ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT NORTHERN CALIFORNIA

Volume 19 No. 2

SPRING 2010

Reverse Corporate Veil Piercing in California Courts

The alter ego doctrine traditionally is applied to pierce the corporate veil so that a shareholder (either an individual or a parent company) may be held liable for the debts or conduct of the corporation. But what about the other way around? Can a corporation be held liable for the actions or debts of a shareholder? Courts confronting this question are divided, and the law is still developing in this area of corporate liability.

Hon. Socrates Peter Manoukian

Traditional Corporate Veil-Piercing

Ordinarily, a corporation is regarded as a legal entity, separate and distinct from its stockholders, officers and directors, with separate and distinct liabilities and obligations. However, when the corporate form is used to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, the courts will ignore the corporate entity and deem the corporation's acts to be those of the persons or organizations actually controlling the corporation, in most instances the equitable owners. The alter ego doctrine

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Also in This Issue

"Catch the Conscience!" — Scripting a Winning Opening Statement

I'll have grounds
More relative than this — the play's the thing
Wherein I'll catch the conscience of the King.
Hamlet, Act 2, Scene 2

In *Hamlet*, the prince writes several lines about murder and adds them to the script of a play to "catch the conscience" of his uncle, the king. Hamlet believes that Claudius will flinch while watching the play and hearing about the killing of a king, a tell-tale sign that Claudius murdered Hamlet's father.

Benjamin K. Riley

A dramatic play seeks to capture the audience, either with virtuous deeds or all-too-recognizable human folly. The audience is drawn into the story because it identifies with the characters and the injustices foisted upon them. The playwright plots the arc of the play to best secure the audience's immediate and sustained interest and participation in the story. Think of your opening statement as "a play within a play," with the jury as your audience. Script your opening to capture the jurors' conscience and make them care about the trial and the result.

The opening statement is your first and perhaps best opportunity to convince a jury that your client should win. The jurors know very little about the case, are anxious to get started, and give you their full attention. Their impression of you will probably be set by the time you finish your opening. Opening is the time to establish the jurors' expectations, start to develop a bond with them, and whet their appetite for your case.

Script an opening statement that takes advantage of the

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natural drama of this moment. Develop a theme that the jurors will care about. Start with a dramatic flourish, organize your points for maximum interest and persuasive effect, and focus on the facts that establish the human conflict and unfairness of the situation. Other than accounting for "bad facts," jettison discussion of evidence that does not directly support your theme or advance the conflict. Talk to the jury — do not diminish this critical opportunity with slavish use of notes or PowerPoint. And trust your own personal "performance" style. At the end of the trial, jurors will recall only a portion of what you seek to teach them. However, if your opening statement provides them with a clear theme and a compelling reason why your client should win, you will be well on your way to a successful result.

Develop Your Theme

Every play, and every case, requires a theme. In a trial, the theme synthesizes why the jury should care and why your client should win. The theme needs to be expressed simply and involve fundamental human emotions, failings or rights. Disloyalty and treachery abound in *Macbeth*; hubris, misperception and human frailty are on display in *King Lear*. Identify and explore your theme carefully. In a trade secret case, the theme will likely be theft and disloyalty; in a patent case, respecting one's property rights; and in a complex commercial dispute, the greed of an over-reaching plaintiff. Regardless of the theme you choose, it should be the lens through which you view every fact and theory. It will be raised in your *voir dire*, the center piece of the opening statement, and then built fact-by-fact during the trial.

When you start to craft your opening, identify your theme and keep it close at hand. Each fact and legal theory should be measured by and further that theme. If a fact amounts to detailed background or does not directly advance the theme, do not mention it. By necessity, there will be background and surplus evidence presented during the trial. Such evidence is not needed — and distracts — in the opening statement.

Once you have selected your theme, revisit and refine it frequently. Motions *in limine* may affect key evidence that you were planning to highlight. Even more importantly, during *voir dire* you will learn about your jurors and their interests and proclivities. Review and revise your theme and factual presentation to appeal to the individual jurors' values.

Plotting the Arc of the Statement

The author of a great play plots the presentation of the story to capture the audience and provoke the desired reaction. Starting with a powerful and foreshadowing scene, the play immediately entangles the protagonist in a deep but personally-identifiable conflict, and then introduces complications and obstacles to resolution as he or she struggles to escape. The climax of the play is carefully planned to capture the audience's full attention before a speedy resolution. Strive for this same dramatic arc in your opening statement.

Most trial lawyers agree that an opening statement should not exceed 45 minutes, even in the most complicated cases. Lawyers who do not distill the key facts and themes deliver long openings. It takes work and attention to structure the opening. You have a good chance to keep the jury attentive and receptive during a crisp, well-organized 45-minute opening. If your opening is longer or if each part is not closely honed, you will likely lose the jury's attention.

Outline the points you want to cover in the opening, and then take a critical look at them. If you figure five minutes for your introduction, and five minutes for the ending, you have 35 minutes left. Divide this time into distinct sections of no more than seven to eight minutes each, or four to six segments. Rather than presenting a straight chronology, consider organizing the presentation by key facets of the case, such as the various stages of trial, the legal claims, two or three "scenes" of the key facts, and the two or three critical witnesses. Provide topic sentences as you move from one segment to the other. By making each of these sections short and distinct, you have a chance to refocus the jury on your developing theme every seven to eight minutes.

The Dramatic Prologue

Like any powerful play, an opening statement should start strongly and dramatically. Think how *Macbeth* opens with the foreboding "toil and trouble" of the Weird Sisters, or how the cast of *The Tempest* is literally blown around the stage during the opening shipwreck scene. The audience cannot turn away — every eye is on the performers. Yet 95% of opening statements start with the lawyer identifying him or herself, providing some background on the client, thanking the jury for their service, and other small talk. Jettison the clutter and unnecessary introductions. The first two minutes of the opening may be the most important moment of the trial. Why waste that opportunity — this singular moment of high drama — on introductions and thank-yous?

