ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

ORANGE COUNTY

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## Q&A with the Honorable Terri Flynn-Peister
**By Carl Cotroneo**

*[Editor's Note: Judge Flynn-Peister currently serves as the Assistant Presiding Judge for the Orange County Superior Court. She was appointed to the Orange County Superior Court in 2012 by Governor Jerry Brown. Judge Flynn-Peister previously supervised the Felony Panel after serving as a panel member for four years and led the West Justice Center from 2018 to 2020. From 2019 to 2021 she was the Assistant Presiding Judge of the Appellate Division as well. Prior to her appointment to the bench, she began her career as an associate with Latham & Watkins LLP before serving as an assistant U.S. Attorney for nearly 12 years in the Central and Southern districts of California. Judge Flynn-Peister serves on the Executive, Finance, and Technology committees and oversees the Pretrial Assessment and Release Services Program. Judge Flynn-Peister joined the ABTL Board of Governors in 2026. Please note that this interview has been edited for length and clarity.]*

**Q: Prior to your time as a Judge, what are some of the skills or qualities you gained as an Assistant U.S. Attorney, specifically prosecuting Orange County gangs, that you now bring to the bench?**

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## Enforcing Third-Party Discovery Subpoenas in Arbitration
**By Chris Wang**

Arbitration offers many benefits for clients – it is often more efficient, flexible, confidential, and less costly than litigating in court. In advising clients whether to enforce their contractual right to arbitrate or litigate in court, lawyers should also assess whether third-party discovery is necessary to prove their clients' claims or defenses. This is an important consideration because an arbitrator's authority to enforce third-party discovery subpoenas can vary by applicable statute and across jurisdictions.

While arbitrators have authority to compel third parties to produce evidence at an arbitration hearing under the California Arbitration Act ("CAA") and Federal Arbitration Act ("FAA"), courts have historically held that these statutes do not grant arbitrators the authority to enforce third-party subpoenas to produce documents or appear at depositions for purposes of discovery. (Under the CAA, an arbitrator may order the deposition of a witness "for use as evidence and not for discovery if the witness cannot be compelled to attend the hearing or if exceptional circumstances exist." Cal. Civ. Proc. Code § 1283.) The rationale behind this rule is two-fold. First, because arbitration is fundamentally a matter of contract, third parties who are not signatories to the arbitration agreement and have not consented to arbitration should not be compelled to participate in arbitration. Second, because arbitration is meant to promote efficient resolution of disputes, allowing third-party discovery could risk undermining the very purpose of arbitration. However, recent developments under both the CAA and FAA are reversing this long-standing principle and amplifying the authority of arbitrators to enforce third-party discovery.

Under the CAA, based on recent revisions to the statute itself and new developments in California case law, arbitrators likely ***do*** have authority to enforce third-party discovery subpoenas. Under the FAA, there is a circuit split on this issue. The Second, Third, Fourth, Ninth, and Eleventh Cir-

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## President's Message
**By Charity M. Gilbreth**

As summer comes to a close, many law firms are preparing to welcome a new class of associates. For those beginning their legal careers, the first months of practice are often both exciting and overwhelming. New lawyers are learning much more than legal research and drafting skills. They are learning how to exercise professional judgment, build relationships, solve problems, and carry themselves as members of our profession. That makes this an especially good time to reflect on the importance of mentorship.

As lawyers, our legacy is not measured only by the cases we win or the clients we serve. It is also measured by the lawyers who follow us. The professionalism, civility, and integrity we display every day become the example that younger lawyers carry forward throughout their careers.

The influence of a mentor extends well beyond teaching technical skills. Mentors demonstrate, often without realizing it, how lawyers should treat clients, colleagues, opposing counsel, court staff, and the judiciary. They show that zealous advocacy and professionalism are not competing concepts. In fact, effective advocacy is built on preparation, credibility, sound judgment, and respect for others.

Young lawyers notice these things. They notice when a lawyer grants a reasonable extension instead of turning a scheduling issue into a tactical advantage. They notice when an attorney disagrees firmly without making the disagreement personal. They learn professional judgment when experienced lawyers explain not only what position to take, but why a particular approach best serves the client's interests and the integrity of the profession.

Those lessons matter. The habits lawyers develop early in their careers often stay with them for decades. If we want professionalism, civility, and collegiality to remain hallmarks of the Orange County legal community, we must be intentional about modeling those values.

Mentorship does not have to be formal. It can be as simple as inviting a young lawyer to attend a hearing, reviewing a draft and providing thoughtful feedback, or talking through a difficult issue that arises in a case. Small investments of time can have a lasting impact.

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## Things We Wish We Knew as Junior Litigation Associates

**By Hon. Karen E. Scott and Hon. Deborah C. Servino**

Starting a legal career as a junior litigation associate has been sometimes described as drinking from a firehose, moving to a foreign country, and trying to climb up a steep learning curve. The purpose of this article is to provide some tips for successful litigation strategies, whether you are a junior associate, mid-level associate, partner, or of counsel.

1. <u>At the Beginning, Look at the End</u>

At the beginning of the case, look at what needs to be proven at the end of the case by reviewing jury instructions and verdict forms that will be given. For plaintiff's counsel, knowing what you will need to prove will guide you as to what should be alleged in the complaint. For defense counsel, knowing what you need to prove as an affirmative defense will inform you what should be raised in the answer. For both sides, knowing what needs to be proved or disproved will also help you develop a discovery plan.

In state court, the California Civil Jury Instructions (CACI) are the official civil jury instructions and verdict forms approved by the Judicial Council of California. The instructions clarify the legal principles jurors must consider in reaching their decisions. They are a statement of the law in plain English. While CACI instructions are not mandatory, their use is strongly encouraged and recommended for use unless a judge "finds that a different instruction would more accurately state the law and be understood by jurors." Cal. R. Ct. 2.1050(f). The instructions contain Directions for Use that alert the user to special circumstances involving the instruction and may refer to other instructions that should or should not be used. Each instruction also sets forth the primary sources that present the legal principles for the instruction in the Sources and Authorities section.

In federal court, you must determine whether federal law or state law applies to each claim. The Ninth Circuit publishes model jury instructions for many federal claims. If the parties disagree over the choice of law,

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## Antitrust and M&A Lessons from Two Settlements and a Litigation: Hewlett Packard Enterprises/Juniper, Live Nation/Ticketmaster, and Paramount Skydance/Warner Brothers Discovery

**By John Shu**

### Case Study #1: Hewlett Packard Enterprise Co.'s Acquisition of Juniper Networks: Intersecting AI Hardware and Antitrust

On June 27, 2025, Hewlett Packard Enterprise Co. ("HPE"), Juniper Networks, Inc., and the U.S. Department of Justice settled the DOJ's January 30, 2025 antitrust lawsuit challenging HPE's $14 billion all-cash acquisition of Juniper. Trial was set for July 9, 2025 (Judge P. Casey Pitts, N.D. Cal.). The Trump 47 Administration inherited the case from the Biden Administration.

The DOJ alleged the deal would stifle competition in the critical Wireless Local Area Networking (WLAN) market because HPE and Juniper are America's second- and third-largest WLAN providers, respectively. The DOJ further alleged that their merging would leave HPE-Juniper and WLAN giant Cisco Systems, Inc. as the two largest American WLAN companies, together controlling 70% of the U.S. market and therefore harming consumer welfare and innovation, particularly in AI-native networking, where Juniper's Mist artificial intelligence for IT operations ("AIOps") was set to combine with HPE's Aruba networking portfolio. As such, the deal implicated national security issues. WLAN delivers internet access and connectivity to large organizations such as hospitals and university campuses through products such as routers, hubs, switches, software, and related services.

Accordingly, the DOJ extracted certain structural and behavioral changes to the deal. They included requiring HPE to divest key business units, such as its Instant On business, to a DOJ-approved buyer within 180 days, along with providing competitors with unprecedented access to its "key software assets" and its proprietary AI source code. The settlement also limited HPE's access to Mist AIOps' source code, required the combined entity to auction up to two "perpetual, non-exclusive" licenses for Mist AIOps' source code to DOJ-approved winning bidders, and transfer approximately 30 engineers and 25 sales personnel to the auction winner(s).

