

# abt REPORT

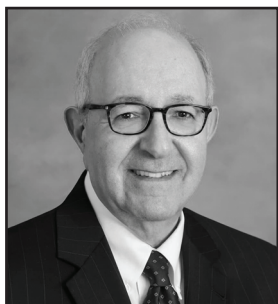
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## *A Lawyer, A Mediator and an Arbitrator Walk into a Bar... Ethical Dilemmas in ADR*



Hon. Robert B. Freedman (Ret.)



Hon. Ignazio Ruvalo (Ret.)

**T**hursday night, 6:15 p.m. The fog is rolling in after a warm day in the big city. Larry Litigious, new to Big Law civil litigation after a prestigious clerkship and a couple of years in the AG's office juggling criminal appeals, wanders into Resolution Taverna, a bar in the canyon of high rises near his firm's office. He is there for a brief respite before returning to bill another few hours working on a brief for a mediation that will follow in a few days.

His eyes adjust to the dim light - the seats at the bar are all occupied. Larry heads toward the only empty booth along the wall, sighs, and slumps down into it. He is worn

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## *The Advantages of Choosing a Magistrate Judge*

**W**e believe that, particularly in the Northern District of California, consenting to a magistrate judge for all purposes to handle all aspects of your case is a classic "win/win" scenario, but one that might seem risky to your clients. In the Northern District of California, cases are automatically and randomly assigned to magistrate judges and Article III "District Judges" alike. Parties then receive a notice and must make a decision to "consent" to or "decline" the magistrate judge. A "consent" means that the magistrate judge will handle the case for all purposes, including through trial. A declination leads to re-assignment to a District Judge. While this practice is not the national norm, as most districts in the U.S. do not follow this process, it forces lawyers and clients to make an early decision if their case is assigned to a magistrate judge. Do you consent or decline? Here are a few reasons to consent.

First, parties can get to trial faster if a magistrate judge handles the case. Magistrate judges can set cases for trial more quickly because they do not



Hon. Sallie Kim



Hon. Richard Seeborg

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have criminal cases that take priority in scheduling. Most District Judges set two or even three cases for each trial date. If the criminal case does not resolve, the criminal case takes priority over the civil cases scheduled for the same date. Even if there is no criminal case pending, the other civil case scheduled for the same trial date might take precedence over another civil trial. Indeed, District Judges who set only one case for a trial date can provide a trial date years from the initial Case Management Conference. Magistrate judges do not have as many trials to schedule, so they can usually set only one trial for a particular date, as soon as 18 months away, and honor that trial date because there are no criminal cases taking precedence. As one local litigator commented for this article: "If you choose a magistrate judge, things go quicker."

And even if parties do not want cases to go to trial faster because they think they can prevail on summary judgment, the date for briefing and hearing on summary judgment will also be faster than with a District Judge. District Judges close their calendars for law and motion hearing dates when there are too many hearings scheduled for that date, but magistrate judges rarely have that problem.

This decision, which occurs early in the Northern District of California, can also take place later. Even if a party declines to consent to a magistrate judge or even if the case is initially assigned to a District Judge, the parties can stipulate to a magistrate judge for all purposes at any stage in the litigation. Contrary to some lawyers' fears, lawyers who make this choice do not offend District Judges, and in fact District Judges are usually happy to send the case for all purposes to a magistrate judge.

The advantages extend to settlement, as well. Magistrate judges routinely handle settlement conferences for civil cases that are pending before District Judges. As a result, magistrate judges know how to structure cases for settlement. Magistrate judges are always thinking about settlement and may be open to creative ways to structure a case for settlement. For example, if the parties think that resolution of one key issue will help resolve the case, the parties can suggest a schedule to the magistrate judge that focuses and narrows the discovery and briefing on that one issue. The magistrate judge,

with more time to handle the matter, might agree to that schedule. Some District Judges have rules that parties can only file one summary judgment motion, simply because of the burden of work, but magistrate judges are generally more flexible. As one local, sports-loving magistrate judge said: "When it comes to case management, Magistrate Judges have something in common with Bruce Bochy, manager for the San Francisco Giants. He was a long-time catcher before he became a coach, so had experience seeing the details of the game from the perspective behind the plate. From our many settlement conferences, Magistrate Judges have first-hand knowledge about how, when, and why cases settle. This gives us insight in case management to help the parties with the best timing and approach to settlement, and to understand how case management events and settlement might interact."

The knowledge that a magistrate judge has about settlement is also helpful in identifying a colleague to handle the settlement conference. Magistrate judges usually know which colleague is best suited to handle the settlement conference. Certain magistrate judges are ideally suited for certain types of cases, and the magistrate judges are most attuned to that issue of "fit." As another magistrate judge said: "I spend part of every day with these people so I know where to send cases for settlement."

There are also efficiencies for a case if one judge hears discovery and substantive motions. In the San Jose division of the Northern District of California, all discovery matters are automatically referred to a magistrate judge, and in the San Francisco/Oakland division, several District Judges refer all discovery matters to a magistrate judge and others do on a case-by-case basis. A magistrate judge who oversees a civil case for all purposes decides discovery matters with knowledge of your case. Parties spend a significant amount of time and effort explaining the basic issues of the case in briefing a discovery motion, and they can save that time and effort if the magistrate judge handles the entire matter. Another local litigator commented for this article: "Most magistrate judges have been in practice recently, and because they deal with discovery so much, they are good at understanding the burdens" of litigation.

If clients are worried about partisanship and political influence in cases, a magistrate judge might seem like a less political choice to the client because magistrate judges are not appointed by the President

TYLER NEWBY  
HANLEY CHEW

## *Individual Standing to Sue in Privacy Cases – Recent Developments*



Tyler Newby

Whether a plaintiff asserting common law and statutory invasion of privacy claims has standing under Article III of the U.S. Constitution has been a heavily litigated issue in privacy class actions for nearly a decade. Although the Supreme Court addressed the question

of when an alleged violation of a statutory right satisfies Article III standing in *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016), that opinion did not put an end to disputes over standing in privacy cases. To the contrary, the question whether a business's use of an individual's personal data without the individual's knowledge or consent injures the individual to such a degree that he may proceed with a lawsuit remains hotly contested. This article recaps several important rulings on the issues of injury and standing post-*Spokeo*.

