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When Is the Right Timing for a Mediation?

Mediation has become so embedded in the litigation process that it is typically no longer a question of if the case will go to mediation, but when. The California courts have repeatedly recognized “strong legislative policy” in favor of alternatives to court adjudication. The California legislature has acknowledged the advantages of mediation — simplicity, economy, privacy, greater opportunity for direct participation of the parties, timely resolution, certainty of outcome, and finality. Clients, particularly cost-conscious in-house counsel, are increasingly more sophisticated in their approach to mediation and expect their attorneys to be as well. Suggesting mediation these days is not a sign of weakness, but simply a recognition of what the court will expect, or at least encourage.



Hon. Rebecca Westerfield (Ret.)

Concepts about negotiation have also evolved to focus on non-economic interests as well as economic solutions to disputes. This approach has made its way into the MBA

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The Supreme Court and Patentable Subject Matter Under Section 101

The increase in patent litigation over the past decade has fostered a debate over the health of the U.S. patent system and its impact on the economy, including over what innovations should be patentable under 35 USC Section 101, which governs what subject matter is eligible for patenting. Courts have typically focused on other tests for patentability, including the requirement of novelty (35 USC section 102), non-obviousness (35 U.S.C. section 103), and disclosure and definite claiming (35 U.S.C. section 112). But recent decisions from the Supreme Court and Federal Circuit have turned Section 101 into a more stringent gatekeeper, particularly for the more controversial patents for business methods, software, and diagnostic methods. Unfortunately, the decisions of the Supreme Court and a splintered Federal Circuit have not formulated principles that can be predictably applied, making section 101 a landmine for both practitioners and companies alike.



Jaideep Venkatesan

Section 101 as Gatekeeper

Section 101 simply states that “[w]hosoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.” Section 101 was often seen as a broad, almost nugatory, declaration of patentability, most famously described in congressional testimony (and quoted by the Supreme Court) as allowing the patenting of “anything under the sun that is made by man.” See *Diamond v. Chakrabarty*, 447 U.S. 303 (1980).

The Supreme Court has held that there are three exceptions to patentability implied by the statute: one cannot

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programs, law schools, management trainings and even trainings for insurance adjusters. While haggling and bazaar-style bargaining over money (or other quantifiable factors, such as real estate, licenses, products or time) are enough for some people and organizations, other experienced negotiators and neutrals will consider a broader range of interests and explore the possibility of a resolution that will expand the “fixed pie.”

Timing, however, is key. Mediation should not be about identifying as reliably as possible the best settlement terms available at the time of the mediation rather the mediation should be timed to get the best settlement terms. “The right offer at the wrong time is the wrong offer.” This article explores some of the considerations involved in choosing the timing of the mediation deliberately and strategically, and preparing for the right time when it comes.

Planning Mediation In the Context of the Litigation

In planning litigation, trial attorneys often create calendaring systems to make sure no deadlines are missed or details are overlooked. Making the effort to consider mediation at different points in the litigation plan is just as important. The critical path to success in mediation should take as much focus and discipline in planning as trial strategy. A very patient golf instructor once said to me “If we don’t aim it’s a waste of time.”

Like most things in the litigation process, it is usually not a neat sequential linear path to a mediation event. The challenge is to be as little surprised as possible, to be able to respond to the unexpected, to minimize potential setbacks and to take advantage of openings. An effective calendaring system could include points that trigger consideration of mediation before the next litigation event.

For instance, is a motion for summary judgment anticipated? Is it likely that its greatest impact on a mediation will be before it is filed, after it is filed but not ruled on, or only after a ruling if it does not dispose of all the issues? Should a mediation session occur before or after making an offer of judgment under CCP §998 or FRCP 68? An offer of judgment ups the ante by shifting certain “costs” to the offeree if they do not get a more favorable verdict. In some cases, increasing the litigation risks before a mediation may be the right call — but it may cause the other side to view the offered number as a “step” in the negotiation dance rather than as the offeror’s “bottom line.”

Another timing consideration is when to begin the mediation. While the marathon one-day session is the traditional paradigm, there may also be a mediation process that includes shorter sessions at different points. In complex cases this can allow for different sessions with different participants, but sequencing multiple individual claims or fractionating issues may be efficacious even in simpler cases. And, as discussed below, a sequenced mediation can be used to help manage the discovery process.

“Bigger-Picture” Timing Concerns

Determining the right timing for mediation also re-

quires knowing about issues external to the immediate dispute that can impact resolution. Is there an initial public offering on the horizon, a financial obligation coming due, an anticipated announcement by a regulatory agency, a change in tax laws, or a pending appellate court case that addresses the subject matter of the lawsuit or a key issue in the litigation? The attorney must appreciate the context of the dispute and know the client’s overarching needs to satisfy them.

There are disputes in which the parties may have a higher interest in preserving an existing beneficial business or professional relationship — unexpired service agreement, software license, supply contract, an ongoing business, or relationships with non-party entities such as customers. A client may have objectives that are unobtainable through the litigation — renegotiated contracts, buy-outs, exchange of property, a release that goes beyond the litigated matter. In these cases, the mediation should occur when the options can be explored fully, before the possibility of productive discussions is eroded by the demands of adversarial litigation. In a high-stakes dispute involving highly technical or scientific issues, the parties’ priority may be retaining control of the outcome. Early mediation in which an independent expert is engaged to assist the mediator before litigation begins may be advisable.

Mediation and Discovery

In some cases, it is helpful to involve a neutral even before the case is ready for mediation, particularly to help facilitate a reasonable and cost-effective discovery process. In a recent construction case, a half-day session was held in which experts on both sides shared information and the parties devised a plan for moving forward towards settlement discussions. Parties can work with a mediator to design a process for exchange of information reducing discovery costs and maintaining confidentiality under the mediation privilege. A mediator can monitor the case to help the parties determine the opportune time to have meaningful settlement discussions.

The conundrum of discovery is that attorneys cannot assess settlement as an alternative to a trial or arbitration outcome without reliable information, but formal discovery processes often involve considerable costs and delays without any guarantee about the usefulness of information obtained. While certainly some discovery battles may be necessary, costly discovery disputes can lead to runaway costs, heightened distrust and sometimes irrational attachment to the litigation.