The settlement was subject to Judge Pitts' approval

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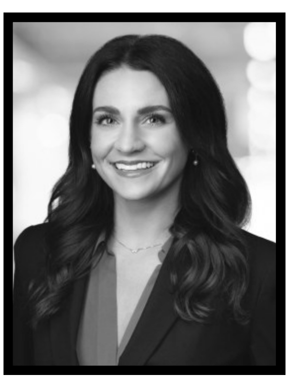
## YLD Update
## By Katie Rosoff, Michael Mosher & Taylor Brown

The Young Lawyers Division ("YLD") 2026 programming is off to a great start! The Co-Chairs of the 2026 YLD committee are Katie Rosoff from Schilling Law Group, PC, and Michael Mosher from Stradling Yocca Carlson & Rauth, LLP. The 2026 YLD Vice Chair is Taylor Brown from Payne & Fears LLP. The YLD Chairs institution of the YLD Planning Committee, which is composed of one young lawyer from every ABTL Orange County chapter board member firm to help develop programming for the YLD, has been integral in the participation and planning for our events this year.

ABTL's YLD introduces lawyers practicing for ten years or less to their ABTL chapter and helps these lawyers develop relationships with other young lawyer members. Over the course of the year, YLD hosts events like Happy Hours, Judicial Mixers, Brown Bag lunches, and MCLE programs. Many of these are complimentary for 2026 ABTL YLD members, and others carry only a nominal charge.

This year, the YLD has undertaken the role of conducting the Judicial Interview for the seasonal *ABTL Report*. As you can imagine, this is an excellent opportunity to get to know our local judicial officers at a more personal level.

In April 2026, the YLD Chairs hosted a Brown Bag lunch with the Honorable Nathan R. Scott, Associate Justice for the California Court of Appeal. A few weeks ago, in July 2026, the YLD Chairs hosted another Brown Bag lunch with the Honorable Thomas S. McConville, Judge of the Orange County Superior Court. Both lunches were very engaging and well attended by YLD members. The YLD Chairs intend to host one more Brown Bag lunch this year with a judge sitting on the local bench. Brown Bag lunches are a unique opportunity to learn from members of the Orange County bench in a small setting and receive insight and advice that will help you grow as an attorney.



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A: I think the main thing you glean, no matter what you do before you become a judge, is you just learn about yourself a little bit better.  Particularly when you're a litigator, you become very much an advocate at the very beginning and you're just so passionate about the side you are on, but the longer you do anything, I think you start to see all sides of it.  So, I think it makes you a more balanced attorney because you can anticipate what the other side is doing and you have had the opportunity to grow as a lawyer and person.  You can look at a case, and you can really weigh the case because you have more experience.  When I was at the U.S Attorney's office, where I was a supervisor before I was appointed, I really started examining the cases from a more neutral perspective: Is this something we should be charging?  It was no longer thinking like "oh, I've got this great case, let me do it," it became why are we doing this one, does it comport with our directed goals.  It just balances you out when you practice longer, I think in anything.  If you're a plaintiff's lawyer, the longer you do that, you're able to look at the defense side more and aptly prepare your case because you've done it and have that experience.

That was what really helped me be ready to go to the bench.  It is a big shift when you go from being an advocate for one side to being completely neutral and dispassionate.  You have to be ready for that.  I care that the proceedings before me are fair, that I'm upholding the Constitution of the United States and the State of California, and giving everybody an opportunity to be heard and present their case.  As long as it's just and everybody feels like they had their day in court, I'm not invested in what happens the way each lawyer on each side is.  It takes a minute to understand that when you get to the bench.  Any judge is going to tell you that they sit there in those first couple of cases and they are thinking in the back of their mind why are you doing this or why aren't you doing that.  You have to take a step back and say that's not my job anymore.

**Q: During your time on the bench, do you think you've developed some kind of judicial philosophy, or do you have some tenets that you use as guideposts in your day-to-day work?**

A: My goal is to make sure everybody has the opportunity to be heard. Whether it's lawyers or self-represented litigants, we are here to resolve disputes, but you have to do that fairly by giving everybody a chance to be heard. I was a young lawyer once and I know how much work lawyers put in to come to court, even on something that

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to me at first blush may be simple. The attorney has the right to be heard and give their prepared argument and speech so that they feel like they were heard, even if I may ultimately rule against them. They may convince me of something that wasn't in the briefs. I don't love when people repeat themselves but at the same time our profession only gets better when we let people practice. Even if that is a newer lawyer presenting an argument for the first time, then I am there to listen so that I can fairly decide it.

I also think if you rule against somebody, if they feel like they got a fair shake, it's easier for them to take, not in all cases. I just think that is the only way our system works by having confidence in the system, and confidence is: I went before Judge Flynn-Peister and she listened to me. I take a lot of notes on the bench, but I also tell the parties beforehand, so they don't think I'm being rude. Particularly in victim impact statements or if a defendant is speaking to me, I want to know what they're saying so that I remember it in the future. So that is my guiding principle, to make sure everyone gets a chance to be heard whether it's a traffic ticket or a murder case, everybody has the right.

**Q: Are there any common lawyer practices you find ineffective or counterproductive?**

A: Well, one of the things, no matter what case type I have presided over, is that I like to give tentatives. I want the parties to know where my head is at. I don't love when a side is winning, that they then repeat the argument that they've written in their brief when I'm already going in their favor. That said, I will let them speak and sometimes remind them that I'm going in your favor, maybe let the other side go and then respond to that. I think that is much more efficient if a judge is ruling in your favor, don't mess it up by talking more. They may wind up talking themselves into something that I didn't even consider and could now change my analysis. I let the parties know of everything that I read, so if I read it you don't need to go through it again. If you want to a highlight a couple points, that's fine. But, don't regurgitate the 15-page brief to me. I read it, I promise you, if I say I read it, I read it. Also, if I don't say I read something, tell me there's something missing. I will take a few minutes to get off the bench and look at it, especially if there is a filing that came in last minute.

**Q: What do you think are some qualities or skills that lawyers in your courtroom should possess or be thinking about when they're before you?**

A: Get to your strongest points first. Tell the court what it is you want. Sometimes in hearings, it's unclear what the remedy is or what you want. Do you want the evidence suppressed? Do you want a certain sentence, if so, what is it? Be clear in what you're asking for, what the solution, remedy, or ruling you're seeking. Also, answer the questions that the court asks. I don't know how many times I have watched when I was on our appellate division where we ask very specific questions and lawyers dance all around them and want to get back to their prepared script. That's not where our mind is focused, but if my mind is in the wrong area, answer the question and then tell me why I'm wrong. I may have gotten bogged down in something that is not important but still answer my question as to why I'm bogged down and redirect me to where you think I need to be.

What I see a lot is that lawyers sometimes are not listening to either the judge or if it's testimony, listening to the witness and responding based on the witness's answer. There are so many times that I see really good pieces of evidence for one lawyer come flying out of a witness' mouth and neither side does anything with it because they are so focused on checking their boxes of what they need to get that they missed this gem. The best lawyers are the ones that are pausing and listening and then responding. It's okay to have silence in the court room while you collect your thoughts. This allows the listener to collect their thoughts as well. If there's a jury or a judge that may have heard the zinger that came by, they will take note. So don't rush right into another point because then points get buried.

**Q: You regularly give presentations on a variety of legal topics including ethics, we have seen AI becoming more integrated into all aspects of our society and specifically in the legal field. How have you seen AI being integrated into the judiciary and what are the big ethical concerns you see with the integration of AI into the judiciary?**

A: I think we have to embrace AI as the next tool and we can't be afraid of it. It's coming whether all of us want it or not. We just need to responsibly use it, and I think we're all muddling with the technology and it's not being responsibly used in some cases. We as the court, the Chief Justice, directed all of the courts to come up with an AI usage policy. We have one in our courts that we've adopted that essentially says you can use AI but if you're going to use it you have to check to make sure it's verifiable. You are responsible for whatever you're putting out there. When I use "you" I mean court employees, staff, legal research attorneys, and judges. My philosophy is if I'm going to use AI to generate an order of some sort or to help me with my legal research, I think the lawyers have right to know that I

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did that. I don't think there's anything wrong with it because frankly, something like Westlaw is somewhat of an AI tool already. But if I'm going to use that type of tool to help me draft an opinion, I should drop a footnote that would say "use of AI was partially responsible for creating this order." I'm responsible for then verifying all of the cites that are out there. That's the big thing, I think it is speeding up so much for all of us and it's a great tool, but so many lawyers aren't taking that second step to check what's actually there. That is where you get the hallucinations that are problematic.

