within the statute of limitations period, and then an indirect purchaser case is filed, how precisely will pass-on be considered at that point? Or, if defendants wish to settle the case, how are they to weigh the effect of the potential exception identified by the Court?

In such cases, it is little comfort to defendants that at the end of the day various offsets for “duplicative” recoveries may be theoretically available. Unless all the arguments can be advanced in a coordinated way in a single forum, the risk of double (or even greater) recovery is great. These problems suggest that defendants may want to shore up their other defenses (such as standing) to indirect purchaser claims to avoid being whipsawed by direct and indirect claims. The decision also will place greater emphasis on class certification proceedings, where courts may be sympathetic to class treatment to deal with the challenge of apportioning liability and damages among direct and indirect purchasers.

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Howard Ullman



Letter from the President

It was an honor to serve as the President of the Northern California chapter in 2010. We enjoyed a series of top-notch programs through the creativity and hard work of our program chair, Diane Doolittle, and her co-chair, Beth Salveson. Our Leadership Development Committee, chaired by Rob Nolan, organized four well-received programs directed at our members who have been in practice ten years or less. In a very challenging environment, our membership chair, Bob Stumpf, and his co-chair, Diane Webb, were indefatigable in reaching out to firms. As a result, we slightly increased our membership over 2009. With the generous assistance of our Board Member Judge Carlos Bea, we had a reception at the Great Hall of the Ninth Circuit to celebrate the vision and contributions of our past presidents.



Sarah G. Flanagan

2010 was the first year that our chapter hosted ABTL's premier statewide event, the Annual Seminar in Hawaii. The organizing committee was chaired by Daralyn Durie, and she and her team (which included Judge Beth Freeman, Drew Bassak and Dan Asimow from our chapter) put on an excellent program, with provocative panels, spirited entertainment and great meals. We had record-breaking attendance, and received superlative reviews. Congratulations to Daralyn and her team.

Our *ABTL Report* is a top-quality publication, and unique among the chapters. In 2010 we again had excellent issues, with timely and well-written articles. Editor Tom Mayhew and his co-editor Howard Ullman have our gratitude for the great work they do in soliciting the articles, working with the authors and editing the final product.

Our chapter has a history of taking action to assist the justice system when it has come under attack in the executive and legislative branches. For example, in 2005 we were actively involved in fighting the impact of budget politics on the state courts to preserve their independence. In 2010 we got involved again to respond to the real threats to the administration of justice in the other branches' proposals to deal with California's budget crisis. On the eve of an important legislative action (and in the face of threatened layoffs and the closure of courtrooms), the Presidents of the five ABTL chapters submitted a joint letter to legislative leaders and key committee members urging them to increase funding to the courts, and, at a minimum, to restore to the budget the trial court operations cuts that had been intended to be one-time reductions. The legislature did the minimum that we asked, which is helpful, but the cumulative impact of the ongoing reductions is restricting access to the state courts and negatively impacting the progress of our business cases. We have to look for more ways to be helpful in securing increased funding for the courts.

I had the pleasure of serving as President with a superb team — Rob Bunzel (Vice President), Mary Jo Shartsis

(Treasurer) and Rick Seabolt (Secretary). I thank each of them for their terrific work and support. I also want to thank Michele Bowen, our Executive Director, for her fine work supporting all of our chapter's activities, from organizing our dinners at the Four Seasons to membership outreach. With Michele's assistance, we made better use of the chapter's website in 2010, with expanded and more timely content.

I want to close this letter in memory of Barbara Caulfield, the President of our ABTL chapter in 1998. Barbara gave a stellar performance in the law and in life. One of the lesser good things that she did along the way was to get me engaged in ABTL and ask me to join the Board in 1998. I am grateful to her for that. It has been a great experience for me.

December 2010

Sarah Flanagan is a partner in the San Francisco office of Pillsbury Winthrop Shaw Pittman LLP, and was the President of the Northern California chapter of ABTL for 2010. sarah.flanagan@pillsburylaw.com

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