

# abt REPORT

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## *Ethics, Civility and Professionalism*

One of the pleasures of being a Judge is that I have administered The State Bar Oath to many new attorneys over the past 22 years. For the lawyers admitted in May of this past year, I noted that the pre-printed oath adds the following sentence: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity." That sentence was added by the State Bar Board of Trustees at the behest of Mr. Philip Kelly, the immediate past State Bar President.

Some may argue that the addition of this sentence is a recognition that the level of civility has declined. Others assert that it merely confirms the ideal that civility is an inherent component of the practice of law.

I was admitted to the practice of law on 23 December 1977. At that time I was introduced to a series of articles in the legal media about the breakdown of civility and pro-



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## *Federal Trade Secrets Legislation and California: Resolving the Conflicts Within and Without*

Trade secrets law has long been a creature of state law, arising in federal court only in diversity cases or via supplemental jurisdiction. Interest in trade secrets laws at the federal level has been growing, however. The U.S. Patent and Trademark Office, an entity whose titular and substantive reach involves patent and trademark law, hosted its first ever Trade Secret Symposium on January 8, 2015. Even more intriguing is the possibility that the U.S. Government will pass a federal trade secrets act. Bipartisan bills have been pending in both the House of Representatives and the Senate for several years, and commentators have become excited by the possibility that lawmakers may now actually enact federal trade secrets legislation.

Indeed, federal trade secrets law may be one of the few areas for which President Obama and the newly minted Republican majorities in the House and Senate may be able to find some common ground. Supporters of a federal trade secrets act have argued that trade secret law would benefit from federalization by creating a uniform system of trade secret law and affording companies more options to litigate in federal court, where they may prefer to be. Critics note that a degree of uniformity has already been achieved through the promulgation of the Uniform Trade Secrets Act ("UTSA"), which most states have adopted and upon which the House and Senate legislation is based.

California has enacted the UTSA, but with a unique procedure: the requirement that a plaintiff alleging misappropriation must first identify its trade secrets with specificity

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**Jaideep Venkatesan**

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## Ethics, Civility and Professionalism

Professionalism. In the intervening thirty-seven years, I am not sure if there has been a further breakdown. To me, it is about the same as it was when I was admitted. To the extent that there has been a breakdown in the legal profession, I can honestly say it is because the judges let it happen.

Business & Professions Code, § 6068(f) states: "It is the duty of an attorney to do all of the following: . . . To advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged." "As an officer of the court the lawyer should support the authority of the court and the dignity of the trial courtroom by strict adherence to the rules of decorum and by manifesting an

attitude of professional respect toward the judge, opposing counsel, witnesses and jurors." (*Hawk v. Superior Court* (1974) 42 Cal.App. 3d 108, 123.)

Judges have their own obligation to uphold and respect the foregoing principles of civility. "Whenever a judge has personal knowledge that a lawyer has violated any provision of the Rules of Professional Conduct, the judge shall take appropriate corrective action." Canon of Judicial Ethics, 3D(2).

There is room for discussion about what constitutes "appropriate corrective action." The commentary states that

"Appropriate corrective action could include direct communication with the judge or lawyers who has committed the violation, other direct action, such as a confidential referral to a judicial or lawyer assistance program, or a report of the violation to the presiding judge, appropriate authority, or other agency or body." (Advisory Committee Commentary to California Rules of Court, Canon 3D.)

Business and Professions Code section 6086.7 and Rule of Court 10.1017, state that a court must notify the State Bar of any of the following: (1) a final order of contempt imposed on an attorney that may involve grounds warranting discipline under the State Bar Act; (2) a modification or reversal of a judgment in a judicial proceeding based in whole or in part on the misconduct, incompetent representation, or willful misrepresentation of an attorney; (3) the imposition of any judicial sanctions on an attorney of \$1,000 or more, except sanctions for failure to make discovery; or (4) the imposition of any civil penalty on an attorney under Family Code section 8620. (Bus. and Prof. Code § 6086.7; Advisory Committee Comment to CA Rule of Court rule 10.1017.)

"Appropriate corrective action" may include the chisel-

ing the names of attorneys who act badly into the granite memorials of published judicial opinions.

In *Pope v. Babick* (2014) 229 Cal.App.4th 1238, the attorney for the defendant violated a court order by eliciting causation evidence from a CHP officer who arrived at the scene of the accident in question. The trial court sanctioned the attorney \$500 for his misconduct, denied the plaintiff's motion for mistrial and provided a curative instruction to the jury. The jury returned a verdict for the defense. Plaintiff appealed. The Court of Appeal affirmed, finding the curative instructions given by the trial judge were sufficient. The opinion condemned the tactics and identified the offending attorney by full name several times. The Court added

"If it were up to us, he would have been sanctioned far more than \$500. . . . By stating our position in a published opinion, we believe we have satisfied our obligation to take appropriate corrective action as required by canon 3D(2) of the California Code of Judicial Ethics. (*Id.* at 1251.)

In *Love v. Wolf* (1964) 226 Cal. App. 2d 378, the Court reversed the judgment for the plaintiff because misconduct by plaintiff's trial counsel resulted in an unfair trial, a miscarriage of justice and required the court to reverse the judgment. The Court of Appeal noted the following:

"Aggressive advocacy is not only proper but desirable. . . . [R]eviewing courts are not, and should not be, overly eager to reverse for conduct which is merely moderately captious.

But there is a limit. The misconduct here was intentional, blatant, and continuous from opening statement, throughout the trial, to closing argument. It was committed by a seasoned and experienced trial lawyer and the record leaves no doubt it was carefully contrived and calculated to produce a result. That sought-for result was so to arouse and inflame the jury that it would render a large verdict. The verdict was a large one; maximally so. Counsel now argues we should assume, as the trial court did in denying a new trial, that the jury was not influenced. He both underrates his own persuasive powers and argues inconsistently. When a skillful lawyer whose reputation bespeaks his power to influence juries strives advertently to achieve a given result and where the result is in fact achieved, how can a court reasonably say that his conduct played no role in the result?

.....

We are satisfied that Mr. Boccardo's grievous misbehavior was prejudicial and that justice miscarried." (*Love v. Wolf* (1964) 226 Cal.App. 2d 378, 393-394.

In reversing the judgment, the Court of Appeal also had some comments about the trial judge:

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### *Ethics, Civility and Professionalism*

“An able, highly respected, jurist of many years’ experience and a well-earned reputation for courtroom control presided at this trial. Loss of such control in this case is unexplained and to us very puzzling. Excepting one mild characterization of conduct by counsel as “a little bit disgraceful” (made in such a manner that a reader of the transcript is left uncertain at which attorney the criticism was directed) and several expressions of disgust, such as, “Let’s all go home. What do you say we all go home,” there was almost no effort to keep the proceedings within the confines of propriety.” (*Love v. Wolf* (1964) 226 Cal.App. 2d 378, 39.

