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Using Discovery to Establish Jurisdiction in California Courts

A plaintiff who sues a foreign party will often face a challenge to the assertion of personal jurisdiction. Many of these cases will involve the determination of fact issues that are common to the question of personal jurisdiction and the ultimate merits of the case.

As with any motion, it is important that the parties to the contest provide the trial court with as much useful factual information as practical. Counsel should be prepared to engage, through the discovery process, in detailed fact-finding to support or to defeat the exercise of personal jurisdiction. Quite often, discovery on the issues of jurisdiction are intertwined with the substantive merits of the case.



Hon. Socrates P. Manoukian

Appellate Considerations in Choice of Forum

Although an article on any topic of civil procedure often ends with a discussion of appellate issues, where personal jurisdiction is likely to be contested, the parties should consider it as a threshold matter. Differences in the timing and nature of appellate review may weigh heavily in the decision whether to file in or

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Recent Decisions Still Leave Scope of Sealed Records Rules Uncertain

Businesses that must produce sensitive documents in litigation worry that their documents will become publicly available. However, the courts have an obligation to the public (and, under the First Amendment, to the press), to ensure that the public is afforded sufficient opportunity to observe how the judiciary resolves legal disputes, including the evidentiary basis for those resolutions. There is, therefore, an inherent tension between the desire of businesses to maintain the confidentiality of documents produced in litigation and the need to provide reasonable public access to those documents. To address these conflicting concerns, the California courts have developed a system for filing and maintaining records under seal — California Rules of Court 2.550 and 2.551, usually referred to as the Sealed Records Rules. This article discusses recent developments in the case law that controls when documents may be filed and maintained under seal.



Jared Kopel

The Public's Right to Know Versus Business Privacy Interests

The California Supreme Court, in *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178 (1999) ("*NBC Subsidiary*"), addressed the conflict between privacy interests and the public's right to be informed about how the judicial system resolves disputes. In *NBC Subsidiary*, which concerned the civil trial of the tort claims of actress Sondra Locke against Clint Eastwood, the Supreme Court held that there was a First Amendment right of access to civil trials and related proceedings. The Court held that before substantive court-

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room proceedings are closed or transcripts are sealed, a trial court must hold a hearing and expressly find that there exists an overriding interest supporting closure and/or sealing; that there is a substantial probability that the interest will be prejudiced absent closure and/or sealing; that the proposed closure and/or sealing is narrowly tailored; and that there is no less restrictive means of achieving the overriding interest. *Id.* at 1217-25.

But *NBC Subsidiary* suggested that the public is not entitled to automatic access to all information that is filed in litigation. Rather, the Court stated that there must be a “specific structural value” to providing public access to court-filed documents, citing Justice Brennan’s concurring opinion in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 589 (1980), that a particularized showing of utility may not be replaced with “rhetorical statements that all information bears upon public issues....” 20 Cal. 4th at 1201.

Although *NBC Subsidiary* centered on access to courtroom proceedings, the far more common issue for most business litigators is whether filings may be kept under seal, particularly filings that include discovery that was provided pursuant to a confidentiality order. *NBC Subsidiary* addressed that issue in a significant footnote, observing that other courts had found “a First Amendment right of access to civil litigation documents filed in court as a basis for adjudication,” but also noting that “by contrast, decisions have held that the First Amendment does not compel public access to discovery materials that are neither used at trial nor submitted as a basis for adjudication.” *Id.* at 1208-09 n.25. *NBC Subsidiary*’s footnote 25 eventually became the basis for the Sealed Records Rules.

The Sealed Records Rules

The Sealed Records Rules are found at California Rules of Court (“CRC”) 2.550-51; they are a renumbered version of old Rules 243.1, *et seq.* The Rules generally provide that court records may not be filed under seal without a court order and the court may not permit a record to be filed under seal solely by the agreement of the parties. CRC 2.551(a). The party seeking the sealing must file a written motion or application accompanied by a memorandum of law and a declaration stating the facts to justify the sealing. CRC 2.551(b)(4). The records are then lodged with the trial court and held “conditionally under seal” while the motion or application is being decided. *Id.* The Rules create a presumption of public access that may be overcome only if the trial court makes express findings that there is an “overriding interest” that overcomes the right of public access to the documents; the overriding interest supports sealing the record; a substantial probability exists that the overriding interest would be substantially prejudiced by release of the documents; the proposed sealing is narrowly tailored; and there is no less restrictive means to achieve the overriding interest. CRC 2.550(d). The trial court must state specifically in its

sealing order the facts that support its issuance. CRC 2.550(e)(1)(A).

The Rules are inapplicable to “records that are required to be kept confidential by law” and to “discovery motions and records filed or lodged in connection with discovery motions or proceedings.” CRC 2.550(a)(2)-(3). The Rules apply “to discovery materials that are used at trial or submitted as a basis for adjudication of matters other than discovery motions or proceedings.” CRC 2.550(a)(3). The Advisory Committee Comment also provides that the Rules “do not apply to discovery proceedings, motions, and materials that are not used at trial or submitted to the court as a basis for adjudication.” Neither the Rules nor the Advisory Committee Comment define the meaning of the phrase “submitted as the basis for adjudication.” The interpretation of that phrase was the subject of an extensive analysis by the Court of Appeals, Sixth District in *Mercury Interactive Corp. v. Klein, et al; The Recorder, et al.*, 158 Cal. App. 4th 60 (Dec. 19, 2007) (the “*Mercury* decision”).

The Mercury Decision

The *Mercury* decision arose from a shareholder derivative action seeking to recover alleged damages to Mercury Interactive Corporation from purportedly improper stock option grants. Mercury provided discovery to plaintiffs on condition that the documents remain confidential during the negotiation of a protective order, which was subsequently executed and entered by the Superior Court. Plaintiffs then filed under seal an amended complaint that attached the discovery as exhibits.

Shortly thereafter, *The Recorder* (a legal publication), *The San Francisco Chronicle* and Bloomberg News (collectively, the “media”), sought an order unsealing the complaint and the attached discovery pursuant to the Sealed Records Rules. After a hearing, the Superior Court issued an order unsealing the complaint and the attached discovery. Shortly thereafter, the Superior Court sustained defendants’ demurrer on the ground that the plaintiffs were no longer Mercury shareholders because of Mercury’s acquisition by Hewlett-Packard and therefore lacked standing to pursue a derivative action.

On appeal, the Court of Appeals rejected the media’s contention that discovery is inherently submitted as “a basis for adjudication” merely by being filed in court: “[D]iscovery is not automatically submitted ‘as a basis for adjudication’ — and thus does not perforce become accessible to the public — simply by virtue of it becoming part of the court file.” 158 Cal. App. 4th at 90.

