ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

NORTHERN CALIFORNIA

Volume 24 No. 1

Summer 2015

Dispositive Motions in Arbitration

Eliminating unworthy cases or claims from an overworked and understaffed court is a goal no one can dispute. But winning a dispositive motion — in any forum — is difficult. For example, a statistical analyses of federal courts in three large districts (Eastern District Pennsylvania, Northern District Georgia, Central District California) show that summary judgments are granted less than 10% of the time. (*See* Eisenberg and Lanvers Summary Judgment Rates Over Time …" Cornell Law Faculty Publications Paper 108 (2008)) A 2009 study of class actions in California Superior Courts showed 3.9% of such cases were disposed of by summary judgment for the defendant. (DataPoints AOC Office of Court Research (November 2009)). As discussed below, winning such motions is even more problematical in arbitrations, but excellent lawyering in the right case can make it happen.

Hon. James P. Kleinberg (Ret.)

Some context is necessary. When commercial arbitration started in the United States early in the 20th Century

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Also in This Issue

High-Octane Fee Awards in Patent Cases

It is now easier to recover attorney fees from the losing side in a patent case, thanks to the Supreme Court's decision in *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014). A court can award fees in "exceptional" patent cases under 35 U.S.C. § 285. But the statute does not define "exceptional." In *Octane,* the Court removed the difficult substantive threshold showing previously required ("objectively baseless" and "subjective bad faith") and lowered the standard of proof. Unsurprisingly, those changes have led to more fee awards: since *Octane*, district courts have awarded fees in 27 out of 63 cases — double the rate of previous years. (This and other statistics are from Hannah Jiam, *Fee Shifting and Octane: An Empirical Approach Toward Understanding*, Berkeley Tech. L. J. (forthcoming July 2015), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2597195i.)

Ragesh Tangri

To some, *Octane* offers a solution to the "patent troll" problem by giving defendants an incentive to litigate to victory instead of paying off the troll with a nuisance settlement. But nothing in *Octane* limits its new regime to troll cases, and any losing party is now more exposed to a fee award. Scarier still — from our parochial perspective — is the enhanced risk that fees, which in patent cases regularly reach millions of dollars, will be awarded not just against the unsuccessful litigant, but against that party's counsel.

Octane Lowers the Bar for Fee Awards

Before *Octane*, a prevailing patent litigant had to show

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it was a natural venue for business disputes. Buyers and sellers in the same field — such as the garment industry in New York — typically had ongoing relationships worth preserving. It made little sense to present such claims to a neutral who knew nothing of the business at issue, and neither side wanted to spend the time and money in a court proceeding. Hence, labor, securities, and other highly specialized enterprises — such as baseball — were the predominant users of arbitration. For many years there were known hallmarks of commercial arbitration: no prehearing discovery or motions, a prompt hearing before an experienced neutral, and a relatively quick (30 days, for example) decision that was, with very limited exceptions, final.

But commercial arbitration has changed. First, the subject matter is not limited as in the past. All types of disputes are heard, from patent licensing to construction defect to class actions. The courts have played a prominent role in this expansion. See, e.g., recent decisions of the Supreme Court, such as *AT&T v. Concepcion*, 131 S.Ct. 1740 (2011). Second, arbitration has become — at least in some commentators' minds — the "new litigation." In the words of Professor Thomas J. Stipanowich, arbitration has become " 'judicialized,', formal, costly, time-consuming, and subject to hardball advocacy." (Thomas J. Stipanowich, Arbitration: The "New Litigation" University of Illinois Law Review 1,8 (2010))

This trend is not surprising. Business litigators, having been trained in the techniques of discovery and motion practice, are not comfortable stepping outside their usual, and frankly lucrative, comfort zone. A recent article observed:

"Most of the cost involved in a typical business lawsuit is incurred in pretrial discovery. Although discovery has long been expensive, costs exploded with the introduction — and now near-ubiquity — of electronic data, including emails and databases. In larger cases, the cost of document discovery can easily reach into the millions of dollars *per lawsuit*. Perhaps more important, because the court rules place little restraint on the tendency of lawyers to search through as much data as possible in the hope of finding something useful, the process is not only expensive but inefficient. One survey of large lawsuits found that for every 1,000 pages of documentation produced in discovery, only one page became an exhibit at trial." Creighton Magid, New Discovery Rules to Rein in Litigation Expenses, Corporate Counsel (2014)

Dispositive motions — demurrer or motion to dismiss — that turn on the language of the claim or defenses would seem to be more straightforward. For example, if a claim is barred by a statute of limitations, the case could be over quickly. But claims, responses, and defenses in arbitration do not necessarily follow the traditional, detailed pleading format. It may be difficult to discern what statute of limitations applies, for example. Of course discovery is the foundation of summary judgment motions. And, at least in theory, there is nothing inconsistent with granting summary judgment motions in arbitration as it is obviously an expeditious method of resolving disputes.

A recent flurry of articles and press releases suggest arbitration institutions such as JAMS and AAA are more open to the idea of dispositive motions, and there is greater receptivity to the concept in international proceedings. See, e.g., Solomon Ebere, Associate at Derains & Gharavi, *Summary Adjudication in Arbitration Proceedings* (2014), Rule 18, JAMS Comprehensive Arbitration Rules, Article 16.3, AAA International Arbitration, Rule 12504, FINRA Code of Arbitration Procedure. But this suggestion of openness to dispositive motions can be viewed too broadly. For example, FINRA states: "FINRA recognizes that, in some limited circumstances, dispositive motions may be warranted, FINRA is concerned, however, that dispositive motions often result in delay of the hearing on the merits. FINRA reminds parties that filing dispositive motions in bad faith may result in sanctions imposed by the panel."

The well-respected *Guide to Best Practices in Commercial Arbitration* published by the College of Commercial Arbitrators in 2014 provides this sobering advice (in bold-faced type):

"To avoid the risk of having an award vacated for refusing to hear evidence, arbitrators should grant dispositive motions only when the party opposing the motion has had a reasonable opportunity to gather and present evidence on the pertinent issues and the arbitrators are confident that on the undisputed facts, the movant is clearly entitled to an award in its favor."

