

# abt REPORT

NORTHERN CALIFORNIA

Volume 24 No. 3

Spring 2016

## Simple Steps to Improve Your Jury Trials

There is nothing comparable in our professional life to a good jury trial. And nothing inspires more civic pride and respect than witnessing 6 to 12 fellow citizens put aside their busy lives and embrace the solemn task of serving as impartial judges of the facts. That is truth in action, to paraphrase Louis Brandeis, and it is the bedrock of our republic's actualization of equal justice under law.



Hon. James Donato

But the rate of civil jury trials in federal court has plummeted to less than 1% and the jury trial is, shockingly, threatened with extinction. While several factors have contributed to this unfortunate state, a leading one is that jury trials are seen as a too long and too expensive way to resolve a dispute. A drawn-out trial might double the legal fees and costs incurred during all the pretrial discovery and motion work, and it heavily taxes witnesses by diverting an excessive amount of

their time from personal or business affairs to focus on court appearances and testimony. It also exacts too high

*Continued on page 2*

## Injunction Relief in Lanham Act Cases Post-Herb Reed

Motions for preliminary injunctive relief are routinely sought in cases involving claims for trademark infringement. For many years, once a moving party established a likelihood of success on the merits, irreparable harm was presumed and an injunction would usually be issued. This all changed with the Ninth Circuit's holding in *Herb Reed Enter., LLC v. Florida Entm't Mgmt., Inc.*, 736 F.3d 1239 (9th Cir. 2013), that a plaintiff must affirmatively establish a likelihood of irreparable harm in order to obtain a preliminary injunction on a trademark infringement claim.



Griff Towle

The *Herb Reed* decision is rooted in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), which overturned many years of jurisprudence in concluding that a party seeking a permanent injunction for patent infringement was not entitled to a "categorical" presumption of irreparable harm after succeeding on the merits. After *eBay*, the circuit courts slowly extended the so-called *eBay* rule to copyright cases. See, e.g., *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 979-81 (9th Cir. 2011).

Whether the *eBay* rule applied to trademark cases remained unsettled. Some argued that a trademark is inherently different from a patent or copyright and that the harm resulting from patent/copyright infringement is different from the harm caused by trademark infringement. Predictably, the district courts reached different conclusions. While the district courts in the Ninth Circuit were generally trending in the direction of requiring concrete evidence of irreparable harm before issuing an injunction, some courts still applied the presumption of

*Continued on page 6*

### Also in This Issue

Leeron Morad	New Sheriff in Town: What to Expect from the Defend Trade Secrets Act.....p. 3
James Yoon	On PATENTS .....p. 7
Howard Ullman	On ANTITRUST .....p. 9
Caroline McIntyre	Using Experts Effectively in Litigation .....p. 11
Diane M. Doolittle	Letter from the President .....p. 12

Continued from page 1

## *Simple Steps to Improve Your Jury Trials*

a toll from the most important participants, the jury.

This is a solvable problem. With just a handful of basic practices, a jury trial can be efficient, effective and affordable.

### Trial Time Limits

The simplest and most direct way to contain costs and make a trial more manageable is to set time limits for each side's case. Some judges, including me, do this routinely in their civil cases and so you may think this is old news. It is not. Every week I hold case management conferences where the parties propose long trial times for straightforward cases — 70+ hours, to take one recent example. This is a failure of will and planning. Many, probably most, civil cases, can be fairly tried in 10-20 hours per side for the presentation of the evidence, with up to an additional 90 minutes per side for openings and closings. That means the case will be in the hands of the jury in about six trial days on a humane 9:00 a.m. to 3:00 p.m. schedule with breaks, or in about four days if the trial goes for full days.

These limits work well in most civil cases and do not result in any party being railroaded or denied due process. A sliver of cases, such as an MDL proceeding or a multi-party antitrust or RICO case, will need more time. But those cases are rare and should not affect the trial time estimate in other matters. I know from personal experience as a trial lawyer and trial judge that the majority of civil cases can be tried fairly within the 10-20 hour time band. And that includes patent cases. It's time to put an end to the patent exceptionalism viewpoint that says patent cases are too complicated to be tried within efficient time limits. They are not, and I know that because the patent cases I've tried have gone to the jury with time left on the clock, and because courts in other districts routinely impose even tighter limits with no ill effects on justice.

The Northern District does not have a formal "rocket docket" but we do have General Order 64 for your use. General Order 64 sets out detailed procedures for an expedited jury trial. With the parties' agreement and the judge's approval, the order provides for focused pretrial discovery and motion practice, and anticipates that a jury trial will be held within six months of the agreement. Trial is before six jurors with three hours for presentation of evidence and additional time for statements. If this procedure is used, the case will go to the jury after about a day and a half of trial.

Give this option a try. My sense is that the trial lawyer bar is not as aware of this option as it should be. General Order 64 best fits a discrete type of case and is not a practice of general application. But you will likely handle a suitable case during your career and you should keep the expedited trial option in mind.

Trial limits definitively answer complaints about the excessive time and expense of jury trials. When there is a hard stop after a very manageable 6 to 12 days in court,

legal fees and costs simply cannot get out of control. The amount of time witnesses will be asked to commit to the trial will be readily determinable and is guaranteed not to exceed a reasonable number of hours. And your case will almost certainly benefit from the incentive to focus on what truly matters and omit the needless detail and cumulative testimony that invariably creep in when time is no object.

### Jury Comprehension

Everything we can do to improve jury comprehension will also increase trial efficiency and effectiveness. You have a panoply of tools to help the jury understand your evidence and argument. The first is intelligent use of the peremptory challenge. In federal civil cases, you get three opportunities to dismiss a prospective juror with generally no questions asked — the main exception being a *Batson* challenge, which also applies in civil cases to prevent racial bias or discrimination in jury selection. I raise peremptory challenges as part of jury comprehension because I frequently see lawyers strike prospective jurors who look well-suited for a case by background, training or education for just that reason, as if counsel fear that someone might actually understand the evidence. This is particularly common in patent and technology cases, where lawyers seem to routinely strike candidates with exactly the kind of technical knowledge or expertise that would let them really grapple with the subject matter. I do not believe that a jury should ever be limited to specialists, and one of our great strengths as a republic of laws is that we call on all citizens, without regard to privilege or status, to sit on our juries. But if a randomly called venire gives you the prospect of a particularly knowledgeable juror, avoid a knee-jerk challenge. If you do use your peremptory challenges to kick off the people who best fit the case, it is bad form to complain at conferences and in bar articles that juries are not equipped to decide complex cases.

