the abtl REPORT

GenAI in the Courtroom: San Diego's Judicial Approach

By Nicole Forister

Generative Artificial Intelligence (GenAI) is expected to transform the legal field within the next decade. GenAI is a subset of AI that relies on data, often from the Internet, to generate content in response to a user prompt. There is no question that GenAI will change the way attorneys practice and courts adjudicate in the near future. In just the past year, the GenAI program ChatGPT has passed the bar exam. Attorneys have used GenAI to draft legal briefs, edit documents, and summarize deposition transcripts. Lexis and Westlaw have also introduced GenAI tools for legal research. The potential capabilities of GenAI seem almost limitless as the technology continues to tackle a wide range of legal tasks.

You have likely heard of GenAI "hallucinations." In the legal context, hallucinations occur when GenAI tools like ChatGPT make up fake cases and holdings in response to attorney prompts. Some attorneys have learned the hard way that they need to double-check the work of GenAI tools. For example, in one recent case, attorneys submitted fake cases in an opposition brief that they researched and wrote using ChatGPT. *Mata v. Avianca, Inc.,* No. 22-CV-1461 (PKC), 2023 WL 4114965, at *1 (S.D.N.Y. June 22, 2023). The attorneys did not review ChatGPT's work product to ensure it was accurate. The court ultimately sanctioned the attorneys. Similar issues have occurred in other cases. *See, e.g., Kruse v. Karlen*, No. ED 111172, 2024 WL 559497 (Mo. Ct. App. Feb. 13, 2024); *United States v. Cohen,* No. 18-CR-602 (JMF), 2023 WL 8635521 (S.D.N.Y. Dec. 12, 2023).

In response, some courts around the country have adopted local or chambers rules that require disclosure when attorneys use GenAI to prepare briefs that are submitted to the court. Other courts have taken a different approach by installing flat bans on using GenAI in briefs or adopting orders that require attorneys to preserve any GenAI prompts they have used to draft a brief. The majority of courts nationwide, however, have not issued any specialized GenAI rules. *See generally* Maura R. Grossman, Paul W. Grimm & Daniel G. Brown, *Is Disclosure and Certification of the Use of Generative AI Really Necessary?*, 107 Judicature 68 (2023).

So, what are judges in San Diego doing?

In the Southern District of California, the federal court has not issued any local rules specific to GenAI, and none of the judges have issued specialized chambers rules. The judges have, however, been learning about what GenAI is and how it could impact their work. The Lawyer Representatives for the Southern District recently set up a training for judges to gain a better understanding of GenAI. Judge Allison H. Goddard adopts the view that special chambers rules are not necessary in light of existing tools, such as Federal Rules of Civil Procedure 11 and 26(g), that can be used to address misuse of GenAI. Under Rule 11,

Continued on page 4

Inside

abtl SAN DIEGO

2024 MEMBERSHIP REGISTRATION

BENEFITS INCLUDE

- ***Diverse membership -*** plaintiff and defense bars, federal and state judiciary, firms of all sizes and solo practitioners.
- ***Dinner Programs -*** topical, informative events, featuring state and nationally known lawyers, judges and experts. *(Member discount & MCLE credit)*
- ***Annual seminar*** at resort destinations - scheduled for October, 2024 at the Meritage in apa Valley. *(MCLE credit)*
- ***"Meet the Judges" Series -*** Judicial Mixer and Judicial Brown Bag MCLE programs *(Complimentary events)*
- ***"Specialty MCLE"*** lunchtime programs. *(Complimentary events w/MCLE credit)*
- ***The ABTL Report,*** a professional publication containing articles of interest to business trial lawyers and judges.
- ***And MUCH more...***

PRICING

$135.00	Individual Membership
$110.00	100% Club Membership *(all litigating attorneys in office, min. 2)*
$85.00	Public Sector, Retired Judge, 1-3 yr Young Attorney
FREE	Sitting Judge, Law Student, ***1st Time*** Young Attorney *(1-3 yr)*

Go to:

abtl.org/sandiego

to register NOW!