The Court of Appeals analyzed the authority cited in footnote 25 of *NBC Subsidiary* and concluded that other courts had found a First Amendment right of access to documents “where they were submitted to the trial court for its consideration in deciding a substantive matter in that action.” *Id.* at 91-95.

The *Mercury* court concluded that *NBC Subsidiary* created a right of public access to civil trials, but not to all proceedings or court filings. *Id.* at 95-96. Examining the policy considerations underlying public access to court

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records, the court concluded that “[p]ublic access to a discovery document that is not considered or relied upon by the trial court in adjudicating any substantive controversy does nothing to (1) establish the fairness of the proceedings, (2) increase public confidence in the judicial process, (3) provide usual scrutiny of the performance of judicial functions, or (4) improve the quality of the truthfinding process.” *Id.* at 96-100. The court noted that there was no “historical tradition” supporting a right of access to discovery material. *Id.* at 98. The court also stated that given California’s liberal discovery rules, permitting public access to any court-filed discovery raised serious risks of abuse, including the public exposure of private matters concerning the litigants and third parties, and burdening trial courts with “myriad discovery skirmishes.”

The court rejected the media’s assertion that attaching discovery to a complaint meant that it was submitted “as a basis for adjudication.” The court noted that pleadings are not typically evidentiary matters that are submitted to a jury in adjudicating a controversy. Nor did the exhibits become a basis for adjudication as a result of the order sustaining defendants’ demurrer, which addressed a purely legal issue and not the underlying factual allegations. *Id.* at 100-05. Based on the above analysis, the court concluded that the discovery materials had not been “submitted as a basis for adjudication.”

The media also made the broad argument that the public should be afforded access to all newsworthy information. The Court of Appeals, however, stated that the contention “that the subject of the litigation may be newsworthy — in effect, an argument that the public has a generalized right to be informed — cannot serve as a substitute for a showing of specific utility of public access to the information.” *Id.* at 105.

Impact of Mercury Decision

The *Mercury* decision is significant in several respects:

- First, the court provided analysis, but no bright-line test, for when discovery is “submitted as a basis for adjudication.” Defendants argued in support of the standard articulated in the federal case law encompassed by footnote 25 of *NBC Subsidiary*, providing that sealed discovery filed in support of a dispositive motion such as summary judgment is presumptively public, but that sealed discovery filed in connection with non-dispositive motions lacks such a presumption. While favorably alluding to the federal decisions, the Court of Appeals relied on more ambiguous and varying formulations suggesting the Rules apply when court records are used to adjudicate “a material controversy,” “a substantive issue,” or “a substantive matter.” *Id.* at 68, 100, 105. Although those phrases appear to be variations on a theme, there could be instances in which the adjudication of a substantial legal issue might be different from a material factual controversy. Further, determining when public access to sealed dis-

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Twombly to Date in the Northern District and Ninth Circuit

Federal practitioners in the Northern District monitoring the lower courts’ application of *Bell Atlantic Corp. v. Twombly*, 550 U.S. ___, 127 S. Ct. 1955 (2007), have been anticipating guidance as to how, and to what degree, the decision will impact complaint allegations and Rule 12(b)(6) motions to dismiss. Within the past few months, several antitrust rulings in the Northern District have provided useful information to counsel appearing in that court. The application of *Twombly* in these cases, the principles of which may transcend the antitrust context, is of interest to plaintiffs and defendants alike. This article looks briefly at some of those cases in the broader context of *Twombly* in its own words and as applied in the Ninth Circuit.

Twombly in Its Own Words

It is common knowledge that *Twombly* retired the “no set of facts” language of *Conley v. Gibson*, 355 U.S. 41 (1957), instead requiring courts to measure allegations against a “plausibility” standard. Specifically, “a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 127 S. Ct. at 1964-65 (internal quotation marks omitted). Speculation will not do, either. *Id.* at 1965. Instead, the plaintiff must plead facts “plausibly suggesting (not merely consistent with)” unlawful conduct, *id.* at 1966, and a court should dismiss a complaint where “nothing contained in the complaint invests either the action or inaction alleged with a plausible suggestion of [unlawfulness].” *Id.* at 1971. This requires a complaint to satisfy the notice requirements of Rule 8, *id.* at 1964, by pleading a certain threshold level of facts: “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 1974. More specifically, the complaint must specify the “time, place, or person involved in the alleged [unlawful activity].” *Id.* at 1970 n.10.

Plausibility is not probability — “[a]sking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage,” *id.* at 1965, but “something beyond the mere possibility of loss causation must be alleged, lest a plaintiff with ‘a largely groundless claim’ be allowed to ‘take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.’” *Id.* at 1966 (quoting *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 347 (2005) (internal quotation marks omitted)).

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Because of this, and because “proceeding to antitrust discovery can be expensive,” *Twombly*, 127 S. Ct. at 1966-67, the allegations in a complaint must constitute “enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal [conduct].” *Id.* at 1965.

Twombly in the Northern District to Date

A review of the dozens of reported and unreported Rule 12(b)(6) rulings filed in the Northern District since *Twombly* confirms that the decision has removed the *Conley* “no set of facts” gloss from the courts’ analyses. It also confirms that the decision applies beyond the antitrust context to all manner of cases. Such review also shows that *Twombly* is indeed fatal to complaints containing conclusory, boilerplate, or speculative allegations — but not because *Twombly* sets a higher pleading standard akin to that of Rule 9(b). Rather, as the majority of rulings in the Northern District suggest, *Twombly* simply summarizes and encapsulates pleading standards already in existence under Rule 8 — standards that would have dispatched such complaints no matter whether the Supreme Court had decided *Twombly* or not.

For example, post-*Twombly* orders in the Northern District typically analyze allegations after citing *Twombly* for such long-standing propositions as (i) a complaint need only contain a short and plain statement of the claim showing that the pleader is entitled to relief; (ii) a complaint does not need detailed factual allegations, but must have sufficient detail to give the defendant fair notice of what the plaintiff’s claim is and the grounds on which it rests; and (iii) a plaintiff’s obligation to provide the grounds of his or her entitlement to relief requires more than labels, conclusions, and formulaic recitations of the elements of a cause of action. Although most (but not all) of the Rule 12(b)(6) rulings in the Northern District now go on to add that *Twombly* prohibits speculation and requires plausibility, some orders cite pre-*Twombly* case law for this proposition (including, sometimes, even *Conley*), suggesting that plausibility and the factual detail it demands are, in actuality, requirements that have always existed within Rule 8 and related decisional law.