Walk to the front of the jury box, set your feet, and make eye contact with each juror. Take at least 10 seconds. Command center stage. THEN speak. Don't introduce yourself or say hello. Have a two minute soliloquy memorized and ready to go. No notes, no documents, just you and the jury. Present the distillation of the most important facts, the theme of your case, and why your client should win. Perhaps start with your best analogy. Make the moment weighty and solemn — two minutes of high drama. Then pause, relax a bit, and offer whatever brief introductions and thank-yous may still be necessary. In the meantime, you have already presented the foundation of your case, imparting it to the jurors when they are most attentive and impressionable.

Conflict

Jurors need to care about your case. They need to see a wrong they can right. Fortunately, the conflict inherent in a trial presents a signal opportunity to capture the emo-

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"Catch the Conscience!"

tions and interest of the jury. Humans cannot help but react to and invest themselves in conflict, especially when they must ultimately resolve it. Think of the audience's mounting suspense and even understanding of the horrors committed by Macbeth, especially because they result from his all-too-human and egotistical failings. The play's conflict captures the audience; it cannot be put aside or ignored.

So too the presentation of the facts in a winning opening statement. Focus on the facts that present the conflict and advance your theme. Make the jurors see the start of the conflict and how the opposing party escalates it and seeks to unfairly turn the conflict or misunderstanding to its advantage. Emphasize the alternatives available and the misguided choices taken by the other side leading to the ultimate dispute. Bring the conflict down to a personal, understandable level with which the jury will identify. Eliminate facts that do not advance your theme or demonstrate your conflict. Although you must anticipate and account for "bad facts" on which the other side will rely, if you can, build them into your conflict scenario as the client's justifiable or understandable reactions to the other side's bad acts.

Performance

When Richard III's horse is slain during the climatic battle with Richmond and Richard yells "a horse, a horse, my kingdom for a horse," the audience knows his denouement is near. Think of the diminished effect if Richard delivered the line from upstage left, behind a post. Or if he read the line from the script or paraphrased it from bullet points on a screen while turning his back to the audience. Yet most lawyers deliver their opening statement while safely hiding behind a podium. Nearly all give the opening with notes or even the entire typed presentation clutched firmly in their hand. And who would dream of delivering an opening statement without a full PowerPoint? In the process, lawyers lose the drama of the opening and their ability to best connect with the jurors.

Unless required by the Court, do not use the podium in opening. Deliver the opening in front of the jury box, grabbing center stage. If possible, do not use any notes. Nothing should interfere with your discussion with the jurors. At a minimum, have your opening and closing segments fully memorized and rehearsed. If you must have notes, condense them to bullet points on one or two pages which you can glance at if needed. Without notes, there is always a risk that you might miss a point or two that you thought were important. However, that slight downside is greatly outweighed by the persuasive force you will gain by speaking in the moment and making constant eye contact with your audience.

Similarly, presenting your opening through a PowerPoint presentation misses the point of persuasive advocacy. There is no doubt that presenting the outline of your

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California Interference Torts for "M&A Collateral Damage" Cases

In every M&A deal, there are winners and losers. Many, if not most, M&A deals are driven by the acquiring company's vision to restructure the target company to improve it and to incorporate its most valuable components into the acquiring company. The losers often include the suppliers, subcontractors, service providers, and royalty earners of the acquired company, as well as their business partners, many of whose previously lucrative relationships with the acquired company and its partners are disrupted or terminated as a result of the M&A deal or the subsequent restructuring — collateral damage to the deal.

California's interference torts provide potential claims to many who suffer M&A collateral damage. All California business lawyers, trial lawyers and deal lawyers alike, need to understand the scope of these torts. This article touches upon some aspects of interference claims that can come into play in cases of "collateral damage."

Andrew Bassak

The Prima Facie Case

In the context of an M&A deal, take the example of a broker who has arranged a long-term supply contract between a supplier and the target company. Under its arrangement with the supplier, the broker is to be paid based upon the volume of sales the supplier makes to the acquired company. As part of the post-closing restructuring of the acquired company, the buyer decides to terminate the long term supply contract with the supplier, and terminates the supply contract upon an agreed payment to the supplier. Although the buyer is aware of the broker's contract, no payment is made to the broker, and because the broker's contract with the supplier is not breached, the buyer's analysis is that it need not concern itself with the broker. The supplier will not be making future sales, and, thus, the broker will not be entitled to further payments from the supplier.

On these facts, the broker will be able to make out the elements of a valid claim for intentional interference with contract. To sustain a claim for intentional interference with contract, the plaintiff must allege: (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage. *Quelimane Co. v. Stewart Title Guar. Co.*, 19 Cal. 4th 26, 55 (1998). Here, the broker can show a contract, defen-

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dant's knowledge, intent to disrupt the contract, an actual disruption, and resulting damage.

Although counterintuitive to some, a breach of the underlying contract is not required. Rather, a mere *disruption* of a contractual relationship — even without an actual breach — gives rise to a claim for tortious interference. The third and fourth elements of a tortious interference with contract claim may rest on "a breach or a disruption of the contractual relationship." *Pacific Gas & Electric Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1126 (1990); *see, e.g., Consolidated Credit Agency v. Equifax, Inc.*, CV 03-01229, 2004 U.S. Dist. LEXIS 31061 (C.D. Cal. 2004) *68 (recognizing that it is irrelevant whether the defendant's conduct resulted in a breach of contract because disruption of a contractual relationship can give rise to a claim for tortious interference).

The third element also requires that the defendant intentionally act in a manner designed to induce a breach or a disruption of the contractual relationship. In *Quelimane*, the California Supreme Court ruled that "intentional action" may include situations "in which the actor does not act for the purpose of interfering with the contract or desire it but knows that the interference is certain or substantially certain to occur as a result of his action." 19 Cal. 4th at 56. In our hypothetical M&A deal, the buyer may assert that there is no intent here to harm the broker (*i.e.* the broker simply is collateral damage), and that without an intent to harm the broker, the buyer should have no liability. Unfortunately for the buyer, "the tort of intentional interference with performance of a contract does not require that the actor's primary purpose be disruption of the contract." 19 Cal. 4th at 56. Rather, the "intent" element is satisfied by an interference that is incidental to the actor's independent purpose and desire where the outcome is certain or substantially certain to occur as a result of the interference. The primary motivation of the acquiring company's conduct resulting in the interference with the broker's contract with the supplier is *irrelevant* to the inquiry so long as the buyer knew that, as a necessary consequence of its actions, the broker's rights under its contract would be disrupted.