After retrial of the *Love v. Wolf* case, the matter went up on the appeal on a different issue. The Court of Appeal observed that

“[A] judge is not a mere umpire presiding over a contest of wits between professional opponents, but a judicial officer entrusted with the grave task of determining where justice lies under the law and the facts between the parties who have sought the protection of our courts. Within reasonable limits, it is not only the right but the duty of a trial judge to clearly bring out the facts....” (*Love v. Wolf* (1967) 249 Cal. App. 2d 822, 835-836.

I have served as a civil and criminal discovery judge on and off for about eight years. Civil discovery has a reputation for bringing out bad behavior in good people. Most recently, I began each calendar with announcing a summary of the respective ethical obligations of the bar and bench. At the top of the calendar, I called any case involving bad behavior so that the discussion of civility, ethics and professionalism was heard by a full audience. I have added the following paragraph as a footnote on more than one publicly posted tentative ruling:

“The Court suggests counsel review *Kim v. Westmoore Partners* (4th Dist. 2011) 201 Cal. App. 4th 267: ‘Our profession is rife with cynicism, awash in incivility. Lawyers and judges of our generation spend a great deal of time lamenting the loss of a golden age when lawyers treated each other with respect and courtesy. It’s time to stop talking about the problem and act on it. For decades, our profession has given lip service to civility. All we have gotten from it is tired lips. We have reluctantly concluded lips cannot do the job; teeth are required. In this case, those teeth will take the form of sanctions.’ (*Kim*, 201 Cal.App.4th at 293.)

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## *Make Sure That Your Demand Letter Does Not Cross the Line*

A new client, Emily, has recently retained you. She believes strongly that Michael owes her \$150,000 on a past due loan. Emily does not want to file a lawsuit just yet, however. She hopes that a demand letter from you, requesting immediate repayment of the loan (or else), will prompt Michael to pay the \$150,000, or at least most of that amount. Emily says that her own e-mails to Michael have proved fruitless.

As attorneys, all of us have likely been in this position. Many times, it simply makes more sense to send a demand letter to the other party and try to resolve the dispute prior to or in lieu of full-blown litigation. But when does your demand letter cross the line — from permissible settlement negotiations into impermissible extortion?

California Penal Code Section 518 defines extortion as “the obtaining of property from another, with his consent...induced by a wrongful use of force or fear...” (Cal. Penal Code Section 518.) In turn, “*if fear...* may be induced by a threat” that includes, among other things, (a) “[t]o do an unlawful injury to the person or property of the individual threatened or of a third person; (b) “[t]o accuse the individual threatened, or a relative of his or her, or a member of his or her family, of a crime; or (c) “[t]o expose, or to impute to him, her, or them a deformity, disgrace, or crime.” (Cal. Penal Code Section 519 (italics added).) Likewise, California Penal Code Section 523 provides that “[e]very person who, with intent to extort any money or other property from another, *sends or delivers to any person any letter or other writing...* expressing or implying...any threat such as is specified in Section 519, is punishable in the same manner as if such money or property were actually obtained by means of such threat.” (*Id.* at Section 523 (italics added).)

In recent years, the California courts have explained at length what does (and does not) constitute extortion in the demand letter context. The salient points of guidance, which can be gleaned from the case law, are set forth below.

• **For purposes of extortion, the operative fact is whether your threat is “coupled with a demand for money.”** Standing alone, a threat to report or expose a crime is not illegal for purposes of extortion. See *Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian*, 218 Cal.App. 3d 1058, 1079 (Cal. Ct.App. 1990)



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(“[A] person, generally speaking, has a perfect right to prosecute a lawsuit in good faith, or to provide information to newspapers.”). But that same threat becomes “illegal” when it is “coupled with a demand for money.” (*Mendoza v. Hamzeh*, 215 Cal.App. 4th 799, 805 (Cal. Ct. App. 2013).) See *Flatley v. Mauro*, 39 Cal. 4th 299, 326 (“[I]n many blackmail cases, the threat is to do something in itself perfectly legal, but that threat nevertheless becomes illegal *when coupled with a demand for money*.” (citation omitted; italics added).)

Absent a demand for money, “*rude, aggressive, or even belligerent prelitigation negotiations*...that may include threats to file a lawsuit, report criminal behavior to authorities or publicize allegations of wrongdoing” do not constitute extortion. (*Flatley*, 39 Cal. 4th at 332-33 (italics added).)

• ***It is no defense that the person (who you threaten to report or expose) actually committed the crime or wrongdoing.*** Let’s say that in your demand letter to Michael, you threaten to disclose to the IRS the fact of Michael’s tax evasion unless he pays Emily the entire \$150,000 loan amount, and you actually have facts supporting that he committed tax evasion on multiple occasions in the past.

For purposes of extortion, however, it is irrelevant whether Michael is guilty of tax evasion. The “threat to report a crime may constitute extortion *even if the victim did in fact commit a crime*.” (*Mendoza*, 215 Cal.App. 4th at 805 (italics added).) Similarly irrelevant is the fact that Michael might actually owe Emily the money you are demanding. In other words, Michael’s past tax evasion is not an opportunity to enhance your settlement leverage. “The law does not contemplate the use of criminal process as a means of collecting a debt.” (*Flatley*, 39 Cal. 4th at 326 (citation omitted).)

• ***Even “vague and general” threats may constitute extortion.*** An illustrative case on this point is *Mendoza v. Hamzeh*, 215 Cal. App. 4th 799 (Cal. Ct. App. 2013). In *Mendoza*, the lawsuit arose from a demand letter, which attorney Reed Hamzeh had sent to Miguel Mendoza during Hamzeh’s representation of his client Guy Chow. Mendoza had previously served as a manager of Chow’s business, Media Print & Copy.

Hamzeh’s demand letter began as follows: “As you are aware, I have been retained to represent Media Print & Copy (‘Media’). We are in the process of uncovering the substantial fraud, conversion and breaches of contract that your client has committed on my client....” (*Id.* at 802.)

Hamzeh continued: “If your client does not...provide us with a repayment of such damages caused, we will be forced to proceed with filing a legal action against him, as well as *reporting him to the California Attorney General, the Los Angeles District Attorney, the Internal Revenue Service regarding tax fraud*....” (*Id.* at 802 (italics added).) Hamzeh then listed Mendoza’s alleged misconduct, including failure to pay Media’s employees, sales

taxes, and bills.