Once the jury is seated, you should give them the tools to understand your case. A simple and effective tool is a notebook. The Ninth Circuit, the ABA and most judges I know encourage notetaking by jurors. I view it as essential to the jury's task. Make it easy for that to happen. In my civil cases, I direct the parties to provide each juror with a three-ring 1" binder that has: (1) 50 pages of lined paper for notes; (2) a glossary of key terms or abbreviations that the parties agree on; (3) any stipulations of fact the parties reach; and (4) space to insert a full-page hard-copy photo of each witness captioned with the witness's name and three-hole punched for insertion into the binder. The photos are head shots that show the witness exactly as she or he appears on the stand, and I have heard from jurors that they really appreciate those visual reminders during deliberations. At the end of the case, I give each juror a hardcopy of the final jury instructions to put into the binder.

Another good way of improving comprehension is to let jurors ask questions. While some older cases have said jury questions are "fraught with peril," *DeBenedetto v.*

*Continued next page*

Continued from page 2

### *Simple Steps to Improve Your Jury Trials*

*Goodyear Tire & Rubber Co.*, 754 F.2d 512, 517 (4th Cir. 1985), I have found them — as lawyer and judge — to be instrumentalities of goodness. Jurors often ask salient questions, or at the very least, questions that help them clear up potential confusion or misunderstanding. You should encourage them. My practice is to allow jurors to submit proposed questions in writing to me after the witness is done testifying but before stepping down. I'll review the questions in a sidebar with counsel and then ask or decline them. Counsel can do a very brief follow-up with the witness if warranted. This practice has worked well and I am convinced it has led to better jury understanding and engagement.

Consider also the timing of jury instructions. During an orientation for new federal judges, I heard jury service likened to being dropped in a classroom, given a multi-day lecture on unfamiliar topics, and then handed an exam with 30-50 pages of instructions on how to complete it. This can be handled better. Many judges will give preliminary instructions about the burden of proof, the phases of the trial, what is evidence, and so on before opening statements. I like to add to that a short statement of the case that I direct the parties to prepare. It is very helpful for the jury to hear even a paragraph on what the case is about at a high level. At the close of evidence, giving the final instructions before closing arguments is useful. That way, the jury has heard from the court first about the rules of law before counsel start arguing about them. I also give each juror a written copy of the final instructions because reading while listening has been shown to substantially increase comprehension.

Another good area for improving understanding is the text of jury instructions. The Ninth Circuit has model civil instructions that are virtually guaranteed not to be a source of reversal when used. Judges and counsel like them for that reason. But that does not mean you need to slavishly follow them word for word. While I am certainly not criticizing the drafters, who brilliantly handled the monumental task of preparing the model instructions, the language can often be streamlined and made more comprehensible. Many of the preliminary instructions would benefit from that. The substantive instructions in the final set can also be improved with careful editing. Making jury instructions clearer and easier to follow should be a priority for you.

I could go on for pages about other techniques to improve jury comprehension. Visual presentation of evidence alone warrants extended treatment. We are disposed by evolution to get something like 80% of our information visually and yet most of the trial graphics I see fail to take advantage of that fact. This is particularly surprising because I know how much trial graphics can cost. But we will leave that topic to another day. You have powerful tools to control the time and expense of jury trials, and you should use them to try more cases.

Continued on page 10

## *New Sheriff in Town? What to Expect from the Defend Trade Secrets Act*

The newly enacted Defend Trade Secrets Act ("DTSA"), 18 U.S.C. § 1831, *et seq.*, permits plaintiffs alleging trade secret misappropriation to bring their claims in federal court without diversity. The DTSA raises important new substantive and procedural questions. This article discusses four of them.

### Where Will DTSA Cases Be Heard?

The DTSA grants original, but not exclusive, federal jurisdiction for claims arising under it, thus giving plaintiffs the ability to shop for the forum that best serves their needs. Plaintiffs faced with the "state or federal" decision likely will assess whether the judges sitting in the respective fora are perceived as being protective of trade secrets or otherwise favorable to plaintiffs. A state court's shorter notice period for obtaining a temporary restraining order may militate in favor of state court. Plaintiffs may also favor some state courts that may be perceived as permitting wider-ranging discovery, especially in light of the recently-amended Federal Rules of Civil Procedure.

Defendants may prefer to remove cases to federal court, to deny the plaintiff its (presumptively) preferred forum. If a plaintiff brings claims under the DTSA in state court, the defendant may remove the case pursuant to 28 U.S.C. § 1331 and the well-pleaded complaint rule because there is a clear federal question (the DTSA claim) on the face of the complaint.

Knowing that, plaintiffs who wish to litigate in state court may try to prevent removal by forgoing claims under the DTSA. In this scenario, a defendant who cannot remove based on diversity jurisdiction will need to be a bit more creative in order to get to a federal forum, perhaps using one of two options:

First, because the DTSA's definitions of "trade secret" and "misappropriation" are based on the Uniform Trade Secrets Act (UTSA), which is also the basis for trade secret protection in 48 states, if there is a legitimate dispute about misappropriation of a trade secret under state law, the defendant may file a declaratory judgment action in federal court arguing that there is a controversy over whether it violated the DTSA. Filing a declaratory judgment may not halt the earlier-filed state court action but, if the federal case is not stayed, it may get done first, and its result may estop the plaintiff on key issues in the state case.

Continued on page 4



Leeron Morad



Continued from page 3

### *New Sheriff in Town?*

Moreover, the federal action may effectively coerce the plaintiff to refile its affirmative case in federal court and assert its DTSA and state law claims in one forum.

Alternatively, if the defendant can assert a patent or copyright counterclaim, the state court action will be removable to federal court. Many practitioners may be surprised by this, since counterclaims do not usually create federal jurisdiction. See *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002). In this case, however, it is possible to remove the action thanks to 28 U.S.C. § 1454 — a relatively new provision created by the America Invents Act that vests federal courts with jurisdiction to hear cases involving patent or copyright claims raised in a counterclaim. See *Vermont v. MPHJ Tech. Investments, LLC*, 803 F.3d 635, 644 (Fed. Cir. 2015). Thus, if the defendant can assert a patent infringement counterclaim, the entire case may be heard in federal court. (If the defendant does not own any patents, it may even wish to purchase one to assert.)