BOG firms will be invoiced ◀

PRESIDENT'S LETTER:

ABTL San Diego, 2024

By Andrea Myers

It is my privilege to serve as the 2024 ABTL San Diego President. Our 2023 President, Paul Reynolds, has left the organization fiscally sound, with a robust membership, and better-than-ever programming. Paul, thanks for your hard work and for everything you have contributed to ABTL. I will do my best to continue these efforts and ensure that ABTL remains one of the preeminent legal organizations in San Diego.

ABTL is the place to be for great networking, interacting with judges, and experiencing next-level programs. We are fortunate to have some of the most accomplished trial lawyers, judges, and justices on our Board of Governors and Judicial Advisory Committee. Our mission is to promote competence, ethics, professionalism, and civility in the legal profession and to encourage dialogue between the San Diego bench and bar. I cannot think of any organization that does this better.

If you have not been to a dinner program recently, you are missing out. In 2023, we featured California Chief Justice Patricia Guerrero, with great insight from Appellate Court Justice Martin Buchanan. Our program "Dinner, Drinks and Daralyn Durie," highlighted lead counsel for California's 2021 verdict of the year. In September, we learned "When its Worth Taking Cases to Trial" from renowned trial attorney, Alex Spiro. In November, we celebrated ten years of hosting the ABTL Mock Trial Tournament and awarded grants to our participating local law schools. We also fostered wonderful connections between the bench and the bar with our annual Judicial Mixer, which featured the always-entertaining game of "Get to Know Your Judges Bingo."

Our lunch programs continue to deliver valuable tips and advice. We presented brown bag lunches with Judge Ronald Frazier and Judge Robert Huie. We also hosted three specialty MCLE programs and two Nuts and Bolts trainings.

In 2024 we kicked off the year with a fantastic dinner program entitled "Conversations with Attorney General Rob Bonta." The remainder of the year is certain deliver so please mark your calendars for our upcoming programs on May 21, August 27, and November 12.

Don't forget to save the date for ABTL's 50th Annual Seminar, scheduled for October 17-20, 2024, at the Meritage Resort & Spa in Napa Valley, California. The Annual Seminar packs in great networking and amazing programs in a stellar location. It will sell out, so watch your emails for registration details.

Of course, ABTL San Diego doesn't run itself. Our incomparable Executive Director, Lori McElroy, puts in countless hours making sure everything runs like clockwork. We are forever grateful for the valuable insight of our Board of Governors and Judicial Advisory Members. I am especially looking forward to working with our officers who will continue to steer ABTL to new heights. Joining me are Jenny Dixon as Vice President, Jon Brick as Treasurer and David Lichtenstein as Secretary. Finally, our dedicated Executive Committee is already hard at work, making sure our chapter continues to thrive. Special thanks to our 2024 Chairs and Vice-Chairs:

Membership: Rebecca Reed & Colin Ward
Sponsorship: Alexandra Barlow & Dan Gunning
Dinner Programs: Maggie Schroedter & Anne Wilson
Annual Seminar: Christian Andreu-von Euw
MCLE Specialty: Ivanna Torres & Brittany Salamin
Leadership Development Committee: Rachel Jensen, Vivian Adame & Dzvinka Mckie
Judicial Advisory Committee: Judge Carolyn Caietti & Judge Marcella McLaughlin
Community Outreach: Judge Linda Lopez, Tess Esqueda & Sarah Shekhter
Mock Trial: Ryan Caplan, Paul Belva & Caitlin Macker
ABTL Report: Lori McElroy, Eric Beste, Paul Reynolds & Kate Fine

As we look forward to another exciting year, we are pleased to acknowledge and thank the wonderful organizations that are sponsoring ABTL's 2024 programs:

Platinum Sponsors: JAMS, Judicate West, Signature Resolution
Gold Sponsor: ADR Services, Inc., Esquire Deposition Solutions
Silver Sponsor: Array, Bill VanDeWeghe
Wine Sponsor: Seltzer Caplan McMahon Vitek

Thanks for your continued support of ABTL and I look forward to seeing everyone at our 2024 events.