There are a couple of dynamics worth noting that needlessly escalate the conflicts around discovery that a mediator involved at an early stage will try to allay. One is sunken cost fallacy, or the tendency to “throw good money after bad” in the belief that this will improve the ultimate outcome. Past attorney’s fees and costs should not influence judgments about future decisions (especially when they cannot be recouped through a statutory or contractual fee provision). In reality, past expenses often do create an irrational commitment to investing more resources into a case even when it may not make economic sense.

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Another destructive dynamic is *fundamental attribution error*; the tendency to attribute an understandable cause to one's own actions and to attribute that same action by another to being unreasonable. Two common examples: "My discovery requests are necessary to evaluate the claim and assess risk. Your discovery demands are a tactic in a costly war of attrition." Or "Your resistance to discovery is because you are hiding something. My resistance is because I am trying to be prudent about costs." Prolonged litigation is likely to exacerbate these dynamics, while a well-timed mediation can help ameliorate them.

The mediator can insure that there has been a timely exchange of data and information that will make a mediation session more likely to succeed, while providing confidentiality for sensitive information through the mediation privilege. For example, parties may need revenue information and financial analysis to evaluate a claim of damages. Or, if a defendant is going to raise an argument about financial ability to pay, credible, current financial statements ought to be available before the mediation session (and before the plaintiffs' expectations are fully developed) if they are to have any significant impact.

Coverage Considerations

Insured matters may require special consideration of mediation timing. A claim may trigger more than one policy. If the case involves continuous progressive damages, several policies covering different years may be in play. Disputes may arise between excess and primary carriers, or among different lawyers of excess carriers. And a single claim or incident may trigger different types of policies, such as a commercial general liability policy and professional liability policy.

A policyholder (and, in most cases, a party suing the policyholder) will want to ensure that all potentially exposed carriers are on notice of a claim. Disputes among different carriers should be identified before mediation, and either resolved or attended to so that everyone knows who will participate in the mediation. It can be extremely frustrating and wasteful when a defending carrier comes to mediation and refuses to grant or use its settlement authority because of the absence of another carrier. Time spent on allocation and contribution issues among a defendants' carriers can antagonize and rankle plaintiffs who expect the mediation to focus on the underlying claims, making it more difficult to bring the case to closure. A mediator who is engaged early can assist the parties in addressing these issues, in reaching agreement as to who will participate before the mediation of takes place, or in determining how to resolve the underlying case while leaving contribution issues for another day. In some cases, a "pre-mediation mediation" among multiple carriers is helpful, either with the mediator that will handle the underlying or with a different mediator if the carriers do now want the mediator in the "main event" to know the amount potentially available to settle the underlying claim.

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Preventing and Remediating Deposition Perjury by Your Witness

Someday you may find yourself in a deposition where the client you are representing commits perjury. Although perjury at a deposition may seem less dramatic than perjury at a trial, it can have devastating effects on a case and can result in severe consequences for both you and your untruthful client.

This article examines the remedial steps a lawyer must take when you learn your client is committing — or has committed — perjury at deposition in a civil case. (The issues that arise when a lawyer learns a client intends to commit perjury at a future deposition, and the issues that arise when your client is a defendant in a criminal case are beyond the scope of this article.) It then addresses how you might have tried to prevent the deposition perjury or limit its damage.

Perjury at a Deposition

Suppose you represent an insurance agent in a lawsuit by an insured against both the agent and the insurance company. The insured's policy required proof of claim within sixty days of loss. The insured alleged that he had mailed the proof of claim one day before the sixtieth day deadline.

You have prepared your client for her deposition on the question of the receipt of the proof of claim. Your client tells you the proof was not timely, and, in support, hands over a copy of her office mail log showing late delivery of the proof, which you later produce to the plaintiff. You leave the preparation session confident about the prospects for success.

At your client's deposition, the plaintiff's lawyer asks questions of the agent about timely receipt of the claim. Your client testifies it was not timely. The agent then signs the deposition transcript, and you start preparing a motion for summary judgment based upon the plaintiff's failure to provide timely proof of claim.

Several days later, you run into the agent at the airport. For the first time, the agent tells you that she lied at her deposition about the proof of claim. She now tells you that she had received the insured's proof of claim by the sixtieth day. To your horror, she tells you she destroyed the proof of claim and altered the mail log, which you had produced, to show late notice. Farfetched you say. No, this exact scenario is based on a case cited in ABA Committee on Ethics and Professional Responsibility Formal Opinion [Formal Opinion] 376 (1993).

Your mind races with questions. What are you now

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Henry L. Hecht

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required to do? Where do you look for guidance? And how might you have tried to prevent this disaster?

The Lawyer's Duty to Take Remedial Action

What you must do depends on the jurisdiction in which you practice and whether you know whether the testimony is both false and also material. Note: For purposes of this article, assume you know its falsity — it is not merely a suspicion — and its materiality — it is certainly neither trivial nor irrelevant.

The Majority Approach

In 49 of 50 states — with California and the District of Columbia being notable exceptions, as discussed below — the ABA Model Rules of Professional Conduct (Model Rules) serve as the direct basis for lawyer conduct rules.

The Model Rules require a lawyer who knows that her client has committed deposition perjury — whether at a deposition or before a tribunal — to “take reasonable remedial measures, including, if necessary, disclosure to the tribunal.” And the duty is triggered when, as in our case, the lawyer knows the client has testified falsely and the falsity concerns a material fact. (See ABA Model Rule of Professional Conduct [Model Rules] 3.3, Candor Toward the Tribunal.)

If the two predicates are met, the first remedial step is to try to persuade the client to rectify the perjury. Failing that, the lawyer must withdraw. If neither of these steps rectifies the perjury, the lawyer must inform the court of a client's perjury — even if that disclosure reveals protected confidences of the client. (See Model Rule 1.6, Confidentiality of Information.)

Before disclosure, if withdrawal alone is sufficient, another step — short of full disclosure — is withdrawal coupled with repudiation of any evidence or document the lawyer knows to be based wholly or partly on false evidence. The lawyer makes this repudiation, however, without saying anything about the disaffirmed item other than that she no longer stands behind it in order to prevent a client from continuing to use tainted evidence, particularly if its use could be construed as a *de facto* continuation of representation by the lawyer.

Ultimately, if none of the foregoing steps rectify the fraud, as noted above, a lawyer must disclose the perjury to the other party and sometimes even to the court. Indeed, Formal Opinion 376 states that disclosure “may prove to be the only reasonable remedial measure in the client fraud situation most likely to be encountered in pre-trial proceedings.”