#### How Specific Will Plaintiffs Need To Be in Describing Their Trade Secrets?

Section 2019.210 of the California Code of Civil Procedure protects defendants in California's state courts from having to respond to discovery until the plaintiff discloses its trade secrets "with reasonable particularity." The Federal Rules of Civil Procedure do not have a comparable provision.

Until recently, some federal courts applied section 2019.210 to trade secret claims based on California law. Their rationale was, at least in part, that "application of section 2019.210 to trade secret claims filed in the federal court avoids improper incentives for choosing a federal forum." *Soc.Apps, LLC v. Zynga, Inc.*, 2012 WL 2203063, at \*2 (N.D. Cal. Jun. 14, 2012). With the creation of a federal cause of action, however, the forum shopping rationale is no longer as strong, and federal courts may not apply section 2019.210 to DTSA claims. Defendants who want to force plaintiffs to provide this disclosure will need to find new ways of doing so.

One option may be a motion to dismiss, under *Twombly* and *Iqbal*, arguing that to plausibly allege trade secret misappropriation the plaintiff must provide some details about the alleged trade secrets. In granting such a motion, one court recently noted:

To adequately plead a trade secret, it must be described with sufficient particularity to separate it from matters of general knowledge in the trade or of special knowledge of those persons who are skilled in the trade, and to permit the defendant to ascertain at least the boundaries within which the secret lies.

*Bladeroom Grp. Ltd. v. Facebook, Inc.*, 2015 WL 8028294, at \*3 (N.D. Cal. Dec. 7, 2015) (quotations omitted). Defendants can employ this rationale to attack DTSA claims that do not provide a sufficiently detailed trade secret disclosure.

Another approach may be to use the recent amendments to the Federal Rules of Civil Procedure that empha-

size the importance of proportionality in discovery. A defendant could argue that the parties and the court need a sufficiently detailed trade secret disclosure to assess whether the discovery sought (particularly the defendant's own confidential information) is proportional to the trade secret claims being asserted. A defendant's successful argument could have the same result as section 2019.210, staying discovery until the plaintiff provides a detailed trade secret disclosure.

Finally, defendants may be able to use the limited scope of the DTSA as a means for obtaining a detailed disclosure of the plaintiff's trade secrets. Congress enacted the DTSA under its Commerce Clause power, creating a private right of action only for trade secrets that are "related to a product or service used in, or intended for use in, interstate or foreign commerce." 18 U.S.C. § 1836(b)(1). Defendants could argue that without a specific identification of the trade secret, a federal court cannot know whether the alleged trade secret was used in or intended for use in interstate commerce, and thus whether it has jurisdiction. Bringing such a motion under Rules 12(b)(1) or 12(b)(6) could persuade a court to limit a defendant's discovery obligations until the plaintiff shows that the alleged trade secret is linked to interstate commerce — a showing that may require the plaintiff to provide details about the alleged trade secrets.

Cases in which a plaintiff has obtained a seizure order under the DTSA may also require an expedited trade secret disclosure. The DTSA's seizure provision contemplates expedited discovery, providing that "[t]he court may make such orders modifying the time limits for discovery under the Federal Rules of Civil Procedure as may be necessary to prevent the frustration of the purposes of a hearing under this subparagraph." 18 U.S.C. § 1836(b)(2)(F)(iv). Since a plaintiff who obtains a seizure order has "the burden to prove the facts supporting the findings of fact and conclusions of law necessary to support the order," *id.* § 1836(b)(2)(F)(ii), including that "the information is a trade secret," *id.* § 1836(b)(2)(A)(ii)(IV)(aa), a court could order the plaintiff to respond to discovery requests regarding the specificity of the trade secrets on a much-expedited basis.

#### Are Tort Claims Preempted by the DTSA?

The California Uniform Trade Secrets Act preempts certain tort claims that arise from the same nucleus of operative facts as a trade secret claim, including claims for unjust enrichment and unfair competition. See, e.g., *Digital Envoy, Inc. v. Google, Inc.*, 370 F. Supp. 2d 1025, 1033-35 (N.D. Cal. 2005). It is uncertain whether the DTSA also preempts state tort claims.

The DTSA states only that it "shall not be construed to preempt or displace any other remedies, whether civil or criminal...for the misappropriation of a trade secret." 18 U.S.C. § 1838. Nor does the DTSA's legislative history suggest that the Act is intended to preempt any state law tort claims. To the contrary, both the Senate and House Reports on the DTSA broadly state that it is not intended to preempt state laws, without specifying any particular

Continued next page

Continued from page 4

### *New Sheriff in Town?*

state laws. See, e.g., H.R. Rep. No. 114-529, at 6, 13, 14 (2016); S. Rep. No. 114-220, at 3, 9, 10, 14 (2016). As a result, courts may find that the DTSA does not preempt state tort claims, even if a state trade secret claim would preempt such claims.

Plaintiffs may therefore prefer to bring their trade secret claims under the DTSA rather than California state trade secret law, and simultaneously seek relief for torts that they could not otherwise assert. If courts permit plaintiffs to do so, the DTSA may significantly expand the theories of liability that defendants could face in trade secret litigation.

#### Implications of the DTSA's Seizure Provision

The DTSA's new, *ex parte* seizure provision is relatively unprecedented in American trade secret law, but bears some similarity to orders available under English law.

Section 2 of the DTSA permits courts to grant *ex parte* orders "providing for the seizure of property necessary to prevent the propagation or dissemination of the trade secret that is the subject of the action." 18 U.S.C. § 1836(b)(2)(A)(i). An application for a seizure order must satisfy several requirements, including demonstrating that the adverse party would destroy or make inaccessible the evidence to be seized if given notice of the order. Law enforcement personnel carry out these orders while the applicant and its representatives may not participate. *Id.* § 1836(b)(2)(E).

Some authors have compared section 2 of the DTSA to the seizure provisions in the Copyright and Lanham Acts through which a court may order the seizure of pirated or counterfeit goods and the means of making them. 15 U.S.C. § 1116; 17 U.S.C. § 503. These authors argue that because the copyright and trademark provisions have not been abused, there is little risk that the DTSA's seizure provision will be abused. This comparison, however, ignores a crucial distinction between copyright or trademark infringement and trade secret misappropriation: it is relatively easy to spot a counterfeit good, especially if it is sold by the proverbial "guy on the corner." Determining whether a trade secret has been misappropriated, however, is a fact-intensive inquiry that depends on, among other things, an alleged misappropriator's illegitimate access to the trade secrets in question and secrecy of the information. Moreover, both the Copyright and Lanham Acts' provisions only permit seizure of the counterfeit goods, means of making them, and records of sales. The DTSA's provision is significantly broader.