The other way I'm seeing it, now that I'm in an administrative role as the Assistant Presiding Judge and not really in the courtroom on a day-to-day basis, is we see AI as tools to help our employees. I think it can help the legal profession in some ways of consolidating and summarizing documents faster. For litigators, civil discovery may speed up a bit as they're able to go through documents and summarize without having to go through every single page. I do see a benefit in that way. For our employees, we have two chatbots, one that helps our employees with questions related to their benefits without having to call HR and they get a response much faster. The other one we have is for our courtroom clerks where they have all these procedures of how they prepare the minutes and the chatbot basically searches and gets them the procedures in a faster way. It's not replacing, it's aiding the already impacted work they're doing. I think it's very exciting, but we have to embrace it in a very ethical manner and that is the hard part. We're looking into getting some legal research tools here and see how we could use them, but in a test case before we just roll them out.

**Q: What is your advice for young lawyers at the start of their career?**

A: Your reputation is everything. Be kind. In Orange County there are 3.5 million people, but the legal community is small, and you will cross paths with these individuals, even if you started in another area. I started in San Diego and then practiced in Orange County, but a lot of my colleagues were in Los Angeles because of the locations covered by the U.S Attorney's office. It is amazing how many people I run into, that I worked with before in my new role. All of those people will remember you as a young lawyer. Anything you do, you want to have a good reputation. What that means is - be kind, be respectful, be ethical, be civil. Do all of the things that help raise up our profession so that you are somebody that is respected.

My second piece of advice is to take advantage of opportunities. Your next opportunity might not come from where you think it would. You may be at a bar event and talking to somebody who could be your next employer or a big change in job. I've been fortunate throughout my career that my path was kind of created by happenstance in some ways because I took advantage of opportunities because I had a passion for it. As long as you have kindness and are working with opposing counsel and your own colleagues that will take you far. You'll be amazed 20-some-odd years after you're practicing just how many people you will run into that you appeared against, or for me, they appear in front of me all the time and then we'll chat in chambers and it's wonderful to catch up. I was given the same advice, that my reputation is going to stay with me as early as my first year of practice.

♦ *Carl Cotroneo is an Associate with Schilling Law Group, PC, in Newport Beach, focusing on business litigation.*

***-YLD Update: Continued from page 4-***

On May 14, the YLD Chairs hosted a wonderful happy hour at Puesto in Irvine, sponsored by Consilio. Next month, on September 17, the YLD will be hosting Bench & Bar Dialogue: A Rotation Mixer, which will take place at the Ronald Reagan Federal Building and United States Courthouse in Santa Ana. The e-blast has gone out, and the event is filling up quickly. Be sure to check your emails to sign up for those few remaining spots.

As we look forward to the balance of 2026, the YLD Chairs also hope to plan a volunteering opportunity and MCLE event for chapter members. If YLD chapter members would like to get more involved with the planning of YLD events or have ideas or requests for certain events, please reach out to Katie, Michael, or Taylor, and they will get you involved in the Planning Committee. We will look forward to seeing you at our events

♦*Catherine Rosoff of Schilling Law Group, Michael Mosher of Stradling and Tayor Brown of Payne & Fears are the Chairs and Vice Chair of the ABTL Orange County Young Lawyers Division.*

*-Third-Party Discovery: Continued from page 1-*

cuits have held that arbitrators generally do not have authority to enforce third-party discovery subpoenas, but the Eighth Circuit has held that arbitrators do have such authority. Given the changing landscape in California law and circuit split among federal courts, there will likely be further developments on arbitrator authority in enforcing third-party discovery subpoenas. Lawyers should carefully consider these developments when advising clients on arbitration-related issues.

## Third-Party Discovery Under the CAA

An arbitrator's authority to enforce discovery is codified under California Code of Civil Procedure section 1283.05, which provides arbitrators the power to "enforce the rights remedies, procedures, duties, liabilities, and obligations of discovery by the imposition of the same terms, conditions, consequences, liabilities, sanctions, and penalties as can be or may be imposed in like circumstances in a civil action by a superior court." With respect to third-party discovery, California Code of Civil Procedure section 1282.6(a) provides that subpoenas can be issued for the purposes of discovery only if section 1283.05 applies. Prior to January 1, 2025, California Code of Civil Procedure section 1283.1 (now repealed) limited the applicability of section 1283.05 to cases involving personal injury, wrongful death, or when the parties incorporated section 1283.05 into their arbitration agreement. As explained below, these statutes have historically limited the arbitrators' ability to enforce third-party discovery.

The Sixth Appellate District in *Aixtron, Inc. v. Veeco Instruments Inc.*, 52 Cal. App. 5th 360, 369 (2020) articulated these limitations. In *Aixtron*, claimant employer initiated arbitration against a former employee who resigned from his position to work for a competitor, bringing claims related to alleged data theft. The claimant employer sought discovery from the third-party competitor, who was not a party to the arbitration agreement, and served subpoenas seeking the competitor's business records and computers. Because the arbitration agreement did not incorporate section 1283.05, the court held that the arbitrator did not have authority to enforce the subpoenas for purposes of discovery. The court held that there are only three instances where an arbitrator may enforce third-party subpoenas under the CAA:

> An arbitrator may compel the attendance of witnesses and production of evidence "at an arbitration proceeding" (Cal. Civ. Proc. Code section 1282.6);
>
> An arbitrator may compel the attendance of witnesses and production of documents at a deposition under Cal. Civ. Proc. Code section 1283 for use as evidence but not for purposes of discovery;
>
> An arbitrator may compel attendance of witnesses and production of documents for discovery only if Cal. Civ. Proc. Code section 1283.05 applies.

*Aixtron*, 52 Cal. App. 5th at 396.

In *McConnell v. Advantest Am., Inc.*, 92 Cal. App. 5th 596 (2023), the Fourth Appellate District agreed with the limitations articulated in *Aixtron*. *McConnell* involved an arbitration stemming from a business dispute between a company and a former senior executive. The arbitration agreement did not incorporate section 1283.05, and the company sought to compel production of documents from third parties who had communications with the former executive. In an attempt to circumvent *Aixtron*'s prohibition on discovery subpoenas, the arbitrator issued subpoenas ordering the third parties to appear and produce documents at a hearing specially set for the "limited purpose of receiving documents from subpoenaed third parties" (*id.* at 605), whereby the hearing would be adjourned until a later date. The hearing to retrieve documents was nearly twelve months before the scheduled hearing on the merits.

The company argued that the subpoenas were not improper subpoenas for the purposes of discovery but rather subpoenas for production for evidence "at an arbitration proceeding" authorized under section 1282.6. The court rejected the argument, classifying the subpoenas as "unauthorized discovery subpoenas." *Id.* at 610. If such subpoenas could be enforced, then "parties to an arbitration could avoid the prohibition against nonparty discovery, and demand any matter of documents, by simply requiring the nonparty produce the documents at an arbitration hearing . . . [which] would defeat the purpose of the statutory scheme and lead to absurd results." *Id.* at 611. Under *Aixtron* and *McConnell*, an arbitration agreement's failure to incorporate section 1283.05 was fatal to an arbitrator's authority to enforce third-party discovery subpoenas, unless the arbitration involved claims related to personal injury or wrongful death.

In 2025, changes to the CAA and subsequent developments in case law have likely rendered the limitations in *Aixtron* and *McConnell* obsolete. On September 29, 2024, California passed SB 940, which amended certain CAA provisions. Notably, the law repealed section 1283.1, which limited arbitrator authority to enforce discovery under section 1283.05 to cases involving personal injury, wrongful death, or when the parties incorporated section 1283.05 to their arbitration agreement. This law went into effect on January 1, 2025.

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The repeal of California Civil Procedure Code section 1283.1 likely allows arbitrators to enforce third-party discovery subpoenas in all arbitrations. While no court has directly addressed this issue yet, *Vo v. Tech. Credit Union*, 108 Cal. App. 5th 632, 632 (2025) is instructive. In *Vo*, plaintiff, a former employee, brought suit against defendant employer, who moved to compel arbitration in accordance with the parties' employment agreement. The superior court, relying on *Aixtron*, denied defendant's motion to compel arbitration on the basis that the arbitration agreement was unconscionable because it did not expressly incorporate section 1283.05, thereby precluding the parties from seeking third-party discovery in arbitration. The Court of Appeal reversed the lower court's ruling, holding that the arbitration agreement, by incorporating the JAMS rules, gave the arbitrator authority to enforce discovery necessary to arbitrate the claims at issue. In dicta, the court further stated that, with the repeal of section 1283.1, "parties can now obtain third-party discovery under the CAA without explicitly incorporating section 1283.05 into their arbitration agreement." *Id.* at 646 n.6.

The repeal of section 1283.1 and *Vo* likely provide arbitrators authority under the CAA to enforce third-party discovery subpoenas in all cases – not just cases involving personal injury or wrongful death – irrespective of whether the arbitration agreement incorporates section 1283.05.