Although a review of post-*Twombly* rulings to date shows that the bench in the Northern District does not always expressly include *Twombly*’s plausibility and “time, place, or person” language when articulating the legal standards governing analysis of a motion pursuant to Rule 12(b)(6), no rulings have suggested that any category of complaint falls outside of these requirements. To the extent the legal standards articulated in some rulings omit this language in favor of pre-*Twombly* references to notice and clarity of claims, it is arguably unclear exactly what is and is not “enough to raise a right to relief above the speculative level,” *Twombly*, 127 S. Ct. at 1965, and to “nudge[]...claims across the line from conceivable to plausible.” *Id.* at 1974. Perhaps for this reason, the Northern District has taken a very practical approach to *Twombly* to date, especially in the antitrust context, as discussed below.

Examples of Allegations Insufficient to Survive *Twombly* Motions

An instructive decision to date demonstrating the types of allegations that are insufficient to survive a *Twombly* motion is that by Judge Alsup in *In re Graphics Processing Units Antitrust Litigation (“GPU”)*, 2007 U.S. Dist. Lexis 76601 (N.D. Cal. Sept. 27, 2007), in which the court granted (albeit with leave to amend) a motion to dismiss a Sherman Act conspiracy claim because plaintiffs’ allegations suffered from several distinct shortcomings: (i) there were no specific allegations as to which persons from which defendant entities met, or what their titles were; instead, there were only general allegations that employees and executives attended trade association and standard-setting organizational meetings at the same time; (ii) there were no details about the alleged agreement itself; (iii) there was no specific allegation that defendants’ representatives actually met to fix prices, (iv) the factual details set forth in the allegations of parallel conduct could, at best, only possibly indicate conspiracy, as they were just as consistent with lawful as unlawful conduct; and (v) the plaintiffs’ allegation that the Antitrust Division of the Department of Justice had served defendants with grand jury subpoenas properly carried no weight in pleading an antitrust conspiracy claim. *Id.* at *36-43. As the court noted, “[t]his is not to say that to survive a motion to dismiss, plaintiffs must plead specific back-room meetings between specific actors at which specific decisions were made.” *Id.* at *45-46. Instead, the complaint failed simply because “the allegations were insufficiently particularized to ‘render plaintiffs’ entitlement to relief plausible.’” *Id.* at *46 (quoting *Twombly*, 127 S. Ct. 1973, n.14). The court then confirmed that the allegations were insufficient under *Twombly* even when those allegations were “analyzed as a whole.” *Id.* at *46-47.

Federal practitioners in the Northern District may also find instructive *In re Late Fee and Over-Limit Fee Litigation*, 2007 U.S. Dist. Lexis 86408 (N.D. Cal. Nov. 16, 2007) (Armstrong, J.), in which the court dismissed an antitrust conspiracy claim because, among other things, the allegations (i) provided “no details as to when, where, or by whom th[e] alleged agreement was reached” and because, as in *GPU*, (ii) the factual details of the allegations of “parallel conduct...could just as well be independent action.” *Id.* at *22 (quoting *Twombly*, 127 S. Ct. at 1966).

Finally, of course, no matter how many facts are alleged, if those facts do not give a defendant fair notice of the claims it faces, then dismissal is proper. See, e.g., *United States ex rel. Unit Here v. Cintas Corp.*, 2007 WL 4557788 (N.D. Cal. Dec. 21, 2007), at *9 (“While it is true that the [complaint] is replete with ‘facts,’ the facts that are pled are not sufficient to give [defendant] fair notice of the claim and the grounds upon which it rests.”) (internal quotation omitted).

Examples of Allegations Sufficient to Survive *Twombly* Motions

Until recently, guidance from the Northern District as to the types, quantum, and specificity of allegations suffi-

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cient to survive a *Twombly* motion was less developed. Early instructive information appeared in *In re Rubber Chemicals Antitrust Litigation*, 504 F.Supp. 2d 777 (N.D. Cal. Aug. 15, 2007) (Jenkins, J.). There, after dismissing without leave to amend plaintiffs' Sherman Act claims to the extent they sought to recover damages for foreign injury (an analysis which constitutes almost the entirety of the ruling) the court denied certain defendants' motions to dismiss plaintiffs' Sherman Act claims based on domestic injury. In doing so, the court did not proceed step-by-step through the plaintiffs' allegations, but apparently found them to be sufficient because they (i) identified specific meetings at trade shows, (ii) detailed who was present at the meetings, (iii) explained how those persons were involved in fixing prices, and (iv) combined those allegations with separately adequate allegations of parallel pricing. See *id.* at 789-90. It appears the complaint also alleged certain individuals' specific involvement in price-fixing meetings, steps taken not only to fix prices but also to enforce the agreement, and, as to at least one defendant, alleged that a specific individual served as a contact between the conspirators both in-person and via email. *Id.*

In February 2008, additional guidance became available as a result of a ruling on motions to dismiss in *In Re Static Random Access Memory (SRAM) Antitrust Litigation* (N.D. Cal. Feb. 14, 2008). There, in applying *Twombly*, Judge Wilken held that plaintiffs' price-fixing allegations were sufficient to survive dismissal where they pled (i) general allegations of a conspiracy, (ii) allegations of price-fixing, and (iii) the susceptibility of the SRAM market to such violations, in combination with (iv) specific allegations of communications amongst competitors. See *id.* at 8-9. Unlike the complaint in *Rubber Chemicals*, the *SRAM* complaint did not allege and identify specific meetings, detail who was present at the meetings, or explain how those persons were involved in fixing prices and enforcing the agreement. Instead, in *SRAM*, the complaint alleged communications by quoting e-mails and appending them to the complaint. The court concluded that "plausible inference[s]" could be drawn from these emails, *id.* at 9, among them that defendants had an agreement to exchange information from time to time and that they were aware that the purpose of sharing information was to affect prices.

Read in combination with *Rubber Chemicals*, the *SRAM* ruling suggests that a relatively high degree of specificity and plausibility is necessary to satisfy *Twombly*, and that the requisite specificity and plausibility must be established through detailed and concrete allegations, or actual evidentiary material (such as e-mails), or some combination of both.

Twombly in the Ninth Circuit

Finally, of course, the application of *Twombly* in the Northern District will depend on how it is applied by the Ninth Circuit. As of the date of this article, the Ninth Circuit has issued only one opinion closely examining

Twombly. See *Kendall v. Visa U.S.A., Inc.*, 2008 U.S. App. Lexis 5032 (9th Cir. Mar. 7, 2008).