The DTSA's seizure provision is more appropriately analogized to English law's Anton Piller orders, which have been granted — and criticized — since 1975. Abuse of Anton Piller orders appears to have been so severe that in the mid-1990s, the British Parliament reformed the law governing such orders.

The first Anton Piller order was issued in a trade secret misappropriation case that sounds like it came right out of a Hollywood script: A German manufacturer suspected — based on the word of two whistleblowers — that its

English agent had been in secret communication with German competitors and was going to supply them with secret designs for power units. *Anton Piller LG v. Mfg. Processes Ltd.*, [1975] A.C. 8 (Eng.). The manufacturer was "fearful that if the English company were given notice [of the requested injunction] it would take steps to destroy the documents or send them to Germany," so the manufacturer applied for an *ex parte* order permitting it and its lawyers to enter the English company's premises to search for and seize the relevant papers, without any prior notice to the English company. Initially, the trial court denied the application, noting its fear that such an order "might become an instrument of oppression, particularly in a case where a plaintiff of big standing and deep pocket is ranged against a small man who is alleged on the evidence of one side only to have infringed the plaintiff's rights." See *id.* The court of appeals reversed and granted the order, setting precedent for so-called Anton Piller orders to be issued under English law.

Like the DTSA seizure provisions, Anton Piller orders were permitted only (i) in the interests of justice where the potential for damage to the applicant was serious, (ii) when there was a "grave danger that vital evidence will be destroyed," (iii) with clear evidence that the defendants are in possession of the documents, and (iv) with a surety bond. *Id.* Despite the procedural requirements, some reports indicate that English courts issued about 500 such orders per year in a variety of areas of substantive law, and commentators appear to agree that Anton Piller orders were commonly abused. As noted, Parliament eventually reformed the law governing these orders with the Civil Procedure Act in 1997, adding safeguards that include protecting privileged information and requiring more facts to be included in an application for an order.

The DTSA's seizure provision presents greater risks than Anton Piller orders. First, Anton Piller seizures are carried out by the plaintiff and her counsel, not by law enforcement personnel. Law enforcement searches risk being broader and more disruptive than necessary because the agents will not be familiar with the details of the civil case. Second, a party can refuse to cooperate with Anton Piller orders. While that risks contempt of court, a defendant that truly believes there is no basis for the order may object and fight in court. A DTSA seizure order may permit law enforcement to use force to enter locked areas, leaving a defendant no option but to permit the search. Third, the DTSA includes no protection against the seizure of items containing privileged or incriminating information, whereas Parliament provided these protections with its reform of Anton Piller orders. Finally, and perhaps most importantly, unlike in the 1970s when Anton Piller orders were introduced, trade secrets are now stored electronically, literally intertwined with essential day-to-day business information. DTSA seizures may confiscate key electronic devices, potentially disrupting businesses far more severely than when Anton Piller orders were first introduced.

With these risks and in light of the abuse of Anton Piller orders, courts may well be very careful in deciding DTSA seizure applications.

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Continued from page 1

## *Injunctive Relief in Lanham Act*

irreparable harm. The Ninth Circuit remedied the resulting confusion in *Herb Reed*.

The case involved “The Platters” vocal group and was the latest chapter in a longrunning dispute over who had the right to use The Platters name. The district court entered a preliminary injunction and defendant appealed. The Ninth Circuit reversed, concluding that a plaintiff seeking a preliminary injunction in a trademark infringement case must actually demonstrate irreparable harm. In reaching its decision, the Ninth Circuit relied on *eBay* and *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008), which reconfirmed the traditional four-factor test for injunctive relief, in finding that “[n]othing in the Lanham Act indicates that Congress intended a departure in trademark infringement cases” and “[g]one are the days when ‘once the plaintiff in an infringement action has established a likelihood of confusion, it is ordinarily presumed that the plaintiff will suffer irreparable harm if injunctive relief does not issue.’” *Herb Reed*, 736 F.3d at 1249-50 (citation omitted).

The Ninth Circuit was the first circuit to expressly extend the *eBay* rule to a trademark infringement case and, to date, the Third Circuit is the only other circuit to have issued a similarly definitive opinion. See *Ferring Pharmaceuticals, Inc. v. Watson Pharmaceuticals, Inc.*, 765 F.3d 205, 216-17 (3d Cir. 2014). With the exception of the Fifth Circuit, which has essentially affirmed the presumption, the other circuits either have not specifically addressed the issue or have expressed an inclination to apply the *eBay* rule to trademark cases, but declined to do so.

Since *Herb Reed*, the focus in motions for injunctive relief in the Ninth Circuit has largely shifted from the merits of the underlying claim to the irreparable harm factor. And while *Herb Reed* confirmed that irreparable harm now must be established in a Lanham Act case, it provided little guidance as to what actually constitutes irreparable harm and how to actually prove it.

### What Constitutes Irreparable Harm (and How to Prove It)

In its broadest sense, irreparable harm is “harm for which there is no adequate legal remedy.” *Arizona Dream Act. Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014). Something more than “economic injury” is required, because “such injury can be remedied by a damage award.” *Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991). Beyond this it is unclear. In the aftermath of *Herb Reed*, it seemingly varies from district court to district court. Arguments and evidence that worked in the past often will not pass muster. In many respects, there is an element of “I know it when I see it” in the courts’ analyses.

For these reasons, how to actually prove irreparable harm in a Lanham Act case has confounded practitioners and the courts since *Herb Reed*. Still, the basic ground

rules are familiar in concept, if not application. “Cursory and conclusory” assertions of irreparable harm and empty “platitudes” are insufficient even in circumstances where the infringement is egregious. *Herb Reed*, 736 F.3d at 1250. There must be more than a mere “possibility” of irreparable harm; it must be “likely” to occur in the future. *Titanes Light Shop, LLC v. Sunlight Supply, Inc.*, 585 F.App’x 390, 391 (9th Cir. 2014), quoting *Winter*, 555 U.S. at 20, 22. Put another way, the threatened harm must be real and not theoretical. *Cutting Edge Solutions, LLC v. Sustainable Low Maint. Grass, LLC*, 2014 WL 5361548, at \*6 (N.D. Cal. Oct. 20, 2014). And an unwarranted delay in seeking relief suggests a lack of urgency and undermines a claim of irreparable harm. *Champion Cain v. MacDonald*, 2015 WL 4393303, at \*10 (S.D. Cal. Jul. 15, 2015).

