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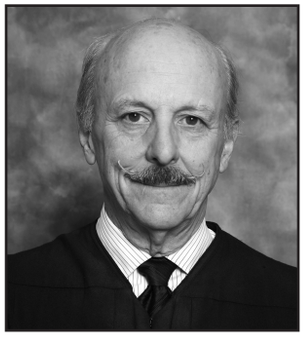
What Civil Litigators and Judges Need to Know About Bankruptcy

Bankruptcy looms as a possibility at any stage of civil litigation. What happens then? What actions should counsel and trial judges take in response to the bankruptcy of a plaintiff or defendant? Are certain actions void? Does bankruptcy affect the standing of parties? Bankruptcy is a highly specialized practice, and can present some unpleasant surprises for those not familiar with it. Amazing as it may seem, many counsel unfamiliar with bankruptcy come into court and make the mistake of admitting as much to the bankruptcy judge. That is not a recommended practice as it probably is already obvious. The judge might wonder if the client is being billed for the appearance (and the admission).



Hon. Dennis Montali

This article is intended to illuminate the dark twists of a typical detour from trial court to bankruptcy court and to help counsel avoid appearing unclear or misinformed on bankruptcy basics. For more specific information about the interplay of bankruptcy procedural

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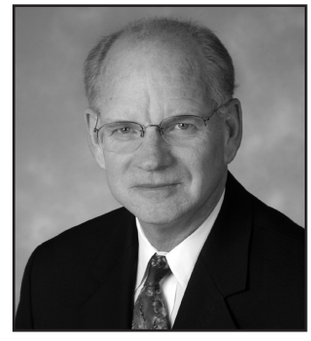
Also in This Issue

Corporate Liability Under the Alien Tort Statute

In beguilingly simple words, the Alien Tort Statute reads: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C § 1350. Passed in 1789, it was largely ignored for almost 200 years. It has now become the basis for more than a hundred suits, against a virtual who's who of international corporations.



Robert (Bob) Mittlestaedt

Since its reawakening, the Alien Tort Statute has been interpreted in a way that makes it the most unusual provision in the United States Code, without any known counterpart in domestic, foreign or international law. Since the mid-1980s, it has been read to provide a federal tort cause of action to anyone with a foreign passport for any conduct alleged to violate "universal and binding" international norms, even if it occurred entirely outside the United States and involved only foreigners. Recently, this interpretation has come under increasing attack and a string of cases have shrouded nearly every aspect of Alien Tort Statute jurisprudence in doubt and uncertainty.

The Origin and Purpose of the Alien Tort Statute

The original purpose of the Alien Tort Statute remains sketchy. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004). In 1784, in the so-called Marbois incident, a member of the French legation was attacked in Philadelphia, and in 1789 a Dutch Ambassador was assaulted in New York. *Id.* at 716. Under the then-existing laws of nations, these assaults, if unredressed, provided just cause for war against the United States. *Id.* Because such incidents

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rules and the Federal Rules of Civil Procedure, *see also* Klein, Tips for Civil Litigators in Bankruptcy Court, 14 ABTL Report No. 1 (Fall 2004).

The Automatic Stay

The automatic stay is probably the most misunderstood concept, and invariably surfaces without warning on the eve of, or even during trial, when a defendant files bankruptcy to thwart the plaintiff (and the trial judge).

When a bankruptcy case is filed, an automatic stay is imposed under Bankruptcy Code section 362(a) instantly and, obviously, automatically. Many matters are stayed, including the commencement or continuation of civil matters against the party in bankruptcy (the "Debtor"), enforcement of judgments or liens against the Debtor or the Debtor's property, and attempts to obtain possession or control of the Debtor's property. Exceptions to the automatic stay are found in section 362(b), and include criminal proceedings; paternity, domestic support and child custody matters; and enforcement of governmental police and regulatory powers.

In civil litigation, trial against the Debtor may not proceed without relief from the stay granted by the bankruptcy court, because any action in violation of the stay is void. *In re Schwartz*, 954 F.2d 569 (9th Cir. 1992). This is true even if the parties are not aware of the bankruptcy and the stay. If parties are aware of it and proceed anyway, they may be subject to contempt. It is not uncommon, however, for non-debtor defendants to try to hide behind the stay and convince the court that the trial cannot proceed. Not so! The only party protected is the Debtor, and plaintiffs' counsel and trial judges should not be fooled into thinking otherwise.

A related trap is set when a party asks the non-bankruptcy court to determine whether the stay applies. The example just given seems easy enough: the judge can tell the other defendants that they are not protected, sever the Debtor, and proceed to trial. But suppose plaintiff asks the court to determine that the Debtor is not protected by the stay. That court better be right, because the Ninth Circuit has held that any state court modification of the automatic stay "would constitute an unauthorized infringement upon the bankruptcy court's jurisdiction to enforce the stay," and thus actions in violation of a stay are void despite the other court's ruling to the contrary. *In re Gruntz*, 202 F.3d 1074 (9th Cir. 2000).

Judicial Estoppel and the Unscheduled Asset

Sometimes Debtors list their assets on their bankruptcy schedules and either intentionally or innocently fail to list pending claims or actions for damages against others. Even if a claim is unscheduled and unknown by the bankruptcy trustee, all the Debtors' assets become property of their bankruptcy estate under section 541.

Trustees administer and quickly close what appear to be "no-asset" bankruptcy cases. Under the law, known assets not administered revert to the Debtor; unknown assets do not.

The problem arises when the defendant in the non-disclosed lawsuit tries to take advantage of the Debtor's failure to schedule the claim, particularly when the non-disclosure is intentional. Some courts apply judicial estoppel, concluding that by not listing the claim in the bankruptcy, the Debtor may not assert it against the defendant. *Reed v. City of Arlington*, 620 F.3d 477 (5th Cir. 2010); *HPG Corp. v. Aurora Loan Servs., LLC*, 436 B.R. 569 (E.D. Cal. 2010). This outcome punishes the wrong parties (the Debtor's creditors) and rewards the potentially culpable defendant.

The proper analysis is for non-bankruptcy courts to recognize that the undisclosed asset remains property of the bankruptcy estate even if the case has been fully administered and closed. *Cusano v. Klein*, 264 F.3d 936, 945-46 (9th Cir. 2001); 11 U.S.C. §§ 554(c), (d). The representative of that estate, the trustee, is the proper party to prosecute the action. *Id*. The trustee cannot be guilty of concealing an unknown asset. Fed. R. Bankr. P. 7017(a)(3) prevents dismissal before a reasonable time has been allowed for the proper party to join the action. *See also* Cal. Code Civ. P. § 368.5; *Bostonian v. Liberty Sav. Bank*, 52 Cal.App. 4th 1075 (1997).

How Does the Attorney Get Paid?