Andrea Myers

Andrea Myers is a partner at Seltzer Caplan McMahon Vitek

GenAI in the Courtroom... | *Continued from cover*

attorneys must certify that every document they file with the court is factual and nonfrivolous. This rule also allows courts to issue sanctions *sua sponte,* which the court did in the *Mata* case. *Mata,* 2023 WL 4114965, at *16. Rule 26(g) imposes a similar requirement for all pleadings related to the discovery process, even if not submitted to a court for filing. Both of these rules require a lawyer who uses a GenAI tool to review the output before using it in a case. According to Judge Goddard, "Even when adopted with the best intentions, GenAI-specific rules can have harmful consequences. They can deter attorneys from using the most up-to-date technology, even if the technology could improve their writing and reduce costs for clients."

The San Diego Superior Court is taking a similar approach. The court has not amended its local rules to address GenAI specifically, relying instead on existing rules. Like the federal court, the judges are working to stay abreast of changing GenAI technology. Judge Yvonne Campos, who recently spoke on an artificial intelligence panel at the California Judges Association Annual Conference, also recommends against implementing GenAI-specific rules. According to Judge Campos, "It's implicit in the rules of professional conduct, and the duty of candor to the court, that lawyers should not be filing pleadings with fake cases." Judge Campos also points to California Code of Civil Procedure section 128.7, which is analogous to Federal Rule of Civil Procedure 11, as sufficient to address any issues that arise.

The bottom line is that regardless of whether a court has GenAI-specific rules, attorneys must always verify the content of work product created in whole or in part using a GenAI tool. The robots are not ready to replace us all just yet. Attorney judgment and input continue to be essential to competent legal representation.

Nicole Forister is a student at the University of San Diego School of Law with an anticipated graduation date of May 2025. She is a judicial extern for the Honorable Allison H. Goddard of the United States District Court for the Southern District of California.

BACK to Inside this issue

ABTL's Q1 Dinner Featuring Speaker Rob Bonta was a Huge Success!

By Brent Kupfer

Left to right: Andrea Myers, Randy Grossman, Attorney General Rob Bonta, Jon Brick, Jenny Dixon, Maggie Schroedter, Anne Wilson

In February 2024, ABTL San Diego hosted an event with Rob Bonta, the California Attorney General, as the keynote speaker. The event began with a lively happy hour on the second floor of the Westin Bayview in downtown San Diego. There, judges and trial attorneys gathered and networked before Mr. Bonta took the stage.

The crowd then moved into a nearby ballroom for a three-course meal and the main event. While the attendees enjoyed their meal, Mr. Bonta took the stage with moderator Randy Grossman, former United States Attorney for the Southern District of California and current Partner at Manatt, Phelps & Phillips, LLP.

Mr. Bonta began by discussing his upbringing and how it developed his interest in public service. When Mr. Bonta was a child, he and his family immigrated from the Philippines to the United States. During Mr. Bonta's more formative years, his parents, who were actively engaged in social justice movements, taught him the importance of public service. Mr. Bonta eventually decided to become a lawyer. So he attended Yale University, where he graduated with honors, and studied law and Yale Law School. He then worked as a Deputy City Attorney for the City and County of San Francisco. And in April 2021, he was sworn in as the Attorney General for the State of California. He is the first person of Filipino descent to hold this position.

Mr. Bonta discussed the types of cases that his office is currently handling, including lawsuits about consumer rights, constitutional rights, transgender rights, and tenant rights. And he opined on ways to reduce crime: arrest criminals for violating the law, but avoid long sentences. According to Mr. Bonta, the threat of an arrest is a sufficient deterrent to committing crime; long sentences, on the other hand, have no such effect.

The evening concluded with questions from the audience. Mr. Bonta addressed questions about difficult issues facing Californians, namely, homeliness, mental illness, and fentanyl use. And he encouraged attorneys to volunteer their time and services to tackle some of these issues.