In a situation where the intent element is satisfied simply because the outcome is certain or substantially certain to occur as a result of the interference, and the underlying contract is only "disrupted" and not breached, a serious potential pitfall is created for a corporate client attending to the restructuring of a newly-acquired subsidiary and its pre-existing contractual relationships. Especially in larger transactions, there are an untold number of contractual arrangements between the target company and its business partners. Add to that contracts between the target company's business partners and others that relate to the target company, and you begin to get a sense of the potential scope of contracts that could be disrupted. Ultimately, the due diligence for our M&A transaction must reach not only the contracts the target company has with its suppliers, but also to any contracts of which the buyer is aware that the suppliers have with others related to the supplier's contracts with the target company.

Parent Company Interference With a Wholly-Owned Subsidiary's Contract

Upon the closing of an M&A transaction, the acquiring company often will hold the business of the acquired company in a separate wholly-owned subsidiary, at least while it undertakes post-closing restructuring of the target. As the parent undertakes the restructuring of the acquired subsidiary, the parent company can become liable for tortiously interfering with contractual relations between its subsidiary and a third-party, subject to a defense of privilege. *Woods v. Fox Broadcasting Sub., Inc.*, 129 Cal.App. 4th 344, 353-56 (2005). The applicable privilege is called the owner's privilege.

To make out the narrow owner's privilege, the parent company must show that, in interfering with its subsidiary's contract with a third party, it used no improper means and acted to protect the best interests of the parent company. It is a qualified privilege that turns on the parent company's state of mind, the circumstances of the case, and the parent company's immediate purpose in taking the action that results in the interference. *Id.* at 351 n.7 (citing *Culcal Stylco, Inc. v. Vornado, Inc.*, 26 Cal. App. 3d at 879, 882 (1972)). This privilege is an affirmative defense.

Because the conduct of the parent company in interfering with its subsidiary's contract with a third party is by definition improper, establishing the owner's privilege as an affirmative defense places a heavy burden on the parent company to show that its motives were pure. No California case has held that a third party having a contract with a subsidiary that is interfered with by the parent is required to demonstrate that the parent engaged in a wrongful act independent from the interference, for at least two reasons.

First, the act of interference with the contract is itself wrongful. In *Korea Supply*, the California Supreme Court noted, "[b]ecause interference with an existing contract receives greater solicitude than does interference with prospective economic advantage, it is not necessary that the defendant's conduct be wrongful apart from the interference with the contract itself. Intentionally inducing or causing a breach of an existing contract is a wrong in and of itself." *Korea Supply*, 29 Cal. 4th at 1158 (internal quotations and citations omitted). Second, the "independent wrongful act" requirement only applies to claims for interference with prospective economic advantage. *Woods v. Fox Broadcasting Sub., Inc.*, 129 Cal. App. 4th 344, 349 (2005); *Quelimane*, 19 Cal. 4th at 55. To require a third party alleging a contractual interference claim against a parent company based upon the parent's interference with the third party's contract with the subsidiary to additionally allege a wrongful act independent of the interference itself would add a requirement to plead an independent wrongful act to an interference with contract claim in the narrow circumstance of a parent company interfering with a contract between its subsidiary and a third party. This would have the improper effect of eliminating

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the "greater solicitude" to be afforded formalized contracts in the limited scope of a parent interfering with a third party's contract with its subsidiary. However, it should make no difference whether the third party's contract is with a subsidiary entity, regardless of whether the third party's contractual co-party is a subsidiary a the time of contracting, or becomes a subsidiary during the performance of the contract. To invoke the owner's privilege in this context, the parent must affirmatively plead and prove that in terminating or disrupting the third party's contract with the subsidiary, the parent used no improper means and did interfere with the subsidiary/third-party contract for an improper purpose given the circumstances of the case. As a planning measure, to avoid interference claims against the parent company, acquiring companies undertaking a restructuring of a subsidiary should ensure the subsidiary accurately documents the subsidiary's decisions to end contracts with its pre-merger business partners as independent decisions of the subsidiary.

Tortious Interference With Prospective Business Advantage

Claims for tortious interference with prospective business advantage have different and higher pleading requirements when compared to contractual interference claims. Pleading a claim for interference with prospective economic advantage requires: (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts by the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; (5) economic harm to the plaintiff proximately caused by the acts of the defendant and (6) conduct that was wrongful by some legal measure other than the fact of interference itself.

As the relationship between the plaintiff and the third party at the time of the interference has not yet ripened into a contract, the plaintiff must satisfy additional pleading and proof requirements to sustain its claim. Unlike an interference with contract claim, a plaintiff seeking to recover for alleged interference with prospective economic relations has the burden of pleading and proving that the act of defendant's interference was independently wrongful by some measure beyond the fact of the interference itself. An independently wrongful act is one "proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1159 (2003).

Voidable or At Will Contracts Treated as Options — Prospective Business Advantage

In the M&A context, it is common for independent contractors and consultants retained on an at-will basis prior to a merger to be terminated if their services become redundant post-close. Assume that a consultant for an acquiring company convinces the acquiring company to terminate an at-will consultant who provides an identical service to the target company. Here, the terminated consultant cannot state an interference with contract claim against the consultant for the acquiring company. Why?

In *Reeves v. Hanlon*, 33 Cal. 4th 1140, 1152 (2004), the California Supreme Court considered a suit involving a claim of tortious interference with an at-will employment contract. The Court observed that "the economic relationship between parties to contracts that are terminable at will is distinguishable from the relationship between parties to other legally binding contracts." *Id.* at 1151. Thus, the *Reeves* court concluded, "an interference with an at-will contract properly is viewed as an interference with a prospective economic advantage." *Id.* at 1152; 5 Witkin, *Summary of Cal. Law,* Torts § 758 ("[I]f the third person is free to terminate his contractual relation with the plaintiff when he chooses, there is still a subsisting contract relation; but any interference with it that induces its termination is primarily an interference with the future relation between the parties.… As for the future hopes he has no legal right but only an expectancy; and when the contract is terminated by the choice of the third person there is no breach of it."). Recently, in *Transcription Communications Corp. v. John Muir Health*, 2009 U.S. Dist. LEXIS 25151 (N.D. Cal., March 13, 2009), the court extended the holding of Reeves beyond employment contracts to other contracts at-will, and held that a claim of interference with a terminable business contract should be analyzed as a claim of interference with prospective economic advantage. *Id.* at **23-26. Applying this rationale, the *Transcription Communications* court held that because the plaintiffs' contract was terminable at will, "any interference with the relationship between [Plaintiff] and [Third Party] is more properly viewed as interference with prospective economic advantage, not the contract itself." *Id.* at **25-26.

