ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

LOS ANGELES

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FOCUS ON THE UNITED STATES SUPREME COURT: SUMMARY OF PENDING UNITED STATES SUPREME COURT CASES

John F. Querio

The United States Supreme Court has a number of cases on its October Term 2013 docket that should be of particular interest to the ABTL membership. The following is a summary of some of those cases:

ENVIRONMENTAL LAW

Do the EPA's greenhouse gas regulations of stationary sources of pollution exceed the agency's authority under the Clean Air Act?

Utility Air Regulatory Group v. Environmental Protection Agency, 684 F.3d 102 (D.C. Cir. 2012), *cert. granted*, No. 12-1146 (Mar. 20, 2013)

In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the U.S.

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— INSIDE —

FROM THE "JUICE" TO "BLADE RUNNER": THE LATEST DEVELOPMENTS INVOLVING CAMERAS IN THE COURTS

Kelli L. Sager

It was dejá vu all over again.

I was contacted recently by PRIMEDIA Broadcasting in South Africa, which operates talk radio stations in Cape Town and Johannesburg, concerning the recent landmark decision to allow electronic coverage of the Oscar Pistorius murder trial. Under the high court's order, audio can be broadcast gavel-to-gavel (and is being streamed on www.702.co.za), and live televised coverage is being permitted for some parts of the trial. Did I see any similarities to the O.J. Simpson criminal trial, where I represented the media and argued in favor of courtroom cameras, and could I explain to their listeners why this kind of coverage should be permitted?

A celebrity sports figure, the tragic death of a beautiful woman, and a murder charge leveled against the popular, charismatic athlete – the parallels are hard to escape. Similar, too, is the public's fascination with the case, and the news media's widespread coverage of every detail. Of course, there also are significant differences: Pistorius admits that he shot and killed his long-term girlfriend, Reeva Steenkamp, but claims it was an accident; Simpson still maintains (despite a civil verdict against him) that he did not kill his ex-wife, Nicole Brown Simpson, and Ronald Goldman. And while Simpson's defense lawyers joined me in advocating for courtroom cameras, Pistorius' counsel opposed any kind of electronic coverage, arguing that his client could not get a fair trial if the proceedings are broadcast on radio or TV.

Dejá vu, indeed. It has been almost twenty years since the Simpson trial. Although technology has continued to make

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PRESIDENT'S MESSAGE

The ABTL is proud to continue its tradition of providing some of the best MCLE programming in the State. In February, we hosted "The Great Debate" between Professors Erwin Chemerinsky and John Eastman and moderated by the Honorable Jacqueline Nguyen of the Ninth Circuit Court of Appeal. The Professors debated and the Judge examined them about important security and constitutional issues in a post-9/11 world. In March, the ABTL partnered with the Daily Journal to offer a lunch program regarding what our clients need to know about the rapidly expanding trend of litigation finance. The panel included three of the most prominent litigation financiers—Chris Bogart of Burford Capital, Selvyn Seidel of Fulbrook Capital Management and Allison Chock of Bentham IMF—as well as the leading academic on the subject, Professor Anthony Sebok, and a leading opponent of litigation finance, John Beisner of Skadden.

On April 23, 2014, the ABTL will host a dinner program featuring trial masters Jennifer Keller, Bart Williams and Brian Panish teaching and demonstrating impeachment techniques. The program will be moderated by the Honorable George King, Chief Judge of the United States District Court for the Central District of California. We hope to see you there. As usual, the program is at the Biltmore Hotel starting with a 6:00 p.m. wine tasting. We also invite you to join us for our annual seminar held on October 15-19, 2014 at the JW Marriott Ihilani, in Oahu, Hawaii. The topic is the science of decision making. Speakers will include not only lawyers but also experts from various disciplines whose insights will be valuable to your practices.

While the ABTL rarely becomes involved in political causes, there is one that we have traditionally and consistently supported: improving access to justice. The ABTL is presently working with the Los Angeles County Bar Association Litigation Section to encourage our members to meet with State legislators and advocate restoration of court funding. If you are interested to join in this effort, please contact LACBA Litigation Section President, Jeff Westerman, at jwesterman@jswlegal.com or (310) 698-7450, or ABTL Courts Committee Chair, Craig Holden, at cholden@lbbslaw.com or 213.599.7818. Working together, we can help advance this important cause.

Sincerely yours,

J. Warren Rissier
ABTL President 2013-2014, Los Angeles Chapter

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8502 E. Chapman Avenue, Suite 443
Orange, California 92869
(323) 988-3428 · Fax: (714) 602-2505
Email: abtl@abtl.org · www.abtl.org

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Supreme Court held that the Clean Air Act required the EPA to make a finding whether greenhouse gases pose a danger to human health or the environment, and if so, to promulgate regulations concerning the amount of such gases emitted by new motor vehicles. After promulgating these new motor vehicle regulations, the EPA determined that its endangerment finding triggered permitting requirements for stationary sources of greenhouse gas emissions under the Clean Air Act. The Supreme Court will decide whether the EPA correctly determined that its regulation of greenhouse gases from new motor vehicles triggered permitting requirements for stationary sources that emit greenhouse gases.

Does the Clean Air Act permit the EPA to require upwind states to reduce their pollutant emissions into downwind states by more than the amounts that contribute significantly to the downwind states' nonattainment of the Act's air quality goals?

EPA v. EME Homer City Generation, 696 F.3d 7 (D.C. Cir. 2012), *cert. granted*, No. 12-1182 (June 24, 2013)

The EPA promulgated a regulation known as the Transport Rule to quantify the amounts by which upwind states must reduce their cross-state pollution emissions into downwind states under the Clean Air Act's so-called "good neighbor" provision. The EPA required certain upwind states to reduce these emissions by more than the amount by which they contributed to downwind states' nonattainment of federal air quality standards. Additionally, the EPA failed to afford the upwind states the first chance to formulate state implementation plans (SIPs); instead, the EPA promulgated its own federal implementation plan (FIP). The Supreme Court will decide whether the Transport Rule violates the Clean Air Act by requiring upwind states to reduce their cross-state emissions by more than their fair share and by imposing these mandates via a FIP before allowing the upwind states time to prepare and submit SIPs.