### Loss of Control Over Reputation, Goodwill and Products/Services

In *Herb Reed*, the Ninth Circuit held that “[e]vidence of loss of control over business reputation and damage to goodwill *could* constitute irreparable harm.” 736 F.3d at 1250 (emphasis added). The district courts generally have followed the Ninth Circuit’s lead. See, e.g., *Brooklyn Brewery Corp. v. Black Ops Brewing, Inc.*, 2016 WL 80632, \*10 (E.D. Cal. Jan. 7, 2016) (infringement “will cause [p]laintiff to lose its ability to control its brand reputation and goodwill, since what could be perceived by consumers as the quality of [p]laintiff’s product risks no longer being within [p]laintiff’s control”); *IHOP Franchising, LLC v. Hameed*, 2015 WL 429547, at \*5 (E.D. Cal. Feb. 2, 2015) (“[A]llowing a deficient operator to operate under Plaintiff’s Marks — despite termination — irreparably harms IHOP by removing its ability to control its reputation.”); *United Tactical Sys., LLC v. Real Action Paintball, Inc.*, 2014 WL 6788310, at \*23 (N.D. Cal. Dec. 2, 2014); *Starbucks Corp. v. Heller*, 2014 WL 6685662, at \*4 (C.D. Cal. Nov. 26, 2014). Notwithstanding, it seems that equating loss of control with irreparable harm is somewhat circular. Isn’t there always a loss of control in a trademark infringement case? And, if so, wouldn’t a finding of irreparable harm be all but a foregone conclusion and at least somewhat inconsistent with *eBay*?

Nonetheless, it appears to be universally accepted after post-*Herb Reed* that non-quantifiable damage to goodwill or loss of control of reputation may be evidence of irreparable harm. However, there is no similar consensus about what constitutes compelling evidence of such harm. The uncertainty generally stems from the Ninth Circuit’s admonitions that “unsupported and conclusory statements” and “pronouncements grounded in platitudes” will not suffice. *Herb Reed*, 739 F.3d at 1250. So, what will suffice? It ultimately depends on the facts and the available evidence, but a few general guidelines can be teased out of recent district court decisions.

As a starting point, a moving party should explain its business and the importance of the infringed trademark to its success. The moving party should offer similarly fundamental and concrete evidence that the mark is well

Continued on page 8



JAMES YOON

## On PATENTS

**L**itigation is a key component of any effective patent licensing program. Without a credible threat of patent litigation presenting a clear risk of large potential damages and/or an injunction, it is very difficult for patent holders to convince companies to pay a significant royalty or licensing fee.

Previously, the required showing of risk was usually based on a detailed analysis of the operation and sales of the accused products, the meaning of the patent claims, and the prior art. Often, patent holders and (potential) defendants had detailed meetings discussing the liability and damage theories. While these discussions rarely resulted in agreement on the merits, they (along with court rulings such as a claim construction order) often resulted in a consensus on the range of likely potential outcomes that enabled the business people on both sides of the patent dispute to reach a compromise. Sometimes such settlements were prompt; sometimes they came only after protracted litigation and the active assistance of a neutral. Either way, the discussions focused on the legal merits of the specific dispute between the parties. This is no longer the case.

Today, we live in a digital “fish bowl” where the metadata surrounding the players involved in a patent dispute and industry statistics are the key driving factors in the “pricing” of patent settlements. That metadata — not the individual merits of the patent claim(s) — shapes the understanding of the negotiating parties. Today, when a company is sued for patent infringement, a defendant no longer puts together a technical team of patent attorneys and engineers to analyze the patent. Defendants know that such teams are expensive and slow, diverting important resources away from the business. Instead, the company decision makers want to see the metadata regarding litigation counsel and the holding company as well as judicial statistics. This data — not the patent — determines how the defendant views the case. If the plaintiff’s counsel has (1) litigated over 40 patent cases but has never taken one even to claim construction, (2) never had a case where the patent has gone through a patent office inter partes review (“IPR”), and (3) typically settled in less than 150 days, the decision makers for the defendant will believe that the plaintiff is looking for a quick settlement for a fraction of the cost for the filing of an IPR (e.g., \$100-\$300K). Experience has generally proven these patent defendants

right. Many of my colleagues report settlements of low-end NPE cases in the low-to-mid five figure range.

In contrast, if the defendant sees that the plaintiff’s counsel has litigated over 40 patent cases, participated in over 20 claim construction hearings, and taken 10 cases to trial (often successfully), the decision makers for the defendant will expect a significant fight over substantial damages. This belief will be enhanced if the data shows that the plaintiff’s counsel has successfully taken many patents through IPR and trial. In such instances, the defendant will focus on hiring a “top” defense firm and know that it needs to demonstrate (1) the case lacks technical and/or financial merit and (2) it will not be “intimidated” by the plaintiff. Often, simultaneously, the defendant will begin the process of educating management about the case’s risks. Executives do not want to sit through a technical tutorial, and tend to focus on the “metadata” and expected litigation costs to determine the strategic options for resolving the case from the profit-and-loss perspective. As the patent case goes on, the liability and damages risks will play a larger role in management discussions about the case.



James Yoon

**T**he primary lesson from the “fish bowl”? It is critical that companies become data aware and use this awareness to their advantage in patent litigation and negotiations. For patent holders and defendants, it is important for them to know that their behavior in patent litigation will shape how future parties view them in litigation. If you quickly settle a case, subsequent opponents may infer that you are willing to enter into “cheap” settlements and/or wish to avoid litigation. It is also important to know the data surrounding your counsel. If you want to send a message that you expect a large royalty and/or are a fighter who will not bow to pressure, do not select a counsel (1) who has never gone to trial and/or (2) has a record of settling cases quickly. The inconsistency between your rhetoric and the history of your attorney could be fatal to your goals in patent litigation. And finally, know the statistics regarding your judge and/or court. How long will it likely take to go to trial? Does the judge have a history of granting transfer motions, motions to stay and/or motions for summary judgment? It is important that your characterizations about a case do not conflict with the history of the court and/or judge. If it does, you will lose credibility and momentum.