On the basis of Hamzeh’s demand letter, Mendoza subsequently sued Hamzeh for civil extortion, among other things. The Court of Appeal found that Hamzeh’s letter was extortionate even though it “did not list specific crimes.” (*Id.* at 806.) The Court of Appeal explained that, as here, the “accusations need only be such as to put the intended victim of the extortion in fear of being accused of some crime. The *more vague and general the terms of the accusation* the better it would subserve the purpose of the accuser in magnifying the fears of his victim.” (citing *Flatley*, 39 Cal. 4th at 327; italics added). See *Flatley*, 39 Cal. 4th at 327 (“[T]he crime with which the extortionist threatens his or her victim need not be a specific crime.”).

Put another way, sometimes, less is more, and in the context of a demand letter, perhaps even more threatening than explicit, detailed threats. Lack of specificity will not necessarily be a bar to a finding that a demand letter is extortionate.

• ***Do the opposite of what D. Dean Mauro did.*** The demand letter at issue in *Flatley v. Mauro* is essentially a textbook example of what *not* to do.

In *Flatley*, Tyna Marie Robertson sued Michael Flatley, a well-known “performer and dance impresario,” for battery and intentional infliction of emotional distress based on allegations that Flatley had raped her at a Las Vegas hotel. (*Flatley*, 39 Cal. 4th at 305.) Flatley subsequently sued Mauro for civil extortion, among other things, on the basis of Mauro’s demand letter to Flatley and Mauro’s telephone calls with Flatley’s attorneys. In his letter, Mauro threatened to publicly accuse Flatley of rape as well as of other unspecified violations of law unless Flatley paid a seven-figure amount.

Mauro was heavy-handed to the extreme, in both his demand letter and his subsequent telephone calls. For instance:

• In his demand letter, Mauro stated that if Flatley did not accept the settlement demand, Mauro would “disseminate[]” press releases to various media sources, including Fox News Chicago, The New York Times, The Chicago Tribune, and “ALL National U.S. Television Networks of NBC, ABC and CBS.” (*Id.* at 309.) Mauro emphasized that the damage to Flatley’s reputation would be far-reaching (*i.e.*, worldwide).

• In his demand letter, Mauro stated that he would disclose Flatley’s personal information, including any information that may form the basis for violations of law, to domestic and foreign authorities. Mauro emphasized that Flatley might face legal repercussions on numerous fronts, including under “any U.S. Federal, Immigration, I.R.S., S.S.Admin., U.S. State, Local, Commonwealth U.K., or International Laws” unless Flatley acquiesced to Mauro’s settlement demand. (*Id.* at 309.)

• Mauro attached 51 pages of documents to the demand letter, such as Robertson’s medical records relating to treatment for the alleged rape, certificates of achievement

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awarded to Mauro, and newspaper articles chronicling Mauro's multimillion-dollar cases and settlements. (*See id.* at 309.) Mauro emphasized his ability to win cases generally (and his purported ability to prevail in this case specifically).

- In a follow-up telephone call with Flatley's attorney, Mauro stated that it would take "seven figures" to settle the matter. (*Id.* at 330.) During another call, Mauro stated: "I know the tour dates; I am not kidding about this; it will be publicized every place [Flatley] goes for the rest of his life." (*Id.* at 310.) Mauro emphasized that the damage to Flatley would be irreparable (*i.e.*, "for the rest of [Flatley's] life").

The *Flatley* Court noted the "insistent theme" of Mauro's communications — *i.e.*, "the *immediate and extensive threat of exposure* if Flatley failed to make a sufficient offer of money." (*Id.* at 332 (italics added).) The Court accordingly concluded that Mauro's communications constituted criminal extortion as a matter of law.

Notably, the *Flatley* decision arises in the context of a motion to strike under California Code of Civil Procedure Section 425.16, California's anti-SLAPP statute. Mauro filed a motion to strike Flatley's complaint pursuant to Section 425.16, which permits a court to strike any cause of action that arises from a defendant's exercise of his or her constitutionally protected rights of free speech or petition for redress of grievances. Specifically, Mauro contended that his demand letter was a prelitigation settlement offer and that Flatley's complaint therefore arose from Mauro's exercise of his constitutionally protected right of petition. The *Flatley* Court, however, disagreed, pointing out that Section 425.16 "does not protect activity that, because it is illegal, is not in furtherance of constitutionally protected speech or petition rights." (*Id.* at 324.) Because Mauro's demand letter constituted extortion as a matter of law and therefore was not constitutionally protected activity for purposes of Section 425.16, the Court concluded that the lower court did not err by denying Mauro's motion to strike.

- **Extortion is more an art than a science.** "No precise or particular" permutation of words is necessary in order for a demand letter to constitute extortion. (*Stenehjem v. Sareen*, 226 Cal.App. 4th 1405, 1424 (Cal. Ct.App. 2014) (citation omitted).)

In *Stenehjem v. Sareen*, Jerome Stenehjem sued his former employer, Akon, Inc., and Surya Sareen (Akon's president and CEO) for defamation, among other things. Sareen countersued for civil extortion on the basis of an e-mail that Stenehjem had sent to Sareen's attorney, in which Stenehjem threatened to file a false criminal complaint unless Sareen paid monies to Stenehjem to settle the defamation claim. Stenehjem's e-mail referred to a potential qui tam suit; alluded to accounting documents created by Stenehjem at Sareen's direction; and mentioned the possibility of involving the United States Attorney

General, Department of Justice, and Department of Defense.

In contrast to the demand letter in *Flatley*, Stenehjem's e-mail was a veritable lesson in subtlety. The Court of Appeal nonetheless held that the e-mail constituted criminal extortion: "Stenehjem's e-mail *may have been less than explicit* — in that it did not contain conditional language, such as 'Unless Sareen pays me for my claims, I will report him to the federal authorities for violations of the federal False Claims Act' — does not make its character any less illegal." (*Id.* at 1424 (italics added).)

At one point in his e-mail, Stenehjem even stated, "I never wanted this to become a long and expensive process let alone involve the United States Attorney General, the Department of Justice or the DOD [Department of Defense].... I do not wish to make a Federal case out of this...." (*Id.* at 1421 n12.) Despite Stenehjem's seeming reluctance to "involve" the Attorney General, Department of Justice, and others, the Court saw Stenehjem's statement for what it was: *i.e.*, a threat to expose Sareen to federal authorities unless Sareen "settled" Stenehjem's private claims. *See People v. Hesslink*, 167 Cal.App. 3d 781, 787 (Cal. Ct.App. 1985) (rejecting defendant's argument that evidence of extortion was insufficient because he had not made a "request or demand for a specific sum").