Hovering over the summary judgment motion is the language of CCP 1286.2:

(a) Subject to Section 1286.4 (which requires a timely and noticed petition or response to request that an award be vacated, or that the court give appropriate notice before vacating the award) the court shall vacate the award if the court determines any of the following:

* * *

(5) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.

Obviously the interplay between discovery limits in arbitration and the criteria for summary judgment makes obtaining such a ruling problematical. Further, under the JAMS rules the arbitrator has the authority to require the moving party to make an abbreviated showing as to the motion's merits before allowing the actual motion to be filed.

Finally, on the negative side, another law professor has authored an article that asserts summary judgment is unconstitutional. The theory is the Seventh Amendment is based on the common law, and since English common law had no procedure in 1791 akin to summary judgment, that procedure and the right to trial by jury cannot co-exist. The author goes on to posit that the courts would be bet-

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ter off without summary judgment because parties would settle and judges would not be faced with reviewing the extensive briefing that accompany such motions. See, Suja A.Thomas, Why Summary Judgment is Unconstitutional 93 Virginia Law Review 139 (2007)

How, then, might a party successfully persuade an arbitrator to grant a summary judgment motion?

First, do not succumb to the notion that the motion is brought to "educate the arbitrator." Or, worse, using the motion as a discovery tool. There are better ways to accomplish those goals, including requesting leave to conduct focused discovery, and briefing key issues in advance of the hearing.

Second, explore with the arbitrator or panel how the motion should be presented. For example, should the submission be akin to what you'd do in court, e.g., declarations, separate statements? The arbitrator may advise that to defeat a dispositive motion it's enough to present material facts in dispute at the time of hearing — which would seem to undercut the preemptive notion of the motion to begin with.

Then, pretend you are back in law school and consider the "elements" of the cause of action you are attacking. The CACI instructions are helpful for this purpose. Remember that the pleadings (claims and responses in arbitration) control. Carefully consider what evidence `supports or undermines each element. Resist the temptation to overload the motion with dozens — or hundreds of undisputed material facts ("UMF"). Understand that if a single designated UMF is in dispute, the motion will likely fail. (For a helpful article on improving chances for success with such motions, see Judge Beth Freeman's article, Increasing the Likelihood of Success on Summary Judgment Motions ABTL Report, Vol. 15, No.3 (2006))

Before the motion is filed, you may well be required to first ask permission of the arbitrator to do so. JAMS' Rule 18 provides:

"The Arbitrator *may permit* any Party to file a Motion for Summary Disposition of a particular claim or issue, either by agreement of all interested Parties or at the request of one Party, provided other interested Parties have reasonable notice to respond to the request. (emphasis added)"

The point of this exercise is — again — to try to adhere to the fundamental principles of arbitration, namely, a prompt, thorough, and final decision that ends the dispute. Since the form of the request to the Arbitrator is not specified, it is best to ask. For myself, a two-page summary on court paper that succinctly states, preferably in bullet-point fashion, (a) here's what the motion's effect will be (e.g., a portion or all of the claims eliminated), and (b) here are the pieces of evidence in support. Indeed, to retired judges now sitting in arbitrators this threshold is a device most would have desired when on the bench.

To assist the arbitrator, highlight portions of depositions or documents. A foot-tall set of materials may suggest that

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Enforcing Arbitration Provisions in Trust Instruments

Trust settlors often hope for — and in some cases, can envision nothing less than — the best case scenario, meaning faithful trustees that dutifully discharge their duties and content beneficiaries that are satisfied with the arrangement the settlor created. Unfortunately, in many cases, disputes among trust settlors, trustees, and beneficiaries arise, and litigation ensues and lingers for years.

Occasionally, forward-thinking settlors have attempted to address the possibility of conflict by inserting arbitration provisions in trust instruments. In many cases, however, one or more beneficiaries are not signatories to the instrument containing the arbitration provision. As a result, the question of the enforceability of such arbitration provisions pits two conflicting principles against each other: the intent of the settlor to have disputes resolved by arbitration and the right of nonsignatory beneficiaries not to be compelled to participate in an arbitration to which they did not consent. This article examines the recent attempts by California courts to balance these competing interests and determine when, if ever, a nonsignatory beneficiary can be required to arbitrate a trust dispute.

John J. Stein

Arbitrating Trust Disputes: An Attractive Option

Any discussion of trust dispute arbitration begs a fundamental question: why would a party to a trust dispute want to forsake a court proceeding in favor of arbitration? The answer is that the unique nature of trust disputes makes arbitration particularly appealing for several reasons.

• *Accelerated Dispute Resolution*. The vast majority of trust disputes proceed before a single department — *i.e.*, the Probate Court — of the Superior Court. *See* Prob. Code §§17000, 17200. As a general matter, California court dockets are congested, and litigation timelines are measured in years. This problem is particularly pronounced in the context of trust litigation because, in many instances, a single judge in each county presides over most of the trust disputes. Arbitration allows for shortened timelines through the selection of an arbitrator with a more flexible schedule.

• *No Waiver Of A Jury*. Generally, trust disputes are decided by judges, not juries. *See* Prob. Code §§825, 17006. In standard civil litigation, arbitration requires that the parties waive their rights to a jury. No such waiver is required in trust dispute because, in most cases, the par-

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ties never had a jury right to waive.

• *Private Information Remains Private*. Trust disputes can be emotionally charged intra-family disputes that are littered with embarrassing and/or sensitive personal and financial information. Many people would prefer that such disputes not play out in a public forum. While litigating in court often requires that private or sensitive information be made publicly available in a court file, arbitration allows the parties' dispute to unfold in relative privacy and often permits larger quantities of material to remain confidential.

• *Respect For The Settlor's Intent*. One of the guiding principles of California's trust law is that the settlor's intent is entitled to great deference and should control whenever possible. Thus, if a settlor includes an arbitration provision in a trust instrument requiring that all trust-related disputes be submitted to binding arbitration, it would seem that the settlor's decision should be accorded significant weight.

All that said, compelling arbitration of trust disputes is not without its difficulties. Arbitration's legitimacy is premised on its contractual nature. In the context of trust disputes, however, compelling arbitration would often require foisting it onto trust beneficiaries that were not signatories to the instrument containing the arbitration provision. As discussed below, California courts have only started to wrestle with balancing the competing considerations of effectuating settlors' intent and the right of nonsignatory beneficiaries not to be unduly coerced into arbitration.