Suppose you are asked to represent a bankruptcy estate in a specific task such as prosecuting a lawsuit, handling SEC disclosures or protecting intellectual property. Your work will be in aid of the bankruptcy estate, but not central to the administration of the case regardless of how important it is. The employment will be as "special counsel" rather than what is generally considered "general bankruptcy counsel." A good rule of thumb in determining whether you will be acting as special counsel is whether you will be rendering assistance the Debtor would need even outside of bankruptcy.

The first order of business after the usual conflict checks and staffing considerations is to have your employment approved by the bankruptcy court. If this is not done, the "getting paid" problem is simple — you won't. *Lamie v. U.S. Trustee,* 540 U.S. 526 (2004); *In re Weibel, Inc.*, 176 B.R. 209 (9th Cir. BAP 1994).

General bankruptcy counsel normally obtain court authority for employment of special counsel, but sometimes they forget. Proposed special counsel should insist on an order of the court authorizing the employment, specifying the manner in which special counsel will be compensated (contingency, hourly rate, retainer, etc.). Proposed special counsel will be required to file disclosures of their connections with the Debtor and other parties, and information as to their qualifications and experience. If special counsel requires an advance retainer, that usually requires a hearing.

If the Debtor's sources of payment are subject to liens of secured creditors, special counsel should also seek assurances from those lienholders that payment may be made once the court approves the compensation. Without that assurance, if there are no "free" (*i.e.*, unencumbered) assets, there may be no source of payment even though the court approves the fees.

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Court approval of fees requires a noticed hearing and counsel will normally be required to file a detailed fee application describing the work performed and including time records (unless such a requirement has been excused due to the nature of the employment). Many courts have published on their websites compensation guidelines that should be reviewed in advance so the employed special counsel will know what the court will expect before awarding compensation. *See, e.g.*, http://www.canb.uscourts.gov/procedures/dist/guidelines/guidelines-compensation-and-expense-reimbursement-professional-and-truste.

The Difference Between Discharge and Dischargeability

The major goal of individual debtors is to obtain a discharge of debt in order to have a fresh start. Discharge may be denied under section 727 for such conduct as making a false oath, hiding assets, transferring assets in fraud of creditors, and disobeying an order of the court. Debtors denied a discharge lose their non-exempt assets but do not get the benefit of a bankruptcy "fresh start."

Even with a discharge, certain kinds of debts survive bankruptcy — *i.e.*, are nondischargeable — as a matter of law and no action by the creditor is necessary. These include most taxes, most student loans, domestic support obligations, fines and penalties, and debts arising from wrongful death or personal injury from operation of a motor vehicle, aircraft or vessel while intoxicated.

Other debts may be nondischargeable, but creditors must act quickly (usually within about 90 days from the date of bankruptcy under Fed. R. Bankr. P. 4007(c)). Debts incurred through fraud, breach of fiduciary duty or embezzlement, or willful and malicious injury are non-dischargeable under sections 523(a)(2), (4), or (6). But the creditor must file an adversary proceeding — a separate lawsuit within the main bankruptcy case — to except those debts from discharge. If the creditor misses the deadline, the debt is likely to be discharged no matter how egregious or wrongful the debtor's conduct. Words of caution: Act fast!

How to Make a Judgment Survive a Bankruptcy Discharge

Individual defendants in state court lawsuits might avoid defending, figuring they will simply file bankruptcy later and discharge the judgment.

The problem for debtors arises under the principle of issue preclusion, previously described as collateral estoppel. *Taylor v. Sturgell*, 553 U.S. 880, 892 n.5 (2008). Once a non-bankruptcy court makes a final determination of liability, that issue is precluded. That is not a problem for the defendant-debtor if the debt will be discharged. The real problem arises if the underlying debt was incurred under circumstances that would render it non-dischargeable under sections 523(a)(2), (4) or (6). If a California court has made an express factual determination of all of the

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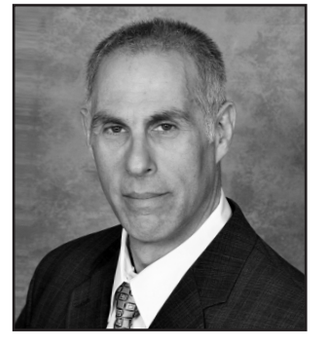
Confidentiality of Settlement Discussions

Settlement negotiations are an indispensible part of litigation. In most cases, clients prefer to keep the contents of their settlement negotiations private and confidential.

Both California and Federal law provide protection for settlement discussions, but those protections are limited. Is it enough to write on the document, as many do, "Privileged and Confidential Settlement Communication?" If so, what protection does this provide? Do settlement discussions remain privileged or confidential during and after the litigation based on having so labeled the written communication? Statutory and ethical frameworks offer little if any long-term protection. The best way to protect settlement communications is by express agreement.



Howard Miller

Does a Settlement "Privilege" Exist?

"Communications are confidential when the freedom of the parties to disclose them voluntarily is limited; they are privileged when the ability of third parties to compel disclosure of them, or testimony regarding them, is limited." *Molina v. Lexmark Intern., Inc.* 2008 WL 4447678, *8 (C.D. Cal. Sept. 30, 2008). With few exceptions, settlement negotiations are confidential, not privileged, and thus not protected from discovery.

Settlement negotiations are most effective if they are frank and open, and confidentiality promotes frank and open dialogue. This is the policy behind Fed. R. Evid. 408 and California Evidence Code sections 1152 and 1154, which restrict the later use of settlement discussions to establish liability. Adv. Comm. Notes to Fed. R. Evid. 408 (1974); *Zhou v. Unisource Worldwide, Inc.*, 157 Cal.App. 4th 1471, 1475 (2007). Rule 408 is by no means a complete bar to production or admission of all aspects of settlements: It allows the use of settlements and settlement communications at trial for a wide range of purposes other than to establish liability. *See e.g., Rhoades v. Avon Products, Inc.*, 504 F. 3d 1151 (9th Cir. 2007). Rule 408 also offers no protection from admissibility where there is no dispute over the validity or the amount of the claim; for example, efforts to resolve a dispute, over an admittedly due amount, for a lesser sum. *See* Adv. Comm. Notes to Fed. R. Evid. 408.

Nevertheless, some courts have denied discovery of settlement discussions by third parties where only marginal relevance exists, based on the underlying policy behind Rule 408. *See, e.g., Cook v. Yellow Freight System, Inc.*,

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132 FRD 548, 554 (E.D. Cal. 1990). But most cases interpret Rule 408 as limiting only admissibility, not discoverability of settlement communications. *Id*. *Phoenix Solutions Inc. v. Wells Fargo Bank, N.A*., 254 F.R.D 568, 584 (N.D. Cal 2008) ("the rule applies to the admissibility of evidence at trial, not to whether evidence is discoverable."); *Matsushita Electric Industrial Co. Ltd. v. Mediatek, Inc*., 2007 WL 963975, *2 (N.D. Cal. March 30, 2007). For example, the Northern District in *Matsushita* held "federal settlement privilege…does not exist," and permitted defendants to discover settlement communications between plaintiff and third parties because the communications were reasonably calculated to lead to the discovery of relevant evidence of patent invalidity and damages.