The Minority Approach

For lawyers in California and in the District of Columbia, in face of testimony known to be false and material, the answer differs. Specifically, because a lawyer in California is not permitted to reveal client confidences and secrets — even in the face of perjury — except to prevent a crime that could result in substantial bodily injury or

death. (See California Business and Professions Code 6068[3].)

Instead, the lawyer must first ask the client to consent to rectification. If the client refuses, the lawyer should warn the client that she cannot participate in or further a client's fraud and is required to move to withdraw from the case — without disclosing the testimonial perjury unless the client consents. But how to make a motion to withdraw with further disclosure is not easy. In one case, a lawyer representing a criminal defendant who wanted to testify falsely a trial dealt with the dilemma in part by informing the court that he had an “ethical conflict.” (See *People v. Johnson* 62 Cal.App.4th 608 [1998].) The lawyer should also warn the client that if the court denies the motion to withdraw, the lawyer's representation going forward will be limited in scope and, in particular, the lawyer will not be able to rely upon or refer to any of the perjured testimony. Hopefully, these warnings will lead the client — who by now should realize the detrimental impact of these steps to her case — to choose to correct the false testimony.

For California lawyers, an interesting alternative remedy is found in California State Bar Formal Opinion 74 (1983), which addressed perjury in a non-jury civil trial. That Opinion suggests the lawyer may seek — again without an explanation that might disclose the client's confidences — a stipulation from opposing counsel that the testimony be stricken. If the stipulation is agreed to, the court may strike the testimony, curing the problem. But, if the stipulation is not agreed to, the lawyer must move that the testimony be stricken, stating whatever grounds exist — again without disclosing the client's confidences unless the client consents.

Federal Rules of Civil Procedure

Finally, in federal practice, a duty to act may be found in Federal Rule of Civil Procedure (FRCP) 26(e), which requires a party to supplement responses to formal discovery requests whenever the party learns that prior disclosures are materially incorrect or incomplete. In particular, FRCP 26(e)(2) explicitly extends the duty to supplement to the deposition of *expert* witnesses. If an expert offers an opinion at a deposition that is materially incorrect or that an opinion that subsequently changes, then the deposition must be supplemented to reflect the correct information or change at least thirty days before trial, unless otherwise directed by the court.

In addition, FRCP 11 may be interpreted to require a lawyer's continuing duty to investigate, which is triggered when a lawyer gains knowledge of perjury that casts serious doubt on the legitimacy of a claim or defense.

Preventing and Remediating Client Perjury

In our hypothetical, your client's deposition perjury caught you — the defending lawyer — by surprise. What steps might you have taken to try to prevent the perjury; and failing its prevention, what can you now try to do to limit the damage — before, during, and after the deposition?

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Preventing and Remediating Deposition Perjury

First, before the deposition, during witness preparation, emphasize the importance of telling the truth. Make clear to your witness that there are many good reasons to tell the truth: moral, ethical, and strategic. As suggested above, a member of the California Bar may even want to alert the client of the possibility the lawyer may need to withdraw if the client commits perjury and refuses to correct the testimony.

Second, if you suspect during witness preparation that your client might testify falsely, make clear your obligation to take remedial steps, including disclosure to the court, in order to prevent or correct the presentation of evidence known to be false. But remember this statement will be taken as an accusation, so be sensitive to its impact on client relations. Third, if your concern rises to more than a suspicion, remember that at least in civil cases, the existing rules give you discretion not to present testimony that you “reasonably believe” to be false.

Once at the deposition, if your witness appears to be straying dangerously close to perjury, there are several steps you can take. First, decide whether an ambiguity in the question may be causing an apparently false response. If so, object to the question if you have a legitimate basis to do so. Your objection may cause the examiner to rephrase the question so that the answer is no longer suspicious, or your objection may signal to the witness that you are concerned about the answer.

Second, after an apparently false answer but before any further false testimony is offered — when permitted by the governing rules — seek a break in order to confer with your witness. Ask the witness why her deposition testimony now differs from the version she provided during witness preparation. Hold this “off-the-record” conversation before any other action is taken; in that way you can decide whether there is a legitimate reason for the change in the witness’s story or whether perjury has occurred or is likely to occur.

Suppose during your conference the witness has no reasonable explanation for the change in her testimony, and you believe additional false testimony will be offered. At this point, bluntly warn your client of perjury’s serious consequences; and tell the client about your ethical obligations. Explain to your client that if she persists in committing perjury or if she refuses to rectify perjury that already has occurred, you must withdraw, disaffirm the evidence, and — depending on the jurisdiction — may even be required to disclose the perjury to the court. If your client still intends to testify in a manner that you believe to be false, suspend the deposition before additional perjury can occur. This step will prevent additional damage while possibly allowing you to reopen the deposition after further discussion with the client.

After the deposition has been suspended, decide whether rectification is required for any false statements already on the record. If rectification is necessary, you have several options. One is to resume the deposition and have the witness correct her testimony. Another is to resume the deposition and clarify the record by question-

ing your witness after opposing counsel has finished his direct examination.

Now suppose you learn about the perjury only after the deposition is over. Initially, take steps that least invade the client’s expectation of confidentiality. Talk to the client confidentially and urge her to correct the false testimony immediately. By recanting false testimony before it substantially influences the proceeding or becomes apparent the falsity would have been exposed anyway, a witness may avoid a perjury prosecution. In addition, immediate recantation demonstrates the type of good faith that can salvage a judge’s goodwill as the case proceeds.

Finally, there may be ways to fix the problem without overly damaging the client’s credibility. Depending on the rules of the relevant jurisdiction and the nature of the evidence, you may be able to rectify the perjury without ever divulging the client’s wrongdoing to the court or breaching the client’s confidence. If the deposition has concluded, you could offer the witness for an additional deposition at which time the witness can correct the testimony. Then at the second deposition, if your witness has not corrected the earlier testimony by the end of direct examination, you can clarify the record by questioning your own witness.

As an alternative, after the deposition, a witness can correct the false testimony by making changes to the deposition transcript. Such changes, however, leave a witness open to both comments at trial about the corrections to the transcript and also cross-examination at trial.

When a lawyer discovers that a client has committed perjury at a deposition, a lawyer must be ready to act. And that means knowing—and strictly complying with—the applicable rules of professional conduct and the relevant case law in your jurisdiction in order to determine the precise scope of your duties in the face of deposition perjury, particularly when the duty of confidentiality is involved.