### **The Spokeo Test**

In *Spokeo*, the Supreme Court addressed whether a plaintiff bringing a claim under the Fair Credit Reporting Act ("FCRA") had Article III standing to sue for the defendant's distribution of a background report about the plaintiff that included inaccurate information about his income and education, but did not otherwise harm him. Remanding the case to the Ninth Circuit for further consideration, the Court held that Article III standing requires that a plaintiff allege a "concrete and particularized" injury, in the context of a statutory violation and not simply a "bare procedural violation, divorced from any concrete harm." In determining whether an intangible injury—such as an injury to privacy

rights—constituted an injury in fact, the Supreme Court stated that courts needed to look at the "judgment of Congress" and at historical practice. Because Congress is "well positioned to identify intangible harms that meet minimum Article III requirements," its judgment was "instructive and important." The historical inquiry examined "whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." However, "Congress cannot statutorily manufacture Article III standing in the case of a 'bare procedural violation, divorced from any concrete harm.'"

### ***Frank v. Gaos* – Renewed Supreme Court Interest in Privacy Standing**

The Supreme Court revisited standing in a statutory privacy case when it raised the issue *sua sponte* in *Frank v. Gaos*, 139 S.Ct. 1041 (2019), a case in which the Court had granted certiorari on an entirely different issue. *Gaos* arose

from the settlement of a class action lawsuit alleging that Google violated the Stored Communications Act (SCA) and state law by sharing the Internet search terms of its users with the owners of third party websites. Beyond a violation of privacy interests in their search terms, plaintiffs did not allege any other harm. Like FCRA, the SCA permits plaintiffs to elect statutory damages in lieu of actual damages. The Court granted *certiorari* on the propriety of the settlement, which consisted of *cy pres* payments to six non-profit organizations totaling \$5.3 million and the payment of \$2.1 million in attorneys' fees to class counsel but no direct recovery by the 129 million class members. The Supreme Court remanded the case for further proceedings to determine whether the plaintiffs in the underlying case had alleged SCA violations that were sufficiently concrete and particularized to support Article III standing in light of *Spokeo*. The Supreme Court's remand of the *Gaos* case ensures that the question whether privacy causes of action—whether arising from a statute like the SCA or FCRA—or from a common law right, addresses particularized and concretized harms will continue to be litigated on a statute-by-statute and claim-by-claim basis.



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or the Senate, but rather by the District Judges.

Even if parties choose not to consent to a magistrate judge and decline, they worry that the magistrate judge will find out about it and take offense. In most cases, the magistrate judge never learns about a declination. Magistrate judges have so many cases that they have no time to look at those filings, or to concern themselves with a decision to decline in any case.

Finally, magistrate judges enjoy handling civil cases for all purposes. It may seem counterintuitive that magistrate judges are happy to have more work, but there are a few reasons why that is the case. Magistrate judges like having a change of pace from the criminal calendar, settlement conferences, and discovery matters. As one local magistrate judge said: “I enjoy getting to know the lawyers and digging into the facts.” One of the reasons that magistrate judges like civil consent cases is that they gain insights that are helpful in settling cases. Often, magistrate judges can tell lawyers and their clients during settlement conferences how they might handle a motion or what the judge handling their case is thinking. Often, even the most experienced lawyer are surprised to hear the judicial perspective. The only way that magistrate judges can gain that knowledge is by handling the same types of cases. It may not be obvious that a happy judge is an attentive and enthusiastic judge who can and will devote time and effort to the case, which leads to the next point. One local litigator said that magistrate judges “take a real interest in your case.”

In summary, when faced with a decision to consent to a magistrate judge, the answer is yes.

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out with worry about the upcoming mediation. Larry was only going to be second chair, but now the partner in charge is stranded out of state and is not going to be able to attend in person. As he sits down, in short succession two other people enter, scan for seats and start walking in the direction of Larry's booth. While Larry knows who the other two are, they have never been introduced in a social setting. One is Justice Portia Tezzla, recently retired after a distinguished career on the Court of Appeal and now (according to inescapable ads in nearly every issue of the print and online legal press), affiliated with a well-known private dispute resolution service. The other new patron is Judge Atticus, retired from the Unified Courts of Alameda and Modoc Counties (Consolidated pursuant to the Judicial Budget Emergency Relief Act of 2008), also now serving as an arbitrator and mediator.

“It looks like we'll need to go someplace else,” Justice Tezzla says glumly surveying the full house. Larry, seizing this improbable opportunity, stands and offers to have them join him in sharing the booth. They both agree and shift into the banquette.

Larry, plagued by conscience, tells them that he has somewhat of an ulterior motive in that he is aware of their work in the neutral community and could, frankly, use some advice in connection with his upcoming mediation. A waiter approaches, takes their order -- three lemonades (this is a work of fiction, sort of) and a plate of sardines -- and departs.

Justice Tezzla begins - “This is somewhat new to me as well, but let's cover the basics. Have you complied with the new requirements for informing your client about the mediation process including the confidential aspects of mediation, and have you obtained your client's written agreement to proceed with mediation on those terms?” A chill runs down Larry's spine. “Written confirmation... did you say written confirmation?” Judge Atticus interjects - “Yes Larry, it's brand-new Senate Bill 954 enacting Evidence Code Section 1129; it became effective on January 1, 2019. The statute requires attorneys representing a party in

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mediation to provide printed disclosures of the confidentiality restrictions related to mediation and obtain the client's signature." The lemonade and sardines arrive and Larry takes a gulp, if only to buy time to think. "Actually, I didn't know about this and don't know if the partner on the case did before he left on his trip. Is it too late?"