In *Kendall*, the Ninth Circuit noted both *Twombly*'s plausibility requirement as well as its concern that "discovery in antitrust cases frequently causes substantial expenditures and gives the plaintiff the opportunity to extort large settlements even where he does not have much of a case." *Id.* at *7-8 (quoting *Twombly*, 127 S. Ct. at 1964-67). The Ninth Circuit also quoted *Twombly* for the proposition that, at least to allege an agreement between antitrust co-conspirators, "the complaint must allege facts such as a 'specific time, place, or person involved in the alleged conspiracies' to give a defendant...an idea of where to begin [to respond]." *Id.* at *9 (quoting *Twombly*, 127 S. Ct. at 1970 n.10). As a result, the Ninth Circuit in *Kendall* affirmed dismissal of plaintiffs' Section 1 claim where plaintiffs alleged only in "conclusory" terms that defendants "participate[d]" and "knowingly, intentionally, and actively participated" in an "agreement," because "the complaint does not answer the basic questions: who, did what, to whom (or with whom), where, and when?" *Id.* at *11-12.

Thanks to an interesting footnote in *Kendall*, practitioners will likely have to wait to learn how *Twombly* will impact Rule 12(b)(6) motions beyond the antitrust context. In footnote 5 of its decision in *Kendall*, the court stated that "[a]t least for the purposes of adequate pleading in antitrust cases, the [Supreme] Court specifically abrogated the usual 'notice pleading' rule, found in Federal Rule of Civil Procedure 8(a)(2) and *Conley v. Gibson*..., which requires only a short and plain statement of the claim..." *Id.* at *8-9 n.5. The footnote is curious for two reasons. First, it suggests that *Twombly* may yet be deemed limited to the antitrust context. Second, it creates uncertainty as to what the Supreme Court abrogated when it decided *Twombly*. Notwithstanding the language of footnote 5 in *Kendall*, there was no indication in *Twombly* itself that Rule 8, or the notice requirements set forth therein, were abrogated. Rather, as discussed above, *Twombly* articulated the continued vitality of Rule 8 and abrogated only an "incomplete" judicial "gloss" placed upon that Rule — *Conley*'s "no set of facts" language. See *Twombly*, 127 S.Ct. at 1964, 1969.

Because no court in the Northern District has cited to *Kendall* or its footnote as of the date of this article, and because courts in the Northern District had previously adopted positions contrary to those now expressed by the Ninth Circuit in footnote 5 of *Kendall*, it will be interesting to observe whether future decisions acknowledge and resolve these apparent tensions.

Certainly none of these cases, decided in what remains the relative infancy of *Twombly*'s jurisprudence, clearly delineates when a complaint's allegations will or will not survive a Rule 12(b)(6) motion to dismiss. However, they do provide an initial spectrum of principles and considerations that both plaintiffs and defendants may wish to analyze in greater detail, even if the case at hand does not involve an antitrust conspiracy claim.

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covery advances a specific “structural value” or “structural utility” is by definition an imprecise analysis.

- Second, the *Mercury* decision leaves undecided whether the application of the Sealed Records Rules turns on the reason for filing the documents in question. Because in *Mercury* the decision concerning standing to pursue a derivative suit did not center on the content of the attachments to the complaint, they could remain sealed. But this standard means that the litigator is not in control of the confidentiality of his or her documents, because the other party could still use those documents as the basis for a proposed ruling, thus triggering the Rules.

- Third, when filing sealed discovery that is subject to a protective order, counsel may assume because of the *Mercury* decision that the Sealed Records Rules do not apply, and therefore decide not to follow the procedures set forth in the Rules for filing documents under seal. Rather than making an incorrect assumption and having the court subsequently determine that the Rules applied, but were not followed, the more prudent course is for counsel to advise the court and opposing counsel that pursuant to *Mercury*, the Rules do not apply and therefore the records may be properly filed under seal. Opposing counsel and the court would then be able to respond if they believed that the Sealed Records Rules applied.

- Fourth, litigants (particularly defendants) should contemplate the possibility that a third party, including the media, might one day invoke the provisions permitting challenges to confidentiality designations.

The Scope of the Rules Remains Unclear

Whatever clarity *Mercury* may have brought to the issue of the scope of the Rules, another recent Sixth District decision took away by refusing to accept the plain text of CRC 2.550(a)(3) providing that the Sealed Records Rules do not apply to discovery motions and proceedings. In *H.B. Fuller v. Doe*, 151 Cal. App. 4th 879 (2007), which concerned a motion to quash a subpoena in an out-of-state lawsuit, the court held that while “routine” discovery matters are exempt from the Rules, that is not true for discovery motions that are not merely ancillary or preliminary, but would determine the substantive rights of the parties. Moreover, even if the Sealed Records Rules by their terms do not apply to a case, the underlying principles of *NBC Subsidiary* may require disclosure of sealed documents when the matter involves important constitutional interests. *Id.* at 891-94.

Documents concerning trade secrets or the attorney-client privilege are exempt from the Sealed Records Rules. Settlement agreements or the sources of settlement payments are not exempt absent a showing of substantial prejudice. See *Huffy Corp. v. Superior Court*, 112 Cal. App. 4th 97, 105-08 (2003); *Universal City Studios, Inc. v. Superior Court*, 110 Cal. App. 4th 1273, 1279-86 (2003). Certain privacy interests, such as those of minor

victims of sex crimes or prospective jurors will be respected, but the mere prospect of public embarrassment is not a sufficient “overriding interest” under CRC 2.550(d)(1) to keep documents under seal. The *Mercury* decision also did not reach (because it was unnecessary) the novel issue of whether the Private Securities Litigation Reform Act of 1995 constitutes an “overriding interest” that would be substantially prejudiced by unsealing discovery in a state derivative action and therefore allowing plaintiffs in a parallel federal action to obtain discovery in contravention of the Congressional purpose underlying the Reform Act.

Fuller also held that simply filing a vague, cautious or conclusory declaration in support of sealing documents will not be sufficient. The declaration must provide specific facts demonstrating the confidentiality interests being protected and the injury that will result if documents are disclosed. *Fuller*, 151 Cal. App. 4th at 894-99. *Fuller* thus places litigants in a classic Catch-22: it becomes necessary to discuss openly the very thing that you are trying to keep secret.

Recent case law illuminates the ambiguities of the Sealed Records Rules and therefore the uncertainties confronting litigators as to when documents may be maintained under seal. Litigators must carefully consider the Rules in drafting confidentiality agreements, providing discovery and advising clients concerning the expectation of avoiding public disclosure of documents.

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Discovery to Establish Personal Jurisdiction

remove the case to federal court, or to position the case to remain in state court.

In state court, jurisdictional issues are always resolved early. Parties must engage in expensive discovery which often will combine issues of jurisdiction with the merits of the case. In California, a trial court’s order granting a motion to quash under C.C.P. 418.10 is directly appealable. C.C.P. 904.1(a)(3), 904.2(d). The defendant whose motion is denied must petition the court of appeal for a writ of mandate within 10 or 20 days after denial of the motion to quash. C.C.P. 418.10(c). Failure to raise this issue results in a waiver of the defense. C.C.P. 418.10(e)(3).