California's Recent Foray Into The Arbitrability Of Trust Disputes

Since 2011, the Court of Appeal has twice addressed the enforceability of arbitration provisions against nonsignatory beneficiaries of trust. In addition to an unexpectedly complex procedural history, these cases have determined that the law's classic answer applies to the difficult question of whether a nonsignatory beneficiary will be required to arbitrate a claim: it depends.

Diaz v. Buckey

In *Diaz v. Buckey*, 195 Cal. App. 4th 315 (2011), the appellate court affirmed the denial of a trustee's motion to compel arbitration. In that case, Marie Buckey was trustee of the Diaz Family Trust, of which she and her sister, Paulette Diaz, were beneficiaries. After finding an accounting for the trust unacceptable, Diaz filed a petition alleging that Buckey breached her fiduciary duty and requesting Buckey be removed as trustee, compelled to account, and required to reimburse the trust. *Id*.

The trust instrument contemplated that disputes would be arbitrated: "Any dispute arising in connection with this Trust, including disputes between Trustee and any beneficiary or among Co-Trustees, shall be settled by…arbitration.…" On the basis of this language, Buckey unsuccessfully moved to compel arbitration of the dispute.

On appeal, the court acknowledged that "[n]o California case has directly addressed the issue" of whether a trust beneficiary could be bound by a trust instrument's arbitration provision. The court noted, however, that fewer than all of the beneficiaries of the trust were parties to the litigation, raising the possibility of conflicting rulings on a common issue of law or fact in contravention of the California Arbitration Act's policy to avoid such inconsistencies.

In addition, the court stated that, in most instances, "only parties to an arbitration contract may enforce it or be required to arbitrate." Buckey contended that Diaz was a third party beneficiary of the trust and was therefore estopped from denying her obligation to arbitrate. Relying on California case law that had "rejected the argument that a trust was a third party beneficiary contract" and *Schoneberger v. Oelze*, 96 P.3d 1078 (Ariz. App. 2004), an Arizona decision that held that trusts are not "written contracts" within the meaning of Arizona's arbitration statute, the *Diaz* court rejected Buckey's argument and affirmed the lower court's refusal to compel arbitration.

The California Supreme Court granted review in *Diaz* but never issued an opinion. Rather, the case was transferred back to the Court of Appeal with directions to vacate its decision and reconsider the matter in light of *Pinnacle Museum Tower Association v. Pinnacle Market Development, LLC*, 55 Cal. 4th 223 (2012), which allowed a condominium developer to enforce an arbitration provision against an owners association that neither bargained over nor participated in the drafting of the document containing the arbitration provision. Before the Court of Appeal could issue a new opinion, however, the parties stipulated to the lawsuit's dismissal.

McArthur v. McArthur

In 2014, the Court of Appeal again considered the enforceability of arbitration provisions in trust instruments in *McArthur v. McArthur*, 224 Cal. App. 4th 651 (2014). In that case, Frances McArthur created the Frances E. McArthur 2001 Living Trust, naming his three daughters — Deborah Tamisia, Kristi McArthur, and Pamela McArthur — beneficiaries. Ten years later, Frances amended his trust to designate Kristi a co-trustee, increase Kristi's share of the trust estate, and insert the following arbitration provision:

> The Trustor and Co-Trustees…are Christians and believe that the Bible commands them to make every effort to live at peace and to resolve disputes with each other in private or within the Christian church (see Matthew 18:15–20; 1 Corinthians 6:1–8). Therefore, the Trustor and Co-Trustees agree that any claim or dispute arising from or related to the Trust as amended shall be settled by biblically based mediation and, if necessary, legally binding arbitration.…This Section shall also be binding on all successor trustees and benefices for the Trust as amended.

Shortly after Frances died, Pamela challenged the validity of the amendment, sought removal of Kristi as trustee, and claimed damages for financial elder abuse. Kristi moved to compel arbitration of the dispute, and the trial court denied the motion, concluding that "there was no

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evidence that the beneficiaries of this Trust gave either their consent to or consideration for the arbitration provision in order to become beneficiaries.…"

The Court of Appeal affirmed. Unlike the *Diaz* court, the *McArthur* court did not voice any concern over the fact that fewer than all beneficiaries were parties to the litigation. Rather, the court's decision primarily rested on an examination of non-California cases and was buttressed by California law regarding the enforceability of arbitration provisions against non-signatories in contexts other than trust disputes.

The *McArthur* court's survey of out-of-state authority focused on two decisions that reached in opposite conclusions. The *McArthur* court first cited *Schoneberger* — *i.e.*, the Arizona case cited by the *Diaz* court — and noted that the reasoning in *Schoneberger* was endorsed in another case by the District of Columbia Court of Appeals. Interestingly, however, the *McArthur* court also recognized that Arizona had subsequently revised its arbitration law to abrogate *Schoneberger* and require the enforcement of arbitration provisions in trust instruments.

By contrast, *McArthur* summarized the Texas Supreme Court's opinion in *Rachal v. Reitz*, 403 S.W.3d 840 (Tex. 2013), as "[holding], based on the wording of that state's arbitration law, that a trust beneficiary can be bound to arbitrate whether or not the trust document is considered to be a contract." The *McArthur* court similarly recognized that cases in New York, Washington, and Colorado had "concluded that a beneficiary who seeks to enforce rights under a trustee's contract with a third party may be compelled to arbitrate the dispute pursuant to an arbitration clause in the contract." Indeed, even *Schoneberger* "recognized that a nonsignatory may be barred from avoiding arbitration if he has claimed or received some direct benefit from the agreement containing the arbitration clause."

These out-of-state authorities were consistent with the court's conclusion regarding the enforceability of arbitration provisions against third party beneficiaries of contract. As stated in *McArthur*, "Although Kristi asserts generally that contractual arbitration clauses are enforceable against third party beneficiaries of the contract, the case law in fact requires that the third party *claim* benefits or rights under the contract before he or she will be bound to arbitrate."