Overall, the event was a success. The drinks and food were incredible. And the event was sold out. If you're interested in events like this, you can access ABTL's calendar through this link: https://abtl.org/sandiego/events/.

Brent Kupfer is the owner of Kupfer Legal. He represents contractors, material suppliers, and design professionals in payment disputes. He is a member of ABTL and on the Leadership Development Committee.

BACK to Inside this issue

BACK to Inside this issue

Appeal Advantage: File Now, Secure Tomorrow!

Every civil litigator practicing in California state court knows: the time to file a notice of appeal in a civil case is the earlier of:

- 60 days from the date the court clerk serves the parties with a Notice of Entry of judgment,
- 60 days from the date a party serves a Notice of Entry of judgment with a proof of service, OR
- 180 days after entry of judgment, whichever is earlier. (CAL. RULE OF COURT 8.104.)

And, a cross-appeal from the same judgment or order is due 20 days after an appellant timely appeals a judgment or appealable order or the court clerk serves notice of the first appeal, whichever is earlier. (CAL. RULE OF COURT 8.108(g).)

If it is that easy and statutorily unambiguous, why are there nearly 300 appellate cases a year discussing the issue? Because it is never that easy. These cases run the gamut; everything from filing the notice of appeal in the appellate court rather than the superior court, to consolidated cases having different judgment dates for different defendants, to the internet or court's e-filing system malfunctioning, to someone forgetting it was a leap year and failing to count February 29 thus calendaring the wrong date, to an attorney on a trip in Pago Pago Samoa emailing instructions to file the notice of appeal at 3:30 p.m. (AST) which is 6:30 p.m. (PST) and the assistant having gone home for the day, to COVID shutdowns, to the notice of entry of judgment stating the wrong date and the appealing party never noticing; to a motion for new trial being filed and then withdrawn, to a legal misunderstanding of the "one judgment rule," to never receiving the notice of entry of judgment in the mail.

If it is such a frequent issue on appeal, there must be room for relief, right? Wrong! I harken back to twenty-five years ago when the now-retired yet ever-brilliant trial lawyer Michael McCloskey shared with me his sage wisdom: "You can fix just about every screw-up you make as a lawyer, but never, NEVER miss a notice of appeal deadline!" This is because "the timely filing of an appropriate notice of appeal or its legal equivalent is an absolute prerequisite to the exercise of appellate jurisdiction." *(K.J. v. Los Angeles Unified School Dist.* (2020) 8 Cal.5th 875, 881). And, "an appellate court cannot relieve a party from a default occasioned by the failure to file a timely appeal." *(Grant v. List & Lathrop* (1992) 2 Cal.App.4th 993, 997.)

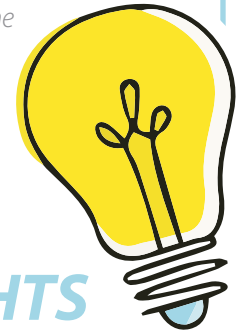
Here's a recent real-life scenario that proves the point: Trial was completed with a verdict entered on December 8, 2023. The parties submitted a stipulated proposed judgment. No post-trial motions were filed. The attorneys took to the slopes and the beach, respectively, for a much deserved holiday break. They returned in the new year and, while waiting to receive notice from the court that judgment had been entered, caught up on old cases they had neglected during trial. On February 20, 2023, the attorney for the losing party thought it was taking the court longer than anticipated and decided to check the register of actions. She discovered that judgment had been entered on December 19, 2023 and the ROA showed that the court clerk certified mailing both parties the notice of entry of judgment on December 22, 2023. No one at her firm received it. The prevailing party's counsel confirmed his firm never received it either. They concluded that the clerk failed to actually mail it. Wanting to start the 60-day trigger running, the prevailing attorney filed and served a Notice of Entry of Judgment on February 21, 2023.

Is the prevailing party's notice of entry of judgment the trigger if neither party ever received the clerk's notice? Or, because the opposing party filed and served it, does it save the losing party from missing the appeal deadline triggered by the clerk's notice?