Cases decided under California Evidence Code sections 1152 and 1154 are similar. *Phoenix Solutions, supra; Covell v. Sup. Court*, 159 Cal. App. 3d 39, 42 (1984) (communications in the course of settlement discussions are not privileged). In *Volkswagen of America, Inc. v. Superior Court*, 139 Cal. App. 4th 1481, 1489-1490 (2006), the court held that documents were discoverable, even if not admissible, because they were reasonably likely to lead to discovery of admissible admissions against interest. Similarly, in *Zhou, supra*, the defendant was allowed to introduce settlement negotiations over a different claim to show plaintiff attributed some of his injuries to a later accident.

Thus, while settlement negotiations are inadmissible to prove liability, they are both discoverable and, where relevant, admissible for other purposes. As such, Rule 408 and California Evidence Code sections 1152 and 1154 do little in themselves to assure confidentiality.

Settlement Confidentiality

Confidentiality enables one party to preclude another party from voluntarily disclosing the confidential information. *Molina, supra*, 2008 WL 4447678, *8. There are several possible methods of advancing confidentiality.

Mediation "Privilege"

One option is to engage a mediator prior to starting settlement discussions. Both California (Cal. Evid. Code § 1115 *et seq*.) and, under certain circumstances, federal law (Fed. R. Evid. 408 and 501), recognize and preclude inquiry into most mediation discussions. *Rojas v. Sup. Ct*., 33 Cal. 4th 407, 415 (2004) (confidentiality is essential in successful mediation which depends on a "candid and informal exchange" among the parties and mediator).

California courts apply the mediation privilege broadly. *Foxgate Homeowners' Ass'n, inc. v. Bramalea California, Inc*., 26 Cal. 4th 1, 4 (2001) ("[T]here are no exceptions to the confidentiality of mediation communications…"); *Wimsatt v. Sup. Ct*., 152 Cal. App. 4th 137, 142 (2007) ("[M]ediation statutes are to be broadly construed to effectuate the legislative intent, even if there are conflicting public policies.").

California Evidence Code § 1115 *et seq*. protects from disclosure or admission into evidence anything said "for the purpose of, in the course of, or pursuant to, a mediation…". Cal. Evid. Code §1119(a), (b). It also mandates that "all communications, negotiations, or settlement discussions by and between participants in the course of a mediation or mediation consultation shall remain confidential." *Id*. §§1119(c), 1126, 1128; *Wimsatt*, 152 Cal. App. 4th at 150 (privilege applies to any communication for the purpose of, in the course of, or pursuant to, a mediation); *Long Beach Memorial Medical Center v. Superior Court*, 172 Cal. App. 4th 865, 875 (2009) (confidentiality continues after mediation ends).

Federal decisional law is not as developed with regard to the scope of mediation communications protection. Federal courts have generally looked to Rules 408 and 501 to find a mediation privilege. Under Federal Rule of Evidence 501, state privilege rules apply where state law governs the dispute. However, even where state law governs, federal law may be held to control certain issues. In *Babasa v. Lenscrafters, Inc*., 498 F. 3d 975 (9th Cir. 2007), the Ninth Circuit held that a letter sent in preparation for mediation discussions was admissible to show that the defendant did not make a timely application for removal. The Court reasoned that whether or not the removal was timely turned on federal law, and therefore, under Rule 501 federal privilege rules applied.

The District Court in *Folb v. Motion Picture Industry Pension & Health Plans*, 16 F. Supp.2d 1164, 1180 (C.D. Cal. 1998) established a federal common law of privilege under Rule 501. The privilege recognized in *Folb*, however, has been limited to the facts presented — a third party attempting to discover the mediation positions of its adversary in another case — and has not been widely adopted. *Molina, supra*, 2008 WL 4447678, *8 ("courts have declined to recognize a federal mediation privilege outside the factual context at issue in *Folb.*").

Federal courts have more commonly looked to Rule 408 to protect mediation communications. *Molina, supra,* 2008 WL 4447678, *11-*12; *see also ABM Industries, Inc. v. Zurich American Ins. Co*., 237 F.R.D. 225, 227 (N.D. Cal. 2006). But, as discussed above, the protection afforded by Rule 408 is usually limited to admissibility to prove liability and does not preclude discovery.

Unilateral Designation

Labeling correspondence "Confidential Settlement Communication" makes it clear that the contents are intended as confidential and for settlement purposes and, at a minimum, it invokes appropriate evidentiary protections as to admissibility. It is questionable, however, as to whether or not it affords any greater protection. *Google, Inc. v. Traffic Information, LLC*, 2010 WL 743878 (D. Or. Feb. 2, 2010) report and recommendation adopted, 2010 WL 1039791 (D. Or. Mar. 19, 2010).

In *Google*, defendant Traffic sent an email to T-Mobile claiming its use of Google's product violated Traffic's patent. The email was labeled "confidential" and "for settlement purposes only, subject to FRE 408." Despite the label, the Court allowed Google to use the email to establish "reasonable apprehension" of liability (to establish jurisdiction in a suit for a declaration of non-infringement). The Court determined that the record contained

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no evidence of a confidentiality agreement between T-Mobile and Traffic. The Court then considered Rule 408 and found that the purportedly confidential statement, along with other factors, established justiciability. *Id*. at *3; *see also Rhoades*, 504 F.3d at 1162-1163.

In another approach, one author suggests a shrink-wrap style confidentiality agreement, warning the recipient not to read or retain the communication unless they agree to maintain it in confidence. Jerry Custis, *Litigation Management Handbook* § 10:10 (Thompson West 2010).

While labeling alone may not provide defensible confidentiality, under analogous situations, courts have looked toward labeling as a factor in defining what level of protection, if any, to afford particular information. In the context of trade secrets, for instance, labeling information as confidential does not conclusively establish it as confidential, but it is a factor considered. *Morelife, Inc. v. Perry*, 56 Cal. App. 4th 1514, 1522 (1997). Labeling is, therefore, a good starting point, but should not be relied on as the sole basis for protecting confidentiality.

Informal Agreement

Where a formal confidentiality agreement is impractical, a simple email exchange with counsel, may afford a basic level of protection from compelled disclosure. The email should memorialize the basic terms of a confidentiality and request assent by reply email. By labeling all further settlement communications as "Confidential Settlement Communications Subject to Agreement," it is clear that the negotiations are in reliance on the confidentiality agreement.