Our terminated at-will consultant thus will not have an interference with contract claim, but will potentially have a claim for interference with prospective business advantage — but only if he can show that the competing consultant acted by means that were independently wrongful (for example, using false information as part of their sales pitch).

It will be worth following future decisions to see if the courts continue to expand the scope of claims of interference with terminable business contracts that are to be treated interference with prospective economic advantage. Counsel for defendants facing interference with contract claims should closely analyze their client's contracts to see if they are voidable, at-will, terminable with or without cause or for convenience, or are otherwise unenforceable. If so, the defendant may be able to force a plaintiff attempting to allege tortious interference with the voidable or at-will contract to plead and prove the additional requirement for interference with prospective business advantage — that the defendant engaged in an independently wrongful act.

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California Interference Torts

Knowing the ins and outs of interference claims is essential for business trial and transactional lawyers. Being sensitive to the nuances of interference claims will allow you to better spot issues, to properly counsel your clients, to conduct effective due diligence, to avoid strategic missteps, and to create tactical advantages, ultimately leading to more predictable and favorable outcomes for your clients.

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"Catch the Conscience!"

argument may free you from notes and make the presentation easier for you. However, the jurors' eyes will be on the screen rather than you; if they do look at you, they will see your back as you point to the screen. You need to command the jury's attention through your heartfelt words, demeanor, body language and eye contact. Presenting your main points through slides forfeits that opportunity. Of course you will want to display the key demonstrative exhibits and charts. Walk to the screen and highlight the key provisions. Strategically intersperse demonstrative evidence to keep the arc of the opening moving and interesting. But when you are done demonstrating the significance of an exhibit, turn the projector off. Bring the jurors' eyes back to you. Tell them why the document advances or demonstrates the conflict.

Style and Language

Of all Shakespeare's characters, Richard III may be the deepest and most complex. A brutal serial murderer, he also is a contemplative philosopher who understands and is tortured by his own crimes. He rises to great power despite a prominent disability. This complexity leads actors to numerous interpretations and differing methods to play and develop Richard. Each brings his or her own personality and skills to the part, turning a dusty character from a script into a living and conflicted villain.

There are myriad ways to "play" your opening statement and trial persona. Each lawyer should develop and be comfortable with his or her own style. Although we can all learn valuable techniques from experienced and great trial lawyers, it is a mistake to think that we can fundamentally change or mask our natural presentation style. Attempting to change basic personality and style traits will not work. Artificial or false mannerisms will impede the jurors from getting to know and trust you. Your most effective style will likely be the one to which you are accustomed.

Relying on your own style does not mean that you should refrain from attempting to raise the level of discourse. A great play has the ability to elevate everyday issues into thought-provoking and memorable moments of discovery. Jurors expect that the opening statement (and closing argument) will challenge them to think and care deeply. Not only should you never talk down to jurors, you should aim to talk "up" to them — dare them to be intellectually curious in solving the meaningful conflict of your case. In preparing your opening, read some of your favorite soliloquies, speeches or short stories. Like a playwright, carefully plan and select the language and imagery you use. Then take the complex ideas of the case and distill them into understandable and memorable themes and facts, structured to make the jurors care about the dispute.

Finish Strong

Whether you leave the jurors laughing, crying, angry, or suspicious, finish your opening statement with a bang. Think how in the last scene of *A Midsummer Night's Dream* the young couples are reunited with their proper partners as Puck weaves his spell of words. Leave one or two of your most important points for last. Consider providing the jurors with three questions to ponder or by which to measure the evidence which you will discuss with them during your closing argument. Energize the jury for the start of testimony so it can begin its important tasks. And have your opening's final "scene" fully rehearsed and memorized so that you can talk directly to the jury and be at your most persuasive.

An opening statement offers an opportunity for solemn, high drama. Like a lead actor, make use of this spectacle by taking center stage and commanding the jury's attention. Script your opening to grab the jury with a dramatic first segment, build your theme through the facts and conflicts of the dispute, and finish strong. Challenge the jurors to reach beyond their everyday lives to untangle the web of conflict foisted upon your client. Make them care. After all, you are the playwright and lead actor; how the jurors react and invest themselves in your client's dispute depends on you. Use the drama of your opening statement to "catch their conscience."

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Reverse Corporate Veil Piercing

prevents individuals or other corporations from misusing the corporate laws through the device of a sham corporate entity formed for the purpose of committing fraud or other misdeeds. Under the alter ego doctrine, a corporate identity may be disregarded —"piercing the corporate veil" — where an abuse of the corporate privilege justifies holding the equitable ownership of a corporation liable for the actions of the corporation. *Communist Party v. 522 Valencia, Inc.*, 35 Cal. App. 4th 980, 993 (1995).

In California, two conditions must be met before the alter ego doctrine will be invoked. First, there must be

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CHIP RICE

On LITIGATION SKILLS

Writing a good legal brief is more a matter of craft than art. Most judges aren't persuaded by eloquent phrasing, vivid metaphors or clever reasoning that calls attention to itself, and I suspect that such attempts at artistry only put judges on their guard.

The best briefs are clear, credible and easy to follow. They don't aspire to be thrilling symphonies or colorful canvasses that sweep the reader away. They are watches that just keep ticking or trains that take the reader to the desired destination without any squeaking or jostling.

No matter how just your cause or how brilliant your arguments, you will fail if you lose your reader somewhere along the way. Even after you have come up with sound, well-supported arguments, you need to continue to think relentlessly about how to make your brief easier to read. You should assume your readers will be too busy and impatient to give your work the attention that you think it deserves. You need to give them all the help that you can.