Let's start with the fact you will rarely be able to prove the clerk did not mail the notice when the ROA states otherwise. Further, it is not a party's actual receipt of the notice of entry of judgment that matters—it is the *date of mailing* that commences the running of the time to appeal. (CAL. RULE OF COURT 8.104.) Finally, and importantly, principles of an attorney's diligence and responsibility in legal proceedings is a fundamental aspect of California law. There is a long history of case law emphasizing the importance of an attorney being diligent in her cases and complying with procedural requirements to avoid adverse consequences. This includes exercising reasonable diligence to monitor the trial court to ascertain any filing errors. *(See, Tamburina v. Combines Ins. Co. of America* (2007) 147 Cal.App..4th 336.) So, if you are waiting on an entry of judgment or immediately appealable order—check your register of actions daily.

"Please calculate and calendar the last date to file an appeal" is a commonly-heard instruction in a litigation firm's halls when notice of a judgment or appealable order comes in. For my cases, I follow that up with "then calendar 30 days before that and *that's* when we will file it." Why? Because life happens! And, according to 300 cases a year—it always seems to happen on that 60th day!

Marisa Janine Page is a Partner at Caldarelli Hejmanowski Page & Leer LLP. She is a certified appellate specialist, author of Appellate Insight, an educational series in the ABTL Report and "Did You Know..." a social media series. Ms. Page is an ABTL past president.



APPELLATE INSIGHTS

BACK to Inside this issue

Building Real Relationships in a Digital World

By Mark Mazzarella

I don't think many attorneys would disagree with the following statements:

- Attorneys who have personal relationships with their clients get sued less.
- Attorneys who have personal relationships with their clients keep them longer.
- There is less turnover in law firms when the stakeholders and employees have positive personal relationships.
- Most people enjoy their work environment more when they have positive relationships with others at work.
- Personal relationships are built through interactions between people.
- Face to face interactions present a better opportunity to develop positive interpersonal relationships than interactions over the phone, and interactions over the phone create a better opportunity to develop positive interpersonal relationships than digital interactions.

If I am right, and most lawyers would agree with each of the statements above, why are most of us relying more and more on purely digital interactions? I use the term "digital" to include any form of communication in which nobody is present in the same room at the same time, and nobody talks to anybody, either in person or on the phone. This includes texts, e-mail, social media and no doubt several means of communication with which this digitally challenged "baby boomer" is not familiar.

Does anyone really believe that they can establish better, more positive, more lasting, and yes, more valuable, relationships by e-mail than over lunch? Do you think you have the same chance of landing clients if you only e-mail them, rather than meet with them, shake their hands and spend time together speaking with them the old-fashioned way—face to face? Do you believe that it will be no more difficult for a competitor to poach your clients or employees if you have a good personal relationship with them, rather than no personal relationship?

If, like me, your answer to each of these questions is "no," then why don't we make more of an effort to interact with others on a personal level? What are our rationales (or excuses)? The most common one I hear is, "I'm too busy. It's just more efficient to communicate by e-mail." That may be true much of the time, but nobody is too busy all the time to make a phone call. The fact is firing off an e-mail takes less effort than making a phone call or scheduling a face-to-face meeting. Like water running down hill, we take the path of least resistance.

There are occasions when it makes sense to communicate digitally. Some information does not warrant personal transmission. Some people we deal with may not want to be bothered with phone calls or take time out of their day to meet with us. Some people feel a lot more comfortable reaching out to others on a keyboard than with a phone call or meeting, especially if the communication deals with a sensitive or contested matter. But there are a lot of occasions for which a phone call or meeting is a viable alternative way to communicate with someone with whom you want to develop a better relationship.

There is one catch. You need to know how to create the impression that you are someone who can meet the other person's needs and expectations. It doesn't do any good, and it could do a lot of harm if you don't make a good impression over the phone or in a meeting. Therefore, you need to know how to make the intended impression. If you work on making a great impression, the benefits will be well worth the effort.