**Third-Party Discovery Under the FAA**

Section 7 of the FAA states that arbitrators have authority to "summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case."

The Ninth Circuit held in *CVS Health Corp. v. Vividus, LLC*, 878 F.3d 703, 708 (9th Cir. 2017) that section 7 "does not grant arbitrators the power to order third parties to produce documents prior to an arbitration hearing." *Id.* at 708. Rather, section 7 only provides arbitrators authority to compel attendance of a person "as a witness," and compel production of documents "at an arbitration hearing." *Id.* at 707. The Ninth Circuit's holding aligns with the Second, Third, Fourth, and Eleventh Circuits which have similarly interpreted section 7 to authorize arbitrators to compel a witness to appear and produce documents at an arbitration hearing. *See Life Receivables Tr. v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 216 (2d Cir. 2008) ("The language of Section 7 is straightforward and unambiguous. Documents are only discoverable in arbitration when brought before arbitrators by a testifying witness."); *Hay Grp., Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 407 (3d Cir. 2004) ("Thus, Section 7's language unambiguously restricts an arbitrator's subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time."); *COMSAT Corp. v. NSF*, 190 F.3d 269, 275 (4th Cir. 1999) ("Nowhere does the FAA grant an arbitrator the authority to order non-parties to appear at depositions, or the authority to demand that non-parties provide the litigating parties with documents during pre-hearing discovery. By its own terms, the FAA's subpoena authority is defined as the power of the arbitration panel to compel non-parties to appear "before them;" that is, to compel testimony by non-parties at the arbitration hearing.") (In *COMSAT*, the court suggested that an arbitration panel might be able to subpoena a third-party for pre-hearing discovery "under unusual circumstances" and "upon a showing of special need or hardship." *COMSAT*, 190 F.3d at 276, 278.) *Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145, 1159 (11th Cir. 2019) ("[W]e agree with the Second, Third, Fourth, and Ninth Circuits and hold that the plain language of the statute is unambiguous in requiring witnesses to appear before an arbitrator and bring any documents with them, thus prohibiting pre-hearing discovery from non-parties"). (939 F.3d 1160-61. It does not provide arbitrator authority to enforce a third-party subpoena through videoconference or teleconference. *Id.*)

These decisions, however, do not necessarily mean that arbitrators are powerless to enforce third-party discovery subpoenas under the FAA. For example, the Second Circuit in *Life Receivables* specified that its interpretation of section 7 does not preclude an arbitrator from calling a hearing for the specific purpose of having a third-party witness deliver documents for discovery. *Life Receivables*, 549 F.3d at 218 (stating that an arbitrators "section 7 authority is not limited to witnesses at merits hearings, but extends to hearings covering a variety of preliminary matters" and that arbitrators "have the power to compel a third-party witness to appear with documents before a single arbitrator, who can then adjourn the proceedings.").

Moreover, in a split from its sister circuits, the Eighth Circuit has held that section 7 ***does*** provide arbitrators authority to compel documents prior to the arbitration hearing for the purposes of discovery. *See Sec. Life Ins. Co. of Am. v. Duncanson & Holt (in Re Sec. Life Ins. Co. of Am.)*, 228 F.3d 865, 870 (8th Cir. 2000) ("We thus hold that implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing."). In an unpublished 2021 case, a Minnesota district court expanded

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*Sec. Life* and ruled that section 7 also provided an arbitrator the authority to enforce a pre-hearing deposition subpoena against a third-party. *Int'l Seaway Trading Corp. v. Target Corp.*, No. 0:20-mc-00086-NEB-KMM, 2021 U.S. Dist. LEXIS 31755, at *7 (D. Minn. Feb. 22, 2021).

In sum, while an arbitrator's authority to enforce third-party discovery is more limited under the FAA than under the CAA, some federal courts have shown a willingness to expand such authority.

**Conclusion**

Along with other considerations in deciding whether to arbitrate or litigate in court, lawyers should evaluate whether third-party discovery is necessary to prove their clients' claims or defenses. Just as the importance of third-party discovery can vary case-by-case, an arbitrator's authority to enforce third-party discovery subpoenas can vary by applicable statute and across jurisdictions. Given the evolving legal landscape, lawyers should carefully consider these recent developments when drafting arbitration agreements or advising their clients on arbitration-related issues.

♦ *Chris Wang in an associate at Umberg/Zipser and focuses his practice on complex commercial litigation.*

## SAVE THE DATES

**September 9th**

Dinner & Program

**October 8th-11th**

52nd Annual Seminar

Park Hyatt Aviara

**November 18th**

Dinner & Program

Annual Holiday Stuffed Animal Drive

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consider how you will raise that issue early to the court.

2. Look at the Rules of Court, Local Rules, and Judge's Policies/Procedures

Rules of Court instruct counsel and parties how to proceed in court. A court's local rules further refine how parties and counsel should proceed in that court. Finally, a Judge's Policies/Procedures often set forth the specific judges' expectations. To avoid unnecessary filing rejections or consternation from the judge, review the applicable rules of court, local rules, and judge's policies and/or procedures. After you review them, bookmark them online for easy reference throughout the case.

3. Observe the Judge's Pretrial Conference

Observe the judge's pretrial conference, also known as a trial management conference. In Orange County Superior Court, Local Rule 317 informs the parties what needs to be prepared, exchanged, and filed prior to the trial. A pretrial conference may give you a window into what matters to the judge.

In federal court, carefully read the district court judge's case management orders to determine if the discovery cutoff date is the last day to file discovery motions or the last day to hear discovery motions. Many district court judges have unique ways of handling dispositive motions, preparation for the pretrial conference, and motions in limine. Reviewing the scheduling order early and thoroughly will enable you to build enough time into your pretrial schedule.

4. Discovery Plan

At the beginning of the case, create a discovery plan. An effective discovery plan can posture the case for settlement or trial. Weil & Brown, *Cal. Prac. Guide: Civ. Proc. Before Trial* (The Rutter Group June 2025 Update) § 8:349. The discovery plan will inform you as to what evidence you will need to obtain to prove claims or defenses and to disprove the opposite side's claims or defenses. It will also help you in selecting the appropriate discovery tool to obtain the information needed. A discovery plan should address the "order of operations" in which discovery should proceed, and what discovery is needed during the stages of litigation.

In federal court, take the process of preparing a Rule 26(f) Report seriously. Discussing the listed topics with opposing counsel will help you create a realistic schedule for completing discovery. Good resources for creating a

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discovery plan are Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group June 2025 Update) for State cases and Stevenson & Fitzgerald, Cal. Practice Guide: Federal Civil Procedure Before Trial (Cal. and 9th Cir. ed. 2026). Also review the relevant California Code of Civil Procedure or Federal Rules of Civil Procedure.

5. Don't Just Calendar Discovery Deadlines

Calendaring programs are helpful. However, not all calendaring programs include adequate time to meet and confer. In federal court, Local Rule 37-1 sets for the meet and confer requirements for discovery motions. In state court, parties must meet and confer in a reasonable and good faith attempt to informally resolve each issue that would be presented by a discovery motion. Cal. Civ. Proc. Code § 2016.040. As to meet and confer, keep in mind that it does not mean you have to convince the other side to agree with your side.

While the court's deadlines may be expressed as the "last day to hear" or "last day to file," make sure that you calendar a deadline for the "last day to serve" and "last day to meet and confer" so that you can meet such deadlines. Even if you rely on a legal assistant or calendaring program, make sure to read the calendar deadlines yourself so that you can set appropriate internal deadlines. For example, when will you start asking for dates when witnesses are available, recognizing that it takes time to schedule depositions?

6. Use the Form Protective Orders

Avoid reinventing the wheel. Use the form or model protective orders. Los Angeles Superior Court provides model stipulation and protective orders both for confidential designation and for confidential and highly confidential designations.
Early in the case, counsel should agree who is going to take the laboring oar to modify a model protective order for the case. Doing this before responding to written discovery helps avoid confidentiality objections that are easily addressed by a protective order.

7. Settlement Plan

Create a settlement plan. This settlement plan should include what you need to know before talking to your client about settlement. Consider when is the earliest opportunity to have reasonable settlement discussions. Look at possible mediators and their availability. Know what you will need to do to prepare for alternative dispute resolution.

In the Central District of California, preparing a Rule 26(f) Report requires discussing with opposing counsel and your client what method of ADR you will use. For example, will the parties pay for private mediation? Or, will they request a referral to a neutral selected from the Court Mediation Panel?