In addition to the law of contracts, parties may look to statutory law to enforce informal agreements between counsel. Members of the California Bar are obligated to be truthful and candid in their dealings with opposing counsel, based on a number of duties imposed by the Business and Professions Code. *See* Cal. Bus. & Prof. Code §§ 6068 ("[t]o employ…such means only as are consistent with truth…"), 6106 ("commission of any act involving…dishonesty…constitutes a cause for disbarment), 6128 ("[e]very attorney is guilty of a misdemeanor who …[i]s guilty of any deceit…with the intent to deceive the court or any party.…"). Arguably, attorneys who exchange settlement communications understood as confidential, or otherwise represent that discussions are confidential, and then disclose the information at a later time, may have violated their ethical duties. *C.F. Scofield v. State Bar*, 62 Cal. 2d 624, 627 (1965) (members of the bar subject to discipline where they use deception to induce another to enter contract).

Formal Confidentiality Agreement

The most effective method of protecting the confidentiality of settlement discussions is to insist on a formal confidentiality agreement. A well-drafted agreement should include enforcement measures and provide a basis for damages claims and specific performance. Because it is generally difficult to assess damages for breach of settlement confidentiality, a liquidated damages clause may be included. *Crowne Investments, Inc. v. United Food and Commercial Workers, Local No. 1657,* 959 F. Supp. 1473, 1480 (M.D. Ala. 1997) (confidentiality agreements often include a provision specifying liquidated damages provisions). Sanctions may even be imposed where confidential settlement information is disclosed in bad faith. *See Rivera v. Sharp* 2010 WL 2555065, *4 (V.I. D.C. June 21, 2010).

When drafting settlement confidentiality agreements, care should be taken to ensure that a party cannot protect otherwise discoverable information by wrapping it up into settlement discussions. There may also be times when the agreement should include carve-outs to enable the use of the settlement negotiations to later show compliance with or breach of a duty to negotiate in good faith. *See, e.g., White v. Western Title Insurance. Co.*, 40 Cal. 3d 870, 887 (1985).

When relying on confidentiality agreements, it is important to consider that settlement communications may be sought by third parties in subsequent actions. Whether or not they are discoverable and ultimately admissible will depend on a variety of factors relating to, among others, the probative value of the communication balanced against the need for confidentiality. The confidentiality agreement should contain language requiring notice in the event a party is required to produce the information in response to a legal demand.

If an agreement is in place, a third party subpoena for settlement information is more likely to be treated as a request for private financial information protected by constitutional privacy rights. *Hinshaw, Winkler, Draa, Marsh & Still v. Superior Court*, 51 Cal. App. 4th 233, 241 (1996). The party seeking discovery must make a greater showing of "relevance and materiality." *Id*. at 238. The Court in *Hinshaw* was influenced by the parties' express desire for confidentiality and did not allow discovery of the settlement. The same result could be obtained by a pre-settlement confidentiality agreement, including where negotiations fail and no final settlement agreement with confidentiality provisions exists.

Protection of settlement communications from disclosure or admission at trial can be statutory, ethical or contractual. However, outside of the mediation context, these protections are limited in scope and application. Ethical obligations along with transmissions confirming an expectation to keep settlement negotiations confidential, plus properly labeled communications, may provide enhanced protection. However, this approach does not provide a level of certainty. In order to ensure confidentiality of settlement discussions, parties should prepare and execute a confidentiality agreement before starting discussions. The agreement should be signed by counsel for the parties at a minimum. It should include jurisdiction, venue, and injunctive relief provisions, and ensure that confidentiality extends beyond termination of the litigation.

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elements that constitute a non-dischargeable debt, even by default, then the debtor is saddled with those factual determinations. *In re Green,* 198 B.R. 564, 566 (9th Cir. BAP 1996). Creditors armed with such favorable determinations frequently seek and obtain from summary judgment of non-dischargeability based on issue preclusion.

Even worse off is a Debtor against whom a California court has awarded punitive damages. Civil Code section 3294 permits punitives when the defendant has been found liable based on fraud, malice or oppression. If the judgment is final, the bankruptcy court has very limited ability to go behind it; the presence of punitive damages in a final judgment must have been predicated on a determination of one of section 3294's elements.

Creditors are well-advised to make sure that juries deliver special verdicts, or bench trials result in specific findings, on each element that they would need to establish in bankruptcy court to obtain a judgment of non-dischargeability.

Bankruptcy Appeals

Many non-bankruptcy lawyers learn the hard way that bankruptcy appeals move on a fast track. Unlike the longer times available elsewhere, a notice of appeal must be filed within 14 days from entry of the order or judgment. Fed. R. Bankr. P. 8002(a). The time begins when the order or judgment is entered, not when notice is served, and the failure of the clerk or another party to serve it is of no consequence. Fed. R. Bankr. P. 9022(a).

In the Ninth Circuit and four other circuits, parties have the option of having the first appeal heard by the Bankruptcy Appellate Panel (BAP) rather than a United States District Judge. Sitting bankruptcy judges are appointed to BAP as an extra duty and may not consider cases from their own districts. Many attorneys prefer BAP judges' expertise in this specialized area; many others avoid that expertise and choose district judges. The appeal goes to BAP unless the appellant "opts out" by filing a separate document concurrently with the notice of appeal. 28 U.S.C. § 158(c)(1); Fed. R. Bankr. P. 8001(e)(1). The appellee has 30 days after service of the notice of appeal to select the district court. 28 U.S.C. § 158(c)(1)(B). Appeals of decisions of the BAP or the district court on final orders are to the Circuit Court of Appeals.

My State Court Suit WAS Removed to Bankruptcy Court

If a party to a civil lawsuit is in bankruptcy, the matter may be removed to the bankruptcy court under 28 U.S.C. § 1452(a) unless it is a tax court action or an action by a governmental unit to enforce police or regulatory powers. *In re Pacific Gas & Elec. Co*., 281 B.R. 1 (Bankr. N.D. Cal. 2002), *aff'd*, 433 F.3d 1115 (9th Cir. 2006). Removal must be timely under Fed. R. Bankr. P. 9027(a) and does not depend on the existence of a federal question or diversity of the parties. The statute refers to removal to the district court; all district courts then automatically refer bankruptcy matters to bankruptcy courts by standing order or local rule.

A party who wants out of bankruptcy court should consider a motion to remand under 28 U.S.C. § 1452(b) and Fed. R. Bankr. P. 9027(d). The statute permits the bankruptcy court to send it back on any "equitable ground." Bankruptcy courts typically consider various factors on remand motions, including whether a party has a jury right (bankruptcy courts may conduct jury trials only if all parties consent), state court expertise, convenience of witnesses, lack of jurisdiction over other parties to the litigation, and impact on the administration of the bankruptcy case. A decision to remand, or to deny remand, may only be appealed to BAP or the district court. There is no right of further appeal to the court of appeals or the Supreme Court. 28 U.S.C. § 1452(b).