There are a lot of good ways to try to keep your reader on track. Make sure that your headings use your key terms and can stand by themselves so that a reader will understand the thrust of your argument by simply reviewing the brief's table of contents. (But don't count on anyone reading your headings, because many readers don't, so the first sentence of a section should repeat your heading in different words.)

Keep your paragraphs short with concise topic sentences. Many readers have a practice of reading only the first sentence of a paragraph and then skimming the rest of the paragraph. A new paragraph is a new chance to engage the reader's attention.

Don't risk making your reader's eyes glaze over by being boring and redundant. Get to the point as efficiently as possible by cutting extraneous words and phrases and by organizing your arguments to avoid repetition. Avoid sarcastic or snarky comments about your adversary — no matter how clever you think you are — because it will just annoy most judges.

The most important thing is to keep working the problem at every level by re-writing sentences or paragraphs that don't quite work or re-ordering small or big pieces of your brief to make it flow better. We'd all like a brief to spring full grown from our brilliant minds, like Athena from Zeus's brow. It would be nice if we could wait for an epiphany and then sit down and dash off a winning brief in one fell swoop. But that is a sure recipe for writer's block. It is better to start putting things down on paper and then push them around until you find the most logical and persuasive order. In the end, perspiration will matter more than inspiration.

Each section of your brief must fill its purpose as part of the whole. The introduction must explain what you want and why in a lucid and concise way. It should be the last section that you write or, at least, the last section that you finish.

The statement of facts must tell a compelling story with conflict, suspense and heroes that inspire sympathy. And it can't just be a "story." It must be backed by specific cites to the evidence, preferably with pithy quotes as well, in order to assure your reader of your credibility.

Finally, the legal argument must explain the law and apply it to the facts in a way that inspires the reader's confidence in your fairness and accuracy. A long string cite without any quotations or parenthetical explanations of the holdings won't inspire such a confidence. As a general rule, you shouldn't cite a case unless you can quote some helpful language from the opinion or explain something about the underlying facts or holding that will bolster your argument. And pay attention to getting the pin-cite right in order to make it easier for the reader who wants to check the case.

Chip Rice

No matter how hard you try, you won't know if your brief is working without getting other people to read it and give you comments and suggested edits. Editing can be a painful process when people don't get your arguments or don't like your favorite lines, but it is better to hear it from your colleagues than from your judge or arbitrator.

It's easier to submit to such editing if you think of yourself as a humble craftsman rather than a romantic artist. It's also easier if you tell yourself that your reader is always right about the problem, but not necessarily the solution. You don't need to take anyone's edits verbatim, but you do need to solve the problem that made your editor want to change your words.

Writing a good brief takes a lot of work and time, and you usually will get sick of the process before it is done. If possible, try to find time to put your work aside for awhile so that you can come back to it with a fresh perspective. You will find new ways to clarify, shorten or expand particular arguments. Keep working at your craft and good things will happen.

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such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone. *522 Valencia, Inc.*, 35 Cal.App. 4th at 993; *Automotriz etc. De California v. Resnick*, 47 Cal. 2d 792, 796 (1957).

"Evidence of intercorporate connections without direct evidence of the parent's manipulative control of its subsidiaries does nothing to support a finding that the validly formed and existing corporate subsidiaries were only instrumentalities or conduits for the parent." *Institute of Veterinary Pathology v. California Health Labs., Inc.*, 116 Cal. App. 3d 111, 119-20 (1981). There must be direct evidence of the parent's manipulative control of its subsidiaries. Id. But cases have also held that the doctrine does not depend on the presence of actual fraud. It is designed to avoid or prevent what would be fraud or injustice, if accomplished. *Talbot v. Fresno-Pacific Corp.*, 181 Cal. App. 2d 425, 431 (1960).

In *Associated Vendors, Inc. v Oakland Meat Co.*, 210 Cal.App. 2d 825 (1962), the court reviewed and analyzed a number of cases in which the trial court had been upheld in disregarding the corporate entity. *Associated Vendors* provides 14 criteria to determine whether the doctrine should be applied. They include commingling of funds and other assets of the two entities, the holding out by one entity that it is liable for the debts of the other, identical equitable ownership in the two entities, use of the same offices and employees, and use of one as a mere shell or conduit for the affairs of the other, inadequate capitalization, disregard of corporate formalities, lack of segregation of corporate records, and identical directors and officers. No one characteristic governs, but the courts must look at all the circumstances to determine whether the doctrine should be applied. *Talbot*, 181 Cal. App. 2d at 432.

Reverse Corporate Veil-Piercing

Reverse piercing of the corporate veil occurs when a claimant seeks to hold a corporation liable for the obligations of an individual shareholder. The courts that have recogized the doctrine hold that reverse piercing is appropriate in those limited instances where the particular facts and equities show the existence of an alter ego relationship and require that the corporate fiction be ignored so that justice may be promoted.

Reverse piercing falls into two categories: inside and outside. Inside claims of reverse piercing of the corporate veil involve a controlling insider who attempts to have the corporate entity disregarded to avail the insider of corporate claims against third parties or to protect corporate assets from third party claims. Outside claims of reverse piercing of the corporate veil occur when a corporate outsider pressing an action against a corporate insider seeks to disregard the corporate entity and to subject corporate assets to the claim, or when an outsider with a claim against a corporate insider seeks to assert that claim against the corporation in an action between the claimant and the corporation. *See* 1 Fletcher, *Cyclopedia of the Law of Private Corporations*, § 43.70 (2008 rev. vol.); 18 C.J.S. Corporations § 17.