Based on the above analysis, *McArthur* concluded that a nonsignatory beneficiary can be compelled to arbitrate only if the beneficiary has impliedly consented to the arbitration by either accepted benefits from, or attempted to enforce rights under, the particular instrument containing the arbitration provision. Applying this rule, the court concluded that Pamela had neither accepted benefits from nor attempted to enforce rights under the trust amendment that contained the arbitration provision, but rather was challenging the validity of that instrument. As a result, the court held that Pamela could not be compelled to arbitrate her claim.

In reaching this holding, the *McArthur* court considered the applicability *Pinnacle*, the California Supreme Court decision that the *Diaz* court was instructed to consider, and deemed "*Pinnacle* inapplicable in the context of a trust." The court similarly rejected Kristi's pleas that the nation was trending toward allowing arbitration of trust disputes, stating that such "arguments [are] best addressed to the Legislature, not to this court."

Unlike in Diaz, the California Supreme Court declined to review the decision in *McArthur*.

The Upshot Of McArthur

The rule stated in *McArthur* — *i.e.*, a nonsignatory beneficiary cannot be compelled to arbitrate unless that beneficiary has accepted benefits provided in, or attempted to enforce rights under, the instrument containing the arbitration provision — has a number of interesting implications.

As an initial matter, though the court refused to compel arbitration, the rule announced in *McArthur* is a surprisingly, and perhaps unwittingly, broad endorsement of the arbitration of trust disputes. The *McArthur* court refused to compel arbitration because (1) the arbitration provision appeared in an amendment and (2) the beneficiary resisting arbitration was attempting to invalidate that amendment. If, however, arbitration provisions in trust instruments gain popularity with settlors, such provisions likely will appear in the initial trust instrument, not a subsequent amendment. Outside of attempts to invalidate a trust *in toto*, most actions instituted by beneficiaries (*e.g.*, petitions to instruct the trustee to take or refrain from taking a certain action, petitions to redress a breach of trust, petitions to remove a trustee, *etc.*) involve the beneficiary exercising a right under the trust because it is the trust instrument itself that confers standing to the beneficiary to bring a claim *vis-à-vis* the trust. Thus, it would appear that, under *McArthur,* a nonsignatory beneficiary will be compelled to arbitrate a trust dispute any time (1) the arbitration provision appears in the original trust instrument and (2) the trust dispute is any type of claim short of attempting to invalidate the instrument containing the arbitration provision.

Perhaps more interestingly, an argument can be made that *McArthur* puts nonsignatory beneficiaries at a significant election early in the litigation. Under *McArthur,* a nonsignatory beneficiary cannot avoid arbitration if that beneficiary has accepted any benefits from the instrument containing the arbitration provision. It would be incongruous to allow a nonsignatory beneficiary to resist arbitration but later be permitted to receive the benefits of the instrument containing the arbitration provision. Thus, rather than creating a mechanism for making a challenge limited to a trust's arbitration provision, *McArthur* may have created an "all or nothing" regime, under which nonsignatory beneficiaries' choices are to either (1) accept the entire instrument, including the arbitration provision, or (2) reject the entire instrument, including whatever assets are to be distributed to the nonsignatory beneficiary.

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that the litigation was brought or maintained in "subjective bad faith," and was "objectively baseless," in order to win a fee award. *Brooks Furniture Manufacturing, Inc. v. Dutailier International, Inc.*, 393 F.3d 1378, 1381 (Fed. Cir. 2005). The Federal Circuit had borrowed that standard from antitrust cases in which the alleged monopolizing conduct was the bringing of a lawsuit. The Supreme Court had held in that context that only "sham litigation" can give rise to antitrust liability, and that a claim constitutes sham litigation only if it is both objectively baseless and subjectively intended to interfere with a competitor's business. *R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) ("*Noerr*"). But the Court in *Octane* rejected the Federal Circuit's application of that principle to § 285.

The Court instead held that an "exceptional case" was "simply one that stands out from others with respect to the substantive strength of a party's litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated." *Octane*, 134 S. Ct. at 1756. The Court pointed to the non-exclusive list of factors it previously had held courts could consider in making fee awards in copyright cases, including "frivolousness, motivation, objective unreasonableness (both in the factual and legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence." In doing so, the Court twice cited its opinion on copyright fee awards in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994), referring to the Copyright Act as a "comparable context" and to §505 of that Act as a "similar provision" to §285 of the Patent Act. The Court did not address the difference between the statutory language governing fee awards in copyright cases, which says only that "the court *in its discretion*" may award costs and that it "may" include fees "as part of the costs" (17 U.S.C. § 505) and the language governing fee awards in patent cases, which limits courts to awarding fees only "*in exceptional cases.*" 35 U.S.C. § 285.

Alex Moss

The Court also lowered the burden of proof from clear and convincing evidence to a preponderance and, in a companion case, held that reviewing courts should defer to district courts' fee decisions. *Highmark Inc. v. AllCare Health Mgmt. Sys.*, 134 S. Ct. 1744 (2014).

Octane in Practice: More Frequent Awards Against Parties (and Counsel?)

Cases decided since *Octane* show that, beyond the statistical uptick in fee awards, the types of conduct that are likely to justify awarding attorney fees have changed. This is not surprising, given that *Octane* removed the need to make a threshold showing of objective baselessness, and suggested that courts could consider "the need in particular circumstances to advance considerations of compensation and deterrence." *Octane*, 134 S. Ct. at 1756 n.6. Post-*Octane* courts have focused on case-specific factors, such as a party's intransigence in the face of court rulings (including rulings made in other cases), success in claim construction or on appeal, history of low-cost settlements, efforts to delay resolution of merits issues, and misrepresentations to the court. They also have relied on the totality of factors rather than any single instance of reprehensible conduct.

For example, in *IPVX Patent Holdings, Inc. v. VoxerNet LLC*, No. 5:13-cv-01708-HRL (N.D. Cal.), the district court pointed to the plaintiff's "continuous egregious behavior" that included conducting an insufficient investigation before filing, taking claim construction positions contrary to another court's ruling, trying to delay resolution on the merits, and misrepresenting facts.