A few years ago, I wrote a couple books with well-known jury consultant Jo-Ellan Dimitrius (of O.J. Simpson, Scott Peterson, Rodney King, John Dupont, Enron, McMartin Preschool, ... fame). One of them was "Put Your Best Food Forward." We spent two years working with a behavioral psychologist and a neuropsychiatrist reviewing research to supplement Jo-Ellan's experience gathered from picking about 800 juries and working with thousands of lawyers and witnesses. Our goal was to identify the different ways we humans influence what others think of us and suggest ways we can all manage the impression formation process.

The first thing we did is poll a number of the mock jurors we were using in the mock trials we were conducting. We asked them to pick from a list of twelve characteristics of others the five which make the best impression on them. Then we asked them to list the five characteristics which make the worst impression on them. Most of the positive traits had a opposite negative trait. For example, honesty was on the top of the list for positive traits. Dishonest was on the top of the list for negative traits. Every time a trait was listed, whether positive or negative, we gave it a point. So, if four people listed honesty among their five positive traits, and three people listed dishonesty among their five negative traits, honesty would receive seven points. We tallied the points to determine what were the most important characteristics to convey.

Continued on page 9

Building Real Relationships in a Digital World | *Continued from page 8*

Based on this survey, the most important traits were:

- Trustworthiness: This included both honesty and reliability. To be trustworthy, someone must be both.
- Caring: This included kindness, friendliness, attentiveness and compassion, among other things.
- Humility: This ranked third even though not a single person included "humility" on their list of positive traits. All of the points for "humility" were the result of people putting down negative traits such as: arrogant, vain, stuck up, self-absorbed.
- Capability: This included intelligence, competence, confidence and professionalism. The first three traits reflect directly on a person's character. Capability is different. An honest caring and humble person can be very capable, but the same can be said of a dishonest, uncaring and egotistical person.

Our research also led us to identify what we called "magic pills" and "toxic traits." Most traits have the potential for positive or negative reactions. For example, a loud strong voice conveys confidence, which is good, but it also can be intimidating. "Magic pills" do not carry with them any potential negative reaction, at least not in our culture. Toxic traits are just the opposite. Nothing good will ever come from exhibiting toxic traits.

The Magic Pills are:

- Eye contact
- Smiling
- Handshakes
- Good posture
- Enthusiasm

The Toxic Traits are:

- Offensive physical acts, including bad hygiene, tasteless behavior, excessive drinking
- Unappealing word usage, including profanity and bad grammar
- Insensitive communication, including gossip, sarcasm, biting or embarrassing humor
- Aggressive behavior, including harsh criticism, domination of conversation
- Pettiness, including downplaying others' successes, jealousy, resentment

As we conducted our research into impression formation, it became apparent there are many ways we communicate our values, our personalities and our characteristics to one another. Some are obvious, others are more subtle, or even unconscious. To develop the best impressions, and great relationships, we need to use every tool available. We ultimately concluded that we could group the various ways we form impressions into seven general categories. We called them the "Seven Colors," analogizing them to a seven-color printer.

The "Seven Colors" are:

- Personal appearance
- Body language
- Voice
- Communication style
- Content of communication
- Actions
- Environment

It is impossible in an article like this to even begin to address all of the nuances that contribute to each of these ways we create impressions. For example, in Put Your Best Forward in the chapter on personal appearance we talk about everything from the shade of lipstick to the height of your heels, the impact of color, shoe style, what accessories to wear (or not to wear). The same is true for each of the other seven means of creating impressions.

Most of us have a basic understanding of how the "Seven Colors" can influence the impressions we make. However, the key is putting them into use. When an e-mail is sent, communication style (are you a "just the facts" type, or do you wander a bit?) and content are the only two "colors" you use. If you call, voice is added to the "colors" used. Studies show that when a live presentation is given, voice and body language have more impact on the audience than content. If you want to convey to a client that you are interested, enthusiastic and ready to do what needs to be done to represent them, speaking to them in person will give you an opportunity you simply will not have if you rely on e-mail, or even the phone.