Judge Atticus responds, "There's still time, but be sure you obtain the form specified in the statute and obtain the client's signature, if she is, in fact, agreeable. The good news is that the language of the form is actually provided in the statute so, you don't need to create the form on your own. If the client is not amenable . . . well that's another matter."

Judge Atticus continues, "And here's some even better, news - when, I mean, if, you end up in a State Bar disciplinary proceeding..." Larry, gasping, exclaims "how is a State Bar disciplinary proceeding good luck...?" Judge Atticus, sensing the potential for cardiac arrest, puts a calming hand on Larry's shoulder and patiently explains that Evidence Code Section 1122(a)(3) contains an express exception to the mediation confidentiality rule to allow the attorney to offer the client's signed disclosure confirmation in a disciplinary proceeding to establish compliance with Section 1129.

"Oh, by the way, if it's a class action, the written acknowledgement by the client, or in this case, the clients or class, is not required--certainly a practical exception." (Evidence Code 1129(a))

"And Larry, these consent forms are by no means merely a formality," adds Justice Tezzla. "The Evidence Code has strict provisions protecting confidentiality during and after the mediation. And the Supreme Court has weighed in and confirmed there is no 'good cause' exception to these statutes." (*Rojas v Superior Court* (2007) 33 Cal.4th 407). The two look at Judge Atticus for affirmation.

"Yes indeed," he answers. "Nothing said in connection with the mediation is later admissible in an arbitration or civil action. And this includes writings made for use in the mediation (Evidence Code section 1119(b)-(c). Even the mediator is

deemed incompetent to testify in any subsequent civil proceeding as to virtually anything that is said or happens during the mediation, except in connection with contempt proceedings, criminal conduct, investigations by the State Bar or the Commission on Judicial Performance, or motions to disqualify under CCP 170.1." (Evidence Code section 703.5). "There's also an exception for certain family law mediations," reminds Justice Tezzla.

Larry is impressed by the breadth of these statements. "Everything is confidential, no matter what?" he asks, testing the extent of the statements. "Oh, like the mediator's incompetence to testify statute, there are exceptions to the confidentiality of statements and writings," cautions Justice Tezzla. "For example, the parties can certainly expressly waive this confidentiality protection, and a statement or writing made outside the mediation is not deemed confidential just because they might be repeated or used during the mediation." (Evidence Code section 1122(a)). Judge Atticus expands the exceptions: "there are procedural exceptions as well. For example, any written agreement to mediate or a tolling agreement that is made as part of the mediation process is admissible, as are declarations used for asset disclosures in Family Court, even if they were initially prepared for a mediation." (Evidence Code section 1120).

Justice Tezzla, sensing Larry's angst at these seemingly endless revelations, remarks "You know Larry, attorneys representing clients in mediation and arbitration aren't alone in having ethical responsibilities in these proceedings. Mediators and arbitrators have obligations as well. Most mediators and arbitrators are members of the State Bar and must comply with applicable Rules of Professional Conduct."

"I haven't really thought about that, and it makes sense" Larry acknowledges, "but I am not sure how this works, in mediation or in arbitration. What should I know?"

"Here are the basics" Justice Tezzla explains, "California Rules of Professional Conduct, Rule 2.4(a) provides that a lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients to resolve a dispute. This includes service as an arbitrator, mediator or other capacity.

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Rule 2.4(b) requires the lawyer serving as a third party neutral to inform unrepresented parties that the lawyer is not representing the unrepresented party and where it is or should be evident that the party does not understand the neutral lawyer's role, the difference must be explained." Larry was now taking notes on a napkin.

The waiter returned and inquired after another round of lemonade. Larry responded, "Yes and please make mine a double." Judge Atticus and Justice Tezzla each nod in agreement. The Justice adds "May we also have another platter of sardines and, if you don't mind, ask the cook if she can provide a side of this tartar sauce," handing her business card with the recipe on the back to the waiter who, apparently unfazed by the request, replies "No problem, be right back."

"So, Larry", asks Judge Atticus, "do you want to ask us anything about how participants should conduct themselves before, during or after the mediation?" Larry looks around to make sure no one is close enough to overhear, "Yes, please, any guidance would be very much appreciated...maybe something like your top 10 suggestions..."

"Portia," Judge Atticus suggests, why don't you start and I'll chime in."

Justice Tezzla begins, "Well, some basics about communications with neutrals, this is governed by Rule 3.5 of the Rules of Professional Conduct - there are no limitations on so-called 'ex-parte communications' with mediators as there are with judges or other decision makers. Arbitrators, like judges, are decision makers so the limitations apply except in the special situation of so-called 'party selected non-neutral arbitrators.'"

Interjecting, Judge Atticus observes, "But remember there is an important distinction between the freedom to communicate confidentially with a mediator and the obligation to speak truthfully. You want to be sure you avoid making the mediator complicit in making a false representation to the adverse party."

Justice Tezzla, pulls out another business card and

passes it to Larry, who scanning the back expects to see a recipe for tartar sauce. Instead, printed on the back are citations to California Rules of Professional Conduct, Rule 4.1 - "Truthfulness in Statements to Others" and Business & Professions Code Sections 6068(d) and 6128 prohibiting, *inter alia*, knowingly making false statements.

Judge Atticus, seeing Larry's puzzled look, continues. "We now have new Rule of Professional Conduct 4.1 which requires attorneys to be truthful when making statements of material fact or law to another person. This includes not failing to disclose a fact that is necessary to avoid assisting the client in committing fraud or a crime. You know, no 'half-truths'."

"Here an example - let's say defense counsel in a joint session with the mediator and plaintiff's counsel responds to a question about insurance policy limits and says, 'I believe we have \$500,000.' But later in a separate session with the mediator, counsel reveals the primary and excess limits are actually \$3,000,000. It is clear defense counsel has violated Rule 4.1. But, if defense counsel also refuses to allow the mediator to tell plaintiff the true insurance limits, what does the mediator have to do?"