ARBITRATION

Does a court or an arbitrator decide whether a precondition to arbitration has been satisfied?

BG Group PLC v. Republic of Argentina, 2014 WL 838424, decided Mar. 5, 2014

Argentina and the United Kingdom entered into a bilateral investment treaty calling for arbitration of disputes between one country and an investor from the other country, but only after the investor had litigated the dispute in the host country's courts for 18 months without result. A dispute between BG Group and Argentina over an investment in a formerly state-owned utility company arose in the wake of Argentina's economic collapse in 2001-02. Rather than litigating its claim in Argentina's courts for 18 months, BG Group went straight to arbitration. Agreeing that litigation in Argentina's courts would be futile, the arbitration panel found that it had jurisdiction and awarded BG Group over $185 million; the district court confirmed the award. Reversing the D.C. Circuit's contrary decision, the Supreme Court held that, even in the context of an arbitration clause in an international treaty between sovereign states, the 18-month local litigation requirement was a precondition to arbitration whose satisfaction was for an arbitrator—not a court—to decide.

CLASS ACTIONS

Should the fraud-on-the-market presumption of classwide reliance in securities fraud cases be overruled?

Halliburton Co. v. Erica P. John Fund, Inc., 718 F.3d 423 (5th Cir. 2013), *cert. granted*, No. 13-317 (Nov. 15, 2013)

In *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), the U.S. Supreme Court ruled that, in securities fraud class actions based on misrepresentation, it is presumed that every member of the class relied on the misrepresentation in connection with his or her purchase or sale of a security, so long as the security is traded in an efficient market (the so-called "fraud-on-the-market" doctrine). The *Basic* Court suggested that a defendant might be able to rebut this presumption by showing the misrepresentation at issue had no effect on the price of the security. In this case, defendant Halliburton argues that the fraud-on-the-market presumption should not apply because the misrepresentations at issue had no impact on the price of its stock; Halliburton thus contends that the plaintiffs cannot prove reliance on a classwide basis, such that common issues do not predominate over individual issues, as is required for class certification. The U.S. Supreme Court has granted certiorari to decide whether *Basic* should be overruled and the "fraud-on-the-market" presumption of reliance discarded.

How close a connection must exist between the defendant's fraudulent scheme and the purchase or sale of a security for the plaintiff's state-law cause of action to be precluded by the Securities Litigation Uniform Standards Act?

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Chadbourne & Parke, LLP v. Troice, 134 S. Ct. 1058, decided Feb. 26, 2014

Congress enacted the Securities Litigation Uniform Standards Act (SLUSA) to preclude state-law class actions based on fraud in connection with the purchase or sale of a security that is traded on a national exchange. In this case arising out of R. Allen Stanford's Ponzi scheme, plaintiffs were investors in CD's marketed by Stanford's bank who sued the investment advisers, insurer, and attorneys for Stanford's entities. The CD's were marketed as based on investments in SLUSA-covered securities, but the CD's were not themselves SLUSA-covered securities. Plaintiffs brought class actions in state court, which defendants removed to federal court and moved to dismiss under SLUSA. The Supreme Court held that SLUSA did not preclude the plaintiffs' claims because the plaintiffs did not themselves purchase or sell (or attempt to purchase or sell) SLUSA-covered securities; the fact that Stanford's entities misrepresented that they would purchase SLUSA-covered securities with funds the plaintiffs invested was not sufficient.

May a parens patriae action brought under state law by a state attorney general in state court on behalf of the general public be characterized as a "mass action" and thus subject to removal to federal court under the Class Action Fairness Act?

Mississippi ex rel. Hood v. AU Optronics Corp., 134 S. Ct. 736, decided Jan. 14, 2014

Mississippi's attorney general brought claims against electronics manufacturers under state antitrust and consumer protection laws in state court alleging that they colluded to inflate the prices of their products. The defendants removed the action to federal court by relying on the "mass action" provision of the Class Action Fairness Act of 2005 (CAFA), which permits removal of claims of 100 or more persons that are proposed to be tried jointly because they involve common questions of law or fact, where at least one of the claims seeks $75,000 or more in damages. The Supreme Court held that a parens patriae action in which a state is the only named party does not qualify as a "mass action" under CAFA, and therefore cannot be removed to federal court under that provision.

PERSONAL JURISDICTION

May a court exercise general personal jurisdiction over a foreign parent corporation consistently with due process, based solely on the fact that the parent corporation's indirect subsidiary performs services on its behalf within the forum state?

Daimler AG v. Bauman, 134 S. Ct. 746, decided Jan. 14, 2014

Argentinian plaintiffs, who allege they were victims of human rights abuses aided and abetted by Daimler's Argentinian subsidiary during Argentina's "Dirty War," sued Daimler in federal court in California under the Alien Tort Statute and the Torture Victim Protection Act. It was undisputed that the court lacked specific personal jurisdiction over Daimler, but that Daimler's indirect U.S. subsidiary, Mercedes-Benz USA, has sufficient presence in this country to make it amenable to general personal jurisdiction. The Supreme Court held that even if Daimler's American subsidiary was acting as Daimler's agent, Daimler still lacked the necessary systematic and continuous contact with the United States so as to make Daimler essentially at home in this country. The Court indicated that in all but exceptional cases, a corporation is at home (and thus subject to general personal jurisdiction) only in its place of incorporation and principal place of business.

May a court, consistent with due process, exercise personal jurisdiction over a defendant where his only contact with the forum state is his knowledge that the plaintiff has connections to that state?

Walden v. Fiore, 134 S. Ct. 1115, decided Feb. 25, 2014

Plaintiffs were stopped at the Atlanta airport en route from Puerto Rico to Las Vegas, and their gambling winnings were seized by a DEA agent as suspected drug proceeds. Plaintiffs sued the DEA agent in Nevada federal court, asserting a single claim for a Fourth Amendment violation. The district court dismissed the complaint for lack of personal jurisdiction. The Ninth Circuit reversed, holding that the DEA agent's action in filing an allegedly false probable cause affidavit with the U.S. Attorney in order to support a forfeiture action satisfied the express aiming requirement for specific personal jurisdiction over the defendant in Nevada. The court explained that, since the plaintiffs lived in Nevada and the defendant must have known or discovered that fact while preparing and filing the affidavit, this sufficed to show that the defendant expressly

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aimed his conduct at Nevada. The Supreme Court reversed the Ninth Circuit, holding that Nevada lacked personal jurisdiction over the DEA agent because he had no relevant contacts with Nevada and the fact that the plaintiffs resided in Nevada was not a sufficient contact to create personal jurisdiction.