While losing arguments do not by themselves qualify a case as exceptional, they may weigh in favor an exceptional case finding. For example, in *Bayer CropScience AG et al v. Dow Agrosciences,* 1:12-cv-00256-RMB-JS (D. Del. Mar. 13, 2015), the court pointed to the appellate court's summary affirmance of its summary judgment ruling as evidence of the weakness of the losing party's stance. On the other hand, winning arguments or close calls may weigh

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If a nonsignatory beneficiary elects to resist arbitration, *McArthur* teaches that the inquiry cannot concentrate merely on the existence of the arbitration provision. Rather, the dispute will necessarily center on whether the nonsignatory beneficiary has impliedly consented to the arbitration provision in the trust instrument at issue. Thus, it is incumbent on parties to a disagreement over the arbitrability of a trust dispute to develop favorable evidence regarding the nonsignatory beneficiary's acceptance of any benefits (be them nominal or substantial) or claiming of any right (either in the past or in connection with the extant dispute) under the instrument containing the arbitration provision.

As discussed above, there is reason to believe that legislatures nationwide are becoming increasingly amendable to the arbitration of trust disputes, and perhaps California will join this trend. Until then, however, it is a court's conclusion with regard to whether the nonsignatory beneficiary has either received benefits from, or claims right pursuant to, the instrument containing the arbitration provision that will likely determine whether a trust dispute will proceed before a court or an arbitrator.

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Amy Briggs

On INSURANCE

Coverage Under Employment Practices Liability Policies: Blow Your Whistle?

Coverage can occasionally be found in unexpected places. Employers, and counsel representing them in False Claims Act ("FCA") litigation, should review all potentially applicable liability policies, but — in particular — pay close attention to the employer's employment practices liability policy. This is because the United States District Court, Northern District of Illinois in *United States Liability Insurance Company v. Sigmatek, Inc.* recently ruled that the employment practices liability carrier owed its insured a defense against an underlying FCA action. *Sigmatek* could have widespread significance because (1) it addresses insurance policy language that is common to many employment practices liability policies and (2) applies a legal standard that is prevalent amongst many jurisdictions, including California.

The following is taken from the allegations in the underlying FCA lawsuit at issue in the coverage case. As attorneys familiar with False Claims Act cases will note, the allegations are fairly routine. Sigmatek and Marathon ("Sigmatek") contracted with the United States Army to supply machine gun mounting systems and tripods. A Sigmatek employee became aware that Sigmatek submitted false statements to federal agencies certifying that the mounts and tripods were designed and manufactured in accordance with the specifications and that they would perform properly and safely in military exercises and combat. The employee allegedly reported these issues but was instructed to falsify documents in response.

During a subsequent government audit, Sigmatek had difficulty producing the documentation the auditor required regarding the mounting systems and tripods. The employee further alleged that Sigmatek's owner grew increasingly concerned over the lack of documentation and pressured the employee, apparently afraid that the employee would spill the beans to the auditor. As a result of the owner's behavior towards him, the employee alleged he was forced to terminate his employment with Sigmatek.

The employee then filed suit against Sigmatek under the FCA asserting various causes of action. Sigmatek tendered the FCA lawsuit to its EPL insurer, which denied coverage and then sued Sigmatek seeking a declaration that it had no duty to either defend or indemnify its insured. The District Court, however, held that the insurer had a duty to defend against the employee's lawsuit, and dismissed the remainder of the declaratory relief action holding that resolution of the carrier's indemnity obligations was premature.

The basis for the Court's ruling — which should be of interest to employers and counsel — was that the employee's FCA allegations were broad enough to bring the lawsuit potentially within the scope of coverage under the policy, which is all that is needed to trigger the insurer's duty to defend. Specifically, the policy applied to any Claim for a "'Wrongful Act," and "Wrongful Act" is defined as any actual or alleged act of discrimination, harassment, retaliation, wrongful termination, or workplace tort. The carrier argued that the employee did not seek to hold Sigmatek responsible for a "Wrongful Act" as defined in the policy. Rather, the employee had brought a *qui tam* action under the FCA seeking damages resulting from his employer's alleged conspiracy to defraud the government through the submission of false claims, making false statements and submitting false claims for payment.

Sigmatek, however, contended that the employee alleged harassment, wrongful termination, retaliation, and discrimination, all "Wrongful Acts" as defined in the policy. The Court agreed that those allegations supported a claim for harassment, wrongful termination, retaliation, or discrimination even though the employee did not assert a separate claim for wrongful employment practices. Looking beyond the legal theories plead (which is what a California court should do as well), the Court focused on the allegedly tortious conduct on which the FCA lawsuit was based. The Court also noted, however, that while it must focus on factual allegations above legal theories, "factual allegations are only important insofar as they point to a theory of recovery" for wrongful employment acts.

Amy Briggs

Turning to the theory of recovery, the carrier argued that the employee only was seeking damages for violations of the FCA. Sigmatek countered, however, that (1) each claim re-incorporated prior paragraphs that described his mistreatment on the job including wrongful discharge (undoubtedly a "Wrongful Act" under the policy); (2) the employee sought relief under the FCA's remedy for wrongful employment practices resulting from conduct protected by the statutory scheme; by realleging paragraph one of the complaint (referencing the statute's subsection affording "relief from retaliatory actions"); and (3) the FCA complaint alleged a broad prayer of relief. Because the relief afforded under FCA makes an employee whole if that employee had been "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against," the Court held that the FCA entitled an employee to certain remedies if an employer committed a wrongful employment act, as that term was used in the policy.

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High-Octane Fee Awards in Patent Cases

against fees. In *Ateliers de la Haute-Garonne v. Broetje Automation-USA Inc.*, No. 09-598-LPS (D. Del. Mar. 30, 2015), the court cited the reversal of its invalidity ruling as evidence that the case was close and the parties' positions reasonable, and in *Stragent v. Intel*, 6:11-cv-00421-TBD-JBL (E.D. Tex. Aug. 6, 2014), the court noted the plaintiff's winning claim construction position to show the same.