*This article is adapted from “Deposition Perjury by Your Witness,” in Henry L. Hecht *Effective Depositions* 2nd ed. (ABA 2010).

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Coverage issues are also often complex and can involve complicated factual determinations or policy language untested by the courts. A pre-mediation mediation of coverage can avoid the chewing up of time during the mediation of the underlying case resulting in inadequate time to reach settlement. Recently I was involved in a dual-tracked, parallel mediation in which I mediated the coverage dispute and another neutral mediated the underlying case. The corporate policyholder knew it would be making some contribution to the settlement and having the

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Patentable Subject Matter

patent laws of nature, physical phenomena, or abstract ideas. *Gottschalk v. Benson*, 409 U.S. 63, 67, 93 S. Ct. 253, 34 L. Ed. 2d 273 (1972). The rub of section 101 is most keenly felt when dealing with claimed processes, such as computer programs whose novelty is in a particular algorithm or formula. In such cases, the Federal Circuit had applied the “machine-or-transformation” test, finding patentability where the claimed process was tied to a particular apparatus or transformed something into a different state. The Federal Circuit applied this test broadly, finding even a so-called “business method” patentable in that it used a machine to transform data through a series of calculations, and thus constituted a patentable application of a mathematical algorithm. *State Street and Trust Company v. Signature Financial Group, Inc.*, 149 F.3d 1368 (Fed. Cir. 1998).

In *Bilski v. Kappos*, 561 U.S. ___, 130 S.Ct. 3218 (2010), the Court confronted a business method patent claiming a process for hedging risk in the energy commodities market. It held that the machine-or-transformation test was “an important and useful clue” but not the sole test for evaluating the patentability of claimed processes. The Court refused to prohibit business method patents entirely. It held more narrowly that the claims at issue in *Bilski* were invalid for attempting to claim an unpatentable abstract idea. The Court cryptically invited the Federal Circuit to create a “business method exception”, noting that the Federal Circuit could “succeed in defining a narrower category or class of patent applications that claim to instruct how business should be conducted, and then rule that the category is unpatentable because, for instance, it represents an attempt to patent abstract ideas.” *Bilski* signaled to lower courts that section 101 should become a more stringent gatekeeper of patentability, and opened the floodgates for section 101 challenges.

The Inventive Concept

In *Mayo v. Prometheus*, 566 U.S. ___, 132 S.Ct. 1289 (2012) the Supreme Court elaborated on the scope of the judicial exceptions for process claims that intertwine abstract ideas or laws of nature with physical elements. The patent at issue claimed a method for determining the effectiveness of the administration of thiopurine drugs to treat autoimmune diseases. The claims recited methods for determining the levels of “metabolites” in a patient’s drugs to determine the effective dose to administer. The novelty of the claim involved clearly physical phenomena — the level of metabolites in a patient’s bloodstream. The claim also included concrete steps that required human activity — the steps of determining the ratio of metabolites and then administering the drug. The Court found these to be akin to “insignificant post-solution” steps that, under previous cases, cannot turn an unpatentable subject into a patentable invention. *Mayo* essentially held that where an abstract idea or law of nature is claimed along with additional concrete steps (such as those performed by a computer or a human) the steps must be “significant,” and must be part of the inventive application “to ensure

that the patent in practice amounts to significantly more than a patent upon the natural law itself.” *Mayo*, 132 S. Ct. at 1294. Only if a claim’s inventive concept incorporates the physical limitations requiring “genuine human contribution” will it survive section 101.

Because almost every patent involves the application of ideas, laws of nature, or physical phenomena, the Court’s section 101 jurisprudence creates a tension in determining which limitations consist of “insignificant post-solution activity” and which are part of the inventive concept. Resolving this tension in some cases will be relatively simple. For example, in *Association for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. ___, (2013) the Court applied this formulation to find that, while DNA cannot be patented because it occurs in nature, modifications to such DNA can. Other technologies, such as software or telecommunications, are trickier. The question for practitioners, litigants, and the Federal Circuit is determining the patent-eligibility of a claim whose novelty lies in a particular process — such as a software program — that is implemented through computer hardware or the internet. Should a patentee be able to claim the application of an algorithm or formula simply because it also claims its operation through a computer-readable medium, processor, and data storage? A claim that includes those limitations could be fairly read as involving physical components or “genuine human contribution” rendering it patentable. Resolving this tension is key to predictability of patent analysis, and has the potential to affect the validity of thousands of patents on software, business methods, internet functionality, and similar processes.

The Federal Circuit seemed poised to resolve this tension when it heard *en banc CLS Bank International v. Alice Corporation Pty. Ltd.*, 2013 U.S.App. Lexis 9493 (Fed. Cir. May 10, 2013). *CLS* involved a claim for a computerized trading platform for conducting financial transactions to eliminate counterparty or settlement risk. The patent included method claims, computer-readable medium claims, and system claims. It was assumed that the claimed process for ameliorating settlement risk was novel, and that even the method claims required implementation on a computer to be infringed (thus requiring at least some physical apparatus or human contribution). Rather than provide clear precedent on when a claimed process that requires computer or internet implementation is patentable, a badly fractured court issued a 55-word per curiam opinion stating that a majority of justices found the method and computer-readable medium claims to be unpatentable, and that an evenly divided panel affirmed the district court’s decision finding the system claims unpatentable. The court issued five additional, non-precedential opinions, all employing different analytical approaches. As Judge Newman noted in her opinion, the result is stark unpredictability, with a litigant’s chances for success depending on which judge and Federal Circuit panel it draws.

Determining Whether a Claim’s Inventive Concept Includes Patent-Eligible Subject Matter

The Supreme Court and Federal Circuit’s decisions provide some guideposts for determining the subject matter

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ANDREW LEIBNITZ

On TRADEMARK

Freedom of expression bowed to the right of publicity on July 31, 2013, when a divided Ninth Circuit panel ruled that college athletes could proceed against Electronic Arts (“EA”) for making sports-based video games so realistic as to capture the likenesses of the athletes. In re NCAA Licensing Litig., No. 10-15387 (9th Cir. July 31, 2013) (Slip Op.). The case calls into question how far one must depart from reality to create a work free from lawful objection by its subjects.