VENUE/FORUM SELECTION CLAUSES

Is a motion to transfer under 28 U.S.C. § 1404(a) a proper mechanism for enforcing a forum selection clause, and if so, how should the transferor court apply the balance of interests analysis required for transfer?

Atlantic Marine Construction Co. v. U.S. District Court, 134 S. Ct. 568, decided Dec. 3, 2013

Virginia-based Atlantic Marine Construction, the general contractor on a construction project in Texas, entered into a subcontract with Texas-based J-Crew Management for work on the project. The subcontract contained a forum selection clause designating state or federal court in Virginia as the forum for litigation of any disputes. When a dispute arose, J-Crew Management ignored the forum selection clause and sued Atlantic Marine Construction in federal court in Texas. Relying on the forum selection clause, Atlantic Marine Construction moved under 28 U.S.C. § 1404(a) to transfer the case to federal court in Virginia, but the district court refused and the court of appeals denied mandamus relief. The Supreme Court reversed, holding that a section 1404(a) transfer motion is the proper mechanism to enforce a forum selection clause designating a different federal court, and that transfer in accordance with the forum selection clause should be granted unless the party opposing transfer clearly demonstrates extraordinary circumstances (unrelated to the parties' convenience) weighing against transfer. In the event transfer is ordered pursuant to a forum selection clause, the Court added, the substantive law of the state where the transferee court sits will govern the case.

COPYRIGHT LAW

Does a company that copies and stores live television broadcast content and retransmits it to its subscribers over the Internet violate the broadcasters' exclusive public performance right under the Copyright Act?

American Broadcasting Companies, Inc. v. Aereo, Inc., 712 F.3d 676 (2d Cir. 2013), *cert. granted*, No. 13-461 (Jan. 10, 2014)

Aereo, Inc. provides a service to its subscribers whereby live television broadcast content is received by individual antennae (one per subscriber per program), copied and stored onto Aereo's hard drives, and retransmitted with a slight delay to subscribers over the Internet. The major broadcast networks sued Aereo, contending that its service infringes their exclusive right of public performance of the broadcast content under the Copyright Act. The district court denied the networks' motion for a preliminary injunction, and the Second Circuit affirmed. The Second Circuit reasoned that each transmission to a subscriber over Aereo's service of an individual copy of a broadcast program is a private, not a public, performance, such that Aereo's service does not violate the Copyright Act. The networks petitioned the Supreme Court for a writ of certiorari, and Aereo agreed that the Supreme Court should grant review. District courts in other jurisdictions have disagreed with the Second Circuit. The Supreme Court's decision will have major implications for the future of the broadcast television industry.

Can the equitable defense of laches bar claims of copyright infringement brought within the Copyright Act's three-year statute of limitations?

Petrella v. Metro-Goldwyn-Mayer, Inc., 695 F.3d 946 (9th Cir. 2012), *cert. granted*, No. 12-1315 (Oct. 1, 2013)

Plaintiff, the daughter of the co-author of the screenplays and book on which the movie *Raging Bull* was based, sued MGM for copyright infringement 18 years after first discovering the existence of her claims. The district court dismissed the lawsuit on the ground of laches, and the Ninth Circuit affirmed. The Ninth Circuit followed its own prior case law allowing a laches defense in continuing infringement situations, but Judge William Fletcher concurred separately, explaining that the Ninth Circuit had confused the defenses of laches and equitable estoppel. The circuits are deeply split over the permissibility of a laches defense to a copyright infringement claim brought within the limitations period, with some circuits barring it altogether, some allowing it in limited circumstances, and the Ninth Circuit giving it full scope. The Supreme Court will determine the proper scope (if any) of the laches defense under the Copyright Act.

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TRADEMARK LAW/LANHAM ACT STANDING

What is the proper test for standing to assert a claim for false advertising under the Lanham Act?

Lexmark International, Inc. v. Static Control Components, Inc., 697 F.3d 397 (6th Cir. 2012), *cert. granted*, No. 12-873 (June 3, 2013)

Lexmark International manufactures printer toner cartridges, and Static Control Components designs software to get around microchips Lexmark installs in its toner cartridges to prevent them from being reused after the toner runs out. Lexmark sued Static Control for copyright and patent infringement, and Static Control counterclaimed for false advertising in violation of the Lanham Act and other claims. The district court dismissed Static Control's Lanham Act counterclaim based on lack of standing. The Sixth Circuit reversed, applying circuit precedent holding that a Lanham Act plaintiff must merely show a likelihood of injury from the defendant's false advertising in order to establish standing. Other circuits follow different tests for Lanham Act standing, with some applying the same factors required for antitrust standing and others finding Lanham Act standing only where the plaintiff and defendant are actual competitors. The Supreme Court will decide the appropriate test for Lanham Act standing.

Can a private party sue a competitor under the false advertising provision of the Lanham Act for deceptive naming and labeling of a food product, or does the Food, Drug, and Cosmetic Act bar such a claim?

POM Wonderful, LLC v. The Coca-Cola Company, 679 F.3d 1170 (9th Cir. 2012), *cert. granted*, No. 12-761 (Jan. 10, 2014)

Pomegranate juice maker POM Wonderful, LLC sued The Coca-Cola Company under the Lanham Act's false advertising provision for naming and labeling one of its Minute Maid juice-blend products "Pomegranate Blueberry," even though pomegranate and blueberry juice constituted a minuscule percentage of the product's ingredients. Coca-Cola sought summary judgment on the ground that a finding of Lanham Act liability would conflict with the misbranding provisions of the Food, Drug, and Cosmetic Act (FDCA) and FDA regulations implementing that statute, which cannot be enforced by private parties. The district court ruled for Coca-Cola on this issue. The Ninth Circuit affirmed, holding that the FDCA and FDA regulations comprehensively governed naming and labeling of Coca-Cola's juice product, and that private Lanham Act litigation cannot be used to interfere with the FDA's sole regulatory authority in this area. This holding conflicts with the approach several other circuits have taken to this and similar conflicts between the Lanham Act and a different statutory scheme of product regulation, and the U.S. Supreme Court will decide the issue.