In sum, if the import of your e-mail, however veiled, is essentially a threat accompanied by a demand for money, your demand letter may still constitute extortion.

- **Remember the Rules of Professional Conduct.** Of note, the Rules of Professional Conduct reiterate many of the principles set forth above. For instance, Rule 5-100 ("Threatening Criminal, Administrative, or Disciplinary Charges") provides in pertinent part that "[a] member shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute." (Cal. Rules of Professional Conduct, Rule 5-100(A).) In turn, "civil dispute" includes "*potential controversies*," and thus covers pre-litigation demand letters. (*Id.* at Rule 5-100(C) (italics added).)

As one federal district court recently noted, Rule 5-100(A) "seeks to discourage the collateral use, or threat of use, of criminal, administrative or disciplinary proceedings to *exert leverage in the settlement of civil disputes.*" *Lopez v. Banuelos*, 1:11-CV-466 AWI JLT (E.D. Cal. Sept. 6, 2013) (citing State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Opinion No. 1983-73; italics added). *See Flatley*, 39 Cal. 4th at 328 ("[A] threat that constitutes criminal extortion is not cleansed of its illegality merely because it is laundered by transmission through the offices of any attorney").

**I**n conclusion, the above guidelines will assist you in ensuring that your zealous advocacy does not cross the line into improper threats or extortion.

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## Federal Trade Secrets

before embarking on discovery. California federal courts adjudicating state law trade secret claims have increasingly applied this procedure. Yet, neither federal bill includes the identification requirement, which will create a unique tension should a federal trade secrets law be enacted.

### The Defend Trade Secrets Act

Pending in the Senate Judiciary Committee is S.2267, the Defend Trade Secrets Act of 2014, co-sponsored by Senators Christopher A. Coons (D-DE) and Orrin Hatch (R-UT). Pending in the House is the Trade Secrets Protection Act of 2014, co-sponsored by several representatives, from both sides of the aisle. Both bills track the basic structure of the UTSA. Each act would be violated by misappropriation of a trade secret related to a product or service used in interstate or foreign commerce, where misappropriation includes acquisition by one who knows or has reason to know the secret was acquired by improper means, or disclosure or use without the trade secret owner's consent. There are subtle differences in each bill's language, however, which would have to be resolved in conference before the bill could be enacted into law.



Sara Petersen Graves

Each bill also includes a striking new element: an *ex parte* procedure by which plaintiffs could obtain a court order to preserve evidence and even to

seize the alleged trade secrets. That is, the pending bills would allow a plaintiff to obtain, upon an affidavit or verified complaint, an order to preserve evidence by making a copy of an electronic medium that contains the trade secrets, or by seizing the alleged trade secret property. The plaintiff would not even be required to give notice to the defendant before obtaining such an order.

Under current law, plaintiffs can obtain similar relief though an application for a temporary restraining order, but only upon demonstrating exceptional circumstances and after surmounting several procedural obstacles. The federal bills' simplified process would shift the balance in favor of trade secret plaintiffs, allowing them quickly to put defendants (such as former employees) on their heels with court orders to seize computers and electronic devices.

These plaintiff-friendly procedures thus could conflict with California law, which has heightened requirements for plaintiffs pursuing trade secret litigation. California federal courts, which historically have struggled with the conflicts in applying California trade secrets law, are likely to become the locus of this tension.

### Section 2019.210: California's Unique Trade Secrets Procedure

California has codified a unique requirement that a

party asserting misappropriation of trade secrets must first identify the trade secrets at issue prior to taking discovery related to them. When enacting the UTSA in 1985, the state legislature also enacted Code of Civil Procedure section 2019.210 (formerly section 2019(d)). Section 2019.210 requires that "before commencing discovery relating to the trade secret, the party alleging the misappropriation shall identify the trade secret with reasonable particularity subject to any orders that may be appropriate under Section 3426.5 of the Civil Code [governing preservation of secrecy in actions arising under the UTSA]." Cal. Civ. Proc. Code § 2019.210.

Section 2019.210 serves several purposes: 1) to promote "well-investigated claims and dissuade[ ] the filing of meritless trade secret complaints;" 2) to prevent "plaintiffs from using the discovery process as a means to obtain the defendant's trade secrets;" 3) to assist "the court in framing the appropriate scope of discovery and in determining whether plaintiff's discovery requests fall within that scope;" and 4) to enable "defendants to form complete and well-reasoned defenses, ensuring that they need not wait until the eve of trial to effectively defend against charges of trade secret misappropriation." *Advanced Modular Sputtering, Inc. v. Super. Ct.*, 132 Cal. App. 4th 826, 833-34 (Cal. Ct. App. 2005) (quoting *Computer Economics, Inc. v. Gartner Group Inc.*, 50 F. Supp. 2d 980, 985 (S.D. Cal. 1999)) (internal quotes omitted). Thus, section 2019.210 is intended to act as a gatekeeper, not only to a trade secret plaintiff's ability to take discovery, but also to that plaintiff's filing of its trade secret claim in the first instance. By requiring a reasonably particular disclosure early, section 2019.210 deters parties with baseless claims from using litigation to unearth their opponents' trade secrets and to tailor their claims to the facts they discover. Section 2019.210 applies to any claim factually dependent upon the trade secret misappropriation allegations. See *Advanced Modular Sputtering, Inc.*, 132 Cal. App. 4th at 834-35.

### Federal Courts Have Been Applying 2019.210

Until recently, it was questionable whether federal courts would apply section 2019.210. Section 2019.210 arguably is a state procedural rule, and under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), only state substantive law matters in diversity cases; federal courts sitting in diversity jurisdiction are to apply federal procedure. California federal courts took different positions on whether the *Erie* doctrine required application of section 2019.210.

On the one hand, the District Court for the Southern District of California, in *Computer Economics, Inc.*, 50 F. Supp. 2d 980, resolved the *Erie* question in favor of applying section 2019.210. There, the trade secret defendant refused to produce discovery until after plaintiff provided a reasonably particular description of its allegedly misappropriated secrets. *Id.* at 982. The plaintiff argued that then section 2019(d) (the former code section for 2019.210) was a state procedural rule inapplicable in fed-

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THOMAS J. McDERMOTT, JR.

## WRITE TO RIGHT?

**I**f I knew my own mind, I would not make essays. I would make decisions." Montaigne, possibly the greatest of all essayists, said that. You've written essays most of your life, forced to from high school on (you were never forced to write a novel or a poem). We write essays here at ABTL, some didactic, some congenial, some polemic.

Essays are meant to be read, but there is one group of essayists slavishly turning out thousands of essays year after year which are not meant to be read, indeed, are almost forbidden to be read. These are the judges on the California Courts of Appeal.