Samuel Keller played quarterback for Arizona State University (ASU) in 2005. In EA’s 2005 edition of *NCAA Football*, ASU’s virtual quarterback had the same number, height, weight, skin tone, hair color, hair style, handedness, home state, play style (pocket passer), visor preference, facial features, and school year as Keller. Keller filed a putative class action against EA for allegedly violating the right of publicity set forth in California Civil Code § 3344 and California common law. EA moved to strike the complaint as a “SLAPP” suit seeking to restrict EA’s First Amendment rights. EA lost the motion and appealed.

The Ninth Circuit focused on the “transformative use defense”: “a balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation.” *Id.* at 11. The test involves five factors: (1) whether the depiction is “the very sum and substance of the work,” or the celebrity likeness is just one of the “raw materials” from which the work is synthesized; (2) whether a likely purchaser’s primary motivation is to buy a reproduction of the celebrity, or to compensate the expressive talents of the work’s creator; (3) whether — in an inquiry “more quantitative than qualitative” — the literal and imitative or the creative elements predominate in the work; (4) whether, in close cases, the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted; and (5) whether the creator’s skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity to commercially exploit his fame. *Id.* at 11-12.

Writing for the majority, Circuit Judge Jay S. Bybee found that the likeness of the players predominated over EA’s contribution because gamers purchased *NCAA Football* for its realism. Keller was depicted in his uniform with his attributes in settings in which he actually played. EA’s literalism impinged Keller’s right to exploit his own likeness.

In dissent, Circuit Judge Sidney R. Thomas found the athletic likenesses comprised “raw materials from which the broader game is constructed.” *Id.* at 36. Gamers control the conduct of the game, weather, crowd noise, and other factors. *Id.* Gamers could change Keller’s “impressive physical likeness...into an overweight and slow virtual athlete, with anemic passing ability.” *Id.* Moreover, a gamer

“could play the game endlessly without ever encountering Keller’s avatar.” *Id.* “That the lifelike roar of the crowd and the crunch of pads contribute to the gamer’s experience demonstrates how little of *NCAA Football* is driven by the particular likeness of Sam Keller, or any of the other plaintiffs, rather than by the game’s artistic elements.” *Id.* at 38. In sum, the “sheer number of virtual actors” in *NCAA Football*, the absence of “any evidence as to the personal marketing power of Sam Keller,” and the relative anonymity of each individual player in *NCAA Football* as compared to the public figures in other California right-of-publicity cases all mitigate in favor of EA’s First Amendment rights. *Id.* at 17 n.7.

In rejoinder, the majority defends the yeomen of college football: “EA elected to use avatars that mimic real college football players for a reason.... Having chosen to use the players’ likenesses, EA cannot now hide behind the numerosity of its potential offenses or the alleged unimportance of any one individual player.” While the ability to modify the avatars is transformative (warranting additional First Amendment protection), “the appeal of the game lies in users’ ability to play as, or alongside, their preferred players or team.” *Id.* at 20. The majority omits an equally compelling argument relied upon in a nearly-identical case decided by the Third Circuit in May: “If the mere presence of the [mutability] feature were enough, video game companies could commit the most blatant acts of misappropriation only to absolve themselves by including a feature that allows users to modify the digital likenesses.” *Hart v. Electronic Arts, Inc.*, 717 F.3d 141, 167 (3d Cir. 2013).

But the majority in Keller’s case goes astray by not according *NCAA Football* greater protection. EA’s software did not attain its success by being “[nothing] more than a mere celebrity likeness or imitation.” The video game is not akin to a charcoal sketch of the Three Stooges reprinted on t-shirts (*Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal 2001)), nor to a Hallmark birthday card depicting Paris Hilton stating, “That’s hot,” *Hilton v. Hallmark Cards*, 599 F.3d , 894, 899 (9th Cir. 2010).

Realism should not be punished in expressive works. If EA had recreated battles from the conflict in Afghanistan using biometric data from actual combatants, gamers would have purchased the software not to obtain celebrity likenesses but rather to reenact history. In the absence of privacy violations, individuals — even sympathetic groups that might otherwise deserve remuneration — should not have power to prevent or tax such speech. Interactivity itself may warrant additional consideration as transformative. Indeed, it may be where history is most tactile — subject to reconfiguration, isolation, and replay — that freedom of expression should be given the benefit of the doubt.

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Andrew Leibnitz



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Patentable Subject Matter

eligibility of patents at the intersection of unpatentable subject matter and patentable applications of laws of nature, physical phenomena, or abstract ideas.

Claim Construction may not be required for a court to invalidate claims under Section 101. Courts have differed on whether they must construe a claim before determining patent eligibility under section 101. Requiring claim construction would preclude an early motion to dismiss, instead potentially requiring a Markman hearing. In *Ultramercial v. Hulu*, 2013 U.S.App. Lexis 12715 (Fed. Cir. June 21, 2013), Judge Rader noted that “because of the factual issues involved, claim construction normally will be required.” *Ultramercial*, 2013 U.S.App. Lexis at 12715. Nonetheless, he intoned that claim construction is not always necessary because “eligibility is a ‘coarse’ gauge of the suitability of broad subject matter categories for patent protection,” and both the Federal Circuit and Supreme Court have rendered judgment under section 101 in several cases without claim construction. Accused infringers would be advised to assert that a motion to dismiss be decided under an agreed-upon claim construction, as the Federal Circuit did in *CLS*, or submit a motion under a construction most favorable to the patentee, as in *Ultramercial*.

Preemption: The breadth of the claims matters. The Supreme Court has noted that at some level, all inventions draw from laws of nature, abstract ideas, or physical phenomena, and widening the scope of these judicial exceptions too greatly would impermissibly invalidate thousands of patents. *Mayo*, 132 S. Ct. at 1293. The degree to which a claim includes elements constituting practical and concrete limitations will determine whether it is patent eligible. A claim limited to a particular physical manifestation, either expressly or through claim construction, stands a greater chance of passing section 101’s “coarse filter.”

In *Research Corporation Technologies, Inc. v. Microsoft Corp.*, the Federal Circuit held as patentable a claimed method for rendering a halftone digital image. At heart the patented method was an algorithm to control digital halftoning. 627 F.3d at 869. The algorithm was applied to a specific technology, digital halftoning, that had a physical manifestation taking it out of the realm of the “abstract idea” exception. Similarly, the United States District Court for the Northern District of California found a claim relating to Java data structures patentable, rejecting the argument that it simply claimed abstract steps for manipulating data in a programming language. *Nazomi Communications v. Samsung Telecommunications, Inc.*, 2012 U.S. Dist. LEXIS 39468, *14-15 (N.D. CA March 21, 2012).