Courts also have considered conduct outside the confines of the particular case — particularly the plaintiff's history as a patent litigant. In *Summit Data Sys., LLC v. EMC Corp.*, C.A. No. 10-749, 2014 WL 4955689, at *3-4 (D. Del. Sept. 25, 2014), the court considered the plaintiff's history of extracting nuisance-value settlements, and in *Small v. Implant Direct Mfg., LLC*, No. 06 Civ. 683 (NRB), 2014 U.S. Dist. LEXIS 154468, at *9–10 (S.D.N.Y. Oct. 22, 2014), the plaintiff's penchant for "extortive litigation" and status as a "patent troll." But not all courts have been willing to take such considerations into account. In *EON Corp IP Holdings LLC v. FLO TV Inc.*, No. 10-1812-RGA (D. Del. May 27, 2014), the district court excluded the plaintiff's alleged pattern of nuisance-value settlements from its analysis — a decision that is currently on appeal to the Federal Circuit.

Notably, not all district courts are awarding fees with equal fervor. The Northern District of California and Southern District of New York have granted fee motions at rates of 50% and 57%, respectively, while Delaware has granted only 33% of such motions. And the Eastern District of Texas has issued only two relevant orders, both denying fees. *Octane* could thus lead to more forum shopping, especially given the Court's ruling in *Highmark* mandating a deferential, abuse of discretion standard when reviewing fee awards.

Lastly, anecdotal evidence suggests that *Octane* may lead to more motions being made for fee awards against opposing counsel, whether under 28 U.S.C. § 1927 (which permits awards against "any attorney…[who] multiplies the proceedings in any case unreasonably or vexatiously") or under the court's inherent power. At least two courts recently have relied on §1927 to find counsel jointly and severally liable with their clients for fee awards in favor of a victorious adversary. *Intellect Wireless v. HTC Corp.*, 1:09-cv-02945 (N.D. Ill. January 8, 2015), and *Worldwide Home Products v. Bed, Bath, and Beyond*, 1:11-cv-03633-LTS-MHD (S.D.N.Y. April 9, 2015). One district court declined to award fees against the losing party or counsel, despite finding that both were vexatious litigants and engaged in litigation misconduct, because "there is little reason to believe that significantly more attorney fees…have been incurred" — but the Federal Circuit reversed and remanded, under both § 285 and § 1927, strongly suggesting that a fee award against both the losing party and its counsel would be supported by the record. *Oplus Tech., Ltd. v. Vizio, Inc.*, 782 F.3d 1371 (2015). And in another post-Octane fees case, the Federal Circuit — while reversing an award of fees because it found the losing party's position meritorious — expressly reserved the question whether the "unreasonable and vexatious" standard of §1927 was any more stringent than the "exceptional case" standard of § 285. *Biax Corp. v. Nvidia Corp.*, (Federal. Cir. February 24, 2015). All of that suggests that counsel, not just clients, face increased risks.

How Big is the Ticket?

As more cases qualify as exceptional under § 285, courts will more frequently have to decide how much to award. *Octane* does not address that question, though district courts and the Federal Circuit have. The standard starting point is the lodestar method, which multiplies the number of hours the prevailing attorneys reasonably spent on the litigation by a reasonable hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Given that as of 2012, patent litigation was reported to have a *median* cost between $2M-5.5M per case (for amounts at risk from 1M to over $25M) AIPLA, Report of the Economic Survey 2013 at 34, a full award of "reasonable" fees can quickly add up.

It is far from obvious, however, that the lodestar approach is appropriate for patent cases. Recall that *Octane* drew on *Fogerty's* discussion of the Copyright Act's fee provision to adjust the standard for patent fee awards under § 285, and that *Fogerty* had looked to *Hensley* for a list of factors to consider in deciding whether to award fees. But in *Fogerty*, that was the "tail." The real question in *Fogerty* was whether the Copyright Act incorporated the same pro-plaintiff fee-shifting framework that civil rights plaintiffs enjoyed. The Court said "no," because fee-shifting serves different purposes in those two contexts. In civil rights cases, fee-shifting was supposed to encourage lawsuits by "impecunious 'private attorney general' plaintiffs" in cases against the government. *Fogerty*, 510 U.S. at 524. But in copyright cases, "defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent [as] plaintiffs," because enhancing the public's access to creative works is an equal part of the constitutional bargain between creators and the public. That logic is equally applicable to patent cases, which flow from the same constitutional bargain. U.S. Const. Art. I, Section 8, clause 8.

Given these different purposes, it is fair to ask whether the same goal of fully compensating the prevailing party for all its reasonable fees should apply. Other differences between patent and civil rights litigation sharpen this question. The losing party in a patent case may be an impecunious plaintiff or defendant, not the government. Awarding fees might still make sense, if the general deterrence value outweighed the harm of putting the loser out of business, but there is no assurance that a fee award will encourage socially desirable behavior Nor do fee awards seem necessary to ensure that patent attorneys will bring legitimate lawsuits: there is little risk that a victory will be economically fruitless because a successful plaintiff is guaranteed monetary damages amounting to at least a reasonable royalty. 35 U.S.C. § 284.

Future Implications of Octane

Prevailing plaintiffs may find treble damages awards eas-

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CAROLINE MCINTYRE

On LITIGATION SKILLS

It is critical for attorneys and clients to understand each other. When the client does not speak English fluently, a thorough game plan for addressing language barriers can pave the way for a successful representation.

Interpreters. Interpreters can be used during all stages of representation to assist the attorney in her communications with the client: during the initial investigation of a potential case, at key court appearances and settlement conferences, to translate documents prior to or during trial, and to translate the client's testimony and interpret the testimony of other witnesses for the client.

Finding the right interpreter. Referrals from colleagues is often the best way to find a good interpreter. Be specific about the language needed, including any dialects. For example, a general Spanish interpreter may not be the best fit for a witness from Argentina. Ask whether the interpreter is court-certified, as that signals the interpreter has passed a rigorous examination.

Meet personally with any prospective interpreters to discuss the needs of your case. Pay close attention to how the interpreter presents herself, both orally and her appearance, as she will be viewed as an extension of your client. Ask the interpreter about her experience translating documents, interpreting in depositions, and interpreting during trial. Follow up with the interpreter's references, and solicit feedback about the interpreter's performance at trial, including any comments from jurors.

Interpreter to assist with representation. An interpreter can help the attorney communicate with the client from the very beginning of the representation. Clear communications with the client from the outset of the case can help establish a relationship of trust, and ensure that the attorney understands important documents and relevant facts from the client's perspective.