Courts recognizing the doctrine of reverse corporate veil piercing point to the same basic principles that underlie traditional corporate veil piercing: Permitting Parties should not be permitted to abuse the corporate form to evade liability, circumvent a statute, or accomplish a wrongful purpose, and courts have equitable power to disregard the corporate form when necessary to do justice. *See, e.g., Goya Foods, Inc. v. Unanue* 233 F.3d 38, 43 (1st Cir. 2000) (reverse piercing allowed under New York law); *C.F. Trust, Inc. v. First Flight, L.P.*, 580 S.E.2d 806, 810 (Va. 2003) ("We conclude that there is no logical basis upon which to distinguish between a traditional veil piercing action and an outsider reverse piercing action."); *Int'l Equity Invs., Inc. v. Opportunity Equity Partners, Ltd.*, 475 F. Supp. 2d 456, 458 (S.D.N.Y. 2007) (reverse corporate veil piercing applies under New York law; standard is relaxed when invoked for jurisdictional reasons only); *see also SEC v. Hickey*, 322 F.3d 1123 (9th Cir. 2003) (affirming asset freeze against third party corporation that was dominated and controlled by individual who owed on judgment for disgorgement, discussing but not resolving the question of reverse corporate piercing under California law).

The Postal Instant Press Case

In *Postal Instant Press, Inc. v. Kaswa Corp.*, 162 Cal. App. 4th 1510 (2008), the Court of Appeal confronted the question of outside reverse piercing. The plaintiff obtained a judgment against an individual who was its former franchisee. The plaintiff then moved to amend the judgment and add the franchisee's former company — which he had used to hold assets associated with the business, the printing machines — as a judgment debtor. The franchisee himself was arguably no longer associated with the corporation; he still owned shares, but he had sold most of his interest in the company to others. Thus, merely enforcing the judgment against the franchisee's shares would not provide the same benefits to the plaintiff as enforcing the judgment against the corporation.

The Court of Appeal held that the plaintiff could not pierce the corporate veil to reach corporate assets to satisfy the former shareholder's personal liability. The court noted that outside reverse piercing can harm innocent shareholders and corporate creditors, and allow judgment creditors to bypass normal judgment collection procedures. Legal theories such as agency or *respondeat superior* and legal remedies such as claims for conversion or fraudulent conveyance already adequately protect judgment creditors without the need to distort theories of corporate liability. When the judgment debtor is the shareholder, the corporate form is not being used to evade the shareholder's personal liability. This is because the shareholder did not incur the debt through the corpo-

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TRENTON H. NORRIS

On ENVIRONMENTAL LAW

Kermit the Frog was right: It's not easy being green.

The last few years have seen an explosion in green marketing claims for products as diverse as automobiles and cigarettes, toys and bottled water, shoes and hand lotion. At one end are companies built around a core of green claims. At the other are those whose interest seems more fleeting: "minty freshness" appears on the label more prominently than "made from sustainable materials." But in most industries, competitors are attempting to outdo each other in the quest to acquire a green halo.

Generations ago, Madison Avenue learned that consumer purchases are a matter of identity. Buying a Pepsi doesn't just satisfy your thirst; it makes you a part of the Pepsi Generation. Add the learnings of the civil rights movement plus a healthy dose of moral suasion, and consumer purchases have become opportunities to associate with a cause, like signing a petition. And today, thanks to the environmental movement, the most prominent cause in consumer marketing is to reduce the impact of consumer products on the planet.

But what does it mean to be green? Isn't it a matter of degree? Paper may be "recycled," but also produced with harsh chemicals that burden air and water. Coffee may be grown "sustainably," but in building the plantation important habitat may have been destroyed. Complicating matters, in comparison to most marketing claims, green claims are almost impossible for a consumer to evaluate based on the product. There is no way to know if carbon offsets were purchased, for instance, by tasting the bottled water. And every product manufacturer has *some* environmental impact. The lines are not at all clear, and for these reasons, companies making green claims — no matter how well substantiated — are vulnerable to accusations of "greenwashing," *i.e.*, misleading consumers about the company's environmental practices or its products' environmental benefits.

Those accusations may be made not only in the press, but also in court. There are several laws and standards explicitly addressing environmental marketing claims. But general principles of false advertising law also apply. For example, it is possible for a literally truthful claim (*e.g.*, "CFC-free") to be misleading (*e.g.*, because most uses of CFCs were banned long ago). Likewise, the touchstone is the consumer's perception and not the advertiser's intent.

The most far-ranging of the specific standards are the Federal Trade Commission's "Guides for the Use of Environmental Marketing Claims," commonly known as the Green Guides. Issued in 1992 and updated in 1996 and 1998, the Green Guides are widely acknowledged to be out of date with the current marketplace and consumer understanding. The FTC has been reviewing them since November 2007. Their revision is anxiously awaited this spring.

Although the FTC views the Green Guides as non-binding, California has given them the force of law. The Environmental Advertising Claims Act outlaws any claims that are not consistent with the Green Guides. It applies to any advertiser (including a retailer) who represents that a product is good for the environment (or at least not bad for it) by using terms such as "environmentally friendly," "ecologically safe," or "green." These terms are not defined, except by reference to the Green Guides, so their enforceability is questionable. In fact, the Act originally defined "recyclable" as anything that can be "conveniently recycled" in a county with more than 300,000 people, a definition ultimately struck down as vague. *Ass'n of Nat'l Advertisers v. Lungren*, 809 F. Supp. 747, 761-62 (N.D. Cal. 1992), *aff'd*, 44 F.3d 726 (9th Cir. 1994).

But the main force of the Environmental Advertising Claims Act is its requirement that companies making green claims maintain comprehensive and specific documentation substantiating their claims, including documentation of "[a]ny significant adverse environmental impacts directly associated with the production, distribution, use, and disposal of the consumer good" and any violations of permits used in making or selling the product. Cal. Bus. & Prof. Code § 17580(a)(2)& (4). Such a substantiation file is common among advertisers. What is not common is the California law's requirement that, for environmental claims, the documentation "be furnished to any member of the public upon request." *Id.* at § 17580(b).

Trenton H. Norris

Enforcement of standards for environmental advertising has varied at the federal level. Of the 22 cases ever brought by the FTC, most were brought shortly after the Green Guides were issued early in the Clinton Administration. None were brought in the George W. Bush Administration, but seven were brought in the first year of the Obama Administration. More can be expected, with state and local prosecutors becoming more active in this area. Competitors have also been known to challenge claims using the federal Lanham Act or similar state laws.