Are these men and women like Montaigne, unable to make decisions without writing an essay? I doubt it. I believe they are writing their essays because that's what appellate judges always did. And it made good sense in a lesser era (lesser people, lesser cases). But when the volume became large, we arrived at the era of the "Not For Publication" opinions, an oxymoron in itself, for what value is an opinion if it's "not for publication." Although, of course, it is published, another oxymoron. So it's really not "not for publication." It's not for citation, not for precedent, which is what decisions are supposed to be for. We may oxymoron ourselves into just plain morons.

What is the point of the unpublished, uncitable opinion? It could be said that it may make the parties feel they got their money's worth, a sort of consumer relations approach. This does not jibe with my experience. The only consumer satisfied is the winner and 99 times out of 100 neither the winner nor the loser reads the essay, just the result. The lawyers read it, but they don't need to because they wrote the essays that led to the final essay.

Should we ever lift the ban on the citation of unpublished opinions? Well, the Federal Courts tried to reach a compromise but the rule varies by Circuit and by date of opinion. This seems even worse than not allowing them to be cited at all.

When I was Chair of the LRCC (Ninth Circuit Lawyer Representative Coordinating Committee - all the lawyers invited to the Ninth Circuit Judicial Conference) the issue of citation of unpublished decisions in the Federal Courts came to a head in, among other things, a vote at the conference. The LRCC held an on-line vote of lawyers before the conference. As a civil litigator in a large firm, I believed it was a slam dunk for allowing citation, and I was wrong. About half the lawyers responding were against it. The prevalent reason was that the lawyer who was a sole practitioner or in a small firm would have to read all this ephemera. It simply made researching too much of an ordeal and, on reflection, this appears absolutely right.

The answer to this waste of resources would seem to

be simply not to write opinions at the intermediate appellate level except where there is a reversal of the Trial Court. If the Trial Court is affirmed, an appeal can go to the Supreme Court on the Appellate Court's decision issued as a decision only without a written opinion and the record in the Appellate Court can go to the Supreme Court. If the intermediate Appellate Court reverses, it should write an opinion as to why it is reversing. This opinion should be published and citable. The obvious concern here is that unless the Appellate Court reverses, the Supreme Court probably may not act since it basically has to start from scratch. But how often does the Supreme Court take an affirmance of the Appellate Court to review unless there is some new rule of law.

Note that the above approach eliminates approximately 60% of the current opinions of the intermediate Appellate Courts. They could still write opinions when (if) they wanted to, but they would be published and citable.

Our editor said my proposal was probably unconstitutional. He's probably right, which is why we have editors. Article 6 of the California Constitution, at Section 14, states,

"The Legislature shall provide for the prompt publication of such opinions of the Supreme Court and courts of appeal as the Supreme Court deems appropriate, and those opinions shall be available for publication by any person.

"Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated."

As is often (always?) found in legislation, there are some contradictions (loopholes?) in this provision. In the first place, we are not dealing with opinions "for the prompt publication." We are dealing with opinions to be "unpublished." Secondly, the Supreme Court is not making decisions as to which DCA opinions will be "published," the DCA is. If "opinions shall be available for publication by any person," I can take all the unpublished opinions I have been victim of and demand they be de-published to the light of scrutiny. Next, what in the world does "determine causes" mean? Most of the appeals on demurrer and on summary judgment reach the conclusion that no causes exist. One cannot "determine" a cause if one says there is no cause. Of course, I am making oblique references to the English language which is not necessarily applicable to constitutionalists.

**T**here is a valid reason for not publishing opinions. There are just too many of them. But it may give the impression that the opinion not published and, therefore, not citable is too sloppy or too unreasoned or, perhaps, wrong.

*Mr. McDermott, the 2013 State Bar Litigation Section's Trial Lawyer Hall of Fame recipient, is a sole practitioner in Palm Desert and a longtime columnist for California Litigation.*



Thomas J. McDermott, Jr.



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### Federal Trade Secrets

eral court. *Id.* The court noted that *Erie* requires a two-step analysis to determine whether a particular rule is substantive or procedural. *Id.* at 986. First, the court considers whether the state rule conflicts with a federal procedural rule. If so, then the federal rule trumps; if not, then the court must determine whether failing to apply the state rule will significantly affect the outcome of the matter or encourage filing in federal court. *Id.*

Tackling the first prong, *Computer Economics* found “no inconsistency, let alone a collision,” between FRCP 26(c)’s mechanism for defendants to seek protective orders preventing disclosure of their trade secrets, and section 2019(d)’s requirement that plaintiffs identify their alleged trade secrets before beginning discovery. *Id.* at 988. Rather, the court found the two rules complementary, and saw no conflict with the scope of discovery promulgated by FRCP 26(b). *Id.* at 989. The court then concluded that a federal court hearing California trade secret claims could not divorce section 2019(d) from the substantive law of California’s UTSA “without frustrating the legislature’s legitimate goals and disregarding the purposes of *Erie*.” *Id.* at 992. Furthermore, the court saw no countervailing federal interests and noted that failing to apply section 2019(d) would “attract to federal court the unsupported trade secret lawsuits the statute was enacted to deter.” *Id.*

Critiquing the *Computer Economics* court’s analysis, the District Court for the Eastern District of California reached the opposite conclusion in *Funcat Leisure Craft, Inc. v. Johnson Outdoors, Inc.*, No. S-06-0533 GEB GGH, 2007 U.S. Dist. LEXIS 8870 (E.D. Cal. Jan. 29, 2007). In *Funcat*, the plaintiff provided a section 2019.210 disclosure, which the defendant challenged as insufficient. *Id.* at \*2-3. The Eastern District found the potential “collision” between section 2019.210 and the FRCP not determinative; federal procedural rules govern, and a court may not add “mandatory discovery procedures under the rubric that the state law does not ‘conflict with’ the federal rules simply because it thinks state law supplies a better way to go.” *Id.* at \*5-6.

Notwithstanding this language, *Funcat* simply recognized a conflict where the *Computer Economics* court did not. It determined that applying section 2019.210 would interfere with the application of FRCP 26. Plaintiffs would be precluded from pursuing discovery if their 2019.210 disclosures were deemed insufficient, in contravention of Rule 26’s regulation of discovery procedure in federal cases. *Id.* at \*7. In so holding, *Funcat* focused more on the entirety of Rule 26 (including subsection (a), which, among other things, specifies the timing of initial disclosures) than on the particular provisions discussed by *Computer Economics*. Finding that section 2019.210 addresses procedure (acting as a gating item to the initiation of discovery) and thereby conflicts with Rule 26, the *Funcat* court refused to apply the state law. *Id.* at \*7-8; *accord Proven Methods Seminars, LLC v. Am. Grants &*

*Affordable Housing Institute*, No. CIV S-07-1588 WBS EFB, 2008 U.S. Dist. LEXIS 10714, at \*7-10 (E.D. Cal. Jan. 31, 2008).