Justice Tezzla - seeing Larry spread his hands palm up in bafflement, steps in. "The mediator should not, cannot, be a party to this kind of deceit. The mediator can and should encourage counsel to gracefully correct the misimpression, but if counsel persists, the mediation should be terminated. The task for the mediator then becomes how to terminate the mediation in a way that does not reveal the misrepresentation by defense counsel."

"Here's another twist on candor challenges that comes up in mediation," notes Judge Atticus. "Plaintiff's counsel tells the mediator that she has authority to settle the case for, let's say \$200,000 and doesn't intend to take a dollar less," when she knows her client has authorized a 'walk away' only if the offer is less than \$150,000." Larry muses "... isn't that just 'horse trading' - the bargaining that goes on in any negotiation?"

"That's right, Larry. Take a look at Comment Two under the rule. It specifically says that expressions of what is an acceptable settlement

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amount for a claim are usually not considered to be false statements of fact.” “Okay - I think I get it,” says Larry, “mediations are way less formal than the courtroom, but there are rules.”

Larry interjects, “Let me ask you this - my case that’s going to mediation is pretty complicated. Even if the parties agree on the monetary amount of a settlement, they will still have some ongoing obligations to meet in order for all conditions of the settlement agreement to be met. Can we agree that if a future dispute arises over these contingencies the parties will resolve that dispute by binding arbitration with the mediator serving as the arbitrator? Is it okay for me to discuss this with the mediator in one of our separate sessions?” Larry adds, “Or maybe I could propose either of you to be the arbitrator?”

“In either case, before you include the identity of the potential arbitrator in the settlement agreement itself, whoever that arbitrator may be will have to make certain disclosures that he or she did not have to make while serving as a mediator,” Justice Tezzla explains. “My goodness, these disclosure obligations are right at the top of my ‘to do’ list whenever I am told that the parties intend to use me as an arbitrator.”

“And boy, are those disclosures long, detailed, and specific,” chimed in Judge Atticus. “California Code of Civil Procedure 1281.9 requires that arbitrators disclose any ground specified in section 170.1 which are applicable to judges, and also to comply with Ethics Standards for Arbitrators enacted by the Judicial Council at the direction of the Legislature.”

“Uh, uh, uh,” says Justice Tezzla somewhat sarcastically as she wags her finger at Atticus. “Don’t forget the added disclosures if the arbitration is considered to be a ‘consumer’ arbitration under the Judicial Council’s definition. In those cases the arbitrator cannot accept any other arbitration assignment involving the same clients, lawyers or law firms without disclosing the offer and getting a waiver from those involved in the already pending consumer arbitration.”

Taking a cue, Judge Atticus passes his card to Larry, and continues. “There are some case type specifics that you might want to keep in mind. Without giving us any information protected by the attorney-client privilege, does your case involve any issues of alleged workplace sexual harassment?”

Larry, eyes wide, exclaims – “Yes it does!...what do I need to know? Do you have this stuff written down on the back of on your cards?”

Justice Tezzla, dipping the remaining sardine in tartar sauce, responds – “I don’t have a large enough card”, “but note these on your bar napkin ‘research memorandum’”. Two sets of new statutory authority, effective January 1, 2019, affect the ability to limit disclosures in these kinds of cases. SB 820 adds Section 1001 to the Code of Civil Procedure, precluding provisions in settlement agreements preventing disclosure of claims in a settlement agreement or a civil or administrative action pertaining to a variety of acts of sexual assault, sexual harassment, discrimination and retaliation based on sex. However, the new statute does not prevent settlement agreements from shielding the identity or the claimant or the financial terms of the settlement, with exceptions when a governmental agency or public official is a party. In addition, SB 1300, adds Government Code Section 12964.5, making it an unlawful employment practice, for an employer to condition employment or compensation upon signing releases or agreeing to certain non-disclosure and/or non-disparagement provisions.

“Yikes”, exclaims Larry- “how am I ever going to get my case settled if one of the parties insists on confidentiality?”

Judge Atticus responds, “All hope is not lost, because Government Code Section 12964.5(c) expressly provides that these prohibitions do not apply to a negotiated settlement agreement to resolve such a claim that has been filed in court, before an administrative agency, alternative dispute resolution forum, or through an employer’s internal complaint process, provided the claimant has counsel or been given an opportunity to retain counsel.

Justice Tezzla, sensing that all will agree, observes “I think this is about all the lemonade, sardines



## *Individual Standing to Sue in Privacy Cases*

### **Standing in State Law Privacy Cases – Biometric Privacy**

While much of the federal litigation over standing in privacy cases has centered on whether the plaintiff's claims satisfy Article III, whether plaintiffs have statutory standing in state court privacy claims is also frequently contested. One of the most active areas of privacy litigation in the past few years has been a surge of lawsuits brought under the Illinois Biometric Information Privacy Act (BIPA) in federal and state courts. Illinois passed the BIPA in 2008 to regulate the "collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information." BIPA requires that organizations provide written notice and obtain a written release prior to the collection of any biometric identifier. A "biometric identifier" is defined as "a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry." The notice must include the purpose of the collection and the duration that the organization will use or retain the data. Only after obtaining a written release can organizations begin their collection activities. BIPA also requires organizations to have a publicly available, written policy stating how long the organization will retain the data and rules governing the destruction of that data.

BIPA also provides that "[a]ny person aggrieved by a violation of this Act shall have a right of action . . . against an offending party." "Aggrieved" parties may recover the greater of actual damages or liquidated damages of \$1,000 for a negligent violation and \$5,000 for an intentional or reckless violation. Successful plaintiffs may also obtain injunctive relief and recover attorney's fees.

BIPA class action lawsuits have been brought against such companies as Facebook, Inc., United Airlines Inc., Intercontinental Hotels Group, Hyatt Corp., Bob Evans Restaurants, Speedway LLC, and others for their collection, use and storage of biometric data. The question of who possesses standing to bring a BIPA action has been hotly contested with courts weighing in on both sides of the issue.