In federal court, the defendant who challenges jurisdiction files a motion to dismiss under Federal Rule of Civil Procedure 12(b)(2). Unlike state court judges who are bound by a 90 day deadline for resolving submitted matters, federal court judges may delay ruling on the jurisdictional motion until after trial. The federal court judge can

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TRENT NORRIS

On ENVIRONMENTAL LAW

Little has never been bigger. Companies across the globe are applying nanotechnology to improve their products, sometimes quite dramatically. The question is whether nanotechnology will be big like computers - revolutionizing our lives — or big like asbestos — shortening some lives and bankrupting entire industries in decades of litigation.

Nanotechnology is the intentional manipulation of materials at a scale of 1 to 100 billionths of a meter, as little as 10,000 times smaller than the width of a human hair. It is expected to transform almost every aspect of the economy in the next decade and will already be a trillion dollar industry by 2015. But, for all its promise, only a fraction of the investment in nanotechnology has been focused on environmental health and safety.

The same material at the nanoscale often behaves differently — often unpredictably — from its conventional-sized counterpart. Indeed, nanotechnology can give an ordinary substance almost magical properties. Sunscreens can be invisible and last ten times longer. Rocket propellants can burn at twice the rate. Cancer treatments can selectively bind to tumors. Nanotechnology offers enormous promise for consumers and businesses.

But, as with most technologies, there is also risk. Nanoscale materials have very high ratios of surface area to volume and therefore can be more potent — for good or for bad. They can cross the blood-brain barrier — again for good or for bad. They can persist longer in the environment and are not easy to dispose of safely.

Already some 500 to 700 products on the market claim to incorporate nanotechnology. These unconventional products are regulated conventionally under laws that have not been substantially revised in decades, leading some to question whether we need new laws to address these new materials or whether we just need to apply existing laws more creatively.

Although there is no reason why toxicology evaluations cannot be performed on nanoscale materials, to date no such materials have been listed as “hazardous” under CERCLA or listed under California’s Proposition 65. In fact, as recently clarified by the U.S. Environmental Protection Agency (EPA), laws such as the Toxic Substances Control Act are likely to treat nanomaterials the same as their larger cousins because they have the same molecular identity but are just found in smaller particles. As a result, some wonder whether businesses are relying on toxicology evaluations of conventional materials to support the use of their nanoscale cousins. Because they usually behave differently — in fact, that is the point of developing the

smaller particles — doing so would be a risky venture.

There is no consensus among regulators about how to address nanotechnology. Views in Europe follow a version of the precautionary principle, while the United States has taken a more hands-off approach. In fact, the federal government’s primary approach to nanotechnology is to encourage its use through the National Nanotechnology Initiative. This effort, codified in a 2003 statute, involves more than 20 departments and agencies in coordinating research and development on nanotechnology, with periodic reports to the Congressional science committees. A working group also has been established to evaluate environmental and health implications.

As for regulation of nanoscale materials, the EPA is evaluating its approach. The U.S. Food and Drug Administration has approved many products containing nanomaterials, on its usual product-by-product basis. The Consumer Product Safety Commission and the Occupational Safety and Health Administration are also reviewing nanotechnology issues. But, for now, specific guidance is lacking.

That seeming lack of regulation has caused one municipality — here in Northern California — to adopt an ordinance on nanotechnology. The City of Berkeley’s ordinance requires researchers working with nanomaterials to report to the city as part of its local regulation of hazardous materials. To date, no other state or local authority has adopted similar requirements. In fact, Berkeley’s ordinance appears to be the first explicit regulation of nanotechnology anywhere in the world.

As research and development continues, businesses may be in the uncomfortable position of preferring a specific regulatory regime over the status quo, both in order to provide some certainty as to regulatory and legal risks and in order to avoid the possibility that the entire field will acquire a bad reputation — rightly or wrongly akin to that acquired by genetic engineering of organisms — because of a lack of care by a small number of companies.

In the meantime, should a nanomaterial cause harm that no regulation addresses, the tort system will act as a catchall, albeit with effects that may be as unpredictable as those of new nanomaterials. This places a heavy burden on scientists and business leaders to make careful decisions in the interests of both their shareholders and their consumers. Activists and plaintiffs lawyers are watching developments closely. Businesses — and the lawyers who advise them — need to do the same.



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also deny the motion based on the pleadings, but allow the defendant to raise the issue as a defense at trial, after discovery has taken place. *Cf. Northern Laminate Sales, Inc. v. Davis*, 403 F.3d 14, 23 (2005). Assuming the issue has been preserved by the filing of a motion to dismiss or by affirmative defense, the defendant must await the outcome of the trial and entry of final judgment. If the appeal is successful, the judgment is reversed on the merits and the plaintiff's case is dismissed. *Toledo Ry. & Light Co. v. Hill*, 244 U.S. 49, 52 (1917). Thus, choosing a federal forum may delay resolution of the jurisdictional issue, leaving the issue in play for settlement considerations, but potentially frustrating a foreign party's attempt to seek early and conclusive resolution of the issue.

Contesting Jurisdiction: Burden of Proof, 170.6, and Jurisdiction to Determine Jurisdiction

When a nonresident defendant specially appears under C.C.P. 418.10(a)(1) to challenge personal jurisdiction, the plaintiff must prove, by a preponderance of the evidence, the factual basis that would justify the exercise of jurisdiction. *Vons Companies, Inc. v. Seabest Foods, Inc.*, 14 Cal. 4th 434, 449 (1996); *Pavlovich v. Superior Court*, 29 Cal. 4th 262, 273 (2002). If the plaintiff meets this burden, it is then up to the defendant to show that the exercise of jurisdiction would be unreasonable. *Pavlovich*, 29 Cal. 4th at 273.

In California, some thought should be given to whether a peremptory challenge to the judge hearing the motion to quash should be made. The trial judge's ruling on a motion to quash service of summons for lack of jurisdiction is not a determination of contested fact issues relating to the merits for the purposes of a timely peremptory challenge to a judicial assignment under C.C.P. 170.6. See *School District of Okaloosa County v. Superior Court*, 58 Cal. App. 4th 1126 (1997).

California courts have jurisdiction to determine their own jurisdiction, and a court may raise the question of jurisdiction on its own motion. *Abelleira v. District Court of Appeal*, 17 Cal. 2d 280, 302 (1941).