Several federal courts in California followed *Funcat*, including in some cases the Southern District of California. In *Hilderman v. Enea Teksci, Inc.*, No. 05cv1049 BTM (AJB), 2010 U.S. Dist. LEXIS 1527 (S.D. Cal. Jan. 8, 2010), the court found that by conditioning trade secrets discovery on the plaintiff making an adequate initial disclosure, section 2019.210 conflicts with FRCP 26 and therefore does not apply to federal actions. *Id.* at \*6-9. A year and a half later, the Southern District of California reviewed a magistrate judge’s order that did not apply section 2019.210 per se, yet still noted that policy considerations underlying the disclosure requirement were relevant. See *Jardin v. DATAlegro, Inc.*, No. 10-CV-2552-IEG (WVG), 2011 U.S. Dist. LEXIS 84507, at \*13 (S.D. Cal. July 29, 2011). As such, the magistrate ordered the plaintiff to identify its allegedly misappropriated information in response to one special interrogatory, propounded prior to any other discovery. *Id.* at \*12. The court upheld that order, finding it within the magistrate’s discretion to manage discovery under FRCP 26. *Id.* at \*14-17.

More recently, most California federal courts seem to apply the disclosure requirement of section 2019.210, albeit sometimes with little analysis of the *Erie* issue. For example, in *Heller v. Cepia L.L.C.*, No. C 11-1146 MEJ, 2012 U.S. Dist. LEXIS 6452 (N.D. Cal. Jan. 20, 2012), the District Court for the Northern District of California essentially assumed that section 2019.210 applied to the case at bar without addressing whether it *should* apply. Rather, the court simply zeroed in on whether the plaintiff’s disclosure was sufficient. See generally *id.*; see also *Art of Living Foundation v. Doe*, No. 5:10-cv-05022-LHK, 2012 U.S. Dist. LEXIS 61582, at \*68-70 (N.D. Cal. May 1, 2012) (ruling earlier in the case that discovery on the trade secrets claim could not proceed absent a disclosure and subsequently considering whether plaintiff’s disclosure was sufficiently particular).

Similarly, though with more analysis, the Southern District of California returned to its *Computer Economics* roots and applied section 2019.210 in *Gabriel Technologies Corporation v. Qualcomm Inc.*, No. 08CV1992 AJB (MDD), 2012 U.S. Dist. LEXIS 33417 (S.D. Cal. Mar. 13, 2012). The court relied upon the same two-part inquiry employed in *Computer Economics* and concluded it could apply section 2019.210 consistent with *Erie*. *Id.* at \*11-15. Specifically, it deemed section 2019.210 a substantive state law not in conflict with a federal rule and noted that “even if that were questionable, which it is not, its non-application would result in undesirable forum shopping.” *Id.* at \*14-15.

The Northern District of California also performed a more detailed review of the “propriety” of applying section 2019.210 in *SocialApps, LLC v. Zynga, Inc.*, No. 4:11-CV-04910 YGR, 2012 U.S. Dist. LEXIS 82767, at \*4-8 (N.D. Cal. June 14, 2012). Noting that the Ninth Circuit had not definitively ruled one way or the other and that district

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HOWARD ULLMAN

## On ANTITRUST

**B**aseball? It's just a game — as simple as a ball and a bat. Yet, as complex as the American spirit it symbolizes. It's a sport, business — and sometimes even religion." Ernie Harwell, "The Game for All America," 1955.

In *City of San Jose v. Office of the Commissioner of Baseball*, Case No. 14-15139 (9th Cir. Jan 15, 2015), the United States Court of Appeals for the Ninth Circuit applied the judge-made antitrust exemption for baseball to bar a challenge by the City of San Jose, California to a rule adopted by Major League Baseball ("MLB") that three-quarters of MLB teams must approve a baseball franchise relocation — a rule which San Jose argued has been interfering with its ability to lure the Oakland A's to San Jose.

Those who are not antitrust aficionados may find it somewhat surprising that baseball enjoys an antitrust exemption. In fact, the court-crafted exemption has a long pedigree and has been discussed in three U.S. Supreme Court opinions. Almost a century ago, in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922), the Supreme Court held that the "business [of] giving exhibitions of base ball" did not constitute interstate commerce and was therefore not subject to the reach of the Sherman Antitrust Act. *Id.* at 208-09.

A quarter century later, in *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953), the Supreme Court affirmed Federal Baseball Club, but on stare decisis rather than interstate commerce grounds. (Under the modern interpretation of the Commerce Clause, it would be difficult if not impossible to argue that Major League Baseball — which requires teams to travel to each other's stadiums throughout the country — does not involve interstate commerce.) The Court noted that "Congress [had] the [Federal Baseball Club] ruling under consideration [and had] not seen fit to bring [baseball] under the [antitrust] laws by legislation...." *Id.* at 357. Baseball was thus left for thirty years to develop on the understanding that it was not subject to antitrust regulation. If there were circumstances that warranted application of the antitrust laws, the Court wrote, those circumstances should be legislatively specified. *Id.*

After another quarter century, the Supreme Court reaffirmed the exemption in its third baseball decision, *Flood v. Kuhn*, 407 U.S. 258 (1972). The Court noted that Congress had acquiesced in the exemption, *id.* at 283-84, emphasized "the confusion and the retroactivity problems that inevitably would result with a judicial overturning of *Federal Baseball*," and reiterated its "preference that if any change is to be made, it come by legislative action...." *Id.* at 283.

With the above background in mind, we can return to the saga of San Jose. San Jose planned to welcome the Oakland A's to a new stadium within the geographic territory allocated by MLB to the San Francisco Giants' fran-

chise. That fact required, under league rules, approval of the relocation by three-quarters of MLB's members. After MLB — in San Jose's view — delayed a vote on the relocation, San Jose sued MLB, arguing, among other things, that the delay was an attempt to stymie the relocation and preserve the Giants' local monopoly. MLB argued that the baseball exemption barred San Jose's suit.