In *Santana v. Take-Two Interactive Software, Inc.*, 717 Fed. Appx. 12 (2d Cir. 2017), plaintiffs alleged that Two-Take Interactive Software, which developed and distributed video games with a feature allowing players to scan their faces and create personalized avatars in the games with a 3-D rendition of their faces, violated BIPA by collecting and disseminating their biometric data without their informed consent; failing to inform them of the specific purpose and duration for which their biometric data would be stored; failing to make publicly available retention schedule or destructive guidelines; and failing to store, transmit or protect their biometric data by using a reasonable standard of care. The Second Circuit affirmed the district court's dismissal of plaintiffs' claims for lack of standing, holding that none of alleged BIPA violations presented "a material risk that their biometric data [would] be misused or disclosed." The Second Circuit found that the mere technical or procedural violations of the statute were not sufficient to confer Article III standing.

In contrast, in *Patel v. Facebook, Inc.*, 290 F.Supp.3d 948 (N.D. Cal. 2018), plaintiffs alleged that Facebook, which uses "tag suggestions" to scan uploaded photographs and then identify faces in those photographs violated BIPA by failing to inform its users that their biometric identifiers (i.e., facial geometry) were being generated, collected or stored; failing to inform users in writing of the specific purpose and duration for which their biometric data was being collected and stored; failing to provide a publicly available retention schedule and destruction guidelines; and failing to receive a written release from its users to collect their biometric identifiers. The district court denied Facebook's motion to dismiss for lack of subject matter jurisdiction, holding that the alleged BIPA violation were enough to satisfy Article III's standing requirement. Specifically, the district court held that "the abrogation of the procedural rights mandated by BIPA necessarily amounts to a concrete injury" and "[a] violation of the BIPA notice and consent procedures infringes the very privacy rights the Illinois legislature sought to protect by enacting BIPA[.]" which is "quintessentially an intangible



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harm that constitutes a concrete injury-in-fact.”

Facebook appealed the district court’s decision, arguing that the plaintiffs had not suffered “real world” harm and therefore lacked standing under *Spokeo*. On August 8, 2019, the Ninth Circuit affirmed the district court. 2019 WL 3727424.

On January 25, 2019, the Illinois Supreme Court weighed in on whether a procedural BIPA violation by itself was enough for standing and issued its highly anticipated opinion in *Rosenbach v. Six Flags Entertainment Corp. et al.*, --N.E.3d-- , 2019 IL 123186 (Ill. 2019) holding that plaintiffs who have alleged a BIPA violation need not allege a separate injury or adverse effect to have statutory standing as an “aggrieved” person to bring a claim under BIPA for liquidated damages or injunctive relief. In that case, the operators of a theme park used a fingerprinting process when issuing repeat-entry passes in order to speed passholders’ entry and reduce the sharing of passes. This process includes scanning pass holders’ fingerprints; and collecting, recording, and storing this data to verify customer identities upon subsequent visits.

The plaintiff, a minor, visited defendant’s amusement park on a school field trip. His mother had purchased a season pass for her son and provided personal information about him. When Rosenbach’s son arrived at the park, he was required to go through the fingerprinting process to receive his season pass card.

After learning of her son’s fingerprint collection, Rosenbach filed a putative class action complaint, alleging that defendants had violated BIPA by (1) “collecting, capturing, storing or obtaining biometric identifiers and biometric information” from her son and other members of the proposed class without providing them with written notice that the information was being collected or stored; (2) failing to provide written notice concerning the specific purpose for which the information was being collected; and (3) failing to obtain a written release prior to collecting the information. Rosenbach sought liquidated damages and injunctive relief to compel defendants to make the required disclosures under BIPA and prohibit them from violating the Act going forward.

Reversing the intermediate appeals court’s dismissal of the entire action, the Illinois Supreme Court held that “an individual need not allege some actual injury or adverse effect, beyond violation of his or her rights under [BIPA], in order to qualify as an ‘aggrieved’ person and be entitled to seek liquidated damages and injunctive relief pursuant to the Act.” The Court began its analysis by looking at the intent of the General Assembly in enacting the specific provision of BIPA that created a private right of action. It observed that, when the General Assembly wanted to require actual damages before a private action under a statute could be brought, “it has made that intention clear.” The Court compared BIPA to the AIDS Confidentiality Act, under which persons “aggrieved” by violations of the statutes or regulations promulgated under the statute could bring a private action for monetary relief without proof of actual damages.

The Court next considered the settled legal meaning of the term, “aggrieved.” Citing one of its decisions more than a century old, the Court held that “to be aggrieved simply ‘means having a substantial grievance; a denial of some person or property right[.]’” and “[a] person is prejudiced or aggrieved, in the legal sense, when a legal right is invaded by the act complained of or his pecuniary interest is directly affected by the decree or judgment.” Applying this definition to BIPA, the Court found that the General Assembly had codified the right of individuals to privacy in and control over their biometric identifiers and information by imposing requirements on private entities concerning the collection, retention, disclosure and destruction of these identifiers and information. The Court further found that “when a private entity fails to comply with one of [BIPA’s] requirements, that violation constitutes an invasion, impairment, or denial of the statutory rights any person customer whose biometric identifier or biometric information is subject to the breach,” and “such a person or customer would clearly be ‘aggrieved’ within the meaning of BIPA and entitled to seek recovery[.]”

The Court noted that a violation of BIPA’s requirements is no mere “technicality.” Instead, it held that the injury is “real and significant” and “[t]o require individuals to wait until they have sustained some compensable injury beyond

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## *Individual Standing to Sue in Privacy Cases*

violation of their statutory rights before they may seek recourse . . . would be completely antithetical to the Act's preventative and deterrent purposes."

The *Rosenbach* decision has significant implications. Although it may not greatly increase the number of BIPA actions, the *Rosenbach* decision has made it much more difficult for defendants to challenge those actions at the pleading stage in federal or state court with a motion to dismiss for lack of subject matter jurisdiction. By finding that BIPA creates substantive privacy rights for individuals to control their biometric identifiers and information through its requirements, the *Rosenbach* decision enables plaintiffs to establish standing solely by alleging a failure to comply with those requirements. In short, plaintiffs need only allege a procedural or technical violation of BIPA to create statutory standing.