Patentees should take special care with claim construction, as using the broadest possible construction may render the claim unpatentably abstract. For example, where a software patent employs functional claiming, the patentee may want to import limitations from the specification that create more concrete limitations requiring “genuine human contribution”. This may make infringement harder to prove, but could be necessary to pass the section 101 gatekeeper. But, while restricting a claimed formula or

algorithm to a particular technological application may ensure patent-eligibility, restricting an abstract idea to a particular field of use will not. In *Bilski*, the Court found the claimed process for hedging risk an ineligible abstract idea even where the claim restricted its application to exchanges in energy commodities markets, and not just markets generally.

The format of the claim will be increasingly irrelevant. *CLS* involved three different types of claims — method claims for facilitating exchanges between buyers and sellers that minimize settlement risk; claims for a “computer readable medium” containing a computer program practicing the claimed process for reducing settlement risk; and system claims reciting data processing systems configured to enable exchanges using the claimed process. Judge Lourie, writing for five judges finding all three sets of claims unpatentable under section 101, noted that three other judges (Newman, Linn, and O’Malley) also treated the different sets of claims under the same analysis, albeit reaching a different result and finding all of the claims patentable. While there is no precedential value in this assertion, courts are likely following Justice Breyer’s admonishment that the Court’s cases “warn us against interpreting patent statutes in ways that make patent eligibility ‘depend simply on the draftman’s art’ without reference to the principles underlying the prohibition against patents for natural laws.” *Mayo*, 132 S.Ct. at 1294. While good reasons may justify treating method claims differently from medium, apparatus, or system claims under section 101, where the key determinant of patentability rests on whether a patentee seeks to monopolize a law of nature or an application of that law, most courts are likely to follow the Supreme Court’s cue and focus on the underlying substance of the claim — not different structural limitations.

Adding limitations that simply require a computer or the internet will not be enough. Following from the principle that courts will look at the substance of a claim, and not a particular format, claimed processes will likely be invalidated where elements requiring a computer medium, processor, data storage device, or network appear to be added as minor limitations. In *Cybersource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366 (Fed. Cir. 2011), the Federal Circuit invalidated method and system claims involving a process that the court asserted could be performed within one’s mind or using a pen and paper. That it would be easier with a computer (and that the claim actually claims using a computer) did not render the claim patentable. “[C]omputational methods which can be performed entirely in the human mind are the types of methods that embody ‘the basic tools of scientific and technological work’ and are free to all men and reserved exclusively to none.” *Id.* at 654 F.3d at 1373.

Not all processes that can be reduced to such a set of steps will be unpatentable. In *Ultramercial*, the Federal Circuit panel found patent-eligible a claimed method for distributing copyrighted products over the internet where the consumer receives a copyrighted product for free in exchange for viewing an advertisement. The Federal Circuit found that while the mere idea of using advertising as

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TRENTON H. NORRIS

On ENVIRONMENTAL LAW

Reform is in the air. Every major environmental statute was written before our newest bar members were born, and most were enacted several decades ago. And as they approach middle age, there is widespread agreement that our environmental statutes need to slim down, focus on the essentials, and maybe undergo a little nip and tuck.

But that is where the consensus ends, as shown by efforts to reform the two groundbreaking laws that have spurred the bulk of California environmental litigation: the 1970 California Environmental Quality Act (CEQA) and the 1986 Safe Drinking Water and Toxic Enforcement Act (Proposition 65). One person's "reform" is another's effort to undermine or expand the law.

CEQA requires any project requiring state or local government approval to undergo a review of its environmental impacts, including alternatives and mitigation. Almost anyone with a filing fee can delay the project by seeking court review of its environmental impacts. Proposition 65 allows anyone to sue any business by alleging that it exposes Californians, without a "clear and reasonable" warning, to any of over 800 chemicals, and the "bountyhunter" keeps 25% of the penalties. Litigation under both laws is made more attractive by the availability of attorneys fees for successful claimants. Code of Civil Procedure § 1021.5.

The business community has strongly criticized both laws because they enable claimants to achieve some of their goals simply by suing. Projects are delayed, publicity highlights claimed environmental or health effects, and the targeted businesses frequently settle. (Of more than 25,000 claims, only a handful of Proposition 65 cases have been tried.) CEQA has been used by both unions and competitors to block projects that affect their economic interests, rather than harming the environment. And Proposition 65 has been used to target small businesses that cannot afford to defend themselves.

It is not intuitive that business-minded reform would be on the agenda when all statewide elected officials and two-thirds of state legislators are Democrats. But moderate, pro-business Democrats hold the balance of power on many issues. And Governor Brown has been critical of both laws, owing in part to the CEQA challenges he encountered as Mayor of Oakland and to his lack of success in reining in Proposition 65 plaintiffs as Attorney General.

There are entrenched, powerful interests behind both statutes. Traditional environmental activists have strong allies with labor unions on CEQA and with the plaintiff's bar on Proposition 65 — a formidable political force. Indeed, this summer, when a U.S. Senate committee was considering a bill to reform the Toxic Substances Control Act, a federal law also widely considered in need of reform,

this coalition prompted top state officials to oppose the reform on grounds it might preempt Proposition 65 and California's nascent Green Chemistry initiative.

Change is also unsettling for regulated businesses. Many businesses have made their peace with Proposition 65, simply posting general warnings or reformulating their products. But the state agency implementing the law has begun a process to revise the 25-year-old standard warnings, which could require changes by almost everyone offering goods or services in California. And under CEQA, experienced developers budget the time and resources necessary to withstand the law's challenges, enjoying less competition from developers who are not as well-heeled or as familiar with California.

But both laws may actually be operating contrary to their purposes. Most notably, CEQA discourages urban infill development that can reduce commuting, greenhouse gas emissions, and pressure to develop open space outside of urbanized areas. And safety advocates are concerned that the ubiquity of Proposition 65 warnings leads the public to ignore them. Fundamentally, in a trying economy, both laws give California a bad name in the national and international business community.

On both CEQA and Proposition 65, there have been lengthy discussions in Sacramento involving trade associations, advocacy groups, administration officials, and legislative staff. Efforts on Proposition 65 were scuttled before the close of the legislative session in September, but may be revived next year. Furthermore, Assemblyman Mike Gatto achieved a relatively modest reform with AB 227, which limits penalties for one-time failures to post warning signs by operators of restaurants, bars, and parking garages. More comprehensive reform of Proposition 65, however, faces the special hurdle of requiring a two-thirds vote of both chambers.