Withdrawal of the Case by a District Judge

The authority of all bankruptcy judges to hear matters depends on referral to them by the district courts, which all district courts have accomplished by standing order or local rule. But district judges have the option to withdraw all or part of a bankruptcy case either *sua sponte* or in response to a motion by a party "for cause shown." 28 U.S.C. § 157(d). The district court "shall" withdraw the reference of the case if "resolution of the proceeding requires consideration of both title 11 [the Bankruptcy Code] and other laws of the United States regulating organizations or activities affecting interstate commerce."

Despite the apparent mandatory language, district judges rarely take bankruptcy matters from bankruptcy judges so non-bankruptcy counsel should not expect this procedure to be very effective. Stick with the bankruptcy judge and take your best shot on appeal, remembering to opt-out of BAP if you really think your chances are better with a district judge.

The Honorable Dennis Montali is a United States Bankruptcy Judge for the Northern District of California, and is on the Board of Governors of the Northern California chapter of ABTL.

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The Alien Tort Statute

threatened to engulf the entire United States in war, leaving state courts as the sole avenue of redress was considered inadequate. The Alien Tort Statute appears to have been intended to provide a federal forum for claims by victims of these types of incidents. Whatever its original purpose, for almost 200 years the Alien Tort Statute lay essentially dormant.

The Modern Alien Tort Statute

The modern Alien Tort Statute was born in 1984 when the court in *Filartiga v. Pena-Irala*, 577 F. Supp. 860 (S.D.N.Y. 1984), held that it creates a federal tort cause of action for a violation of any "universal and clear" rule of international law. Over the next decade, scores of cases were filed against former government officials claiming that they had violated international human rights laws by allegedly engaging in torture, extrajudicial killing and other

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TRENTON H. NORRIS

On ENVIRONMENTAL LAW

The key disputes in environmental law are scientific disputes: How toxic is the chemical? How many people are exposed? What was its source? What will it cost to clean it up? How clean must we get it?

Science is present in many areas of law, of course. But the scientific issues in environmental litigation are both quite susceptible to emotional appeals — with plaintiffs, advocacy groups, governmental bodies, and trade associations arranged in opposite corners — and likely to involve intertwined issues of policy, such as how much risk is acceptable. As a result, to resolve the scientific disputes at the heart of most environmental cases, judges and jurors have to cut through hardened positions and appeals to emotion while also separating scientific data from policy choices. It is our job as litigators to help them do that.

Experts disagree. As a result, the judge or jury has the difficult task of resolving scientific disagreements in the face of uncertainty. On many environmental issues, the science may be immature or incomplete. Information may be lacking. There may not be enough studies, or enough high-quality studies, or even more than a few scientists who have looked at the issue. In some cases, the ultimate truth may be virtually unknowable. (After all, even evolution is still a theory.)

Law and science deal with uncertainty in quite different ways. Science measures uncertainty — whether in probabilities or ranges or other statistical measures — but it does not resolve uncertainty just to resolve it. An answer is not required. The scientific jury can be out indefinitely, open to new information and new analysis.

But in law, the litigants demand an answer. And so the law, and lawyers, have developed tools for dealing with uncertainty. Using them wisely is key to guiding the factfinder through the thicket of a scientific dispute.

The main tool is the burden of proof. Environmental cases — not uniquely — are decided before they begin if the default outcome, set out by law, cannot be overcome. The lawyer who understands the default, and what it takes to overcome it, will develop a sound litigation (or settlement) strategy.

In environmental cases, where regulations play a role, a key tool for resolving uncertainty is deference to agency determinations. The court need not decide an issue if an agency has already done so and if its conclusion, although perhaps not what the judge would have decided, is within the realm of reasonable options delegated to the agency. *See, e.g., Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). This tool avoids the need for resolving uncertainty because another appropriate authority has already done so.

The problem for environmental litigators is that policy can masquerade as science. Many environmental policymakers were trained as scientists, and their expertise is critical to good policy. But not all can disentangle science from policy, and there are often strong incentives against doing so. The advocacy system, combined with the human need to defend one's conclusions (or those of one's employer and colleagues), tends to exacerbate this phenomenon. Lawyers must confront it.

The assessment of risks, which lies at the heart of environmental law and policy, is a good example. Government scientists and policymakers tend to err on the side of caution, to apply presumptions that reduce risk. This means that in determining, say, the safe level of a given chemical, where there are multiple decision points, policymakers make multiple conservative assumptions in the face of uncertainty.

Trenton H. Norris

But these assumptions are policy decisions, not scientific conclusions. They may be conventional methods for addressing uncertainty in certain contexts, and they may be valid policy choices, but they are not the path to determining the truth — for example, the actual toxicity of the chemical — without applying a finger to the scale. The problem is that these policy decisions are embedded in a conclusion that sounds scientific and was made by scientists, all with the government's seal of approval.

As a result, a key question for environmental litigators is how the agency's number was set and how it was intended to be used. How was uncertainty dealt with in the standard-setting process? What assumptions are embedded in the number? What policy goals are behind the standard? In short, what decisions were made in the policy process that are the province of the factfinder in litigation, and what purely scientific decisions are its basis?

Educating the judge or jury on this distinction is perhaps the most important role of an environmental litigator because it protects the role of the judge and jury. The factfinder can defer to the policy conventions of scientific policymakers, or she can reject them and apply her own judgment to the scientific data. But the factfinder needs to understand where science ends and policy begins. Environmental lawyers must work hard to highlight the distinction, and to remind the judge or jurors of their obligation to find the facts and apply the law to resolve the scientific dispute.

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The Alien Tort Statute

offenses. Most of these cases proceeded in the defendants' absence, resulting in a series of default judgments.

Beginning in the late 1990s, a second wave of Alien Tort litigation commenced. In this wave, plaintiffs began suing corporations that were purportedly complicit in abuses committed by foreign governments. Since then, more than one hundred Alien Tort cases have been filed against major domestic and foreign corporations, such as Coca-Cola, Rio Tinto, Yahoo! and DaimlerChrysler. Several of these resulted in pretrial settlements. Two corporate Alien Tort Statute cases — *Romero v. Drummond* and *Bowoto v. Chevron Corp.* — proceeded all the way through trial, both ending with defense verdicts. The majority of corporate Alien Tort cases, however, have been dismissed in pretrial proceedings. Unlike the first wave of Alien Tort litigation, these cases have been fiercely litigated and they have brought to the fore many fundamental issues regarding the interpretation and application of the Alien Tort Statute.