### **What's Next**

As states and Congress debate enacting broad privacy statutes, the Article III and statutory standing issues left both resolved and unresolved by *Spokeo*, *Gaos* and state court cases like *Rosenbach* are likely to continue to play out in the courts with early, facial challenges to whether a plaintiff has asserted a "concrete" injury in fact, and whether a mere violation of the statutory right, without more, makes the plaintiff "aggrieved." For example, the California Consumer Privacy Act (CCPA), which goes into effect on January 1, 2020, includes what will become the most expansive definition of personal information of any state privacy law and is likely to lead to new battles over standing in privacy litigation. Although amendments are being considered that would narrow the scope of the definition, at the time this article went to press, the CCPA defined personal information as any information "that identifies, relates to, describes, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household." Cal. Civ. Code 1798.140(o). The CCPA affords California consumers a number of rights concerning their personal information, including the right to request disclosure and deletion of their personal information held by a business, the right to request

disclosure of third parties to which a business has sold the consumer's information in the past 12 months, and the right to opt-out of the sale of the consumer's personal information. Cal. Civ. Code 1798.100, *et seq.* Although the CCPA does not provide individuals with a private right of action for violation of these rights, plaintiffs may attempt to bring a claim under California Business & Professions Code, § 172000, alleging that such CCPA violations constitute "unlawful" business acts or practices.

The CCPA also creates a private right of action for data breaches of a narrower class of unencrypted personal information—social security numbers, driver's license numbers, financial account numbers with access codes, medical information, health insurance information and online account login credentials—as a result of a business' failure to implement and maintain reasonable security procedures and practices. Cal. Civ. Code § 1798.150. The CCPA provides a remedy of the greater of actual damages or statutory damages of \$100 - \$750 per consumer, per incident. Unlike other state privacy and unfair business practices laws, however, the CCPA does not require that the plaintiff be "aggrieved" or suffer an economic injury. Thus, even if a defendant in a diversity jurisdiction case were able to prevail in showing that a federal court lacks Article III standing over claims raised under this provision of the CCPA, the defendant will likely find itself litigating the same issues in state court.

*Hanley Chew is Of Counsel at Fenwick & West, LLP and focuses his practice on privacy and data security litigation, counseling and investigations, as well as intellectual property and commercial disputes affecting high technology and data driven companies.*

*Tyler Newby is a partner in the San Francisco office of Fenwick & West LLP, where he chairs the firm's IP and Commercial Litigation group and co-chairs the firm's Privacy and Cybersecurity Practice.*



CAROLINE MCINTYRE

## On LITIGATION

*If at First You Don't Succeed,  
Trial, Trial Again*

**Y**ou are facing a second trial in state court after the Court granted a motion for new trial or declared a mistrial. A new trial offers an opportunity to address weaknesses and deficiencies with witnesses or evidence from the first trial and present evidence more effectively at the second trial. But where do you begin?



Caroline McIntyre

**Jury input:** It is important to try to speak with jury members after the trial to get their feedback on what worked, what did not, impressions of witnesses, including experts, any gaps in evidence or areas of confusion, the method of evidence presentation, and how they reached (or in the case of a hung jury, obstacles they faced in reaching) their verdict. While jury members are not obligated to speak with the trial attorneys, they often are eager to do so because this is their first opportunity to interact with the trial attorneys and ask questions or give their impressions. Jury members may provide critical feedback for mapping out the second trial such as why they believed or did not believe certain witnesses, which exhibits were persuasive, issues they would have liked to be addressed during the trial, any sense of confusion or overreaching on damages, or even a new theory of the case or themes that had not been considered. Where you do not have the benefit of post-trial jury discussions, similar feedback regarding the first trial can be obtained from the client and others who attended the trial.

**Transcripts:** Read the trial transcripts carefully. Look for areas where testimony was not credible or unclear. Did the evidence presented meet the

promises in the opening statement? If not, why not? If the evidence met the opening statement promises but the jury did not find in your client's favor, consider how the evidence could be presented more effectively. Was there a clear theme presented? If not, consider a theme that will resonate with the jury in the second trial.

**Witnesses:** The order of witness testimony can be key to effectively presenting the evidence. If the transcripts reflect the testimony during your client's case did not start and finish strong, or if the testimony was broken up with other witness testimony, consider changing the order of witness testimony for the second trial. Note also that with a new trial, you are not required to call the same witnesses or present the same evidence. If a witness did not do well in the first trial, and is not critical to your client's case, consider not calling that witness at the second trial. Keep in mind, however, that opposing counsel could still attempt to call this witness, or read their testimony if the witness is considered unavailable, so you will need to weigh the pros and cons of eliminating witness testimony at the second trial. You could also consider calling witnesses who did not testify at the first trial, provided they were properly disclosed during discovery and will be included on witness lists for the new trial.

**Discovery:** Discovery is reopened with a new trial based on the new trial date. If a review of the first trial shows gaps in the evidence, additional discovery could be propounded. You are not required to use the same experts in the new trial. If your expert from the first trial is not available or was not effective, consider using a new expert. To ensure you know whether the opposing party will be calling a new expert, timely serve a new demand for exchange of expert witness information.

**Stipulations and Motions in Limine:** Before the new trial, meet and confer with opposing counsel to try to reach stipulations, including issues related to the first trial. If stipulations cannot be reached, bring motions in limine on those issues. For example, seek agreement from opposing counsel that the parties will not make reference to the fact there was a prior trial, and that any testimony from the first trial will simply be referenced during the new trial as "prior testimony" with the date of that testimony. If the jury from the first trial reached a

*Continued on page 14*

HOWARD M. ULLMAN

## On ANTITRUST

**B**lockchain technology has burst onto the scene and into the public consciousness over the last few years. While the securities and privacy law questions surrounding Blockchain technology have received much attention, the potential antitrust issues raised by the technology are perhaps less obvious.