Preparing client for testimony through interpreter. In preparing for deposition or trial, certain advice — such as responding only to the question asked, not guessing in response to questions, and not talking over the attorney or interpreter — are critical when the client is testifying through an interpreter. Advise your client to make sure the interpreter has translated the entire question before responding, to ensure that the client has a clear understanding of the question. Also, discuss ahead of time with the client, opposing counsel, and the court how objections will be handled, i.e., before or after the objectionable question is interpreted.

Another issue to discuss in advance with the interpreter and client is whether the interpreter will be interpreting consecutively or concurrently. With consecutive interpretation, the interpreter waits for the witness to conclude a thought or phrase before interpreting. In contrast, concurrent interpretation involves interpreting at the same time the witness is speaking. While concurrent interpretation helps with the flow of testimony, it may be more distracting for the court and jurors to follow compared to consecutive interpretation.

Interpreter for deposition and trial. If your client needs an interpreter for deposition, it is best to coordinate with opposing counsel in advance of the deposition. If you are providing the interpreter, opposing counsel may want background information on the interpreter, such as whether she is certified, dialects, and prior experience.

In contrast to the interpreter who the attorney retains to assist with communications with the client, an interpreter for deposition and trial is an extension of the court. The interpreter is not there as an advocate for your client, but only to provide an accurate record of the witness's testimony. The interpreter for depositions and trial should not have any relationship with any of the parties.

Caroline McIntyre

At the beginning of the deposition or trial testimony, the interpreter will swear under oath that the testimony will be interpreted accurately. If it appears during testimony that the interpreter may not be interpreting accurately, the issue should be addressed immediately. For example, if the witness provides a lengthy response, but the interpreter only provides a short response, it may indicate that the interpreter is summarizing rather than translating the witness' exact words. If possible, videotape deposition testimony in case there is a dispute regarding the interpretation. For trial testimony, consider where your client is seated compared to the interpreter to make sure that your client still connects with the court and the jury, rather than just with the interpreter.

At trial, it may be helpful to have your own interpreter available to translate key testimony, and to communicate your thoughts and advice, for the client. This person can also help confirm that the interpreter designated for trial is interpreting everything correctly. Having a check interpreter available during trial should be discussed and coordinated with the court and all counsel in advance of the commencement of trial.

Coordinating early in the case with your client and interpreters, and being mindful of the issues relating to communications with, and testimony from, non-English speaking clients, can help ensure that your client has equal access to the justice system and the best representation possible.

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ier to get. Currently, the Federal Circuit requires a showing of both objective and subjective unreasonableness to establish willfulness under 35 U.S.C. § 284. That two-part test comes from the same antitrust precedent (*Noerr*) that the Court held inapplicable to § 285 in *Octane*. Some judges on the Federal Circuit already have called for reevaluating the willfulness test in light of *Octane*. *See, e.g. Halo Electronics, Inc. v. Pulse Electronics, Inc.*, No. 2013-1472, at *4 (Fed. Cir. Mar. 23, 2015) (O'Malley, J., dissenting) ("We now know that the artificial and awkward construct we had established for § 285 claims is not appropriate. We should assess whether the same is true with respect to the structure we continue to employ under § 284."). (The court declined *en banc* review not because the relevant issues were unworthy but because they were not squarely presented.)

If the Federal Circuit does take up the application of *Octane* to willfulness and treble damages, it will have to grapple with the Supreme Court's treatment of the First Amendment in *Octane*. The "objectively baseless" component of the *Noerr* test grew out of a concern that monetary awards should not be based on conduct protected by the First Amendment (petitioning the government for redress of grievances) unless the activity was a sham. According to the *Octane* Court, those First Amendment concerns did not carry the same weight in the context of patent fee awards, principally because the Court seemed to assume the numbers would be smaller. *Id*. at 1757-58 ("the threat of antitrust liability (and the attendant treble damages, 15 U.S.C. § 15) far more significantly chills the exercise of the right to petition than does the mere shifting of attorney's fees."). The Court has not previously held that the First Amendment comes into play only when the financial burden placed on speech is sufficiently high — there is no exception to *Noerr-Pennington* immunity for low-value cases. Rather, First Amendment concerns are triggered when a statute "imposes a financial burden on speakers because of the content of their speech," without regard to the size of the financial burden. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991). *Octane* therefore leaves room for the Federal Circuit to decide that *Noerr* applies to willfulness, because willfulness determinations, like antitrust cases, subject defendants to treble damages.

Octane changed the stakes of patent litigation by making it easier to win fees from the losing side, and perhaps its attorneys, and giving district courts more freedom to decide whether, and why, to award fees in patent cases. At the same time, it has raised entirely new questions that district courts, the Federal Circuit, and potentially the Supreme Court will have to confront before the full impact of *Octane* can be seen.

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Dispositive Motions in Arbitration

the issues are more complicated than the motion suggests. And, the more complicated the fact pattern, the less likely the motion will be granted. Again, the moving party should explore with the arbitrator the form to be followed. It is likely that a former judge now sitting as an arbitrator will feel comfortable with the submission of declarations and separate statements.

The brief should be concise, and rhetoric, adjectives, adverbs, and general "arm waving" should be avoided. Footnotes, string cites, and recitations of black-letter law are not helpful.

Be prepared for the opposition to ask the arbitrator to allow discovery on key issues raised by the motion. Depending on the case history, the arbitrator may well allow more discovery to foreclose some later appeal on that ground.

In summary, the arbitrator has two compelling thoughts in mind: making the right decision, and making a record that avoids the possibility of the award being overturned. When all is said and done, the motion preparation, additional discovery, hearing on the motion — if permitted — may suggest the motion is not worth the cost.

Judge James P. Kleinberg is an arbitrator and mediator with JAMS after 11 years as a Superior Court judge and 34 years in business litigation practice.