8. For Motions, Tell the Court What You Want

For motions, clearly tell the court what you want. That means, on the first page of the brief, state what you are requesting. Do not waste space by simply stating, "Therefore, the Court should grant the motion." An example of a clear request is the following: "Therefore, the Court should order the party to provide Code-compliant further responses to requests nos. 5, 29, and 50, without further objections, within 15 days of the notice of ruling." That specificity should also be in the conclusion. Finally, the proposed order must be specific so that the court and other parties know what is being requested.

9. Observe a Trial

Try to observe a trial from start to finish. This observation will help you understand how discovery helps you prove your case. In observing a trial, try to look at everything and everyone. Is the attorney looking at the jury and responding to the witness? Is the jury responding in the expected manner? Take note as to which trial strategies work and don't work. See how closing argument integrates the evidence presented and the applicable law as given in the jury instructions.

10. Civility and Professionalism

Finally, the practice of law is a noble profession. Civility and professionalism are paramount. Respect and support your colleagues, legal assistant, paralegal, and staff. Be professional towards and cooperate with opposing counsel. As one court noted:

> Incivility between counsel is sands in the gears. [¶] Incivility can rankle relations and thereby increase the friction, extent, and cost of litigation. Calling opposing counsel a liar . . . can invite destructive reciprocity and generate needless controversies. Seasoning a disagreement with avoidable irritants can turn a minor conflict into a costly and protracted war . . . . All sides lose, as does the justice system, which must supervise the hostilities. [¶] By contrast, civility in litigation tends to be efficient by allowing disputants to focus on core disagreements and to minimize tangential distractions.

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*Karton v. Ari Design & Construction, Inc.*, 61 Cal. App. 5th 734, 747 (2021).

Be respectful towards the bench. Three excellent resources are the Orange County Bar Association's Civility guidelines, the State Bar's Civility Toolkit, and the Central District of California's Civility and Professionalism Guidelines. The Orange County Bar Association's Civility guidelines are available on the Orange County Bar Association's and the Orange County Superior Court's websites. The State Bar's Civility Toolkit is available on the State Bar's website. The Central District of California's Civility and Professionalism Guidelines are available on the United States District Court, Central District's website.

♦*Magistrate Judge Karen E. Scott was appointed to the United States District Court for the Central District of California in 2015.*

♦*Justice Deborah Servino is an Associate Justice on the Fourth District Court of Appeal, Division Three. Justice Servino previously serviced as a judge on the Orange County Superior Court from 2009 to 2026.*



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under the 1974 Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, better known as the Tunney Act (named after Senator John Varick Tunney (D-CA)), which Congress passed in 1974 in response to public reports of improper influences behind the Nixon DOJ's settling an antitrust lawsuit against International Telephone & Telegraph.

The Tunney Act requires the DOJ to file a competitive impact statement with the court, publish it and the proposed judgment in the Federal Register, invite and respond to public comments, and obtain the court's determination that the settlement is "in the public interest" prior to the court's entering a consent decree resolving an antitrust case.

Reviewing courts may conduct evidentiary hearings, take testimony, and appoint special masters, but courts historically deferred to the DOJ's judgment that the settlement is in the public interest and thus conducted their reviews on the written record alone. Courts may not edit or change a settlement agreement or consent decree; they either accept or reject them as is. No court has ever blocked a settlement under Tunney Act review; they typically are perfunctory.

The HPE-Juniper case is unusual because on October 14, 2025, California, Colorado, Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, North Carolina, New York, Oregon, Washington, Washington, D.C., and Wisconsin (all Democrat AGs), led by Colorado AG and gubernatorial candidate Phil Weiser, moved to intervene, claiming inadequate remedies and questioning the settlement process based on public reporting and an August 18, 2025 speech by fired Principal Deputy Assistant Attorney General Roger Alford, who claimed that the unexpected settlement resulted from HPE-Juniper improperly lobbying the senior levels of the DOJ, going above Assistant Attorney General Gail Slater and her DOJ Antitrust Division senior staff, and echoing the Nixon DOJ's 1974 IT&T settlement. Slater resigned on February 12, 2026.

Judge Pitts allowed the states' unusual intervention for the limited purpose of assisting his Tunney Act review. Judge Pitts denied the states' request to hold a full evidentiary hearing. Judge Richard Leon (D.D.C.) is the only judge to hold a full Tunney Act evidentiary hearing when he reviewed and approved the 2019 CVS-Aetna merger.

Judge Pitts granted targeted discovery on whether the DOJ's proposed remedies and the settlement process adequately satisfied the "public interest." Among other

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things, Judge Pitts reviewed documents and deposition testimony from Alford; Mike Davis, Will Levi, and Arthur Schwartz (lawyers/lobbyists well-connected with the Trump Administration); and Chad Mizelle, then-chief of staff to then-Attorney General Pam Bondi. He also reviewed documents and deposition testimony showing that HPE-Juniper officials met with the CIA's Director and Deputy Director, the Undersecretary of War/Defense (Policy), the Chief Information Officer of the National Security Agency, and National Security Council staff, all of whom supported the merger based on national security.

The DOJ subsequently moved for entry of the Final Judgment, maintaining that the HPE-Juniper settlement satisfied the "public interest." Judge Pitts held the Tunney Act hearing on March 23, 2026, and he issued final judgment on August 12, 2026, approving the settlement in the public interest.

**The Companies**

HPE, which is distinct from HP, Inc., the famous printer company, focuses on enterprise solutions, including servers, storage, and networking. Its Aruba networking portfolio was its strategic cornerstone. In July 2025, HPE held 15.9% of U.S. WLAN market share and had a market cap of $23.5 billion.

Juniper is a pioneer in high-performance networking and represents the future of AI-driven network management for HPE. Juniper's crown jewel is "Mist," an AI-native IT operations platform. In July 2025, Juniper held 5.3% of U.S. WLAN market share with a market cap of $12.1 billion.

Thus, the combined HPE-Juniper entity would have a combined 21.2% market share and a combined market cap of $35.6 billion, and therefore likely would not have triggered the U.S. Supreme Court's 30% market share standard in *U.S.* v. *Philadelphia Nat'l Bank* (1963), which, while not an absolute safe harbor, is in the DOJ's current merger guidelines, as are the Herfindahl-Hirschman Index market concentration standards.

In comparison, Cisco Systems, Inc. long has been WLAN's titan, with a $266.8 billion market cap and a 39.5% market share in July 2025, or more than seven times HPE-Juniper's combined market cap and nearly double its U.S. market share.

**The Regulators**

While a new presidential administration has the authority to drop, restart, pursue, or settle a previous administration's cases, the state AGs, all fierce political opponents of the Trump Administration, argued that the merger was anticompetitive and that the settlement was improperly obtained.

The state AGs and the Biden DOJ apparently did not properly consider that HPE, Juniper, and other WLAN companies all energetically compete on many factors such as speed, reliability, sophistication, security, maintenance and installation costs, and customer support and troubleshooting. Moreover, the network market consists of many more components than Wi-Fi, and therefore both domestic (*e.g.* Dell, Arista) and powerful – and potentially hostile – foreign (*e.g.* Huawei) WLAN companies compete fiercely. Likewise, they apparently did not recognize that (1) HPE-Juniper merged to survive and create a "formidable rival" to challenge Cisco and Huawei and their long-standing WLAN dominance, thus creating increased competition, differentiation, and innovation, and (2) the adverse national security implications if America lost the WLAN race to China instead of becoming the leader in secure, scalable networking and critical digital infrastructure.

Additionally, had the DOJ successfully blocked the acquisition, Cisco would have benefitted the most and become even more dominant because the DOJ did not seek to break up Cisco. Forcing HPE and Juniper to remain separate, smaller companies would have expanded Cisco's and Huawei's existing WLAN market dominance because HPE and Juniper would have been unable to meaningfully compete with them.

Interestingly, the European Commission's directorate-general for competition approved the merger, stating that HPE-Juniper would "continue to face competition from a wide range of competitors, including strong and established players on each of the markets." The United Kingdom's Competition and Markets Authority ("CMA") also approved the merger, stating that HPE-Juniper "does not give rise to a realistic prospect of a substantial lessening of competition as a result of horizontal unilateral effects or conglomerate effects."

**CASE STUDY #2: LIVE NATION AND TICKETMASTER: WHEN STATES DEFY THE FEDS**

Imagine it is November 15, 2022, when Ticketmaster opened ticket "pre-sales" for Taylor Swift's U.S. Eras Tour. General public sales were to begin on November 18.