Howard M. Ullman

Although these issues are nascent, they are not wholly theoretical. For example, last March the FTC announced that it is creating a Blockchain Working Group to look at, *inter alia*, competition policy.

“Cryptocurrency and blockchain technologies could disrupt existing industries. In disruptive scenarios, incumbent companies may sometimes seek to hobble potential competitors through regulatory burdens. The FTC’s competition advocacy work could help ensure that competition, not regulation, determines what products will be available in the marketplace” (FTC Blog Post). Also last year, the Japan Fair Trade Commission indicated that it may look into the competition policy issues involving Blockchain-based cryptocurrencies.

Of course, the extent of future adoption of Blockchain technology remains unclear, and even if it is robust, assuming that Blockchain requires its own law may be like trying to create a special law of horses, “doomed to be shallow and to miss unifying principles” in the words of Judge Frank Easterbrook in his famous article *Cyberspace and the Law of the Horse*. Still, it is worth considering whether Blockchain poses any new or unique issues for antitrust enforcement.

### What Is Blockchain Technology?

Entire papers and books have been written about what Blockchain is and how it works, and obviously we can’t cover all the issues here. In a nutshell, Blockchain technology consists of three

parts: (i) a peer-to-peer network, (ii) a consensus mechanism, and (iii) a Blockchain. The peer-to-peer network allows network participants to communicate with each other directly, without the need for a centralized, trusted intermediary. The consensus mechanism allows the network to agree upon the validity of transactions that take place over the network. And the Blockchain itself consists of a shared ledger of transactions that is typically open for inspection by all network participants.

### Potential Antitrust Issues Raised by Blockchain Information Sharing

Some Blockchains simply record the transfers of tokens between and among network participants. However, Blockchain technology is highly malleable, and Blockchains can record other information. If that other information includes price or cost information of goods or services, and the information is available to network participants who are also competitors or potential competitors, the technology may facilitate information sharing that would be prudent to avoid. It may be possible through cryptographic mechanisms, information firewalls or the like, to limit one competitor’s access to, *e.g.*, another’s current or future pricing information. In addition, in highly concentrated markets, even the sharing of non-price information might be argued to cause certain issues. For example, if firms fear that any moves to try to capture more of the market may become transparent through the Blockchain and prompt retaliation by competitors, they might be dissuaded from trying in the first place.

### Potential Antitrust Issues Raised by Setting Blockchain Standards and Rules

Industry standards often enable multiple companies to produce and share interchangeable or interoperable products, and are therefore generally pro-competitive. However, the formation and promulgation of industry standards can create antitrust risk. For example, if a standard favors one competitor’s technology over another’s, and is adopted in a non-transparent manner that obscures the ownership interest, the standard could be argued to create or enhance market power through industry “lock-in.” For this reason, network membership criteria should be objective and reasonable, and Blockchain technology standards

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JAMES YOON

## On PATENTS

**T**oday, companies confronted with patent infringement accusations face many challenging questions. This article focuses on three of the more important and common questions: (1) when does it make business sense for a company to investigate the merits of patent infringement claim(s); (2) if the claim(s) is investigated, should the results of the investigation be shared with the entity asserting patent infringement; and (3) if the claim(s) is investigated, should the company obtain an opinion letter that documents its non-infringement and/or validity defenses.



James Yoon

Generally, it does not make business sense for a company to immediately begin performing a comprehensive investigation of a patent and associated assertion of infringement after receiving an initial “threat” of an infringement action by a patent holder. Such investigations are not only expensive but also capable of disrupting a company’s business at critical junctions in its history. The investigation can often pull key engineers and executives away from product development and important business functions. The distractions and legal costs associated with such investigation can greatly outweigh the cost of taking a license and/or settling with the patent holder.

Even after a company receives a letter from a patent holder, it is often clear that the actual threat of an infringement action is minimal. The initial notice letter from the patent holder is frequently part of a mass mailing and often lacks any indication that the patent holder has conducted detailed, specific infringement analysis with respect to the company’s products. In such situations, it does not make business sense to begin a detailed patent investigation until the company receives additional data points indicating that the threat of

an infringement action is substantial. Examples of such data points include the litigation history of the patent holder, communication from the patent holder with the company’s customers and/or follow up communications that provide detailed descriptions of the infringement allegation.

If a legal threat seems substantial, as a first step, a company can initiate a prior art search into the validity of the asserted patents. Such searches and the subsequent analysis of the identified prior art can determine whether there is a good chance that the patent can be invalidated. The search and analysis can demonstrate whether the company can file an *inter partes* review petition with the patent office to invalidate the patent. The benefit of the “prior art first” approach is that the investigation will place a minimal burden on the company, since such search and analysis can be handled externally or by the company’s legal team. There is no need to take engineers away from their jobs and disrupt projects so that the engineers can assist attorneys in rebutting the claims.

If the prior art is not particularly strong or if the company (for specific business and/or relationship reasons) needs to affirmatively demonstrate that it is not infringing the patents, the company can commit the legal and engineering resources necessary to perform a non-infringement analysis. For example, small companies with limited sales often have to go the “extra mile” to convince larger companies to adopt their technology and, as a result, want to eliminate patent or IP concerns. When such infringement analysis is performed, the goal is to identify one or more elements in each independent claim of the patent that is not practiced by the accused product. Alternatively, if there is a substantial infringement risk, the goal is to work with the company’s engineers to “design around” the independent claims by removing one or more elements of the claims from the accused product. The goal here is to document how the accused product does not (today) and/or will not (in the future) practice the claims of the patent.

As discussed above, after a company has conducted a validity and/or non-infringement analysis, the company needs to decide whether to share the information with the patent holder. While

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## *Ethical Dilemmas in ADR*

and law that we can take in at one time. Larry, best wishes in resolving your case and maybe next time we meet we'll have some case law applying these new statutes to discuss.”