Discovery Issues in Litigating Personal Jurisdiction

After the motion to quash or dismiss is made, the court will occasionally allow parties to conduct discovery prior to its ruling on the issue of personal jurisdiction. Indeed, "[t]he plaintiff has the right to conduct discovery with regard to the issue of jurisdiction to develop the facts necessary to sustain this burden" and "is generally entitled to conduct discovery with regard to a jurisdictional issue before a court rules on a motion to quash." *Mihlon v. Superior Court*, 169 Cal. App. 3d 703, 710 (1985); *Goeb-ring v. Superior Court*, 62 Cal. App. 4th 894, 911 (1998). The granting of a continuance for discovery lies in the discretion of the trial court, whose ruling will not be disturbed in the absence of manifest abuse. *Beckman v. Thompson*, 4 Cal. App. 4th 481, 487 (1992).

The defendant should be allowed the same opportunity for discovery to defeat personal jurisdiction, but here a

curious tension arises. Counsel for the defendant should always pay close attention to their litigation strategy so as to make sure that conduct does not lead to a general appearance by a waiver or by acquiescence. Under C.C.P. 418.10(e)(1), a party who moves to quash service does not make a general appearance under section 1014 until entry of the court's order denying the motion. It has been held that objections to interrogatories upon the ground they are oppressive, made during the pendency of a motion to quash, do not constitute a general appearance. *1880 Corp. v. Superior Court of San Francisco*, 57 Cal. 2d 840, 843 (1962). However, a defendant who has not yet answered has been held to have made a general appearance if he invokes the authority of the court on his behalf, or affirmatively seeks relief. A party who propounds discovery makes a general appearance, as does one who moves for summary judgment before filing an answer. *Roy v. Superior Court*, 127 Cal. App. 4th 337, 341 (2005). It is not difficult to imagine other scenarios where an overly aggressive defendant goes overboard with discovery or other litigation tactics that may be construed as going beyond issues pertaining to jurisdiction and which constitute litigation on the merits, thereby creating waiver or acquiescence. *Mansour v. Superior Court*, 38 Cal. App. 4th 1750 (1995).

Additionally, defense counsel should be alert to discovery that is an attempt to gain trade secret information under the guise of discovery to determine jurisdiction. Counsel will be well advised to obtain an appropriate protective order under C.C.P. 2019.210.

The plaintiff's prerogative to obtain jurisdictional discovery is reflective of the liberality of Section 2017.010 of the Code of Civil Procedure, providing that "any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence."

In seeking the right to undertake discovery, the parties should be ready to tell the court what the discovery will accomplish. Counsel should prepare proper briefs with proposed discovery designed to explore the respective claims on the issue of personal jurisdiction. This includes demonstrated familiarity with the substantive law and even proposed jury instructions. Discovery that does not establish a relationship with California either generally or specifically will probably not be allowed. For example, in *Beckman*, such discovery was properly denied where plaintiff's request for a continuance did not suggest that discovery was likely to produce evidence of additional California contacts by one defendant relating to the defendant's lending activities in California. 4 Cal. App. 4th at 487.

In *In re Automobile Antitrust Cases I & II*, 135 Cal. App. 4th 100 (2005), the trial court had twice asked plaintiffs to offer facts that would justify a reasonable belief that additional relevant jurisdictional evidence existed and could be gathered if a continuance were granted. The plaintiffs were unable to make such an offer of proof,

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KATE WHEBLE

On TRADEMARK & COPYRIGHT

On September 10, 2007, a three-member panel of the World Intellectual Property Organization (“WIPO”) found in favor of Actelion Pharmaceuticals, Ltd. (“Actelion”), holding that the use of its trademark drug name TRACLEER by a law firm for the purpose of soliciting clients for litigation was improper under the Uniform Domain Name Dispute Resolution Policy (“UDRP”). The Panel’s decision, which departs from previous precedent, is good news for trademark owners whose trademarks are being improperly used by lawyers to attract litigation clients.

In a two-to-one decision, the panel in *Actelion Pharms., Ltd. v. Hackard & Holt*, WIPO Case No. D2007-0838 (Sept. 10, 2007), ordered that the domain name <tracleerinfo.com> be transferred from the law firm that was using it to attract potential clients for its products liability practice to Actelion, owner of the TRACLEER trademark.

Before *Actelion*, the seminal WIPO case involving use of a pharmaceutical company’s trademarked drug name by a law firm was decided in favor of the lawyer. See *Pfizer, Inc. v. Van Robichaux*, WIPO Case No. D2003-0399 (July 16, 2003).

Background

The *Actelion* dispute began when Hackard & Holt, a California law firm specializing in products liability litigation, registered and began using the domain name <tracleerinfo.com>, which incorporated Actelion’s trademark TRACLEER. TRACLEER is the brand name of Actelion’s drug used to treat certain types of pulmonary arterial hypertension.

After registering the domain name <tracleerinfo.com>, Hackard & Holt began using it to advertise the firm’s products liability practice. According to the WIPO decision, Hackard & Holt used the <tracleerinfo.com> domain name “for the purpose of soliciting clientele” even though Hackard & Holt’s website provided little information about TRACLEER.

To obtain a transfer of a domain name under the UDRP standard, a complainant must show (1) that the domain name is confusingly similar to the complainant’s trademark; (2) that the respondent has no legitimate rights to the domain name; and (3) that the respondent has registered and is using the domain name in bad faith.

Hackard & Holt conceded that the domain name <tracleerinfo.com> was confusingly similar to Actelion’s TRACLEER trademark but argued that its use of the TRACLEER trademark was permitted under the same fair use analysis that succeeded in *Pfizer*. Although the majority in *Actelion* acknowledged that a fair use defense is viable in a trademark infringement or cybersquatting case in a national court, the Panel noted that it was required to decide the proceeding under the UDRP, and not under a particular

country’s trademark or cybersquatting law.

In analyzing the facts under the UDRP, the Panel recognized that there was “clearly initial interest confusion” because Hackard & Holt was using the domain name “to attract Internet users looking for information on TRACLEER.” After acknowledging the initial interest confusion associated with Hackard & Holt’s use of the domain name, the Panel found that “the use of the name of a trademarked drug for the purposes of soliciting clientele is not using the disputed domain name in connection with a bona fide offering of services.”

In finding bad faith, the Panel noted that Hackard & Holt was not using the domain name incorporating Actelion’s trademark to provide information regarding any known deleterious effects of TRACLEER and was not conducting litigation against the manufacturer of TRACLEER. Instead, Hackard & Holt was using the trademark in “a subtle ploy to use [Actelion’s] mark to attract customers for other litigation.” Such use, according to the Panel, was evidence of bad faith registration and use of a domain name. The Panel ordered the domain name <tracleerinfo.com> be transferred to Actelion.