Ticketmaster is the nation's largest ticket provider and part of Live Nation Entertainment, the nation's largest major concerts promoter. They vertically merged on January 25, 2010, with Obama DOJ approval. A vertical merger is when two or more companies at different stages

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of the same supply chain combine into a single entity, such as if General Motors purchased a chain of car dealerships or an aluminum producer. Live Nation's 2025 report stated that it had $25 billion in revenue, put on 55,000 events and sold 646 million tickets, managed more than 300 artists, and owned or controlled 460 venues.

Between November 1 – November 9, 2022, 3.5 million "Swifties" registered for Ticketmaster's Verified Fan program to purchase pre-sale tickets. Ticketmaster sent pre-sale codes to 1.5 million and placed the remaining 2 million on a wait list.

Ticketmaster's website and app crashed within an hour of pre-sales starting, overwhelmed by the unprecedented number of ticket seekers as well as "bots" with and without pre-sale codes. Customers reported the system rejecting their pre-sale codes, forcibly logging them out of the system, or freezing them in virtual queues. Ultimately, Ticketmaster received 3.5 *billion* total system requests and was forced to cancel remaining pre-sales and all general public sales; it sold 2.4 million tickets that day, setting the single-day record for the most concert tickets sold. To make things worse, ticket scalpers bulk-purchased many tickets and resold them on the internet for exorbitantly high prices. Moreover, other bad actors sold tickets that they didn't yet have, a practice known as "speculative ticketing" which does not guarantee ticket(s) to the buyers.

The public outcry was, well, swift, passionate, and loud, especially on social media. State and federal regulators and legislators from both parties raced to respond, eager to cast blame and take political advantage. Many introduced legislative bills and proposed regulations. At least one Biden Administration regulator, FTC Chair Lina Khan, even threw shade at the Obama Administration DOJ, stating that they approved the 2010 merger and that Live Nation was "too big to care." The U.S. Senate held hearings on January 24, 2023, verbally pounding Live Nation Entertainment's president and CFO, Joe Berchtold, into a metaphorical pulp.

Thus, the Biden DOJ had to respond to the Swift/Ticketmaster debacle. On May 23, 2024 it filed an antitrust lawsuit against Live Nation Entertainment in S.D.N.Y. (Judge Arun Subramanian), joined by forty bipartisan jurisdictions (Arizona, Arkansas, California, Colorado, Connecticut, Florida, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Washington, D.C., West Virginia, Wisconsin, and Wyoming), alleging that Live Nation engaged in anticompetitive conduct in the ticketing and promotions of live concerts, misused exclusive long-term contracts with promoters and venues (*i.e.,* foreclosing), retaliated against venues which chose to work with competing promoters or ticketing firms, and unfairly forced artist and venues to use Live Nation's ticketing, large amphitheaters, and concert promotion services (*i.e.*, bundling/tying), thereby increasing consumer prices, worsening the ticketing experience, and blocking competitors and innovation.

The Trump 47 Administration inherited the case and continued to prosecute. It started trial on March 2, 2026. On March 5, David Warrington, the White House Counsel, then-Attorney General Pam Bondi, and Live Nation reportedly engaged in settlement discussions in the White House's Roosevelt Room; President Trump reportedly visited the meeting and urged a quick settlement. On March 9, Omeed Assefi, the Antitrust Division's acting assistant attorney general, unexpectedly submitted a letter and a signed settlement "term sheet" to the court, shocking his trial team, his lead counsel, the state co-plaintiffs, and Judge Subramanian, who said of the surprise, "It shows absolute disrespect for the court, the jury, and this entire process. It is absolutely unacceptable."

Arkansas, Iowa, Mississippi, Nebraska, Oklahoma, and South Dakota joined the DOJ's settlement. The proposed settlement required Live Nation to (1) build a standardized system permitting tickets to be listed, verified, and delivered across platforms, (2) offer its back-end technology as a stand-alone service so that venues can use the technology without an exclusive relationship; (3) surrender exclusive booking control at 13 key venues nationwide; (4) allow artists and competing promoters to rent its amphitheaters under the same terms as with its own promotion entity; (5) allow major venues to have a non-exclusive option so they can distribute at least 20% of their tickets through competing primary ticketing platforms; (6) impose a 15% cap on ticketing service fees at amphitheaters that Live Nation owns, operates, or controls; and (7) provide for almost $281 million in damages. It also imposed an eight-year consent decree with enhanced anti-steering and anti-retaliation provisions but did not require that Live Nation divest or otherwise breakup with Ticketmaster. It required a compliance monitor who has broad authority to investigate allegations of anticompetitive behavior and must regularly report to the court, DOJ, and states. Each violation carries a $5 million penalty.

The remaining plaintiff states hired their own outside counsel (Jeffrey Kessler of Winston Taylor), went to trial (the first government monopolization civil case to go to a

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jury trial instead of bench trial), and won a jury verdict on April 15, 2026. On May 21, 2026, they sought divestment/breakup of Ticketmaster, limitations on Live Nation's acquiring any ownership interest in the primary ticketing for the major concert venues market, prohibitions on conditioning a venue's access to Live Nation's content based on choice of ticketing platform, prohibitions on exclusivity contracts, and divestment of Live Nation's large amphitheaters plus prohibitions on their future ownership.

As of this writing, Judge Subramanian has yet to decide on post-trial remedies and has yet to approve the DOJ's settlement per the Tunney Act. In preparation for the Tunney Act hearing, Live Nation disclosed in court filings that it had settlement discussions with the Administration from February 2025 – March 2026, numerous communications with senior DOJ and White House staffers in the weeks leading up to the settlement, and that in February 2026 CEO Michael Rapino spoke with President Trump about "a variety of topics related to Live Nation's business." Live Nation listed several people who substantively participated in the settlement discussions in addition to Rapino and Berchtold, including Kellyanne Conway, Mike Davis, Richard Grenell (a Live Nation board member), James McDonald, and Will Levi, all of whom have strong ties to senior levels of the Trump Administration and President Trump himself. Critics quickly cried foul, claiming improper lobbying and influence.

**Case Study #3: Paramount Skydance ("PSKY") and Warner Brothers Discovery ("WBD"): When States Disregard the Feds**

Imagine that it's almost Thanksgiving 2025. David "Zas" Zaslav, WBD's CEO, and his board are thinking not of turkey but the three bids from PSKY, Comcast, and Netflix to acquire WBD, whose Warner Brothers is one of Hollywood's most storied studios, as is PSKY's Paramount Pictures. Additionally, tech and cross-platform giants Amazon and Apple lurk in the background like hungry orcas. Amazon owns Amazon Studios, Metro-Goldwyn-Mayer ("MGM"), United Artists, Orion Pictures (which Warner Brothers partially owned in the 1980's and 1990's), Amazon Prime Video, and Twitch, a very popular live-streaming service, especially amongst young people. All the suitors have their respective advantages and disadvantages for WBD, its officers, its shareholders, its customers, and its content production.

WBD was born from the 2022 merger of WarnerMedia and Discovery, Inc. AT&T had spun off WarnerMedia as part of unwinding its 2018 acquisition of Time Warner for $109 billion, which ironically, then-Antitrust Division Antitrust Attorney General (now PSKY's Chief Legal Officer) unsuccessfully sued to block in 2017. It is worth noting that bi-partisan state AGs from Alabama, Georgia, Kentucky, Louisiana, New Mexico, Oklahoma, South Carolina, Utah, and Wisconsin sided with AT&T.

Mergers, acquisitions, break ups, spinoffs, and other corporate restructuring is common in Hollywood. For example, as recently as January and February 2024, WBD had engaged in merger negotiations with Paramount Global (a PSKY predecessor), and certain industry labor unions (*e.g.,* SAG-AFTRA, Directors Guild of America) are themselves the result of mergers.

Under Zas' tenure, WBD struggled with a staggering $30+ billion debt load and a steadily declining share price. It also lost its $600 million-per-year National Basketball Association ("NBA") broadcasting rights, a devastating blow to the company's prestige and cash flow. WBD's IP library is massive (*e.g.*, DC Comics, HBO, Cinemax, Looney Tunes, Turner Classic Movies ("TCM"), and pre-1991 Hanna-Barbera cartoons), but WBD integrated its holdings poorly. Its Discovery and CNN channels have unscripted content, but few viewers. WBD's repeatedly rebranded and shifted its streaming service, HBO Max, confusing consumers and diluting the brand's premium status. By Thanksgiving 2025, most Wall Street analysts viewed WBD as a "distressed asset" that required a larger partner to survive its dire situation. While Zas' personal compensation remained very high, WBD was in survival mode.