If you have clients you have never met, make it a point to meet them in person. Next time you need to communicate something to an existing client, call them. If you are contacted by a potential client, arrange a meeting, rather than try to deal with them just over the phone and by e-mail. But remember to "put your best foot forward" by managing the impressions you make.

If you want to develop positive and lasting relationships within your firm, don't let occasional e-mails from you to your staff be the only way they know you. Have monthly firm lunches, not just to handle firm business, but to give everyone an

Continued on page 10

Building Real Relationships in a Digital World | *Continued from page 9*

opportunity to get to know one another. You might want to ensure that people who generally work from home, come into the office a couple times a week. If all you and your firm are to your employees is a business card and a paycheck, those can be easily replaced. The cost of losing a good employee is astronomical. It makes sense to invest a modest amount into building the type of relationships which will last.

Hopefully, I've motivated some of you to make more of an effort to develop stronger personal relationships with your clients, colleagues, employees, opposing counsel, and everyone else in your life by using as many of the "Seven Colors" as possible. Don't fall into the digital trap, it's getting bigger every day.

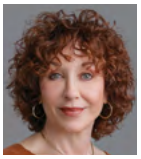
For anyone who would like a copy of *"Put Your Best Foot Forward,"* e-mail me and I'll send you one.

Mark Mazzarella is President of Mazzarella Law APC, and a trial lawyer with almost 100 trials. His practice focuses on resolving real estate and general business disputes, as well as probate and trust litigation. Mr. Mazzarella is an ABTL Past President.

A 30-Year Track Record You Can Trust

JUDICATE WEST — CELEBRATING 30
Alternative Dispute Resolution

We are proud to offer the services of these experienced local neutrals.


Hon. Cynthia G. Aaron, Ret.


Hon. Jan M. Adler, Ret.


John S. Adler, Esq.


N. Denise Asher, Esq.


Hon. Jeffrey B. Barton, Ret.


Hon. Victor E. Bianchini, Ret.


Jonathan A. Brenner, Esq.


Hon. Timothy M. Casserly, Ret.


Hon. Steven R. Denton, Ret.


Hon. Herbert B. Hoffman, Ret.


Richard A. Huver, Esq.


Robert J. Kaplan, Esq.


Hon. Joan M. Lewis, Ret.


Hon. Frederick L. Link, Ret.


Hon. William McCurine, Jr., Ret.


Hon. Thomas P. Nugent, Ret.


Hon. Leo S. Papas, Ret.


Gregory A. Post, Esq.


Hon. Joel M. Pressman, Ret.


Hon. Linda Quinn, Ret.


Kristin Rizzo, Esq.


Thomas E. Sharkey, Esq.


Hon. Nita L. Stormes, Ret.


Maureen A. Summers, Esq.

Judicate West Proudly Welcomes
Hon. William V. Gallo. Ret.

- Served as Federal Magistrate Judge for the U.S. District Court, Southern District of California
- Presided over 2,500 settlement conferences
- Available for mediations, arbitrations, and private judging assignments

Learn More About Our Neutrals

JudicateWest.com
(619) 814-1966

BACK to Inside this issue

Not So fast! A Tenant in Common Owner's Ability to Stop or Delay a Sale of the Property

By Clarissa Cardes

On July 1, 2022, Governor Newsom signed into law the Partition Real Property Act (AB-2245) which expands upon an already large change to partition laws by the Uniform Partition of Heirs Property Act (AB-633) (hereinafter UPHPA) that went into effect on January 1, 2022. Specifically, the Partition Real Property Act extends the special protections and procedures afforded by the UPHPA for "heirs property" (e.g., property inherited by a specified percentage of co-owners) to all partitions of real property held by tenants in common filed on or after January 1, 2023 where no partition agreement is in place.[1]

Among these protections, the most significant are: (1) the court determination of fair market value by independent appraisal at the outset of a partition action, and (2) the right to prevent a partition by purchasing the requesting party's interest at that fair market value (i.e., right of first refusal). Previously, a single co-tenant with a fractional interest, however small, could force the partition of the property with minimal safeguards in place for the non-requesting co-owner(s) and partition by appraisal could only be accomplished by agreement of all co-owners. The UPHPA addressed this dilemma and now change has come to all tenancies in common for which there is no partition agreement.