SARBANES-OXLEY ACT/WHISTLEBLOWER RETALIATION

Can an employee of a private contractor or subcontractor of a public company sue for whistleblower retaliation under the Sarbanes-Oxley Act?

Lawson v. FMR LLC, 2014 WL 813701, decided Mar. 4, 2014

Employees of companies that function as investment advisers (and thus independent contractors) to the Fidelity group of mutual funds sued their employers under the whistleblower retaliation provision of the Sarbanes-Oxley Act, alleging that their employers actually or constructively terminated them for reporting suspected fraud. The district court denied the investment advisers' motion to dismiss, but certified for interlocutory appeal the question whether employees of contractors or subcontractors of public companies are covered by Sarbanes-Oxley's whistleblower protection cause of action. Over a dissent, the First Circuit reversed, holding that Sarbanes-Oxley's whistleblower protection provision covers only employees of public companies and does not extend to employees of contractors or subcontractors of such companies. The Supreme Court reversed the First Circuit, holding that Sarbanes-Oxley's whistleblower retaliation provision extends its protection to employees of contractors and subcontractors of public companies.

PATENT LAW

Does the burden of proof in a declaratory judgment action brought by a patent licensee rest with the licensee to prove noninfringement or with the patent holder to prove infringement?

Medtronic, Inc. v. Mirowski Family Ventures, LLC, 134 S. Ct. 843, decided Jan. 22, 2014

Mirowski Family Ventures, LLC entered into a license agreement with Medtronic, Inc. to manufacture a patented cardiac defibrillator device to treat arrhythmia and congestive heart failure. Under the agreement, Mirowski notified Medtronic of various other devices Medtronic

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manufactured that Mirowski contended were covered by the relevant patents. Medtronic brought a declaratory judgment action to establish that these other devices did not infringe Mirowski's patents. Finding that Mirowski bore the burden of proof to show infringement and that it had not met that burden, the district court granted Medtronic declaratory judgment of noninfringement. The Federal Circuit reversed, holding that Medtronic bore the burden of proof to show noninfringement because it was the plaintiff seeking declaratory judgment and because Mirowski was prevented from bringing an infringement counterclaim due to the licensing agreement. The Supreme Court held that the patentee-defendant bears the burden of proof in a declaratory judgment action by a licensee against a patent holder for noninfringement.

Should a district court's determination that a patent case is exceptional under 35 U.S.C. § 285, warranting attorney fee-shifting, be reviewed de novo or for clear error? Is the two-part test for finding a patent case exceptional where the accused infringer-defendant prevails too onerous compared to the more lenient standard applied where the patentee-plaintiff prevails?

Highmark, Inc. v. Allcare Health Management Corp., 687 F.3d 1300 (Fed. Cir. 2012), *cert. granted*, No. 12-1163 (Oct. 1, 2013); *Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, 496 Fed. Appx. 57 (Fed. Cir. 2012), *cert. granted*, No. 12-1184 (Oct. 1, 2013)

In each of these cases, the district court rejected the plaintiff's claims of patent infringement, and the defendant requested that the court make an exceptional case determination under 35 U.S.C. § 285, under which a losing party in a patent case can be forced to pay the prevailing party's attorney fees if the court finds the case exceptional. In *Highmark*, the district court found the case exceptional, but the Federal Circuit reviewed that finding de novo and partially reversed. The Supreme Court granted review in *Highmark* to decide whether a district court's exceptional case determination in a patent case should be reviewed de novo as a legal conclusion or for clear error as a factual finding. In *Octane Fitness*, the district court denied the defendant's motion for an exceptional case determination, and the Federal Circuit affirmed. The Supreme Court granted review in *Octane Fitness* to determine whether the substantive standard for finding a case exceptional where the accused infringer-defendant prevails—whether the patentee-plaintiff's claims were objectively baseless/frivolous and brought in subjective bad faith—unduly raises the bar for awarding attorney fees to prevailing accused infringers, while prevailing patentee-plaintiffs face a much lower standard for showing that a case is exceptional.

Is a patent claim to a computer system ineligible for a patent because it does no more than embody an abstract economic principle?

Alice Corp. Pty. Ltd. v. CLS Bank International, 717 F.3d 1269 (Fed. Cir. 2013), *cert. granted*, No. 13-298 (Dec. 6, 2013)

CLS Bank brought a declaratory judgment action against Alice Corporation seeking a declaration that Alice's patents for an electronic escrow method to reduce settlement risk in trading situations, as well as a computer system to implement it, were invalid because not drawn to patentable subject matter. The district court agreed that the patents were invalid, and the en banc Federal Circuit affirmed by a badly splintered vote. The plurality held that all of Alice's patent claims were not drawn to patentable subject matter because they embodied only an abstract economic principle without sufficient additional limiting steps to embody a concrete application of that principle. Other judges stated that Alice's computer system claims were drawn to patentable subject matter and did not fall under the abstract principle/law of nature exclusion. The Supreme Court granted review to decide how the exclusion from patentable subject matter for abstract principles, natural phenomena, and laws of nature applies to patent claims to computer systems that do little more than implement an abstract economic principle.

May a party be held liable under the Patent Act for induced infringement of a method patent where it performs some of the steps of the patented method and instructs its customers how to perform the remaining steps, such that no single party could be liable for direct infringement?