The board now faced a pivotal choice: which suitor would offer the best value to shareholders and survive the treacherous *trous de loup* of antitrust scrutiny?

**The Suitors**

**1. Netflix: The Streaming Giant**

At first, WBD's board approved Netflix as a suitor and rejected PSKY's overtures several times. Netflix offered $27.75 per share ($83 billion total) and made clear that it did not want WBD's underperforming assets (*e.g.*, OWN, the Magnolia Network, CNN, and Discovery).

The industry reacted unfavorably to Netflix acquiring WBD because of likely adverse impacts on movie theaters and box office revenues. Netflix's interest in WBD was a major shift in its strategy because Netflix long had boasted of its "builders, not buyers" philosophy; it had been streaming since January 2007. Netflix's co-CEO Ted Sarandos referred to movie theaters, traditional movie making, and the traditional movie experience as

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"outdated concepts" and "outmoded ideas," contradicting WBD's philosophy, business, and legacy.  Sarandos also said that consumers "like to watch movies at home … the studios and the theaters are duking it out over trying to preserve this 45-day window that is completely out of step with the consumer experience of just loving a movie."

Netflix faced strong political opposition from both sides, such as from Elizabeth Warren (D-MA) and Mike Lee (R-UT), and Darrell Issa (R-CA) and Laura Friedman (D-CA).  Senator Roger Marshall (R-KS) wrote to then – Assistant Attorney General Gail Slater that a Netflix-WBD merger would "raise prices, restrict output, and reduce the variety of content available to consumers.

Acquiring WBD would give Netflix more than 40% of global subscription VOD subscribers, more than the Supreme Court's 30% standard.  Moreover, Netflix, unlike Comcast and WBD, has a worldwide reach, with paid memberships in 190+ countries.  Therefore, Netflix faced significant antitrust regulatory concerns in the U.S., Asia, the E.U., and the U.K.

The markets responded unfavorably to the initial WBD-Netflix deal.  Netflix share price dropped and a normally bullish key Netflix analyst stated that Netflix "may have the smallest synergy opportunity and perhaps the toughest regulatory path … Netflix shares have been under pressure over concerns that a WB acquisition, if announced, would complicate the investment thesis, distract management, and dilute EPS."

**2.  PSKY:  The "Logical" Choice**

PSKY resulted from David Ellison's Skydance Media acquiring Paramount Global and its parent company, Sumner and Shari Redstone's National Amusements. They announced the deal on July 7, 2024 and completed it on August 7, 2025.  Skydance and Paramount had collaborated on major film franchises since 2009, such as *Top Gun*, *Mission: Impossible*, *Transformers*, and *Star Trek.*

PSKY's bid was favorable:  **(1)** PSKY wanted WBD in its entirety, including WBD's less desirable assets, and pay cash; **(2)** PSKY acquiring WBD would create IP synergy, such as bringing together Nickelodeon and the Cartoon Network to create a valid challenger to Disney's dominant children's programming; **(3)** Combining Paramount+ and HBO Max, despite their previous individual streaming losses and declining cable viewers, would create a combined service with 200 million subscribers, putting it on par with Disney+ and Amazon Prime and within potential reach of dominant market leader Netflix's 300 million subscribers; **(4)** Both PSKY and WBD shared a "creative first" philosophy and a firm commitment to traditional theatrical releases, which resonated well with certain Hollywood talent leaders.

The markets responded approvingly to PSKY's pursuit of WBD, whose respective share prices sharply rose.

**3.  Comcast:  The Vertical Titan**

Comcast, NBC-Universal's parent, offered scale but had several likely regulatory problems.  Because Comcast is a dominant broadband and pay-TV provider, its merging with WBD would give the combined entity control over approximately 40% of prime-time television and create content overlap, raising serious horizontal and vertical antitrust concerns as well as FCC ownership and broadcasting license issues.  The markets responded unfavorably to Comcast's initial bid; its shares dropped.

**PSKY Wins**

PSKY eventually won the bidding battle on February 27, 2026 for a final purchase price of $110.9 billion at $31 per share in cash, but only after repeatedly raising its bid and acceding to WBD's demands, such as arranging for Larry Ellison (David Ellison's father) to personally guarantee part of the purchase price, and that PSKY's foreign partner sovereign wealth funds (*e.g.* the Saudi Public Investment Fund, U.A.E.'s L'imad Holding Co., and the Qatar Investment Authority) would own only non-voting, passive shares with no control or voting authority over the shares or corporate governance.  This would help avoid both FCC and Committee on Foreign Investment in the United States ("CFIUS") issues.  Additionally, because PSKY owns CBS and numerous regional television broadcasting stations, it petitioned the FCC for regulatory approval at the end of April 2026 because the FCC restricts foreign ownership of broadcast license holders to 25%.

On June 12, 2026, the DOJ approved the deal with no conditions, stating that after analyzing more than 2 million documents over an 8-month period, "the extensive investigatory record reviewed by the [Antitrust] Division suggests that the impact of the transaction will be to increase competition across the media and entertainment ecosystem, with benefits for American consumers and workers," and that PSKY-WBD would increase consumer choices, provide more value to subscribers, reduce churn rate, and better compete against larger streaming rivals such as Netflix, Amazon Prime Video, and Disney+, thus stabilizing or lowering streaming prices. Since then, 68 international jurisdictions also approved the deal, including the E.U., the U.K., and Mexico, with findings similar to the DOJ's.  For example, the E.U. stated that Amazon MGM, A24, Lionsgate, Disney, Univer-

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sal, Sony, and several smaller European studios would "remain as competitors in the European Economic Area," and considered streaming platforms as direct competitors to linear television.

On July 13, 2026, Arizona, California, Colorado, Connecticut, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, and Washington (all Democrat AGs) sued to block the merger (N.D. Cal.). They also hired James Weingarten of Milbank as their main outside lawyer. Judge Pitts caught the case but PSKY successfully moved for his recusal because he previously was "long standing labor counsel" for the Writers Guild of America ("WGA"), which on July 14, 2026 filed its own lawsuit to block the deal.

The case is now Judge Araceli Martínez-Olguín's. She issued a TRO on July 20, 2026, pausing the merger. The parties agreed to delay closing the merger until June 1, 2027; the merger was to have closed by September 30, 2026. Trial is set for March 2 – 19, 2027.

The dates are important because PSKY-WBD's merger agreement requires it to pay a $7 million per day "ticking fee" to WBD shareholders starting October 1, 2026. PSKY also must pay WBD a $7 billion termination fee if the deal fails to close due to the regulators. The DOJ's Hart-Scott-Rodino antitrust waiting period expires on February 19, 2027.

On August 17, 2026, the parties began discovery and PSKY filed a motion asking the court to require the plaintiffs to post a $1.88 billion bond under 15 U.S.C. §26 and F.R.C.P §§54(b), 65(c), which is pegged to the "ticking fees" and other costs related to the merger closing's delay, to reimburse PSKY if it ultimately prevails.

**What Happens Next**

The states and WGA will respond to PSKY's bond motion. The parties' discovery will focus on, among other things, the key questions of what is the proper "relevant market," how concentrated it is, and what, if anything, the merger would do to that concentration. Market concentration refers to the extent to which a small number of firms dominate the market and their respective market shares.

While the "failing market" defense can be ineffective in market concentration cases (Hollywood has bled jobs and money for many years), precedential cases such as *U.S.* v. *General Dynamics Corp.* (1974), *U.S.* v. *Marine Bancorp.* (1974), and *U.S.* v. *Baker Hughes* (1990, D.C. Cir.) (then-Judges Ruth Bader Ginsburg and Clarence Thomas were on the panel) provide a framework for antitrust defendants to rebut the structural presumption of market-share evidence in declining industries, recognizing that market concentration ratios "can be unreliable indicators of actual market behavior" and give "an inaccurate account of the acquisitions' probable effects on competition." In fact, the DOJ's own merger guidelines permit consideration of "whether significant recent or reasonably foreseeable changes to market conditions suggest that a firm's [market concentration] overstate or understate its future competitive significance" and that "How market shares are calculated may further depend on the characteristics of a particular market." The parties also will focus on the likely industry and economic effects of the M&A.

The states focused on wide-release theatrical films, big-budget blockbusters and tentpoles, and basic cable television licensing, and concentrating on the legacy studios (Paramount, Warner Bros., Universal, Disney, and Sony). Contrastingly, the DOJ and PSKY-WBD also considered included theaters, linear television, streaming, gaming, distribution, and data, in which the legacy studios plus Netflix, Amazon, Apple, Alphabet/Google/YouTube, and studios such as A24 and Lionsgate fiercely compete.