The Supreme Court provided its first and only substantive analysis of the Alien Tort Statute in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). The Court rejected *Filartiga's* view that the Alien Tort Statute creates a statutory cause of action for international law violations, but it held that federal courts retain "residual" discretion to create causes of action out of federal common law based on a "narrow set" of international norms. The court declined to provide the "ultimate criteria" for creating such claims. But it held that, at a minimum, for any international norm to be eligible for enforcement under federal common law, it must be universally recognized and defined by international law with a high degree of specificity.

Application of Sosa's Universality and Definability Requirements

Proponents of an expansive use of the Alien Tort Statute have attempted to bring claims for a broad array of conduct based on international norms including rights to "health," "liberty of person" and "sustainable development," and norms against racial discrimination and environmental pollution.

Courts generally have agreed that a small number of modern international human rights norms satisfy Sosa's criteria. For the most part, these are norms that arose from the International Military Tribunal set up by the Allied Powers to try the Nazi leaders after World War II. They include crimes against humanity, war crimes and genocide.

Courts also generally agree that Alien Tort claims cannot be based on broad, amorphous international norms such as the right to health or sustainable development. *Flores v. Southern Peru Copper*, 414 F. 3d 233 (2d Cir. 2003). They have rejected claims based on norms against intra-national environmental pollution, finding that such norms establish only "a general sense of environmental responsibility" without "articulable or discernable standards and regulations." *Beanal v. Freeport McMoRan*, 197 F. 3d 161, 167 (5th Cir. 1999); *see also Flores*, 414 F. 3d 233.

However, courts have expressly reserved the question of whether claims for international (as opposed to intranational) environmental pollution can be brought under the Alien Tort Statute. *Flores*, 414 F. 3d at 255 n.29. Courts also have not clearly resolved the viability of employment discrimination claims. *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. 2007), rehearing granted 499 F. 3d 923 (*en banc*). And courts have divided as to whether other human rights norms — such as the proscription against cruel, inhuman and degrading treatment — satisfy *Sosa's* demanding standard. Some courts hold that any norm that lacks a specific, articulable definition cannot be the basis for an Alien Tort claim. *Aldana v. Del Monte Fresh*, 416 F.3d 1242, 1247 (11th Cir. 2005); *Forti v. Suarez Mason*, 672 F. Supp. 1531, 1544 (N.D. Cal. 1987). Others hold that a norm is actionable under the Alien Tort Statute if the conduct alleged is of comparable gravity to conduct condemned by regional human rights tribunals—such as the European and Inter-American Courts of Human Rights —even if the norm lacks a specific, articulable definition. *Doe v. Qi*, 349 F. Supp. 2d 1258, 1286 (N.D. Cal. 2004). Finally, a recent case against Catholic ministers suggests that the Alien Tort Statute may support claims based on sexual abuse. *Doe I v. Cardinal Roger Mahoney, et al.*, Case No. 10-02902 (C.D. Cal. Feb. 25, 2011).

Nongovernmental Liability Under the Alien Tort Statute

Even for norms that courts have generally recognized, important issues remain regarding the application of such norms to non-governmental entities, such as corporations. Most of these issues turn on the extent to which Alien Tort Statute claims are defined by international law as opposed to domestic law. Advocates of a broad and aggressive Alien Tort Statute argue that international law defines only the underlying tort. They claim that domestic tort principles can be used to resolve all other issues. Advocates of a narrower Alien Tort Statute argue that all substantive issues must be defined by international law.

These arguments initially played out principally in the debate over the existence and scope of secondary liability. The issue is what conduct of a corporation will make it legally responsible for alleged international law violations by foreign governments. Plaintiffs have sought to invoke the full panoply of domestic tort secondary liability theories, including agency, aiding and abetting, conspiracy and joint venture liability. Defendants have countered that only secondary liability principles universally recognized in international law may be employed under the Alien Tort Statute. Although international law generally recognizes aiding and abetting liability (at least in the criminal context), it recognizes conspiracy and agency liability only in very limited circumstances, and does not recognize joint venture liability at all.

Another issue on which debate has focused recently is the existence of corporate liability. Under United States law, it is well-established that corporations can be liable for most torts (though important exceptions exist, such as Bivens and the Torture Victims Protection Act). By contrast, corporate liability is unknown to international human rights law, which has traditionally fastened liability

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KATE WHEBLE

On TRADEMARK

Gray market goods, or parallel imports, are products sold through channels unauthorized by the manufacturer. For example, an American company may sell its goods to a foreign distributor, which imports them back into the U.S., often selling them at a lower price than the normal U.S. market price. The U.S. Supreme Court recently addressed a case which will affect the so-called "gray market," also known as parallel imports. *Omega S.A. v. Costco Wholesale Corp.*, 541 F.3d 982 (9th Cir. 2008), *aff'd*, 131 S.Ct. 565 (2010).

Each Omega S.A. Swiss-made watch features on its underside an engraved globe design protected by a U.S. copyright. Omega uses globe designs as trademarks on its watches.

Omega sold its watches to authorized distributors outside the U.S., who in turn sold the watches to Costco. Omega sued, claiming that Costco's unauthorized acquisition and sale of the watches was copyright infringement because the watches bore a copyrighted design. The Copyright Act forbids the importation of copyrighted goods into the U.S. without the consent of the copyright holder. 17 U.S.C. § 602(a).

Costco claimed that under the Copyright Act, the "first sale doctrine" precluded claims of infringement. The "first sale doctrine" means that once a copyright owner sells a copy of a protected work, subsequent owners can sell or otherwise distribute that copy as they wish. 17 U.S.C. § 109.

Omega moved for summary judgment. The district court ruled in Costco's favor. Omega appealed and prevailed before the Ninth Circuit. Costco appealed to the U.S. Supreme Court. An equally-divided Supreme Court affirmed the Ninth Circuit decision in a one-sentence ruling. Justice Kagan recused herself because as U.S. Solicitor General she had argued against *certiorari*. Although the Court's affirmation means that the case is precedent only in the Ninth Circuit, other circuits will surely pay close attention.

At issue in *Costco* was whether the first sale doctrine governed works made outside the U.S. The Supreme Court had previously ruled that the doctrine applied to copyrighted goods made in the U.S., then sold to foreign distributors, who imported them back into the U.S. *Quality King Distributors, Inc. v. L'Anza Research Int'l, Inc.*, 523 U.S. 135 (1988). L'Anza made hair care products bearing copyrighted labels, which it sold both to domestic and foreign distributors. Foreign distributors sold the goods back into the United States at prices far below those set by L'Anza for sale in the United States. L'Anza claimed that the distributors had illegally imported copyrighted items. The district court and the Ninth Circuit agreed with L'Anza, but the Supreme Court reversed, holding that the first sale doctrine applied: once L'Anza sold the goods to its distributors, it lost control of all further sales.