The last year has seen a spate of such accusations in the form of consumer class actions brought by private plaintiffs, some of whose lawyers may take a more aggressive view than the FTC or other public enforcers have historically taken. Despite efforts to limit California's consumer protection laws, the state remains a magnet for such suits. And with a state law providing broad, general standards and public disclosure, California appears to welcome consumer lawsuits over green marketing claims.

It certainly has never been easy being green. But now it takes a lawyer.

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Reverse Corporate Veil Piercing

rate guise and misuse that guise to escape personal liability for the debt. The judgment creditor can enforce the judgment against the shareholder's assets, including shares in the corporation. Upon acquiring the shares, the judgment creditor will have whatever rights the shareholder had in the corporation.

The *Postal Instant Press* court further noted that outside corporate piercing should be discouraged where alternative, adequate remedies (such as claims for conversion, fraudulent conveyance of assets, *respondeat superior*, and agency) exist. The Court recognized out-of-state cases holding that a court considering reverse piercing must weigh the effect of veil piercing on innocent investors and on secured and unsecured creditors, and must consider the availability of other remedies the creditor may pursue.

In the alternative, the *Postal Instant Press* court held that if it were to accept outside reverse piercing, the plaintiff failed to meet the requirements for its application. At the time of the litigation, the judgment debtor was not the sole shareholder of Kaswa. Therefore, the plaintiff failed to show that innocent creditors would be adequately protected. Amendment of a judgment to add an alter ego is an equitable procedure, and therefore before applying outside reverse piercing, the availability of alternative, adequate remedies must be considered by the trial court.

Despite *Postal Instant Press's* extensive discussion of the issue, litigators might reasonably regard the issue as unsettled. The *Postal Instant Press* court acknowledged that in an earlier case, — *Taylor v. Newton*, 117 Cal.App. 2d 752 (1953), the Court of Appeal had concluded that a corporation was liable on a judgment against the corporation's sole stockholder because the evidence supported a finding of alter ego, thus imposing liability on a reverse corporate veil piercing theory, though without calling it by that name. The *Taylor* court did not discuss the doctrine of reverse piercing but rather relied on traditional alter ego law to conclude that adherence to the fiction of a separate corporate existence "would promote an injustice" to the stockholder's creditors. This split in California authorities leaves the question arguably unsettled, and would enable a party to invoke the substantial body of out-of-state cases that have applied the doctrine. *See Annotation, Acceptance and Application of Reverse Veil-Piercing—Third-Party Claimant*, 2 A.L.R. 6th 195 (2005).

An interesting procedural note about the *Postal Instant Press* case — and one that could be argued to undermine its persuasive authority — is that the court decided the issue with no briefing by the parties. Neither the plaintiff nor the defendant had briefed reverse corporate veil piercing or cited any of the cases that had applied or rejected the doctrine elsewhere. The court nevertheless decided that because of a reference to alter ego cases generally, the parties had had the "opportunity" to brief the issue (but merely failed to do so), and then reached out to discuss and resolve the issue itself.

The Law Remains Unsettled

Postal Instant Press has been criticized by a handful of courts.

In Fischer Inv. *Capital, Inc. v. Catawba Dev. Corp.*, 689 S.E. 2d 143 (N.C.App. 2009), the North Carolina Court of Appeal took issue with *Postal Instant Press*, finding it to be not "persuasive since our California colleagues' logic ignores the possibility that the individual used the corporation to shelter personal assets rather than the other way around." *Id.* at 151-52. The Court therefore held that — at least for purposes of jurisdictional analysis — it would recognize reverse corporate veil piercing as a matter of North Carolina law.

Meanwhile, in an unpublished decision in April 2009, the California Court of Appeal held that a trial court properly added two corporations as defendants subject to a judgment issued four years earlier. See *McWethy v. Village Green, Inc.*, 2009 WL1111241 (Cal. Ct. App. April 27, 2009). The corporations were solely owned and controlled by the judgment debtor, had received transfers of real property from him for limited consideration, and other aspects of alter ego liability were satisfied. Because there were no innocent shareholders whose rights could be affected, the court of Appeal applied the reverse corporate veil piercing theory and affirmed, finding no abuse of discretion. The court found an arguable split in authority between *Postal Instant Press and McClellan v. Northridge Park Townhome Owners Assn.*, 89 Cal. App. 4th 746, 752 (2001) (holding that a successor corporation could be held liable for the debts of its predecessor), and distinguished Postal Instant Press based on the degree of effect on third party rights:

> In our view, notwithstanding the factual similarities and divergent results, the holdings and rationales of *McClellan* and *Postal Instant Press* of the two cases can nonetheless be reconciled. What we take from both cases…is the overall requirement that in considering whether to employ section 187 to add a defendant, courts should consider the extent to which the target corporation embodies the interests of the judgment debtor, whether innocent third parties may be unfairly impacted and whether other legal remedies are adequate to protect the legitimate rights of the plaintiff.

McWethy was unpublished, although it directly took on an unsettled issue and resolved it in a way that repudiates the *Postal Instant Press* decision of just a year earlier. So litigators will need to await further guidance to determine the viability of this doctrine under California law.

Reverse corporate veil piercing has a long history – it can be traced back as far as Judge Learned Hand's opinion in *Kingston Dry Dock Co. v. Lake Champlain Transp. Co.*, 31 F.2d 265 (2d Cir. 1929). Despite its history, it remains an unsettled issue under California law. Business trial lawyers should consider employing it in an appropriate case, until this area of law is resolved.

The Honorable Socrates Peter Manoukian is a judge of the Superior Court for the County of Santa Clara. *He would like to thank his law clerks Danielle Johnson, Michel Deeb and Bridget Foged for their contributions to this article.*

KATE WHEBLE

On TRADEMARK

Virtual worlds are experiencing real trademark trouble.

Several current Internet-based computer "worlds" create richly-detailed online environments in which users can interact with others via online identifiers called "avatars" and do most of the things that people in the "real" world do, including buy and sell goods and services. On Linden Research, Inc.'s Second Life, for example, products are sold using "Linden Dollars," which are purchased with real currency. Many real companies promote their goods and services in these game worlds, attracted by the vast market of potential customers.