Limelight Networks, Inc. v. Akamai Technologies, Inc., 692 F.3d 1301 (Fed. Cir. 2012), *cert. granted*, No. 12-786 (Jan. 10, 2014)

The Patent Act specifies that a party can be liable for directly infringing a patent where it infringes the patent itself, as well as for inducing another party to infringe a patent. For patents on physical items, one party can be liable for inducing another party to infringe a patent only where the second party is liable for direct infringement. However, for method patents, two or more parties can

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perform the steps constituting the patented method in conjunction, such that no single party can be liable for direct infringement. The question presented by this case is whether a company that performs some of the steps of the patented method can be liable for inducing its customers to infringe the patent by performing the remaining steps. Here, Akamai Technologies holds a patent on a method of structuring website components to allow a website to handle Internet traffic more efficiently. Akamai sued Limelight Networks for inducing Limelight's customers to infringe Akamai's patent, alleging that Limelight performed the initial steps and caused its customers (website content providers) to perform the remaining steps. Overruling prior circuit precedent, the en banc Federal Circuit held that liability for induced infringement is permitted in these circumstances. The Solicitor General urged the U.S. Supreme Court to grant Limelight's petition for certiorari, and the Court will now decide the scope of induced infringement where no single party is liable for direct infringement.

FOREIGN SOVEREIGN IMMUNITY/DISCOVERY IN AID OF ENFORCEMENT OF JUDGMENT

May a judgment creditor of a foreign sovereign utilize third-party discovery against the sovereign's banks in the United States to require production of information related to the sovereign's assets outside the United States that are presumptively immune from execution under the Foreign Sovereign Immunities Act?

Republic of Argentina v. NML Capital, Ltd., 695 F.3d 201 (2d Cir. 2012), *cert. granted*, No. 12-842 (Jan. 10, 2014)

Plaintiff NML Capital obtained a judgment against Argentina in federal district court in New York, arising out of Argentina's 2001-02 economic crisis and bond default. After lengthy pre- and post-judgment discovery, NML Capital served subpoenas on two of Argentina's New York banks seeking information about Argentina's assets held outside the United States. While narrowing the subpoenas, the district court denied Argentina's and the banks' motions to quash and granted NML Capital's motion to compel compliance with the subpoenas. On Argentina's appeal, the Second Circuit affirmed, holding that the district court's discovery order did not infringe Argentina's sovereign immunity because it did not actually attach any of Argentina's presumptively immune extraterritorial property and because it was directed at third parties (the banks) which could not assert immunity. Since this holding conflicts with cases from the Seventh, Fifth, and Ninth Circuits and since the Solicitor General—noting the importance of this issue to the federal government's foreign relations—recommended that it grant certiorari, the Supreme Court has taken up the issue.

CONSTITUTIONAL LAW/NATIONAL LABOR RELATIONS BOARD

Does the Constitution's Recess Appointments Clause grant the President the power to fill vacancies via recess appointment at a time when the Senate does not consider itself to be in recess and is holding pro forma sessions every three days?

National Labor Relations Board v. Noel Canning, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, No. 12-1281 (June 24, 2013)

On January 3, 2012, President Obama appointed three new members to fill existing vacancies on the National Labor Relations Board (NLRB). He purported to act pursuant to his power under the Constitution's Recess Appointments Clause to fill vacancies that happen during the recess of the Senate. At the time of these appointments, the Senate had not adjourned and was holding pro forma sessions every three business days. The newly-constituted five-member Board—including the three recess-appointed members—subsequently ruled against employer Noel Canning in a pending unfair labor practice matter. Noel Canning petitioned the D.C. Circuit for review of the NLRB's order, arguing among other things that the NLRB lacked a quorum to act in its case because the three recess-appointed members were not constitutionally appointed. The D.C. Circuit agreed, ruling that the Recess Appointments Clause allows the President to fill only those vacancies that arise during recesses between Senate sessions (as opposed to during a Senate session). The Third and Fourth Circuits have also concluded that President Obama's NLRB appointments are constitutionally invalid because the Recess Appointments Clause authorizes the President to make recess appointments only during intersession Senate recesses. The Supreme Court granted certiorari at the Solicitor General's behest to decide the scope of the President's power under the Recess Appointments Clause.

John F. Querio, Associate at Horvitz & Levy LLP and ABTL Member

YLD UPDATE

Jeanne A. Fugate

The ABTL's Young Lawyer Division is excited to announce a series of programs for the first half of 2014, with a focus on helping junior attorneys develop practical skills as well as an effort to attract new members to the ABTL.

The YLD kicked off the new year with our annual Bench and Bar Reception on January 28, 2014. The event, which was co-sponsored with the Los Angeles County Bar Association Barristers, brings together lawyers who have been in practice for less than ten years with members of the federal and state judiciary. The event is limited to just 100 attendees in order to maximize the time that young lawyers will have with judges.

"It's a great venue for young attorneys to feel comfortable talking to judges," said Jason Wright, co-chair of the YLD Board and an organizer of the event. "Unlike larger ABTL events, we deliberately keep the numbers small to make sure everyone gets the chance to speak to the judges."

This year, an estimated 30 judges attended the sold-out event, including judges from the Los Angeles Superior Court, the Central District of California, the Ninth Circuit Court of Appeals, and the Second District Court of Appeal. The two-hour reception was held at the Los Angeles Athletic Club, and, from all appearances, the three-to-one ratio of bar to bench led to many spirited conversations.

The event was co-sponsored with the LACBA Barristers, which also provided the opportunity to mix and mingle with other Los Angeles lawyers—and to introduce ABTL to this group. "Working with the Barristers led to a great synergy," Wright said. "We were able to publicize ABTL's activities to a larger number of attorneys and judges."

The two goals of assisting young lawyers to develop important skill sets, along with seeking to introduce ABTL to that same demographic, are themes that run throughout the YLD's programs this year.

"An important mission of the YLD is to help advance the careers of junior ABTL members," said Edward Andrews, another YLD co-chair. "This also gives us a great opportunity to get out the word about ABTL to younger attorneys in Los Angeles."

The YLD's next program, scheduled for the end of February, will target lawyers who are in their first years of practice. It will consist of a panel of YLD members who will give practical advice about how to succeed. Topics will range from the small (such as email etiquette or how to act at a client meeting) to the most important question of how to do well on a first assignment. The goal is to give actual takeaways to help lawyers avoid making mistakes that YLD members have observed, or have had the misfortune to make themselves.

The YLD will have a second panel in May that also will focus on taking and defending depositions, particularly in the face of difficult opposing counsel. The program will include leading practitioners acting out the roles of questioner/defender with other attorneys acting as the "difficult" opposing counsel. The YLD hopes to provide real-world advice and techniques that attorneys can use in their practice.