The Ninth Circuit agreed with MLB. Although it acknowledged that the baseball exemption originated in the 1922 *Federal Baseball Club* case, which was erroneously decided on the basis that baseball is not in interstate commerce, the Ninth Circuit refused to set aside what it described as an anomalous exemption, noting that MLB has built its business in reliance on the decision, and that the Congress has not acted to change the law in light of the Supreme Court's precedents. In the court's view, the congressional acquiescence rationale was particularly applicable to the issue of franchise relocation, because the 1988 Curt Flood Act (codified at 15 U.S.C. § 26b(b)(3)) withdrew baseball's antitrust exemption with respect to certain labor issues but explicitly maintained it for franchise relocation. "[W]hen Congress specifically legislates in a field and explicitly exempts an issue from that legislation, our ability to infer congressional intent to leave that issue undisturbed is at its apex."

The court also rejected San Jose's argument that the court-made exemption should be limited to the subject matter of some of the prior cases (e.g., limits on movements of players between teams), reasoning that "[t]he designation of franchises to particular geographic territories is the league's basic organizing principle" and that "[i]nterfering with franchise relocation rules ... indisputably interferes with the public exhibition of professional baseball." The baseball exemption extends to the entire "business of providing public baseball games for profit between clubs of professional baseball players...." *Toolson*, 346 U.S. at 357.

"Like Casey [at the Bat], San Jose has struck out here," concluded the Ninth Circuit. "Only Congress and the Supreme Court are empowered to question [prior Supreme Court decisions'] continued vitality, and with it, the fate of baseball's singular and historic exemption from the antitrust laws."

It is expected that San Jose will attempt to seek review in the U.S. Supreme Court, although on a statistical basis, of course, the Court accepts only a small percentage of cases for review. In January, the San Jose Mercury News reported that a bill to repeal the baseball exemption is pending in Congress, sponsored by Sens. John McCain, R-Ariz., and Richard Blumenthal, D-Conn., among others, but political experts do not expect it to pass.

If there were a clean slate upon which to write, few would predict that the courts would grant baseball an antitrust exemption. City of San Jose is a testament to the power of stare decisis.

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Howard Ullman



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### *Federal Trade Secrets*

courts were split, the court found “the reasoning of the cases applying section 2019.210 more persuasive.” *Id.* at \*46. The Social Apps court agreed that section 2019.210 does not conflict with — rather, is consistent with — Rule 26’s regulation of discovery, and a federal court’s authority to control the timing and sequence thereof and to issue protective orders to protect confidential information. *See id.* at \*7. Application of section 2019.210 also, according to the court, should prevent “improper incentives for choosing a federal forum,” by foreclosing trade secret plaintiffs from being able to conform their cases to the information disclosed by defendants in discovery. *Id.* at \*8.

The federal trade secret bills pending in Congress have no requirement analogous to section 2019.210. Instead, the federal trade secret bills seek to streamline procedures for plaintiffs, making it easier for them to preserve or even seize electronic media that contain the alleged trade secrets. Should the congressional bills become law, California federal courts would be faced with the issue of whether to apply section 2019.210 to what would be both federal and state substantive claims. California state courts have applied section 2019.210 not only with respect to discovery, but to require plaintiffs to identify their trade secrets with particularity before obtaining temporary injunctive relief. *See, e.g., Syngenta Crop Protection, Inc. v. Helliker*, 138 Cal. App. 4th 1135, 1173 (2006); *DVD Copy Control Ass’n, Inc. v. Bunner*, 31 Cal. 4th 864, 879 (2003). Would a California federal court applying federal trade secrets law apply that requirement to an ex parte seizure or preservation request, or would it simply green-light the request in accordance with the mechanisms created by the pending bills? California federal courts already have struggled with interpreting the *Erie* doctrine to apply section 2019.210, which constrains plaintiffs’ moves early in a trade secrets case. Should either of the current federal bills become law, California litigators will need to be on guard for new battles in the trade secrets realm and the federal versus state law front.

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#### **Back Issues Available on Website!**

Readers can browse the ABTL website for back issues of *ABTL Northern California Report*, covering the premiere issue in the Fall of 1991 through the current issue.

[www.abtl.org](http://www.abtl.org)

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### *Ethics, Civility and Professionalism*

Talking about a decline of professionalism and civility is irrelevant. Attorneys and judges should remind themselves of their respective obligations to adhere to their respective ethical obligations and take appropriate corrective action. As I have said on many occasions, the opposing counsel on the second-biggest case of your life may be the trial judge on the biggest case of your life.”

*Socrates Peter Manoukian is a Judge on the Santa Clara County Superior Court. David Zweig is a member of the California Bar and is currently a law clerk for Judge Manoukian*



## *NorCal Hosts This Year’s Annual Seminar in Ojai*

The ABTL Annual Seminar will be hosted this year by the Northern California Chapter. This ever-popular gathering of members from all five of the ABTL chapters will be held at the Ojai Valley Inn & Spa in Ojai, CA from October 1 – 4, 2015. The theme will be A Digital World Confronts An Analog Profession. NorCal Board members Daniel Bergeson and Bruce Ericson, along with Chapter President Drew Bassak, are working diligently on the agenda, which will focus on the demands placed on business trial lawyers by a business environment that is increasingly digital and by audiences that couple ever-shorter attention spans with a dislike of passive listening. Further to this theme, our team is exploring ways of making the seminar more interactive and increasing audience participation. Further details will be available soon!

#### *2015 Dinner/CLE Program Schedule*

May 5

*Dinner Program, Four Seasons E. Palo Alto*

June 16

*Dinner Program, Four Seasons San Francisco*

September 15

*Dinner Program, Four Seasons San Francisco*

Oct. 1-4

*Annual Seminar, Ojai Valley Inn and Spa  
(NorCal Ch. Hosts)*

November 17

*Dinner Program, Four Seasons San Francisco*

JAMES YOON

## On PATENTS

Patent litigation has fundamentally changed over the past few years. The hunters have become the hunted. Unlike the recent past, defendants do not fear patents or patent litigation. They feel empowered by recent reforms such as the America Invents Act (which created the ability to file covered business methods (CBM) reviews and *inter partes* reviews (IPR)) and court decisions that provided them with an unprecedented number of weapons for attacking patents and eliminating weak cases. Defendants know that, with the exception of legal fees, the risks associated with losing patent cases are generally low. They know that Supreme Court and Federal Circuit decisions over the past decade have generally eliminated the risk of an injunction, the possibility of large “reasonable royalty” damages, and the risk of treble damages due to willful infringement.

Today’s patent defendants expect to “win” patent cases, with good reason. Every week they seem to hear good news in the “war” on patent trolls. As of January 2014, the U.S. patent office had granted 70% of IPR petitions and has invalidated 83% of the claims in cases where IPR petitions were granted. Since the Supreme Court decision in *Alice v. CLS Bank* in June 2014, over half of the written decisions by district courts on motions to invalidate patents on the ground that they fail to claim patentable subject matter.