Justice Ginsberg's concurrence stated that the decision applied only to goods manufactured in the U.S., and that it did not resolve cases where the "allegedly infringing imports were manufactured abroad." The *Quality King* court left standing precedent that § 109 applied to copies made outside the U.S. if the copyright owner was the party authorizing the first U.S. sale. *Denbicare U.S.A. Inc. v. Toys "R" Us, Inc.*, 84 F.3d 1143 (9th Cir. 1996).

The Ninth Circuit in Costco held that the first sale doctrine did not provide Costco with a defense because the doctrine applied only to works made in the United States. The court perused the language of § 109, which states that the first sale doctrine applies to works "lawfully created under this title." Omega's watches were made in Switzerland. The court reasoned that any other interpretation would "impermissibly apply the Copyright Act extraterritorially." *Id*.

Kate Wheble

The Ninth Circuit declined to address the vitality of the *Denbicare* ruling that the first sale doctrine covered foreign-made copies of copyrighted works that are first sold in the U.S. by the copyright owner.

Omega and many other companies today use copyright law to stop parallel importation of branded goods in a way that trademark law cannot. A trademark owner can stop parallel imports if the goods bearing its trademark are "materially different" from the goods for sale in the U.S. If, however, the imported goods are identical to the authorized branded goods, or the importer affixes an appropriate disclaimer to the product, the product can be allowed in the U.S. *See*, "Best Practices for Preventing Sales of Gray Market Goods in the United States," *INTA Bulletin*, vol. 65, no. 17 (Oct. 1, 2010).

Copyright law allows the manufacturers to place copyright-protected designs or text on their products to stop some parallel imports. Applying the Copyright Act to products like watches and shampoos is an innovative use of copyright law. As Justice Stevens noted in the *Quality King* decision, the primary purpose of the Copyright Act is "the protection of original works, rather than ordinary commercial products that use copyrighted material as a marketing aid." Yet companies find it to be an effective strategy in battling gray market goods.

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only on the individuals that bear direct moral culpability. As a result, corporations have argued that they are not proper defendants in Alien Tort Statute cases. Initially, courts gave short shrift to these arguments. Most courts assumed that previous cases that allowed Alien Tort claims to proceed against corporations without addressing the issue constituted binding precedent establishing corporate liability. *Romero v. Drummond Company, Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008). Other courts found that, even though corporate liability does not exist in international human rights law, it should be available under the Alien Tort Statute as a matter of domestic policy. *In re Agent Orange*, 373 F. Supp. 2d 7, 54-59 (E.D.N.Y. 2005).

A divided panel of the Second Circuit recently addressed this issue at length in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010). The majority held that international law determines whether corporations can be liable under the Alien Tort Statute, just as it determines other issues of the scope of liability. Because international human rights law does not impose liability on corporations, they cannot be liable under the Alien Tort Statute. The court found that policy arguments are beside the point. The Alien Tort Statute permits claims based only on universally recognized violations of international law.

David Wallach

Judge Pierre Leval wrote a lengthy dissent. Judge Leval found that the position of international law with respect to corporate liability is essentially neutral: it neither imposes corporate liability of its own force, nor precludes states from imposing such liability. Instead, it leaves it to each individual country to decide for itself whether to impose liability on corporations. Judge Leval argued that corporate liability should be permitted under the Alien Tort Statute as a matter of policy.

An evenly divided Second Circuit denied rehearing *en banc* in Kiobel. The issue sparked a sharply worded debate between Chief Judge Jacobs, who responded to the suggestion that he was soft on "moral monsters" by saying "even moral monsters are humans, and I would happily see them hang," and Judge Leval, who countered that the issue wasn't whether they should hang but whether, "when a child enslaved for prostitution eventually obtains her freedom and sues, she can recover the profits the business earned from the sale of her body." *Kiobel v. Royal Dutch Shell*, 2011 WL 338048 (2d Cir. Feb. 4, 2011).

A host of other issues turning on the domestic/international law dichotomy also remain unresolved. These include the types of damages available, the definition of state action, whether domestic "color of law" jurisprudence can be applied to impose liability on corporations for allegedly violating obligations that international law imposes only on sovereign states, and the means (if any) for imputing to a parent corporation alleged international law violations by its subsidiary.

The Elephant in the Room: Does the Alien Tort Statute Apply Extraterritorially?

Although nearly all modern Alien Tort Statute cases have involved alleged torts committed overseas, no court has squarely addressed whether the Alien Tort Statute applies extraterritorially and, if so, the extent of any such application. Defendants have persistently raised this issue over the past several years. However, district courts have largely dismissed it, finding that appellate decisions that allowed Alien Tort claims based on foreign conduct to proceed, though without addressing the extraterritoriality issue, constitute binding precedent. *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1088 (N.D. Cal. 2008). The Second Circuit showed in *Kiobel,* however, that Courts of Appeals may be less likely to treat cases in which extraterritoriality was neither raised by the parties nor analyzed by the court as precedent.

As discussed above, the Alien Tort Statute appears to have been enacted to provide a federal forum for violations of international law occurring within the United States. The limited evidence available indicates that when it was enacted the Alien Tort Statute was understood not to provide jurisdiction over torts occurring in foreign territory. In 1795, Attorney General William Bradford opined that transactions that "originated or took place in a foreign country" cannot be the subject of Alien Tort claims. 1 Op. Att'y Gen. 57. Moreover, in *Morrison v. National Bank of Australia*, 130 S. Ct. 2869 (2010), the Supreme Court recently reiterated in resounding terms the presumption against extraterritorial application of United States laws, holding that unless Congress has clearly expressed a contrary intention, United States statutes apply only to conduct in United States territory. *Id*. at 2877-83. Thus, a strong argument can be made that the Alien Tort Statute does not apply extraterritorially.

Although it is nearly as old as the Republic itself, the Alien Tort Statute remains immature. Fundamental issues about its scope and application remain thoroughly unresolved, including who may be sued, what they may be sued for, and what damages are available. Broad interpretations of the Alien Tort Statute would make it a radical new instrument for the implementation and enforcement of the law of nations without any known counterpart in domestic, foreign or international law. Narrow interpretations would consign the Alien Tort Statute back to the dormancy in which it abided for the first two hundred years of its existence. Courts of Appeals have only begun to grapple with these issues and, to date, they have been deeply divided. Thus, the Alien Tort Statute likely will remain shrouded in uncertainty until the Supreme Court provides a definitive interpretation.

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CHIP RICE

On LITIGATION SKILLS

Recent amendments to Rule 26 of the Federal Rules of Civil Procedure changed the disclosure and discovery requirements for expert witnesses in federal court. These changes — which have been endorsed by the U.S. Department of Justice, the American Bar Association and many other lawyer groups — are intended to facilitate frank and open communications between attorneys and their experts and should make collaboration with experts more effective and less expensive.