In addition to the programs described above, the YLD is discussing how to improve young lawyer attendance at ABTL programs. One suggestion is to designate an area at pre-dinner receptions where YLD Board Members will congregate. "We think it could be a great tool for encouraging younger lawyers to come to the programs," said Emily Jarvis, the YLD Committee member who suggested the idea. "This would be an informal designated area for junior attorneys to network with other lawyers with less than 10 years experience and learn about upcoming YLD events."

A final set of programs for 2014 will seek to involve another group of lawyers—those who work on the West Side. Edward Andrews, who works in Bingham's Santa Monica office, noted that most ABTL programs take place in downtown Los Angeles, which can lead to long drives for West Side practitioners. "We want to make sure that there are YLD programs that are easily accessible to our members who work in Century City, Beverly Hills, and Santa Monica."

To that end, the YLD will have two West Side events: a happy hour, to be set for a date in March, and a brown bag lunch with judges in the Santa Monica courthouse in April. "We had our first West Side happy hour last year," Andrews said. "And it was a great success. We expect this year's will be even better attended."

Jeanne A. Fugate *is a partner at Caldwell Leslie & Proctor, PC and ABTL YLD Committee Member.*

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great strides – to the point that handheld cameras and video devices, quite literally, fit in the palm of one's hand, and virtually everyone in a major city has a personal electronic device with its own video camera – we continue to debate the same issues about whether there should be electronic coverage of the courts. Most recently, the U.S. Supreme Court was faced with the "crisis" of having footage from inside the courtroom posted on YouTube, after activists apparently smuggled in a hidden camera to film a protester disrupting the proceedings in an unrelated case to speak out against the *Citizens United* decision. *See* http://gawker.com/heres-the-first-known-video-taken-inside-the-supreme-c-1532819650.

Although I would not advocate this kind of violation of the Court's rules, the resulting brouhaha about the footage and security measures needed to prevent similar surreptitious recordings (which received a lot more attention than the outburst itself), inevitably raises the bigger question: why not have televised coverage of Supreme Court hearings? And why not televise other court proceedings on a more regular basis?

For appeals courts, the arguments against electronic coverage are hard to muster. The Ninth Circuit has permitted audio and video coverage of hearings since 1992 (although the panel in a particular case must agree to allow video cameras). Earlier this year, the Circuit announced that it would begin live audio streaming of panel arguments, which can be accessed at *www.ca9.uscourts.gov*. The Circuit also will have live video streaming of all *en banc* proceedings through its website. The public can access an archive of digital audio recordings of oral arguments in the Circuit dating back to 2003, and digital video recordings of *en banc* courts and some three-judge panels from 2010 to the present date. *See http://www.ca9.uscourts.gov/media*. It is an enormously valuable resource – not only for practitioners, who may not be able to leave their offices to go to a local courthouse to observe an argument (let alone travel to another city, since the Ninth Circuit covers a wide territory), but also for academics, students, researchers, and – not least of all – members of the public who may be interested in a particular case or in the appellate court system in general.

Although the U.S. Supreme Court has allowed tape-delayed audio recordings to be broadcast, thus far it has steadfastly refused to consider televised proceedings, even on a tape-delayed basis. The reasons offered – lawyers will "grandstand." the "dignity" of the court will be negatively impacted, clients will feel pressure to hire "photogenic" lawyers (yes, this has been suggested) – have been disproven resoundingly by the Ninth Circuit's two decades of experience, not to mention the experiences of other circuits, state courts of appeal, and state supreme courts. Given the advances in technology, and the undeniable importance of the issues being decided, providing public access to Supreme Court hearings by electronic means is long overdue. *See* Maureen O'Connor, "Lights, camera, Supreme Court," *Los Angeles Times*, December 20, 2013.

But what about trial courts? In the last two decades, camera coverage of trials in California reached an all-time low (post-Simpson), but then steadily increased, and the parade of horribles often mentioned (distracted witnesses, nervous jurors, showboating judges) has not occurred. Courts in some other states, like Florida, have continued to allow cameras in virtually every proceeding – again, without experiencing the disruptions or distractions that opponents of electronic coverage always trot out. Claims that a courtroom camera will make it "impossible" for a criminal defendant to get a fair trial – echoed most recently in the Pistorius case – ignore the empirical evidence in all the states that have allowed camera coverage, as well as the fact that O.J. Simpson was *acquitted* in his criminal case, even though a civil jury later found that he had committed the murders. (For a discussion of the many state studies and experiences, *see* Alex Kozinski & Robert Johnson, "Of Cameras and Courtrooms," *Fordham Intellectual Property, Media & Entertainment Law Journal*, Spring 2010; Kelli Sager & Karen Frederiksen, "Televising the Judicial Branch: In Furtherance of the Public's First Amendment Rights," 69 Southern California Law Review 1519 (1996).)

After the Ninth Circuit voted overwhelmingly several years ago to allow televised coverage of non-jury civil trials in district courts, the U.S. Judicial Conference stepped in, and decided instead to have a three-year nationwide "experiment" with camera coverage in district courts that volunteered to participate. Unfortunately, unlike the Ninth Circuit resolution, the Judicial Conference process gave the parties a veto, making it very difficult to find cases where everyone would agree to allow cameras. But thus far, more than forty trials have been televised among the fourteen participating district courts (including three districts in the Ninth Circuit), and the experiment was recently extended for another year – to July 15, 2015. Videos are available on

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the Judicial Conference website, and there is nothing that shows any negative impact on the performance or demeanor of the participants, or any detraction from the "dignity" of the proceedings. (*See* http://www.uscourts.gov/Multimedia/Cameras/OverviewofPilot.aspx).

But what is the benefit of allowing technological access to the courts? In deciding to allow limited electronic coverage of the Pistorius trial, Judge Dunstan Miambo of the high court in Pretoria gave one obvious answer: these are public proceedings, and the public should be able to observe what is happening in its courts. *The New York Times*, "Pistorius Trial In Large Part Can Be Aired On Live TV," February 26, 2014 p. A14. Judge Miambo also noted that allowing the public to observe the proceedings was particularly important in the Pistorius case, to help dispel unfounded perceptions that South Africa's legal system treats the rich and famous "with kid gloves" but is "harsh on the poor and vulnerable." *Id*.