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Continued from page 6

### *Injunctive Relief in Lanham Act*

known and positively perceived by the consuming public, as well as evidence of the steps it has taken to develop and protect its trademark(s) and goodwill, including sums spent on marketing, brand management, and prior enforcement efforts. Unsupported assertions that the infringement “diminishes,” “undermines,” “taints,” or “tarnishes” the goodwill/reputation of the moving party or the infringed mark should be avoided; instead, such arguments should be linked to actual evidence that the underlying product/services are counterfeit or inferior, or of customer confusion or lost sales/lost customers.

#### Customer Confusion and Complaints

While the majority of circuit courts seem to agree that evidence of consumer confusion or complaints will, as a matter of course, constitute irreparable harm, the Ninth Circuit expressed a different opinion in *Herb Reed*, holding that customer confusion does not constitute irreparable harm and to find otherwise “collapses the likelihood of success and the irreparable harm factors.” 736 F.3d at 1251. Some district courts have interpreted *Herb Reed* as essentially setting forth a blanket prohibition on consumer confusion evidence being considered in determining whether there is irreparable harm. See, e.g., *Zeltiq Aesthetics, Inc. v. Sun Serenity SPA*, 2105 WL 9242154, at \*5 (E.D. Cal. Dec. 17, 2015) (“[E]vidence of customer confusion is not evidence of irreparable harm.”); *Williams v. Green Valley RV, Inc.*, 2015 WL 4694075, at \*2 (C.D. Cal. Aug. 6 2015) (“Plaintiff’s evidence...is nothing more than a regurgitation of consumer confusion evidence, which is the exact type of evidence explicitly rejected by the Ninth Circuit in *Herb Reed*.”).

However, more recent Ninth Circuit cases suggest that evidence of actual customer confusion may be relevant at least in so far as it demonstrates damage to goodwill or loss of control of reputation. *San Miguel Pure Foods Co., Inc. v. Ramar Int’l Corp.*, 625 F.App’x 322, 327 (9th Cir. 2015); *Life Alert Emergency Response, Inc. v. LifeWatch, Inc.*, 601 F.App’x 469, 473-74 (9th Cir. 2015). Several district courts have followed this approach. See, e.g., *Pom Wonderful LLC v. Hubbard*, 2015 WL 10433693, at \*12 (C.D. Cal. Aug. 6, 2015) (“[O]ne way to show a likelihood of irreparable harm is to show that there has, to date, been some actual confusion or harm”; emphasis in original); *Anbing Corp. v. Thuan Phong Corp. Ltd.*, 2015 WL 451846, at \*23 (C.D. Cal. Jul. 24, 2015); *IHOP*, 2015 WL 429547, at \*5; *United Tactical*, 2014 WL 6788310, at \*23; *Kreation Juicery, Inc. v. Shekarchi*, 2014 WL 7564679, at \*12 (C.D. Cal. Sept. 17, 2014). And some courts have found that the absence of confusion is evidence of no irreparable harm. See, e.g., *Cutting Edge Solutions*, 2014 WL 5361548, at \*5.

While evidence of customer confusion/complaints is perhaps not as probative as it once was, and some courts have flatly rejected it, a moving party should still present any such evidence that exists, as well as explain in which the context customer communications were made and

whether the infringement resulted in a spike in the number or type of customer complaints. In many instances, this type of evidence may be most tangible proof of the harm caused by the infringement.

#### Lost Sales and Customers

Courts routinely consider evidence of lost sales or customers as evidence of irreparable harm. *Stublbarg Int’l Sales Co. v. John D. Brush and Co., Inc.*, 240 F.3d 832, 841 (9th Cir. 2001) (“Evidence of threatened loss of prospective customers...certainly supports a finding of the possibility of irreparable harm.”); *Starbucks*, 2014 WL 6685662, at \*4 (Starbucks deprived of potential accounts); *Am. Bullion, Inc. v. Regal Assets, LLC*, 2014 WL 6453783, at \*5 (C.D. Cal. Nov. 17, 2014) (evidence of lost sales based on consumer testimony that they chose to do business with competitor). However, some district courts have found that this type of harm may be adequately remedied by an award of damages. *Arcsoft, Inc. v. Cyberlink Corp.*, — F.Supp.3d —, 2015 WL 9455516, at \*12 (plaintiff failed to explain why decreased downloads, users and advertising sales are not “economic injuries that can be remedied by monetary damages”); *Wells Fargo & Co. v. ABD Ins. & Fin. Servs. Inc.*, 2014 WL 4312021, at \*12 (N.D. Cal. Aug. 28, 2014) (“[E]ven if Wells Fargo could show that it had lost (or was likely to lose) business as a result of defendants’ use of the “ABD” name, it is likely that such harm could be remedied through monetary damages — as opposed to harm to reputation or goodwill, which is less easily quantified.”). Notwithstanding this divergence of opinion, evidence of lost sales or customers should be submitted to the extent it exists.

#### Counterfeit and Inferior Products or Services

Courts typically have little hesitation in finding irreparable harm when the trademark infringement involves counterfeit or demonstrably inferior products or services. See, e.g., *SATA GmbH & Co. Kg v. Wenzhou New Century Int’l, Ltd.*, 2015 WL 6680807, at \*8 (C.D. Cal. Oct. 19, 2015) (defective counterfeit spray paint reservoirs); *Anbing*, 2015 WL 451846, at \*23 (inferior rice products); *United Tactical*, 2014 WL 6788310, at \*23 (subpar PepperBall projectiles). Evidence that the product or services are subpar may come from customer complaints.

#### Survey Evidence

Survey results are frequently utilized in Lanham Act cases and may be compelling evidence of confusion and harm. It is critical that the survey methodology be sound, with a solid causal nexus between the survey results and the claimed confusion or harm. *Wells Fargo*, 2014 WL 4312021, at \*23 (deficiencies in survey re confusion “bear on the weight given to the survey”); see also *Pom Wonderful*, 2015 WL 10433693, at \*16, n. 92 (if survey “evidence had been adduced, it is likely the court would have found that Pom Wonderful had satisfied its burden” of demonstrating irreparable harm).

Continued on page 10



HOWARD ULLMAN

## On ANTITRUST

### Sixth Circuit Opens a Pandora's Box of Joint Venture Challengers

**I**t's been 38 years since *Jaws II* debuted with its tagline "just when you thought it was safe to go back in the water..." After some years of consensus-building on how to appropriately structure competitor joint ventures ("JVs"), a recent opinion out of the Sixth Circuit makes one wonder whether it is still safe to put a toe in the JV ocean.