And on CEQA, the most recent official analysis of the reform legislation (Senator Darrell Steinberg's SB 731) notes, "The author continues to meet and negotiate with numerous...interests to address concerns." Senator Steinberg is seeking what he calls "the elusive middle ground" and has nicknamed his bill "The How to Make No Friends Act." In the last days of the session, however, he did succeed in enacting several minor corrections and quick fixes in a separate, non-controversial bill (SB 743).

Some goals of reformers may be achievable outside of legislation through regulatory action, and discussions are sure to continue into 2014. Although prospects are dim for significantly reducing litigation, changes in these statutes will undoubtedly affect what we do as environmental litigators. And the overall climate of reform affects how judges view our arguments and our clients.



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Right Timing for a Mediation

dual processes at the same time allowed it to assess its exposure and ability to pay.

Timing considerations will matter even when there are no coverage or contribution issues. A case is not “ready for mediation” until the policyholder’s counsel makes absolutely sure that all information requests from the carrier have been addressed and that the carrier has had all it reasonably needs to evaluate the case. Policyholder’s counsel should also know how much time a claims representative needs to obtain settlement authority — and, since the answer to that question may depend on the amount sought, plaintiffs’ counsel should consider setting forth a demand well in advance of the mediation to allow the carrier time to work through the process of obtaining settlement authority. Making a demand for the first time in a mediation brief a few days before the mediation session is not helpful if the plaintiff wants an insurance carrier to take the demand seriously and evaluate it fully.

Getting to Resolution

To bring a dispute to full closure, all necessary parties must be engaged. How or when will all identified plaintiffs be available? Are all the possible defendants known? Time is not right for mediation if there is an indispensable party absent from the table. In a construction matter, for example, is the architect, the engineer, a major subcontractor in addition to the general contractor available and ready to participate? Is there an indemnification provision that requires the consent to settle and involvement of a third party? Is the indemnitor ready to participate and if not, what processes are needed to get its involvement? These questions should not be afterthoughts in scheduling a mediation session.

A party can be engaged and ready for mediation, however, even if the party does not feel ready to settle. A party may be too emotionally embroiled in the conflict, too intimidated by the situation, or too confident in its own position. Working through these issues with the parties is often what mediators are expected to do. In some cases, the parties’ deposition must occur first, to allow counsel to obtain necessary facts but also to give the parties the chance to tell their stories or to get a “taste” of what trial may be like. But party-depositions can harden positions and exacerbate animosity as well. Counsel simply needs to consider the value of such depositions in the timing of the mediation.

Counsel also need to be sure they give mediators the tools that they need. Lawyers and their clients have the right to expect a mediator to be thoroughly prepared for a mediation — to understand the legal arguments, to be knowledgeable about the central undisputed facts, to be appreciative of the different perspectives of disputed facts, to be skilled at handling a wide variety of personalities and emotions. But even the best mediators are hamstrung if they do not get information in a timely manner. The scheduling of a mediation should include a pre-mediation discussion about how to ensure a productive session, including when information should be provided, the type of presenta-

tions needed or wanted, the use of joint and private caucuses, the decision-makers who should be available, and whether any additional persons (such as a party’s tax advisor or an accounting expert) should be present or on call.

At the end of the day, some cases simply need to be tried. After all that is what the members of this Association of Business Trial Lawyers do well. It is also why ABTL and the private ADR sector have a responsibility to vigorously support a strong and independent judiciary and an adequately funded public court system. But a case should be tried for the right reasons, and not because the players did not consider when and how they could use the timing of the mediation process to its best effect.

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Patentable Subject Matter

a form of currency is abstract, the claim recited a practical application of that idea and was therefore patentable. The panel’s initial ruling was vacated by the Supreme Court for reconsideration in light of its decision in *Mayo*. On remand, the Federal Circuit still found the claims patentable citing to the long history of the Federal Circuit’s affirmation of the validity of software patents and finding that programs creating new “machines” were patentable. Noting the difficulty in determining when a claim’s invocation of a computer is sufficient, it stated that “[w]hile no particular type of limitation is necessary, meaningful limitations may include the computer being part of the solution, being integral to the performance of the method, or containing an improvement in computer technology.” *Ultramercial*, 2013 U.S.App. Lexis 12715 at *34*35. The Federal circuit specifically noted the programming algorithms and computers described in the specification, though that technology was not necessarily present in and required by the claims. By implicitly reading that technology into the claims, the Federal Circuit signaled that properly construed limitations clearly incorporating technology, such as computer hardware, for implementing a patented program or algorithm will pass muster under section 101. On August 23, 2013, the accused infringer in *Ultramercial*, Wildtangent, Inc., filed a petition for certiorari with the United States Supreme Court to reverse the Federal Circuit’s ruling in *Ultramercial*, and requesting the Court to clarify what it asserted to be the Federal Circuit’s muddled framework for resolving Section 101 issues.

These guideposts are necessarily amorphous, given the Supreme Court’s penchant for rejecting bright-line rules and the heavily factual nature of the inquiry. As the Supreme Court and Federal Circuit grope towards a coherent analytic framework for resolving section 101 questions, such disputes will continue to be a feature of more patent litigations.

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CHIP RICE

On CROSS-EXAMINATION

Watching one of your witnesses be cross-examined is one of the most nerve-wracking experiences a litigator can have. By that point in the process, you don't have much ability to influence events. Of course, you can raise objections to improper questions, but asserting too many objections can backfire by making it look like you are afraid of what your witness may say. So most of your work needs to be done before your witness takes the stand.

I love the old adage that cross-examination is a test of character for both the witness and the questioning attorney. Jurors may not follow all of the intricacies of the evidence, but they can and will evaluate the competence and credibility of both the witness and the cross-examiner. And they will be heavily influenced by their sense of who seems to be winning the cross-examination.

Warn your witnesses that they will not win the cross-examination if that are too combative. Tell them that the point is to convince the jury that they are telling the truth, not to show how smart they are or how dumb the questioner is. Sarcasm and personal attacks on the cross-examiner should be scrupulously avoided, and humor should be used only if it is self-deprecatory or, at least, gentle. Train your witnesses to be polite, conscientious, thoughtful and patient and not to let themselves be rushed by the questioner or their own adrenaline.