*Hon. Ignazio J. Ruvo (Ret.) is a full-time neutral at JAMS. He was presiding justice of the California First District Court of Appeal, Division Four from 2006 until his retirement in 2018. He was appointed as an associate justice in Division Two in 1996. Prior to that, he served on the Contra Costa Superior Court.*

*Hon. Robert B. Freedman (Ret.) is a full-time neutral at JAMS. He was a Judge of the Alameda County Superior Court for 21 years before joining JAMS, serving over time as Assistant Presiding Judge and Judge in the Complex Department.*



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## *On LITIGATION*

verdict as to certain issues, but not others, consider a stipulation that issues already decided by the jury have been decided and will not be referenced in the second trial.

**Legal arguments:** Remember to update trial briefs and any prior motions in limine, including addressing any changes in the law.

**Presentation:** A second trial is an opportunity to streamline evidence and clarify issues for

the jury. If the jury struggled with damages or complex issues in the first trial, consider ways to simplify those issues. Graphics can be helpful in that regard.

**Putting it all together:** Armed with details about what worked and what did not work during the first trial, you can more effectively present evidence during the second trial to obtain a favorable outcome for your client.

*Caroline McIntyre is Managing Partner with Bergeson, LLP. She has extensive experience with complex business litigation, with a focus on securities litigation.*



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## *On ANTITRUST*

should be adopted pursuant to transparent and fair processes.

Blockchain consensus mechanisms – which can be thought of as resulting from adopted standards – may also be subject to antitrust review. For example, most Blockchain networks require a certain number of network participants (or “nodes”) to agree that a given transaction is valid. The validation mechanism could raise antitrust issues if it, for example, favors certain network members over others (e.g., in connection with processing time or bandwidth), boycotts the transactions of certain members, etc.

### **Potential Antitrust Issues Involving Access to Private Blockchains**

Some Blockchains are open to any and all interested parties. (Bitcoin is the most obvious example.) Other Blockchains involve closed networks open to participants only by invitation. As with other competitive collaborations,

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## On ANTITRUST

Blockchain participants should ensure that they are not excluding competitors or others for anti-competitive reasons with an anti-competitive effect, and that the rules for expulsion of members (if any) are clear, objective and not anti-competitive.

### Other Issues

Given the inherently decentralized nature of Blockchain technology, most implementations are likely to cross numerous borders. This may make determining the applicable law particularly complex. Moreover, another potential issue arises from the supposedly irreversible or immutable nature of Blockchain transactions. If a court orders a change in the practice of a particular Blockchain, can such an injunction be implemented given the nature of the technology? If not, what are the parties to do? Finally, Blockchain's pseudo-anonymity and its distributed nature may make detection of antitrust violations and the enforcement of antitrust laws more difficult, leading some commentators to call for laws to specify the nature of Blockchain technology to provide some sort of backdoor or enforcement path. See Thibault Schrepel, *Is Blockchain the Death of Antitrust Law?*, 3 GEO. L. TECH. REV. 281, 321 (2019).

### Conclusion

It is far from clear how regulatory agencies or the courts will apply antitrust law to Blockchain technology. However, it is abundantly clear that competitors should not simply ignore the possible application of traditional antitrust concepts to this emerging technology.

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## On PATENTS

lawyers normally do not like to disclose privileged information, there may be very good reasons to share the analysis with the patent holder. First, by sharing the information, the company is sending a clear message to the patent holder that it is ready, willing, and able to fight a patent lawsuit. This message may convince a patent holder to seek an “easier” target for patent royalties. Second, sharing the information may establish a better fact pattern for the company in the event that a patent case is filed. The company can point to the disclosure to support its claim that it had a “good faith” reason to believe that it was not infringing the patent.

The company also needs to decide whether it should obtain an opinion letter on the asserted patent. While the law no longer requires such an opinion letter to rebut a claim of patent infringement, there are a number of circumstances where it makes good business sense to obtain an opinion letter. For example, privately held companies may want to request opinion letters in order to make it easier for them to raise capital and to show potential investors that they do not need to worry about the infringement allegations. The opinion letter will be disclosed to potential investors during the due diligence process and will, hopefully, ease investor concerns about patent risks. As a result, the opinion letter improves the ability to obtain investments in the company and may improve the terms (from the company's perspective) of such investments.

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## Letter from the President

First, I would like to thank you all of your tremendous support of ABTL this year. Because of your support we are on a record setting pace this year for revenue, attendance, and membership levels. Our Chapter is now the largest ABTL Chapter in California and our current membership total is the second highest membership level ever.



Daniel J. Bergeson

Second, it is hard to believe but we only have two remaining Dinner Programs this year. Our next Dinner Program will be on September 17, 2019. Entitled "Return of the Octopus? Has Big Tech Gotten Too Big?", the panel will be moderated by the Honorable Susan Illston, U.S. District Court, N.D. Cal. and will feature some of the most prominent lawyers and scholars in antitrust law in the nation. On the panel will be Bill Baer (Arnold & Porter), Former Assistant Attorney General for Antitrust, DOJ and Former Director, FTC Bureau of Competition; Megan Jones (Hausfeld LLP); Daniel Swanson (Gibson, Dunn & Crutcher LLP) and Professor A. Douglas Melamed (Stanford Law School).

Our final 2019 Dinner Program will be on November 19, 2019 and will feature California Supreme Court Justice Carol Corrigan and California First District Court of Appeal Associate Justice Mark B. Simon. Stay tuned for further details on this program.

Finally, we hope you will be able to attend the Annual Seminar on October 3-6, 2019 at La Quinta Resort in La Quinta, California. The Annual Seminar is entitled "The Transforming Business of Business Litigation." Serving as speakers from our Chapter will be the Honorable Brian C. Walsh (Santa Clara Superior Court); Quyen Ta (Boies Schiller Flexner, LLP); Michael Joyce (Wilson, Sonsini, Goodrich & Rosati); and Cynthia Bright (Head of U.S. Litigation and Government Investigations for HP, Inc.) It should be an outstanding Annual Seminar.

Best,

Daniel J. Bergeson

ASSOCIATION OF BUSINESS TRIAL LAWYERS



NORTHERN CALIFORNIA

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