PSKY-WBD likely will formalize in writing what David Ellison repeatedly has said to federal and state regulators, labor unions, investors, and theater chains: guaranteed minimum 45-day exclusive theatrical window before moving to PVOD and 60-90 days before release on Paramount+, HBO Max, or other digital/streaming platforms; longer windows for blockbusters and tentpoles as box-office performance warrants; no "day-and-date" simultaneous theater and streaming releases; approximately 15 theatrical releases for Warner Bros. and Paramount each (30 total) for three years; and no "streaming-first pivots" for films budgeted for theaters, which is when studios deliberately chooses streaming/digital and not theaters as the primary destination for new films. Contrastingly, Amazon historically releases many of its mid-budget films directly to Prime Video, and Netflix built its entire film strategy around day-and-date and streaming-first releases. Unsurprisingly, the CEOs of AMC Theatres (the world's largest theater chain), Cineworld/Regal Cinemas (second largest), and U.K.-based Vue Cinemas, all publicly endorsed and supported PSKY-WBD and their belief in Ellison's promises and plan.

The litigation also presents antitrust questions which go beyond Hollywood and the film industry, such as what evidence do plaintiffs need to produce when defining novel markets that are estimates? How does a court weigh the merging entities' proposed commitments to increase or preserve a product line in the face of declining consumer demand for that line? When federal and international regulatory review are finished, are overlapping

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state challenges an additional safeguard or a *de facto* state veto over national transactions?

**Lessons Learned in Common**

State attorneys general increasingly will sue to stop mergers and acquisitions, even when federal antitrust authorities approve a deal or settlement, especially if the state AGs and the president are of different political parties. Because political tensions between certain states and the federal government are higher than ever, companies seeking M&A must be sophisticated and alert to not only potential regulatory roadblocks, but also the political ramifications for both federal and state regulators. However, state AGs sometimes will sue or join a suit against an administration of the same party if they differ on policy or state/federal interests.

State AGs also may sue under their respective state laws, such as California's 1907 Cartwright Act, Cal. Bus. & Prof. Code §§ 16720–16770, and New York's 1899 Donnelly Act, N.Y. Gen. Bus. Law §§ 340-347; both are considered broader than the federal Sherman and Clayton Acts. Additionally, in California, all 58 county district attorneys may enforce the Cartwright Act. Accordingly, merging companies should anticipate that states could delay final deal approval and adversely affect the public relations battle.

The public allegations and reporting about alleged questionable lobbying of senior White House and DOJ officials by HPE-Juniper set the stage for state AG pushback on DOJ's Live Nation-Ticketmaster settlement and PSKY-WBD approval. Regardless of whether the allegations and reporting about HPE-Juniper/DOJ lobbying are true or accurate, those already disfavorable towards the Administration would find them unseemly and an opportunity to score political and policy wins.

Accordingly, companies should, to protect themselves and avoid even the appearance of impropriety, especially *quid pro quo* criticisms, create and maintain clear records of competitive analyses, non-privileged internal decision-making, remedial options, and stakeholder involvement, including any interactions with state and/or federal regulators or agencies, officials, political appointees, and/or lobbyists. This extends beyond those responsible for antitrust enforcement. For example, when the M&A has national security or CFIUS issues, it is appropriate to meet with national security officials early and often, some of whom will need the companies' personnel to explain technical aspects and why the M&A would be advantageous to America's national security. For example, Judge Pitts very likely found it important that U.S. national security officials supported the HPE-Juniper merger.

Additionally, companies engaging in M&A should, early on, identify jurisdictions where the target and/or acquirer have significant operations, employees, customers, suppliers, or economic impact, and accordingly evaluate the like interest(s) of the state AGs and of the relevant local, state, and federal legislators. Preemptive mitigation strategies such as direct outreach to those AG offices likely will be helpful.

In the past, M&A and antitrust lawyers dealt with state and federal regulators on a lawyer-to-lawyer basis, but it is now much more common for clients to enlist well-connected political and public relations consultants and lobbyists who can properly and advantageously frame the public relations conditions, arrange for early and frequent educational meetings and discussions with regulators and legislators, and smooth the path towards deal approval or settlement. This is especially true if a regulator or legislator expressed hostility to a M&A or if the companies believe that a regulator is on the verge of filing a complaint.

Doing so unskillfully or clumsily, however, risks offending career staff (whether regulatory or legislative), which can be detrimental for "repeat players" who must regularly deal with them or their political bosses. Career staff often have long memories, and no AG or administration stays in power forever.

Furthermore, companies ideally will want to include as many plaintiffs and co-plaintiffs as possible in approval or settlement discussions and to eventually join the final proposed settlement. Settling with only one plaintiff, even the main one, leaves the company open to continued legal and public relations attack, especially where the co-plaintiffs feel left out of the process with no stake in or ownership of the settlement.

Outside entities, whether state attorneys general, private entities, or other entities, who move to intervene in Tunney Act hearings raise legitimate concerns as to whether doing so undermines the DOJ's ability to settle cases and improperly rewrites the Tunney Act – which is not supposed to be a second trial – into a means for political activism, thereby threatening judicial independence.

Companies involved in M&A must regularly do what they can to ensure that they are not perceived as uncaring about their users or customers, regardless of their eventual market position. Popular goodwill, credibility, and transparency are invaluable when crisis hits. If some catastrophe should occur, poor or inadequate communications and public relations likely will lead to legislative hearings, regulatory investigations, and major lawsuits.

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Accordingly, today's increasingly faster news cycles make skillful public relations, including defensive or counterattack methods, increasingly important. For example, PSKY CEO David Ellison was right to publicly defend himself, PSKY, and the merger when public reporting indicated that one of the reasons that the Democrat state AGs sued to stop PSKY-WBD was because of CNN. For example, Congressman Jamie Raskin (D-MD) wrote to Ellison that "Your company appears to be colluding with the Trump Administration to curtail media independence, promote political and ideological censorship, and stifle dissent … It is clear that President Trump expects your potential ownership of Warner to produce favorable press coverage for him and his allies." Raskin is poised to chair the House Judiciary Committee if the Democrats win the House in November 2026.

Ultimately, the objective Consumer Welfare Standard ("CWS") from *Reiter* v. *Sonotone Corp*. (1979) remains controlling law, despite a growing movement pushing a "neo-Brandeisian," "big is bad" approach that considers almost any corporate consolidation as inherently reprehensible. CWS states that government antitrust action should be limited to situations where consolidation or market concentration harms consumers, such as with higher prices, diminished quality, hampered innovation, decreased choice, *etc*. Antitrust law protects *competition*, not individual competitors, and not employment or labor unions.

♦*John Shu is an attorney and legal commentator. He has lectured and published widely on constitutional, administrative, and antitrust law. He formerly served as editor-in-chief of the Journal of the National Association of Administrative Law Judiciary. Mr. Shu worked for both Presidents Bush in the White House. He clerked for Judge Paul Roney, U.S. Court of Appeals for the 11th Circuit and Presiding Judge of the Foreign Intelligence Surveillance Court of Review.*

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As we move into the fall, I encourage each of our members to consider how you can help support and encourage a new lawyer. Invite an associate to join you at an ABTL program. Introduce that lawyer to someone outside your firm. Share your experiences and make yourself available as a resource. Those small steps can make a meaningful difference.

ABTL provides a unique environment for those relationships to develop. Our programs bring together lawyers at every stage of practice, along with members of both our state and federal judiciary. That opportunity to connect across firms, generations, and perspectives is central to our mission and one of the greatest strengths of our Chapter.

We have several opportunities to connect this fall. On September 9, we have an exciting dinner program that will discuss The Evolving Name, Image, and Likeness (NIL) Landscape. Our 52nd Annual Seminar follows October 8 through 11 at the Park Hyatt Aviara in Carlsbad. The theme for this year is Litigation in 2026: Effective Advocacy in the age of AI, Fake News, and the Vanishing Attention Span. Then we will conclude the year with a dinner program on November 18 and our annual Orange County Superior Court Stuffed Animal Drive. I hope you will join us, bring a colleague, and consider extending a special invitation to a young lawyer.

Thank you for your continued support of ABTL Orange County and for the many ways you contribute to our profession. By investing in the next generation, we do more than help individual lawyers succeed. We strengthen the legal community and help ensure it remains defined by excellence, professionalism, civility, and collegiality for years to come.

♦ *Charity Gilbreth is a partner at Schilling Law Group.*

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