In this environment, how can a patent owner convince companies to settle patent litigation for a significant amount of money? First, it has to abandon the old, outdated approach to patent enforcement and monetization. That old approach consisted of the following: Step 1, identify a patent that covers some aspect of a high revenue product; Step 2, file a patent law suit in a “patent friendly” jurisdiction such as the Eastern District of Texas; Step 3, wait for the money to roll in. That path no longer exists.

For example, with respect to Step 1, recent decisions on “apportionment” have made clear that patent holders will rarely have the ability to apply a straight royalty rate to overall product revenue. Instead, the patent holder bears the burden of identifying the amount of revenue attributable to the patented feature of the accused product. Such apportionment can have a dramatic impact. If you have patent covering a popular app that comes “free” with a smart phone that has \$1 billion in revenue, what portion of the revenue is associated with the app? After you back out the value of the brand, the screen, the phone, the camera, the text, the music, the video and other features, you might be lucky to show that \$5-10 million in revenue is associated with the patented feature. Applying a “generous” 5% royalty means that the damage risk is \$250,000 to \$500,000. Amounts like that demonstrate that most patent cases make no financial sense. Not surprisingly, patent case filings fell 18% in 2014.

With respect to Step 2, patent cases are regularly transferred out of the Eastern District of Texas and are frequently stayed pending the resolution of an IPR. With respect to Step 3, many technology companies have instituted internal policies against paying monies to companies viewed as patent trolls.

In light of this environment, what can a company with a patent it views as valuable and infringed do?

The patent owner needs to accept that the world has changed. It now bears the burden of demonstrating why its patent is valuable and why it should not be treated like a typical patent troll. This acceptance requires the patent holder to invest early in the case so that it can make strong impression when it files the suit. As indicated above, the pendency of a patent lawsuit alone no longer worries defendants.

The patent owner must also accept that rhetoric is not enough. Virtually all patent plaintiffs start out claiming that they seek large damages. Unfortunately, most of these plaintiffs are like an empty can: They make loud noises but have no content. A patent owner needs to show defendants, through objective facts, that it’s case is different and that the defendants bear a real risk.

Whenever possible, the plaintiff should demonstrate that it may be able to obtain injunctive relief. The complaint should recite specific facts that demonstrate that the plaintiff can make the required showing of irreparable harm. Defendants act differently if a patent suit could prevent them from making, using and/or selling an important product.

Whenever a patent plaintiff can demonstrate “lost profits” or “price erosion,” it should make that clear from the beginning of the case. These damages theories can lead to higher damages numbers and support a claim for injunctive relief.

If the patent plaintiff is limited to “reasonable royalties,” the plaintiff should work hard throughout the case to communicate that there is a strong probability that a jury will find that the defendants revenue is (to the maximum extent possible) attributable to the patented invention. For example, the patent plaintiff should analyze the defendants’ marketing and sales documents to identify features touted by the defendants. The plaintiff should then work throughout the case to tie the touted feature to the invention. These efforts take time but will allow the plaintiff’s damages expert to make a strong showing for larger damages, and may change how the defendants view the case.

In conclusion, patent holders must focus on filing and communication strategies that provide an easy to articulate and objectively verifiable message that the case constitutes a clear and present danger to the defendant and its business.

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James Yoon



## Letter from the President

It is my distinct pleasure and honor to serve as the 2015 President of our Northern California Chapter of the ABTL. I am humbled to be charged with continuing the legacy of the ABTL's dual mission: to provide a forum for lawyers and judges to discuss issues concerning business trials, and to promote civility and collegiality among lawyers who take business and commercial cases to trial. Our chapter is blessed with an exceptionally talented Board and leadership team. Serving as the other 2015 officers are Vice President Diane Doolittle (Quinn Emanuel), Treasurer Tom Mayhew (Farella), and Secretary Larry Cirelli (Hanson Bridgett).



Drew Bassak

Our endlessly creative Dinner Program Co-Chairs, Rachel Brass (Gibson Dunn) and Dan Asimow (Arnold & Porter) are working hard to produce an engaging series of programs featuring distinguished speakers. The 2015 program series is off to a notable start. Our very well attended January program "Keeping Your Bearings In The Crucible: Ethics At Trial" featured Jim Brosnahan, (Morrison & Foerster), Allen Ruby (Skadden), Hon. Beth Labson Freeman (NDCA), Hon. Peter Kirwan (Santa Clara Superior), and Moderator Alison Buchanan (Hoge, Fenton) in an engaging discussion on identifying and addressing ethical issues that can arise during trial. At our March program, an exclusive members-only event, we had the unique opportunity to get acquainted with our most recently appointed California Supreme Court Associate Justices, Hon. Leandra Kruger and Hon. Mariano-Florentino Cuéllar, through an engaging conversation with their new California Supreme Court colleague and ABTL Board Member, Associate Justice Carol Corrigan.

Under the leadership of Editor Frank Cialone (Shartsis Friese), The ABTL Report continues to be a valuable, content rich publication packed with relevant information for business trial lawyers. We are always on the lookout for issues of interest to ABTL members. If you have an idea for an article, please let us know, by phone, e-mail, or during the cocktail hour preceding a Dinner Program.

This year our Chapter will host ABTL's 42nd Annual Seminar at the fabulous Ojai Valley Inn and Spa from October 1 to October 4. Mark your calendar now. Dan Bergeson (Bergeson, LLP) and Bruce Ericson (Pillsbury) are the Annual Seminar Committee Co-chairs. Their vision is to create a unique roster of programs that will examine cutting edge issues confronting business trial lawyers and the judges who hear their cases in today's digital age. It will be an exceptional seminar and is not to be missed.

Last year the Northern District joined several Bay Area Superior Courts and the ABTL when it adopted Guidelines for Professional Conduct. To me, the need to formalize civility guidelines regrettably confirms the loss of aspects of a slower, more courteous time gone by. Yet I am energized by the sterling conduct consistently exemplified by ABTL members as they act as what I have called "Ambassadors of Civility" in their practices and in our courts. I am convinced that by modeling exceptional civility, our members have led and will continue to lead our peers towards higher levels of professionalism, resulting in greater respect for trial lawyers and the courts. As 2015 begins, take time to recognize civility when you encounter it, and to appreciate its value.

Warm regards,  
Drew Bassak

*Andrew A. Bassak is a San Francisco based business trial lawyer and litigation partner at Manatt, Phelps & Phillips, a national law and consulting firm, including offices in New York, Los Angeles, and Washington, D.C. Mr. Bassak's clients are leaders in their respective industries, including energy, real estate, water, financial services, and both old-world and new-world technology companies.*



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