The Pfizer Case

Four years earlier, a sole Panelist in the *Pfizer, Inc. v. Van Robichaux* case decided that fair use of a trademark in a domain name can be a defense in a UDRP proceeding if the domain name owner can show that the product is not readily identifiable without use of the trademark; only so much of the trademark is used as is reasonably necessary to identify the product; and the user of the trademark does not do anything that would suggest sponsorship or endorsement by the trademark owner.

After setting forth this standard, the *Pfizer* Panelist found that Van Robichaux’s use of Pfizer’s LIPITOR mark was fair and therefore Van Robichaux had a right or legitimate interest in the <lipitorinfo.com> domain name. Despite conceding that initial interest confusion would occur with Van Robichaux’s use of <lipitorinfo.com>, the *Pfizer* Panelist determined that initial interest confusion could not, standing alone, preclude the fair use of a trademark in a domain name. Accordingly, the *Pfizer* Panelist refused to transfer the domain name to Pfizer because Van Robichaux’s use of LIPITOR was fair and therefore Van Robichaux had rights or a legitimate interest in the domain name <lipitorinfo.com>. The sole Panelist in the *Pfizer* case was also the dissenting Panelist in the *Actelion* case.

Pharmaceutical companies can now use the *Actelion* decision to recover domain names that improperly incorporate trademarks to advertise legal practices. Additionally, the majority rationale in *Actelion* should be generally applicable to other businesses and industries that are targeted by personal injury/product liability lawyers and law firms to solicit litigation clients.

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Kate Wheble

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prompting the trial court to deny their request for further jurisdictional discovery against the three parent manufacturers under the effects test of demonstrating purposeful availment.

In *Terracom v. Valley Nat'l Bank*, 49 F3d 555, 562 (9th Cir. 1995), the court observed that “[w]here a plaintiff’s claim of personal jurisdiction appears to be both attenuated and based on bare allegations in the face of specific denials made by defendants, the Court need not permit even limited discovery...”

In many if not most cases, the discovery pertaining to jurisdiction will also serve as discovery on substantive issues. For example, in cases of relationships between foreign parent and subsidiary business organizations, the issues of agency, representative services and alter ego are the same for both establishing jurisdiction as well as on the merits. See *Sonora Diamond Corp. v. Superior Court*, 83 Cal. App. 4th 523 (2000).

I will commonly ask lawyers questions about just what is expected to be accomplished by engaging in the type of discovery that is sought, or why certain parties are being added, or what is the possible theory of liability against existing or contemplated parties. All too often, the lawyers are unable to answer these questions.

A really smart lawyer begins case preparation with careful and thoughtful compilation of possible jury instructions on the elements of each cause of action. Given the trial court’s discretion to grant discovery, plaintiffs seeking jurisdictional discovery should identify clearly what discovery they seek, and how they contend it will assist them in establishing a basis for jurisdiction. Consideration should be given to both general jurisdiction and specific jurisdiction theories, though with an emphasis on the more commonly successful specific jurisdiction basis. Jurisdictional discovery is particularly effective in developing an agency theory to extend the foreign party’s contacts to a U.S. subsidiary or other affiliate.

Regardless of the theory, as with any discovery issue, a request for jurisdictional discovery should be linked to the substantive facts that will govern the outcome. California has followed the Restatement, 2d, Conflicts of Laws, § 27(1) in determining what kind of relationships with California may allow a California court to assert jurisdiction over a defendant. A list of jurisdictional factors is also set forth in the Judicial Council comments to C.C.P. 410.10. These include:

“In the case of natural persons, such bases currently include presence, domicil, residence, citizenship, consent, appearance, doing business in a state, doing an act in a state, causing an effect in a state by an act or omission elsewhere, ownership, use or possession of a thing in a state, as well as other relationships to a state.”

“In the case of corporations and unincorporated associations (including partnerships), such bases currently include incorporation or organization in a state, consent, appointment of an agent, appearance, doing business in a state, doing an act in a state, causing an effect in a state by an act or omission elsewhere, ownership, use or posses-

sion of a thing in a state, and other relationships to a state.”

On the defense side, the principal defense to jurisdictional discovery is showing that it will not change the result. Showing the court that jurisdictional discovery will be an expensive and time-consuming diversion, with no change in the ultimate result, will help overcome the presumption that such discovery should be granted. By showing that the discovery sought does not relate to any legally significant or cognizable theory of jurisdiction, the defense can argue that plaintiffs should be prevented from pursuing “fishing-expedition” jurisdictional discovery.

Discovery Sanctions in Contests Over Jurisdiction

“It is a cardinal rule of California discovery practice, probably of constitutional origin, that discovery sanctions must be suitable to enable the party seeking discovery to obtain the objects of discovery; the sanction must not put the prevailing party in a better position than if discovery had been obtained nor may the sanction be a form of punishment.” See *Motoun Record Corp. v. Superior Court*, 155 Cal. App. 3d 482, 489-90 (1984).

Where a party in a contest to establish jurisdiction fails to provide discovery, the Court cannot know whether sanctions would put the party seeking discovery in a better position than if the discovery had been obtained. The trial court’s uncertainty is caused by the recalcitrant party’s wrongful refusal to play by the discovery rules. In those circumstances, the party that has refused to provide discovery must bear the consequences of the uncertainty. See *Higbland Ranch v. Agricultural Labor Relations Bd.*, 29 Cal. 3d 848, 863 (1981) (“In fashioning an appropriate remedy, we must be guided by the principle that the wrongdoer, rather than the victims of the wrongdoing, should bear the consequences of his unlawful conduct, and that the remedy should be adapted to the situation that calls for redress); *County of El Dorado v. Schneider*, 191 Cal. App. 3d 1263, 1282-83 (1987) (defendant in an action to establish paternity who refused to comply with blood testing orders deemed to be the father).

A trial court may deem the issue of personal jurisdiction as having been established (and apparently not established) for willful violation of discovery law and orders.

To comply with C.C.P. 2023.040, counsel should confirm that their notice of motion for sanctions and supporting papers identify every person, party, and attorney against whom the sanction is sought, and specify the type of sanction sought.

Even in the best of circumstances, obtaining jurisdiction over a foreign defendant is expensive and time-consuming. Counsel should keep in mind that a global picture of the litigation strategy is necessary. Discovery to build a case for or against jurisdiction should be detailed, well-documented and well-thought out.

The Hon. Socrates Peter Manoukian is a judge on the Superior Court for the County of Santa Clara. He was assisted on this article by Bonnie Bates, a fourth year night student at Lincoln Law School, and Geoffrey Ling, a graduate of Santa Clara University School of Law who just passed the Bar and is currently seeking employment.

CHIP RICE

On LITIGATION SKILLS

There is a lot to like about arbitration because it has been shaped by the free market of clients and lawyers seeking a fair and efficient process. As a result, among other things, arbitrators and their support organizations are more “lawyer friendly” than courts in all sorts of ways.