Judge Miambo's expressed concerns about public perception of the courts have been echoed on many occasions by the U.S. Supreme Court, in reinforcing the public's right to attend criminal proceedings in this country. As the Supreme Court noted in *Richmond Newspapers v. Virginia*, 448 U.S. 555, 572 (1980), "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." The Court found strong support for the public's right to attend trials in our historical tradition, dating back to the "days before the Norman Conquest." *Id*. at 565. Throughout our history, members of the community had always possessed the "right to observe the conduct of trials." *Id*. at 572.

In contemporary society, however, logistical obstacles prevent most people from personally attending trials. *Id*. at 572-573. These obstacles are even greater in a high-profile trial, like the Pistorius murder trial. As one court asked, "what exists of the right of access if it extends only to those who can squeeze through the [courtroom] door?" *United States v. Antar*, 38 F.3d 1348, 1360 (3d Cir. 1994). But if electronic coverage is allowed, anyone interested in the proceedings can listen, or even observe, first-hand.

Without electronic coverage, reports about the proceedings come from those few members of the public and the media able to fit inside the courtroom, or from individuals outside the court offering their speculative opinions about what has taken place. It was Supreme Court Justice Anthony Kennedy who told Congress more than two decades ago:

> You can make the argument that the most rational, the most dispassionate, the most orderly presentation of the issue is in the courtroom, and it is the outside coverage that is really the problem. In a way, it seems perverse to exclude television from the area in which the most orderly presentation of the evidence takes place.

Hearings Before a Subcomm. of the House Comm. on Appropriations, 104th Congress, 2d Sess. 30 (1996).

By allowing electronic coverage of a murder case – apparently, for the first time in South Africa's history – Judge Miambo has taken an important step forward in giving the public the access to court proceedings that is critical to understanding and having confidence in the resulting verdict. Perhaps someday our own Supreme Court will do so as well.

Kelli L. Sager, *partner at Davis Wright Tremaine LLP and ABTL Member.*

REVIEW OF CONTRACTUAL ARBITRATION AWARDS

Bernice Conn

Depending on how you feel about it, a touted or reviled aspect of contractual arbitration is that many arbitration awards are insulated from review. For the most part, arbitrators were, and still are, allowed to incorrectly apply governing law or to apply the wrong law, and the affected parties have no means of remedying such errors. By the time the dispute makes it to litigation counsel, it's generally too late to do anything about review of the arbitration award. But you might want to let your client know about some options for the next contract and, depending on the circumstances of your case, you could have some options to consider as well.

ADR APPEAL OPTIONS

In November 2013, the American Arbitration Association announced its new optional appellate rules. Both JAMS and CPR: International Institute for Conflict Prevention & Resolution have had optional appeal rules for years and other ADR providers may have similar procedures. Unlike an ADR provider's other rules, which generally are deemed incorporated into the parties' contract merely by designating the ADR provider, the parties must specifically agree to the optional appeal procedure. Each of these three ADR providers suggests the contractual language to be used in order to preserve the parties' appeal rights.[1]

If the optional appeal procedure is invoked, the arbitration award is not considered final until the appeal is concluded. Typically, the appeal panel consists of three neutral arbitrators. Briefing is allowed to a different extent by each provider. Oral argument may be allowed at the request of a party or sometimes at the Tribunal's request. But the grounds and preconditions for appeal vary by ADR provider.

AAA. Rule A-10 of the new AAA procedures allows a party to appeal an arbitration award on the grounds that the award is based upon: "(1) an error of law that is material and prejudicial; or (2) determinations of fact that are clearly erroneous." Rule A-19 requires the appeal Tribunal to issue a written opinion within 30 days of service of the last appeal brief and to take one of the following actions: (1) adopt the underlying award, (2) substitute its own award for the underlying award or (3) request another 30 days to render its decision. The Tribunal may not order a new arbitration or send the case back to the original Arbitrator(s) for correction or further review.

JAMS. Rule D of JAMS' appeal procedures provides that, within 21 days of the later of final briefing, oral argument or receipt of evidence, the Appeal Panel will issue a written decision and "will apply the same standard of review that the first-level appellate court in the jurisdiction would apply to an appeal from the trial court decision. The Appeal Panel will respect the evidentiary standard set forth in Rule 22(d) of the JAMS Comprehensive Arbitration Rules."[2] The Appeal Panel may affirm, reverse or modify an award, but may not remand the case to the original Arbitrator(s).

CPR. The CPR Rules allow for review of an arbitration award whether or not the original arbitration was conducted under the CPR Rules. But Rule 1.3 limits review to those arbitrations in which the arbitrators were "(a) . . . required to reach a decision in compliance with the applicable law and rendered a written decision setting forth the factual and legal bases of the award; and (b) there is a record . . . that includes all hearings and all evidence. . . ." In such instances, Rule 8 provides that the review Tribunal may issue an award modifying or setting aside the original award only on the grounds that the original award contains material and prejudicial errors of law of such a nature that it does not rest upon any appropriate legal basis; or is based upon factual findings clearly unsupported by the record; or that the original award is subject to one or more of the grounds for review in § 10 of the Federal Arbitration Act (FAA). If the Tribunal does not modify or set aside the original award, it must issue a decision approving the award; the Tribunal cannot remand the case to the original Arbitrator(s).

Invoking these appeal procedures can be costly. Rule A-11 of the AAA rules allow the Tribunal to assess appeal costs including attorneys' fees (if a statute or the contract allows it) against a party who is not determined to be a

[1]If no ADR provider is identified, the parties can always include their own appeal provisions.

[2] Rule 22 states that strict conformity to the rules of evidence is not required.

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prevailing party. Rule A-12 allows for a further reallocation of costs. If a CPR Tribunal affirms the original award, CPR Rule 12 requires the losing party to pay its opponent's costs and fees unless the Tribunal orders otherwise; if the Tribunal reverses or modifies the original award, it may apportion the parties' fees and costs in a reasonable manner. CPR Rule 14 also requires a party who opposes confirmation of, or loses a subsequent judicial appeal of, an appellate award to pay its opponent's fees and costs if the court does not vacate or substantially modify the original or appellate award. JAMS' rules do not state who will bear the cost of the appeal process.