Games like Second Life, City of Heroes and World of Warcraft are also known as "massively multi-player online role-playing games." They are popular and lucrative. The *New York Times* estimates the value of virtual world transactions at over $1 billion a year. Many questions arise about the use of trademarks in these worlds. For example, can the games' designers use real brands in depicting the game world? What happens to gamers who use others' real brands? What rights are held by those who create their own branded products to sell in the virtual world?

Under certain circumstances, real brands may be depicted in game worlds. The Ninth Circuit used both trademark law and the U.S. Constitution to decide *E.S.S. Entertainment 2000 Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095 (9th Cir. 2008). There, Rock Star Videos, which created the game Grand Theft Auto, modeled a game background on parts of East Los Angeles, including a real bar called the Play Pen. Rock Star Videos called the bar the Pig Pen. Play Pen owner E.S.S. sued for infringement of its trademark logo and the appearance of its establishment.

The Ninth Circuit affirmed the district court's decision that the use of the images was protected by the First Amendment. The court explained that the First Amendment protects trademark use in an artistic work unless it has no relevance to the underlying work or if it explicitly misleads the consumer about the source of the product. *E.S.S., 547 F.3d at 1109 (quoting Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002)). The court found that the Pig Pen helped capture the seedy feel of the game's neighborhood and that game users were unlikely to believe that Rock Star and E.S.S. were affiliated. *Id.* at 1110.

No court decision directly addresses the issue of gamers who create virtual products using the real brands of others, but the Central District of California has held that gamers using third party trademarks on game characters do not infringe when the characters are not used to sell products. *Marvel Enterprises, Inc. v. NC Soft Corp., et al.*, 74 U.S.P.Q. 2d 1303 (C.D. Cal. 2005).

In *Marvel*, the defendants' game City of Heroes allowed users to create their own "super heroes." Marvel sued, claiming that its copyrights and trademarks in the images and names of characters like Captain America and the Incredible Hulk were infringed by users who created similar or identical characters. Marvel claimed that defendants shared liability by inducing the infringements and failing to stop them.

The court dismissed Marvel's contributory and vicarious trademark infringement claims because the users accused of direct infringement were not using the characters in connection with the sale or advertisement of goods or services. Instead, the marks were used "to identify characters in a recreational game." Accordingly, the users were not infringing Marvel's rights.

It is not yet clear whether those who create brands in the virtual world can be protected by U.S. trademark law. Because trademark law is based on "use [of the mark] in commerce," the initial question is whether virtual use satisfies this requirement. Virtual brand owners argue that the "commerce" element is present because virtual products are sold using a currency based on dollars.

Kate Wheble

This issue has been raised in a class action suit filed in September 2009 against Linden Research by creators of virtual goods and services, asserting piracy of their products and brands in Second Life. *Eros, LLC, et al. v. Linden Research, Inc., et al*, Case No. CV-09-4269 (N.D. Cal). One of the plaintiffs, Eros LLC, sells erotic products in the game that are branded with the trademark SEXGEN®.

Eros claims that other Second Life players use its trademark on virtual goods that are not created by Eros. Plaintiffs also claim that their original creations and content are copied by other users, violating their copyrights, and that Second Life could stop the infringement but does not do so because it profits from the sale of the goods. Linden's answer denies all claims. As of press time, the parties have filed case management statements in preparation for an initial case management conference.

Eros had earlier filed suits in New York and Florida against individuals who allegedly sold counterfeit goods. The Florida suit resulted in a default judgment; the New York action was terminated by a consent judgment. Obtaining a ruling against Linden would be more efficient for Second Life merchants than suing individual infringers.

As virtual worlds become increasingly vibrant, the opportunities for creativity and commerce increase, creating new challenges for trademark law.

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Letter from the President

It is an honor to serve as the President of the Northern California chapter this year during a transformative period for our profession. As I reflect on the impacts of the "new economy," I see two primary drivers for change in the way that business trial lawyers practice law, one that we should embrace and one that we should resist.

Our clients are demanding lower-cost litigation services. They are rejecting the big firms' traditional leveraged-team model — in part because of billing rates, but also because of increasing recognition that some of the traditional law firm services do not need to be performed by lawyers. Clients are looking to advances in technology and specialized vendors to lower costs, especially in the discovery area. In response firms have reduced the hiring of associates dramatically and imposed layoffs as they move away from the traditional leverage model. They are rethinking their practice areas and fee models, and are exploring strategic alliances with other professionals. Business litigators are moving into smaller specialized firms and leveraging their expertise with that of other firms and vendors.

Sarah G. Flanagan

Any thought that these changes may be temporary adjustments must give way to recognition that the demands for new cost-effective approaches is growing, independent of the financial constraints that may have first prompted them. We as business lawyers need to take ownership of this restructuring, rather than resist it. ABTL has always stood for the highest quality legal work in service of our clients. The search for more cost-effective approaches is consistent with ABTL's goals, though we need to be vigilant to insure that cost cuts do not reduce our equally-important commitment to professional activities and *pro bono* work.

The dangerous development that I see also driving change in our practice is the cumulative impact that reduced court funding is having on our access to the courts. At our East Bay lunch program last year, we heard from the presiding judges in our Bay Area counties about the specific cost-cutting steps then being implemented in their respective courts, from reduced hours to elimination of research attorneys and hiring freezes. Since then things have only gotten worse, with mandatory state-wide furlough days. And now we are hearing of planned layoffs and the closure of courtrooms.

It is obvious that the civil docket — and our clients — bear the brunt of the negative impacts. Forget about the increased number of complex litigation departments and enhanced court settlement programs that we have sought. We now have to worry about having documents timely processed through the clerks' offices and getting court days for hearings and trials within a reasonable time. We need to step up and do something about this. The Presidents of the five ABTL Chapters have started a dialogue about the ways in which our organization can support the courts in their efforts to secure adequate funding, and we plan to initiate action through each chapter's Board. At the same time, each member should let his or her voice be heard with legislators and others as opportunities present themselves.

We are in a period of great change in the profession. The "new economy" demand for a restructuring of our delivery of legal services should be embraced as an opportunity to improve our performance and our clients' satisfaction. But, for the very same reasons, we need to resist the reduction of funding for the courts. It strikes at the heart of our civil justice system — and it will significantly impact the progress of our business cases.

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