In order to win a cross-examination, witnesses need to defend the crucial points of their direct testimony, admit the facts that cannot be successfully disputed and show good judgment about when to resist a leading question. That will not come naturally to most witnesses, so you will need to work with them to develop these skills. Role-playing will help, especially if you have a colleague play the cross-examiner. Another lawyer who does not already have a relationship with the witness is less likely to subvert the process by unintentionally pulling punches during the mock cross-examination. In addition, your witness will be less comfortable facing an unknown lawyer, which will make the exercise better practice for the real thing.

To help your witness fight effectively when necessary, you should develop a list of "safe harbors," *i.e.*, irrefutable points that the witness can fall back on when under attack. These safe harbors should be based on the major themes of your case and should be as simple, short and clear as possible. For example, if you are defending an investment manager who is accused of recklessly misman-

aging a hedge fund, it will help your defense if the manager invested his own money in the fund so that his own interests were aligned with his investors. If that is the case, you should develop that theme on direct examination and also prepare your client to repeat that point when questioned about a challenged investment or strategy by saying, for example, "I put my own money where my mouth was."

These "safe harbors" should be as concise and pithy as possible so they can be stated quickly in the course of a cross-examination. Witnesses have a tendency to filibuster when facing a tough question, subconsciously assuming that they are winning if they are taking up the cross-examiner's air time. They draw out their answer to avoid the point of the question and postpone the next attack. That strategy can be effective in a deposition setting, but such filibustering will cause the jury and judge to feel that the witness is being unduly argumentative, evasive or even dishonest.

A witness must also be prepared to admit the points that have to be admitted. Fighting over every question looks bad — especially when an equivocal answer or denial can be effectively impeached with a document or prior deposition testimony. You and your witness should make sure that you are completely familiar with all of the documents that may come up on cross-examination. And you should both review the witness's deposition testimony exhaustively so that the witness will recognize any question that was asked at the deposition and remember the prior answer. In most cases, the witness should simply track the prior testimony unless there is a very good reason not to do so. If the witness has a good reason for changing her testimony, she should be prepared to explain the reason for the change as briefly and gracefully as possible.

Witnesses have a tendency to talk too much when making admissions, just as they do when fighting a question. A simple yes or no without showing any emotion is the best way to minimize the impact of an admission.

Practicing cross-examination should make the witness better at both fighting and admitting and at knowing which to do for any particular question. It will also help to manage your witness's expectations and goals. A competent cross-examiner will score at least some points, so the witness should not expect to win every battle. But it should be enough if they can defend their safe harbors and come across as likeable, honest and knowledgeable.

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Chip Rice



Letter from the President

A Bay Area legal newspaper reporter recently emailed that “ABTL events are probably among the most important functions in the entire Bay Area. And that’s not hyperbole.”

Since our last ABTL Report, we have had terrific programs.

Our June 18 annual Silicon Valley dinner program “Trolls, Traders and Wizards” hit key issues underlying patent litigation before a standing-room only audience. Federal Circuit Chief Judge Randall Rader and U.S. District Judge Lucy Koh, who presided over the *Apple v. Samsung* trial, discussed their patent litigation perspectives with Intellectual Ventures co-founder Peter Detkin and Cisco GC Mark Chandler — on a panel skillfully moderated by Weil Gotshal’s Ed Reines. Together on one stage we had

Detkin, co-founder of a major Non-Practicing Entity (“NPE”), who ironically coined “patent troll” when heading Intel’s patent group, and Chandler, a prominent critic of NPEs. No one disputed President Obama’s view that some NPEs wanted “to hijack somebody else’s idea and see if they can extort some money.” But Detkin alone advanced the idea that funds like his assisted innovation by monetizing the inventions of small inventors. Stark differences about how trial judges could curb abuses emerged, with Judge Koh stating that statutes gave only limited authority to order “fee-shifting.” Judge Koh also noted that only

patent litigation defendants had the ability — unique among federal litigants — to seek federal agency “do-overs” through Patent & Trademark Office re-examinations after litigation had started.

Our July 30 annual East Bay lunch had California Supreme Court Justice Carol Corrigan and Court of Appeal Justice Mark Simons presenting “Lost Profits Experts and Sargon v. USC.” Justice Simons grappled with the age-old problem of whether and how a new business with no track can recover lost profits. Can a startup — even a “future Instagram” — ever satisfy the reasonable certainty hurdle? Justice Corrigan gave her humorous take on experts who use faulty logic to project future profits for wobbly startups. She explained that, while Sargon was not new law, it strengthened the trial court’s “gatekeeper” function and required experts to provide all of their reasoning — “the why behind the what.”

On August 20, 2013, our first dinner program starring a United States Supreme Court Justice was our first sold out “members only” event. After Ninth Circuit Judge Carlos Bea’s amusing introduction, Justice Antonin Scalia and Bryan Garner discussed their second book, *Reading Law: The Interpretation of Legal Texts*. Justice Scalia entertained the packed audience, including those who might disagree with his conservative judicial philosophy — one of whom, it appeared, was his own more-liberal co-author. At times, the pair’s banter sounded like the legal wonk version of “Click and Clack.” Justice Scalia argued that his



Rick Seabolt

decisions are not political, but grounded in text. He said he sometimes was required to reach conclusions he did not like, such as the First Amendment’s protection of the “bearded, sandal-wearing weirdo” American flag burner, and reportedly said “you show me a judge who likes every decision he makes and I’ll show you a bad judge.”

Upcoming programs hold equal promise.

Our next dinner program, October 29, is “Trials without Rules: The Wild West of Arbitration.” The panelists will explore arbitration — the good, the bad and the ugly.

Our final 2013 dinner program will be on December 10 and will feature retired U.S. Supreme Court Justice Sandra Day O’Connor and California Chief Justice Tani Cantil-Sakauye, in a moderated interview with former U.S. District judge — Federal Judicial Center head, Judge Fern Smith. The topics will include the importance of civics, the rule of law, and the role of the judicial branch.

These programs, together with other member benefits, like this ABTL Report, have allowed our Chapter to regain the membership strength it had before the 2007-2008 financial crisis. Our membership, which has long made us the largest of the ABTL chapters, has grown to near our high watermark of about 2,000 members. Because our December program likely will be another “members only” sell out, please encourage others to join this great organization and attend our future dinner programs.

Rick Seabolt is a past Chair of the State Bar of California Litigation Section and a partner in Duane Morris LLP’s San Francisco office.

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