The pros and cons of these ADR appeal procedures are many. Electing to include an appeal right in the parties' arbitration agreement may seem contrary to the goal of expediting dispute resolution in a cost-effective manner. But the appeal option may ensure a high degree of regularity in the arbitration proceedings, and may provide a client with some additional peace of mind about the outcome. The arbitration and appeal should also take less time and money than litigating the case in the trial and appeal courts.

JUDICIAL APPEAL OPTIONS

If the arbitration agreement is governed by the California Arbitration Act, the parties can stipulate to judicial review of the arbitration award, but they must do so properly. In *Cable Connection Inc. v. DirectTV Inc.* 44 Cal.4th 1334 (2008), the contract provided that "the arbitrators shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error." The Supreme Court held that because the parties had clearly agreed that "legal errors are an excess of arbitral authority that is reviewable by the courts", the arbitration award was subject to judicial review of its merits. *Id*. at 1361. (The underlying legal premise of this holding is that acts in excess of authority constitute statutory grounds to vacate or correct an arbitration award. (CCP §1986.2(a)(4) and 1986.6(b)). The Court emphasized "that parties seeking to allow judicial review of the merits, and to avoid an additional dispute over the scope of review, would be well advised to provide for that review explicitly and unambiguously." *Id*.

So, if the arbitration agreement is governed by the CAA (which also should be explicitly stated in the contract), the parties can enjoy the efficiency, cost-effectiveness and speed (hopefully) of arbitration with the confidence that the arbitrator's decision will have to be consistent with the evidence and California law. (Just make sure you make a sufficient record for review). Even if review is sought in either or both the trial and appellate courts, there should still be a substantial reduction in the time and cost involved in litigating the dispute.

While the parties cannot similarly stipulate to judicial review of arbitration agreements governed by federal law beyond the scope of review allowed by § 10 of the FAA (*see Hall Street Associates, L.L.C. v. Mattel*, Inc. 552 U.S. 576 (2008)), the Ninth Circuit recently held that parties cannot stipulate to avoid review under § 10 of the FAA either. *See, In Re: Wal-Mart Wage & Hour Empl. Practices Litig. v. Class Counsel & Party to Arbitration* (2013 U.S. App. LEXIS 24949; 164 Lab. Cas. (CCH) P36,187).

Wal-Mart involved an Arbitrator's allocation of attorneys' fees between class counsel pursuant to a settlement agreement which contained a provision requiring that any disputes concerning fee allocation be submitted to "binding, non-appealable arbitration". Following the reasoning in the U.S. Supreme Court's holding in *Hall Street* which prohibits parties from expanding federal review of arbitration awards, the Ninth Circuit concluded that the parties were similarly barred from constricting or eliminating such review. The court held that allowing parties to contractually eliminate all federal review of arbitration awards would run counter to the text of the FAA and frustrate Congress's intention of ensuring "a minimum level of due process for parties to an arbitration". The court held in closing: "If parties could contract around this Section [§ 10] of the FAA, the balance Congress intended would be disrupted, and parties would be left without any safeguards against arbitral abuse."

So, whether it's through an ADR provider's appeal procedures or by judicial review, it may be possible to give your client some protection against the vagaries of an arbitrator's decision. Given the increasing prevalence of arbitration as a preferred method of dispute resolution, clients need all the protection they can get.

Bernice Conn *is a partner in the Los Angeles office of Robins, Kaplan, Miller & Ciresi LLP and represents clients in commercial business, unfair competition and antitrust disputes.*

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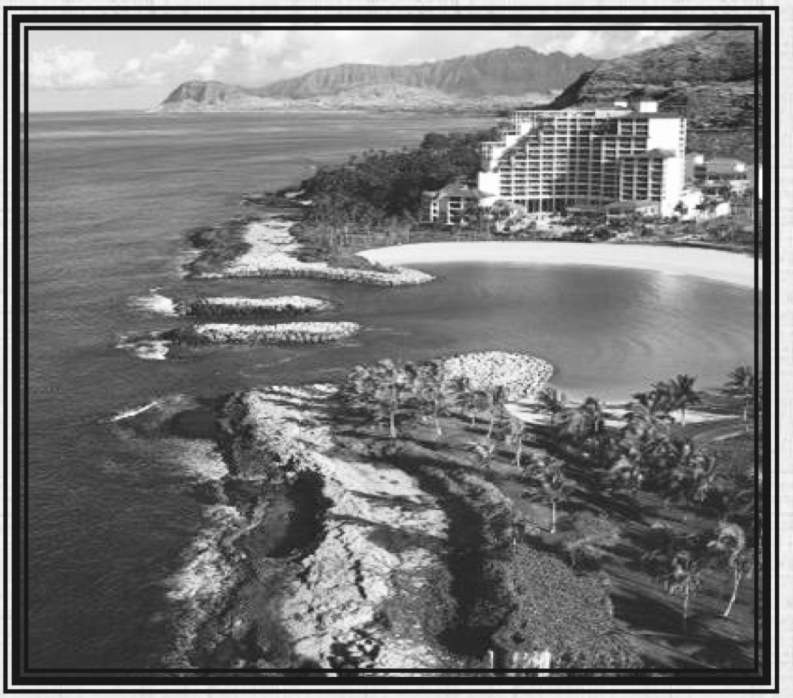

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CONTRIBUTORS TO THIS ISSUE:

Bernice Conn *is a partner in the Los Angeles office of Robins, Kaplan, Miller & Ciresi LLP and a member of the ABTL Board of Governors.*

Jeanne A. Fugate *is a partner at Caldwell Leslie & Proctor, PC and ABTL Young Lawyer Division Committee Member.*

John F. Querio *is an associate at Horvitz & Levy LLP and an ABTL Member.*

J. Warren Rissier *is a partner in the Los Angeles office of Bingham McCutchen LLP, and current president of the Los Angeles chapter of ABTL.*

Kelli L. Sager *is a partner at Davis Wright Tremaine LLP and an ABTL Member.*