Consider the problem from the perspective of the following hypothetical. Say you're a group of hospitals that get together under a Joint Operating Agreement ("JOA"). You agree to form an integrated health system. You agree to total your net incomes into a single "network net income" that is allocated to the parties based on predetermined percentages. That means that no hospital has an incentive to poach patients from another. You also agree to share losses according to the same predetermined percentages.

And you go further — you grant significant operational authority over each hospital to a central operator. That operator can, among other things, require coordination of activities. The operator has authority to manage all hospital operations and is in charge of centralized managed care and legal functions. The operator also has authority and control over strategic plans, budgets, and business plans, and controls hospitals' debt incurrence and negotiates with insurance companies on behalf of the hospitals. The operator's CEO has the power to remove each defendant hospital's CEO.

All of these steps suggest that you're an integrated joint venture and that the hospitals cannot conspire to violate Sherman Act Section 1 (at least insofar as JOA activities go). See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), and *American Needle, Inc. v. National Football League*, 560 U.S. 183 (2010). In other words, one should analyze a competitor joint venture from a structural perspective — and ask questions such as: What have the competitors agreed to do? How economically integrated is the JV? And who has the power to do what?

However, on March 22, 2016, the Sixth Circuit, in *The Medical Center at Elizabeth Place, LLC v. Atrium Health System*, No. 14-4166, wrote that all of the structural evidence in the hypothetical above is insufficient to support a summary judgment in favor of the hospitals on conspiracy claims brought by a competing hospital. Why? Because there was also evidence that the intent of the arrangement was (at least in part) to prevent plaintiff hospital from entering the local healthcare market. The Sixth

Circuit also held that evidence that the defendants sought insurance exclusives — which the Court characterized as a form of "boycott" — meant that summary judgment was inappropriate.

In dissent, Judge Griffin wrote that

As the majority states, American Needle "eschewed formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate." *Am. Needle*, 560 U.S. at 191. Guided by the rule of reason, my colleagues interpret this directive to mean that we should ask how defendants "actually operate" with regard to plaintiff — specifically, their intent to keep plaintiff out of the market as expressed through apparent threats by Premier's [the JOA entity] executives and the boycott defendants allegedly arranged among the insurance companies. This view is flawed. Defendants' intent to exclude others from the market is irrelevant to determining whether defendants themselves constitute a single entity. To resolve that question, we should consider how defendants "actually operate" amongst each other.

*Id.* at 20. Due to the allocation of profits and losses, no single hospital had any incentive to become more profitable by attracting more patients than the other. "The majority is therefore incorrect to say 'defendant hospitals compete with each other...for patients.' They do not." *Id.* at 22 (Griffin, J., dissenting). Judge Griffin then analyzed the various powers granted under the JOA and determined that they evinced more than adequate integration to defeat any conspiracy claim.

Putting aside whether the dissent was right that this particular hospital network had adequate integration, the Sixth Circuit's decision is troubling. The majority opinion focuses on intent (which may be relevant once one gets to a Rule of Reason analysis of restraints) to analyze the preliminary question of whether joint venture defendants' structure even allows for a Sherman Act Section 1 claim. And so, on little more than one or two slips of possibly self-serving evidence or testimony, plaintiffs may get to go to trial against joint ventures that are appropriately and conservatively structured.

**N**eedless to say, this makes designing and advising joint ventures considerably more difficult. Prior to *Atrium Health*, JV counsel could comfortably focus on the structure and functions of the JV as well as questions relating to whether it would have or facilitate the exercise of market power. Now, it is not clear whether these structural issues are dispositive (at least in the Sixth Circuit), or what the right touchstone for analysis should be. For all these reasons, the Sixth Circuit should have followed Judge Griffin's dissent and disposed of the claims on structural grounds.



Howard Ullman

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Continued from page 8

### *Injunctive Relief in Lanham Act*

#### Marketing and Other Expert Testimony

While many, if not most, motions for injunctive relief include testimony or declarations from “marketing” executives or experts regarding the irreparable harm being caused by the alleged infringement, such evidence has met with a mixed reception. Some courts have found such evidence to be persuasive, if not determinative, of irreparable harm. *See, e.g., Starbucks*, 2014 WL 6685662, at \*4; *E & J Gallo Winery v. Grenade Beverage, LLC*, 2014 WL 4073241, at \*1415 (E.D. Cal. Aug. 15, 2014). Other courts have been more critical of this type of evidence and carefully analyzed whether the assertions were impermissible legal conclusions, tethered to actual evidence, “unsupported and conclusory,” and otherwise generally admissible. *See, e.g., Pom Wonderful*, 2015 WL 10433693, at \*1118; *Wells Fargo*, 2014 WL 4312021, at \*910, 912.

It is undisputable that *Herb Reed* materially changed the landscape in Lanham Act cases. It appears equally clear that motions for preliminary injunctions are being granted with less frequency than in the past. And while this is unlikely to change, all is not lost for a party seeking injunctive relief. The evidence and carefully crafted arguments of irreparable harm will now make the difference. And perhaps this is the way it should be given that injunctions are supposed to be an extraordinary remedy.

*Griff Towle is a Principal at Bartko Zankel Bunzel & Miller who represents clients in complex commercial litigation.*



Continued from page 3

### *Simple Steps to Improve Your Jury Trials*

Get over your fears and get back into the courtroom. It's time for you, business trial lawyers, to put the “T” back into ABTL.

*The Honorable James Donato is a District Judge of the United States District Court, Northern District of California.*



### *Los Angeles Hosts Annual Seminar in Maui*

This year's Annual Seminar — set for October 1-5 at the Ritz Carlton in Maui, Hawaii — is entitled *The Technology Enigma — A 21st Century Trial*. Focused on the timely topics of encryption technology and a possible data breach, the Annual Seminar will feature a mock trial in which participants and spectators alike learn how best to prepare and present evidence involving a technology dispute. Such issues will include presentation of complicated data and code to a jury, multi-jurisdictional discovery disputes, and the intersection between public and private interests in data security. The Seminar will also feature opportunities to interact in small groups with judges and practitioners. More than 30 judges have already registered and we expect a record turnout from the bench. Registration is open and spaces are filling fast — sign up soon!

### *Which cabana is yours?*





CAROLINE MCINTYRE

## On LITIGATION SKILLS

### *Using Experts Effectively in Litigation*

**B**esides clearly and persuasively explaining complicated issues to a trier of fact, experts assist clients and counsel to understand specialized areas at the beginning of the case, provide input on discovery, assist with cross-examination of the opposing expert, and facilitate settlement.