2015 Dinner/CLE Program Schedule

September 15

Dinner Program, Four Seasons San Francisco

(Title:TBA)

October 1-4

Annual Seminar, Ojai Valley Inn and Spa
(NorCal Ch. Hosts)
"Countdown: The Digital World Confronts an Analog Profession"

November 17

Dinner Program, Four Seasons San Francisco

"Admissible Or Not: You Be The Judge"

ROGER HELLER

On CLASS ACTIONS

Many class practitioners can recall a time in the not too distant past when preliminary settlement approval was viewed, correctly or not, as something of a formality in the overall settlement approval process. In some cases, the parties would submit a proposed class settlement and courts would grant preliminary approval in matter of hours, choosing to wait until the final approval stage to perform a close analysis of the settlement's terms. Those days are largely gone: there has been a trend over the past decade towards a greater emphasis by courts, particularly federal courts, on the preliminary approval stage of the process.

There are several possible explanations for this trend. For one, the substantive scope of the issues covered by preliminary approval orders has expanded. Modern preliminary approval orders address not just the question of whether a proposed settlement is within the "range of reasonableness" so as to justify taking the next step, but typically include detailed directions about the forms of class notice, how notice is to be disseminated, provisional class certification (and corresponding findings), appointment of class administrators and/or notice consultants, and, in claims-made settlements, an initial evaluation of the claim form and claim process. As the role and content of the preliminary approval order have grown, so too has the significance of the preliminary approval process.

Courts also have found it more efficient to look more closely at proposed class settlements earlier on, and where appropriate to suggest adjustments, before substantial resources are spent on sending notice to the class and other administrative and judicial tasks. Under Rule 23 and the case law applying it, a full analysis of a proposed class settlement should await the final approval stage, but courts in the Ninth Circuit and elsewhere are increasingly using the preliminary approval process to scrutinize the relief provided, the risks to the parties of continued litigation, and the other factors relevant to approval of a class settlement. Under this approach, preliminary approval provides the parties greater comfort regarding the chances for final approval, and the court can focus, at the final approval stage, on updating its initial evaluation in light of the reaction of class members (e.g., objections, opt-outs, claims) and other post-preliminary approval developments. This approach has the additional benefit of having another experienced eye reviewing the settlement to make sure, on the front end, that there are no inadvertent drafting errors (e.g., regarding implementation timing) that might need to be corrected later.

Class practitioners on both sides should be mindful of the greater emphasis that is being placed on preliminary approval. In drafting preliminary approval papers, counsel should specifically address how the relief being provided to the class members compares to the claims and the harm alleged, and to explain in more than summary fashion the potential challenges and risks of further litigation. While a detailed and lengthy analysis is not typically required, courts will expect these issues to be addressed in the papers before they make a preliminary reasonableness determination. Moreover, where provisional class certification is requested, the parties should make sure that their preliminary approval papers contain a sufficient analysis of the Rule 23(a) and (b) factors. Parties should also be prepared to promptly address any comments the court makes, and to resubmit modified exhibits or provisions in short order, to minimize delay in obtaining final approval, distributing settlement benefits to class members, and to the defendant receiving the release it bargained for.

Roger Heller

Where the court does suggest or direct any changes to a proposed settlement or to the class notice or other settlement exhibits, one additional issue that the parties should consider is whether supplemental notice under the Class Action Fairness Act, 28 U.S.C. § 1715 ("CAFA") may be required or at least prudent. CAFA requires defendants to notify relevant federal and state officials regarding proposed class settlements within 10 days of the date the settlement is first submitted, and provides that the final approval hearing may not occur until at least 90 days after such notice is provided. 28 U.S.C. § 1715 (b), (d). While non-substantive changes or changes that simply improve the relief to the class members may not trigger a supplemental CAFA notice requirement, more substantive changes might. See, e.g., *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1083 (C.D. Cal. 2010) (noting that CAFA "is unclear as to its application to revisions of proposed settlements," but finding that notice of revised settlement terms provided to government officials ten days before the fairness hearing was insufficient); *Steinfeld v. Discover Fin. Servs.*, 2014 U.S. Dist. LEXIS 44855, *15-17 (N.D. Cal. Mar. 31, 2014) (finding that there is a "dearth of authority on the issue of whether a defendant must provide notice of revisions or amendments to settlements under" CAFA, but ruling that supplemental CAFA notice was not required under the circumstances there, where the changes were favorable to class members and class members received notice of the amended terms).

The role of preliminary settlement approval is evolving at a steady pace. Class practitioners should be sure that their practices are evolving accordingly.

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Letter from the President

Dear ABTL Members and Friends-

As we reach the midpoint of the ABTL program year, it is a good time to reflect, and to look forward. Our 2015 Dinner Program Co-Chairs Rachel Brass and Dan Asimow have thus far put together four excellent dinner programs. In our January program, "Keeping Your Bearings In The Crucible: Ethics At Trial," an expert panel discussed ethical issues that can arise during trial. At our February program, "Meet The New California Supreme Court Justices," California Supreme Court Justice Carol Corrigan introduced us to her two newest colleagues on the Court, Associate Supreme Court Justices Mariano-Florentino Quéllar and Leondra R. Kruger. At our annual Silicon Valley program in May, "Intellectual Property At The Supreme Court," a panel of experts discussed recent and expected U.S. Supreme Court intellectual property cases. Most recently in June, we had the privilege of hearing an insiders' view of the most prominent jury trial in California thus far this year in *"Pao v. Kleiner Perkins — Lead Trial Counsel Deconstruct Their Strategies And Tactics."*

Drew Bassak

As we look forward, the Northern California Chapter is the host chapter for this year's ABTL Annual Seminar to be held October 1-4 at the fabulous Ojai Valley Inn & Spa. Annual Seminar Committee Co-Chairs Dan Bergeson and Bruce Ericson, along with their committee, have been hard at work crafting a terrific event. The seminar is titled "Countdown: The Digitial World Confronts An Analog Profession," and will focus on issues surrounding trying business cases at digital speed in today's digital world. Judge Richard Kramer is returning this year to put together an engaging and amusing hypothetical. The seminar sessions will cover several new, important topics, including litigation funding, engaging juries of millenials, and a deeper look at computer-assisted evidence evaluation, among others, and the entertainment is not to be missed. Registration is open now, so please go to ABTL.org/annualseminar today to reserve your spot.

Following the annual seminar, we will have two remaining dinner programs on September 15 and November 17. Please mark your calendars now. The November 17 program will be an interactive presentation on evidence rulings at trial, and also will be our Chapter's Annual Meeting. I look forward to seeing you there.

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.