The sensitivity of arbitration to both litigants and lawyers as consumers generally makes arbitration a more comfortable forum than court. But this tendency to try to accommodate everyone involved can be a double-edged sword, so you need to plan accordingly.

The Market Theory of Arbitration

Put bluntly, as a simple matter of economics, arbitrators and their support organizations want and need our disputes, but judges and our judicial system don't. For our courts, one more case, one more motion, or one more discovery dispute is always an incremental burden without any equivalent benefit in time or money for overworked judges and their staffs.

By contrast, private judges can control their workload to a much greater extent and can bill for their extra work, just like counsel who appear before them. And private arbitration organizations like JAMS and its proliferating competitors have an obvious interest in more work — especially repeat business from both parties and lawyers. So they try to make everyone feel as well treated as possible by providing nice workspaces and all the amenities — even fresh fruit and cookies. As a result, arbitration sometimes feels like the legal equivalent of shopping at Nordstrom.

Of course, the market for private dispute resolution is not driven by the refreshments. It is driven by the parties' and, more importantly, the lawyers' perception of the quality of justice dispensed, and that depends primarily on the arbitrator's reputation for integrity, diligence and insight. But, the market is also influenced by the lawyer friendliness of both the arbitration organization and the arbitrator in the sense of giving lawyers more opportunities to shape the process and, sometimes unfortunately, being more tolerant of lawyers' shortcomings and mistakes.

Adapting to Arbitration's Lawyer Friendliness

At the most fundamental level, arbitration accommodates lawyers by allowing them to influence the process in ways that courts do not and cannot. This often begins with drafting the contractual arbitration provision, which gives us lawyers the opportunity to specify the arbitration

organization and arbitrator qualifications as well as, to the extent appropriate, the rules for discovery, confidentiality, conduct of the hearing and format of the award.

Most arbitration organizations also permit lawyers to participate in the selection of the arbitrator — either by agreeing to a particular candidate or by ranking and striking names from a list of candidates — and this can make a crucial difference. Frankly, I'd rather have an arbitrator that is not too lawyer friendly, especially when I have a particularly strong case, so I usually prefer former judges who are accustomed to deciding cases and telling counsel “no.” In addition, former judges also provide some assurance of predictability in following the law, and this is often very important to parties who fear that an arbitrator will “split the baby” and leave them with no meaningful recourse.

Once selected, any arbitrator is likely to have more time and patience for your particular dispute than any court could devote to it. So, you and your opponent will probably find it easier to get the arbitrator's attention on a scheduling matter or motion, and you and your opponent will probably get more latitude about the timing, length and number of briefs. But, don't assume that an arbitrator's generally greater willingness to consider motions necessarily means any greater willingness to grant them.

In fact, most litigators think that it is more difficult to win a dispositive motion in arbitration than in court. Cynics might say that's because denying such a motion means more work and that judges and arbitrators have a very different economic incentive to take on more work. I think that arbitrators' reluctance to grant dispositive motions is more a result of trying to be lawyer (and client) friendly. Waiting to decide a case until after listening directly to the parties gives everyone a greater sense of being heard and therefore a greater sense of justice being done.

So don't count on winning a dispositive motion in arbitration, especially one that is even arguably dependent on the credibility of a party. Try to be patient if the arbitrator seems to be too accommodating with your opponents about scheduling matters or even too tolerant of arguments that you think are misleading or unethical. In such situations, the lawyer friendliness of arbitration can be inefficient and frustrating, but you won't gain much by complaining. You will probably do more for your client by accepting that an arbitrator is less likely than a court to throw out claims or arguments (or even make negative comments about them before hearing testimony) and then planning accordingly on both offense and defense.

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**Chip Rice**

Letter from the President

It is my honor and privilege to welcome you, our members, to another year of ABTL programs and events. The Northern California Chapter of ABTL, now in its 17th year, is the largest chapter in the State with almost 2,000 members. We're off to a wonderful start to 2008.

Our Program Co-Chairs Daralyn Durie and Darryl Woo have been hard at work putting together excellent programs for the year. We've now completed two very successful dinner programs. The January program was an "Ask the Judge" panel featuring some of our most respected (and entertaining) state and federal court jurists answering questions posed in advance of and during the program. The recent March program was a thoughtful and spirited discussion about recent developments and rulings in the *Qualcomm v. Broadcom* case. The recent decisions of the court in that action raise issues that could significantly impact discovery and trial strategy, and the relationships between co-counsel, local counsel, in-house counsel, and their clients in complex commercial cases.



Steve Lowenthal

Our next program will be on May 27 in Palo Alto, and will feature a presentation on legal issues and litigation arising in connection with detentions at Guan-

tanamo Bay, Cuba. The remaining programs for the year will include an "appeal" from last year's ABTL mock trial in a trade secrets case, and a presentation on "unconscious bias," a powerful program that every trial lawyer will want to see.

We are particularly proud of our new ABTL 2008 Diversity Initiative, a program designed to further the efforts of our firms and the legal community in expanding the number of diverse attorneys practicing in the business litigation field. We have teamed with the Bar Association of San Francisco and its Diversity Director, Yolanda Jackson, to reach out to diverse attorneys and encourage them to attend ABTL Programs and events as our guest. Thanks to Bob Sims for heading up these efforts.

We are also pleased to see the continuing growth and popularity of our ABTL Leadership Development Committee, which focuses on programs for attorneys in practice for 10 years or less. The LDC has planned four programs for this year, one of which will coordinate with the ABTL Diversity Initiative and focus on encouraging diverse law students to explore business litigation as a career choice. We thank LDC Chair Lucas Huizar for his efforts with a very talented group of future ABTL leaders.

None of our programs, events or initiatives would be possible without the hard work of a number of individuals. It is my honor to serve with a dedicated group of officers: Vice President Stephen Hibbard, Treasurer Sarah

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Flanagan, Secretary Robert Bunzel, and the entire Board of Governors. In addition, I'd like to particularly thank our Membership Chair Mary Jo Shartsis, whose efforts building our membership greatly assist our ability to provide outstanding programs and services to our members. One of those services is the always excellent ABTL Report, co-edited by Tom Mayhew and Howard Ullman. I am pleased to note that this edition is the 50th issue since its inauguration in November 1991. Finally, a special thanks to our Executive Director, Michele Bowen, for her "behind the scenes" efforts in keeping everything running smoothly.

We welcome each of you to participate in our programs and events, and encourage you to contact us with ideas for future programs, ABTL Report articles or new initiatives.

Steve Lowenthal is a partner in the San Francisco office of Farella Braun & Martel LLP and is the President of the Northern California chapter of ABTL for 2008.