#### Do You Need an Expert?

Certain subject areas, such as patent infringement and medical malpractice, are so specialized that experts are necessary. But what about a breach of contract claim? It depends. A simple breach of contract case may effectively be litigated without expert assistance. But complex contract claims could benefit from an expert who can speak to what terms are “industry standard” and how they are interpreted.

#### When to Retain Experts

It can be helpful to consider experts at the beginning of a case. Early expert review can highlight problems that may guide the client to consider settlement. Experts can also assist counsel propounding and responding to discovery on specialized issues, frame questions for deposition, assist with mediations and settlement conferences, and develop themes that counsel can use.

#### How to Find Good Experts

Ask colleagues in and outside your firm for expert recommendations. Clients may have helpful suggestions about individuals with expertise in their industry. Consulting companies can be a good source of experts in a wide variety of subject areas at different price points.

Once potential experts are identified, request CVs and schedule interviews, providing relevant, non-confidential material to the expert. The interviews should cover questions about background, relevant expertise, the expert’s prior cases (including the number of depositions, trial testimony (bench and jury), and expert reports provided), and whether the expert was ever disqualified. Ask the expert if he has handled similar issues, and how he would approach your case. Confirm his hourly rate, including rates for any supporting personnel. Request and follow up with references on how the expert performed in deposition and trial, including any feedback from jurors, the quality of any written report, and whether they would work with the expert again. Check online jury reporting sources for prior expert testimony, and call the attorneys who conducted cross-examination.

Expert fees can add up quickly, so discuss the potential

cost of the expert through trial with your client early in the case, and keep an eye on expert fees as they are incurred.

#### Expert Communications

Once the expert is retained, communicate with the expert with an eye toward what communications you will need to disclose to opposing counsel. The federal rules provide greater protection for expert communications than the California state rules. If you are in California state court, consider proposing that the parties will follow the federal expert discovery rules.

#### Expert Reports

The federal rules require experts to provide a written report. Federal Rules of Civil Procedure (“FRCP”) 26(a)(2) (A)(B). In contrast, California rules do not require experts to prepare written reports (though any discoverable report prepared must be produced if requested). It becomes a strategic decision whether to request the expert to prepare a report. If the expert does not prepare a written report, opposing counsel may be at a disadvantage at deposition. If the expert is preparing a detailed analysis, however, a report may be necessary to ensure accuracy at deposition, and a less experienced testifier may be more confident with a report in hand. Moreover, a strong expert report may be valuable in settlement discussions.



**Caroline McIntyre**

#### Depositions

Thorough preparation is key. Make sure the expert knows all aspects of any report he prepared, opinions he will give, and documents he has relied on. Consider how the expert will present at deposition, as many expert depositions are videotaped, and jurors may be put off by an expert who comes across as arrogant or argumentative. In certain technical cases, having the expert present during testimony of the opposing expert is an essential aid to cross-examination. Note that where there is a general order excluding witnesses in effect at trial, you should confirm that experts are exempt.

#### Trial

The expert should review his prior testimony and be prepared to present his opinions consistent with it. He needs to explain his opinions in a way the jury will understand. Expert testimony on complicated subjects such as damages and patents may benefit from demonstrative exhibits that explain the opinions (and keep the jurors engaged).

**E**xpert testimony can be critical. Finding the right expert early on and working closely with the expert throughout the litigation can make the difference between winning and losing a case.

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## Letter from the President

**T**oday, more than forty years after its founding, ABTL is the largest bench/bar organization in California. With five chapters and more than 5,000 members statewide, ABTL reaches many business litigators and the judiciary who preside over their cases. Our Northern California chapter is the largest again this year, with over 1,800 individuals and 43 firms as members. In reflecting on these statistics, and the responsibility that comes with them, this year's officers chose to focus on three areas to make 2016 the best year yet.

First, ABTL's officers developed and rolled out an online survey to solicit membership feedback. We wanted to know what we are doing right, and what we can do better. In some respects, we confirmed what we thought:



**Diane M. Doolittle**

members want "marquee names" as speakers for our bi-monthly dinner programs. Other preferences include having more judicial speakers, programs that focus on litigation skills, and programs with live demonstrations. We learned that the greatest impediment to having more members attend the Annual Seminar is the time commitment involved. We heard that the ABTL website is not well used, but that members are in favor of posting video links to past programming on the web for members to view after the fact. A number of members suggested that the evening programs be shorter. We welcome this feedback. As the year progresses, we intend to implement some of the suggestions on a test basis and see how the membership responds.

Second, we created a new Board Committee, entitled Pro Bono/Community Outreach, to improve our efforts at giving back to the broader community. Beatriz Mejia of Cooley LLP is our inaugural chair. In years past, ABTL has sponsored pro bono events. For example, we volunteered with Santa Clara County's "peer court," a voluntary program for minors to hear and recommend outcomes for other minors facing criminal charges. We sponsor the "One Warm Coat Drive" every year, where we collect and distribute coats to the needy in San Francisco. But with a compelling need, and a large and enthusiastic membership, we concluded that we can do more. Stay tuned for more information about our community outreach and programs/activities for ABTL members that we hope will have a large positive impact on our community.

Third, we are committed to making ABTL relevant not only for its current members, but also for the next generation of business trial lawyers. Towards that end, we have formed a sub-committee of Board and LDC members (lawyers 10 years or fewer out of law school) to consider the question of how to improve ABTL's appeal to younger attorneys. We want to attract more junior lawyers to our programs. We want them as members. We want them to understand that the relationships created amongst our

members help build community and help their careers. Indeed, ABTL is committed to nurturing business trial lawyers of all vintages, despite the current membership skew toward more seasoned lawyers. The sub-committee is co-chaired by ABTL Board member the Honorable Elizabeth LaPorte of the Northern District and Arthur Roberts, Chair of the LDC. As the sub-committee undertakes its work, we will report on its progress.

From my vantage point as a long-time Board member and now president, I have enormous respect for this organization. Our chapter is healthy and strong. As with most things in life, however, there is room for improvement. I look forward to implementing some of the changes noted above to help fulfill our mission of improving the quality of business trial lawyer advocacy, while encouraging civility and collegiality amongst bench and bar.

*Diane M. Doolittle is a partner with Quinn Emanuel Urquhart & Sullivan, LLP and the President of the Northern California chapter of ABTL.*



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