Work Product Protection for Expert Discovery

Amended Rule 26(b)(4) provides work-product protection against discovery for draft expert reports and — with three specific exceptions — communications between testifying experts and counsel. Such communications are discoverable only if they

- relate to the expert's compensation;
- identify facts or data that the expert considered in forming the expressed opinions; or
- identify assumptions that the expert relied on in forming the expressed opinions.

In addition, amended Rule 26(a)(2) requires expert reports to state the "facts or data" — rather than the "data or other information," as in the previous version of the rule — considered by the expert witness. The Advisory Committee Notes explain that this change is "meant to limit disclosure to material of a factual nature" and exclude "theories or mental impressions of counsel." (Unless otherwise noted, all subsequent quotes are from the Advisory Committee Notes on the 2010 Amendments.)

Before the new amendments, many federal courts had allowed discovery of all communications between counsel and expert witnesses and all draft reports. The Advisory Committee was "told repeatedly that routine discovery into attorney-expert communications and draft reports has had undesirable effects," including rising costs. For example, attorneys often used two sets of experts — one for consultation and the other for testimony — to avoid disclosure of the attorneys' legal analysis and concerns.

The Advisory Committee also noted that, under the previous rules, attorneys tended to "adopt a guarded attitude toward their interaction with testifying experts that impedes effective communication" and experts tended to "adopt strategies that protect against discovery but also interfere with their work." For example, experts were often warned not to make notes or put anything in writing in order to avoid discovery.

According to the Advisory Committee, communications between the party's attorneys and assistants of the expert witness are also protected. In addition, "communications with in-house counsel for the party would often be regarded as protected even if the in-house attorney is not counsel of record in the action."

The Three Exceptions

Attorney-expert communications regarding *compensation* are still fair game for discovery. Such discovery "is not limited to compensation for work forming the opinions to be expressed, but extends to all compensation for the study and testimony provided in relation to the action. Any communications about additional benefits to the expert, such as further work in the event of a successful result in the present case, would be included." Compensation for work done by any "person or organization associated with the expert" is also subject to discovery. "The objective is to permit full inquiry into such potential sources of bias."

Attorney-expert communications that identify the *facts or data* provided by counsel and considered by the expert are subject to discovery, but "further communications about the potential relevance of the facts or data are protected." To avoid confusion, disputes and unwanted disclosures, counsel should take care to keep communications that identify the facts or data to be considered by the expert separate from communications that discuss the relevance of those facts or data. Then the former can be disclosed without having to disclose the latter.

Chip Rice

Attorney-expert communications that identify any *assumptions* that the expert relied upon in forming the expressed opinions are also subject to discovery. "This exception is limited to those assumptions that the expert actually did rely on in forming the opinions to be expressed. More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception."

Discovery regarding attorney-expert communications on subjects other than the three exceptions or regarding draft expert reports "is permitted only in limited circumstances and by court order." The party seeking such discovery must show that it "has a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship." Even if a party makes such a showing, "the court must protect against disclosure of the attorney's mental impressions, conclusions, opinions, or legal theories.…"

The amendments to Rule 26 became effective on December 1, 2010, and "shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending." *See* Supreme Court Order of April 28, 2010. In order to remove any uncertainty, counsel with pending federal cases should consider proposing a stipulation and order to establish whether and to what extent it is "just and practical" to apply the new amendments.

Bear in mind that California law does not provide any work product protection for a testifying expert's drafts, notes or communications with counsel. Accordingly, unless and until that law changes, attorneys litigating in our state courts will continue to face all of the problems with expert discovery that the new federal rules were intended to eliminate.

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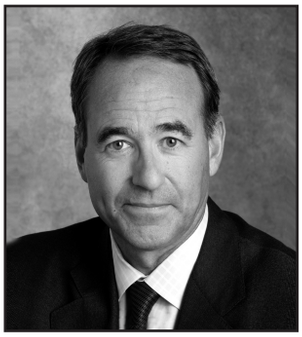
Letter from the President

In the May 7, 2011 issue of The Economist, an article titled "A Less Gilded Future" paints a picture of American law firm business, suggesting we have gone the way of the accounting profession in adding increasingly diluted and commercialized value to the corporate bottom line. So it was with great pleasure to see over 400 people at the ABTL May 2011 dinner meeting, with many of our area's top trial attorneys and judges in one room, congregate again to boast a profession, not just a trade.

The ABTL officer ladder leads only one way — up to President and out — so I want to make this year count for myself and ABTL members in every way. I started 2011 with three basic priorities: (i) maintain the size and health of our chapter (1700 lawyers in the Bay Area in 2010), (ii) plan and present the most searching and technically advanced programs possible (after dinner and wine, that is), and (iii) use the ABTL platform, while staying true to our core charter as the finest bench/ bar organization, to educate and galvanize our members on public issues that touch the core of our profession.



Robert H. Bunzel

As of this midterm report, our numbers are steady and our model of firm-wide litigation membership has withstood the awful wreckage of a global recession and the closing of major firms. Indeed, some firms that had briefly left our fold are back. Not all members make it to all dinners, but a critical mass assures that attending ABTL events means you will talk to many important colleagues and opponents and judges in a positively charged environment. Change is sweeping our profession, altering the way we bill and market and connect with each other. Our intent is that ABTL continue to help people make connections that count.

With our January program on resolving the Qualcomm ethics battle, the timely class action panel anchored by the actual lawyers in two blockbuster Supreme Court cases, a technology theft investigations program with DOJ experts in June, and Ken Feinberg speaking to us in September about mass tort alternatives to litigation, this year showcases what we do best in substantive evening presentations.

On public issues, our membership cheers Senate confirmation of four new Northern District judges in the last eighteen months, all with present or future strong ties to ABTL as board members, panelists, dinner guests, and annual seminar invitees. Miscreant party politics that delay and bottle-up worthy judicial officers in committee hurt our profession and hinder access to justice. We should speak out against it when practiced by either party.

On the state side, ABTL officers are meeting to assist in whatever way we can in keeping California courts sound and independent. Cumulative state court funding cuts in 2010 and 2011 may exceed $300 million, or more than 20 percent, directly affecting what ABTL lawyers do on a daily basis in advancing California business and consumer access to a strong civil judicial system. Legislation in Sacramento to shift parole hearing responsibility to the superior courts will further erode civil judicial resources. ABTL will be publishing information to our members as the year goes on as to how you can help protect our courts.

Throughout this year and beyond, my goal is that ABTL will help our members resist commoditization of the profession and rather continue 'to strive, to seek, to find and not to yield' in the pursuit of justice.

Robert H. Bunzel, the President of the Northern California chapter of ABTL for 2011, is the managing shareholder of Bartko Zankel Tarrant & Miller in San Francisco. rbunzel@bztm.com