Taken together, the new procedures set forth in the Partition of Real Property Act effectively operate to say, "Not so fast!" to a co-tenant in common seeking partition. The impact is to slow partition actions, if not deter the filing of such actions altogether.

Partition of Real Property Act – What it does

Under the new statutory scheme, codified at Code of Civil Procedure sections 874.311- 874.323, if a co-tenant in common files a partition action on or after January 1, 2023 and no partition agreement is in place, the Partition Real Property Act applies.[2] Absent limited exceptions, the court orders an appraisal by a disinterested licensed real estate appraiser to determine the fair market value of the property.[3] Once that appraisal is filed, notice of the appraisal is sent to all co-owners of the property informing them that they have the right to file an objection within 30 days and the court must set a hearing no sooner than 30 days after notice of the appraisal is sent.[4]

If partition by sale is requested, "any cotenant[,] except a cotenant that requested partition by sale[,] may buy all the interests of the cotenants that requested partition by sale."[5] Any co-tenant, except for the cotenant requesting partition by sale, may give notice of their election to purchase the requesting co-tenant's fractional ownership of the parcel at fair market value within 45 days after the appraisal notice is sent.[6] Various procedures apply based on whether one or more co-tenants send notice of their election to purchase the property and whether they ultimately pay the entire price for the remaining interest, all of which increase the time for resolution.[7]

However, if all interests of the requesting cotenants are not purchased or if a cotenant who requested partition in kind remains, "the court shall order partition in kind unless the court, after consideration of the factors listed in Section 874.319, finds that partition in kind will result in great prejudice to the cotenants as a group."[8] Such factors include:

1. Whether the property practicably can be divided among the cotenants.
2. Whether partition in kind would apportion the property in such a way that the aggregate fair market value of the parcels resulting from the division would be materially less than the value of the property if it were sold as a whole, taking into account the condition under which a court-ordered sale likely would occur.
3. Evidence of the collective duration of ownership or possession of the property by a cotenant and one or more predecessors in title or predecessors in possession to the cotenant who are or were relatives of the cotenant or each other.
4. A cotenant's sentimental attachment to the property, including any attachment arising because the property has ancestral or other unique or special value to the cotenant.
5. The lawful use being made of the property by a cotenant and the degree to which the cotenant would be harmed if the cotenant could not continue the same use of the property.
6. The degree to which the cotenants have contributed their pro rata share of the property taxes, insurance, and other expenses associated with maintaining ownership of the property or have contributed to the physical improvement, maintenance, or upkeep of the property.
7. Any other relevant factor.[9]

Continued on page 14

Not So Fast!... | *Continued from 13*

If a court orders partition in kind, various procedures are available to make the partition in kind just and appropriate for those who requested partition and those that were unlocatable.[10] However, if a court does not order partition in kind, then the matter will either be dismissed if partition by sale has not been requested or proceed to partition by sale.[11]

If a partition by sale proceeds, the Act mandates that the sale be open-market "unless the court finds that a sale by sealed bids or an auction would be more economically advantageous and in the best interest of the cotenants as a group."[12] If the parties are unable to agree on a real estate broker, the court must appoint an independent and disinterested real estate broker to "offer the property in a commercially reasonable manner at a price no lower than the determination of value and on the terms and conditions established by the court." If the broker is unable to "obtain an offer to purchase the property for at least the determination of value within a reasonable time, the court, after a hearing, may do any of the following:

1. Approve the highest outstanding offer, if any.
2. Redetermine the value of the property and order that the property continue to be offered for an additional time.
3. Order that the property be sold by sealed bids or at an auction."[13]

Finally, although apportionment of costs is typically shared in proportion to the co-owner(s)' interests, the new law provides "that the court shall not apportion the costs of partition to any party that opposes the partition unless doing so is equitable and consistent with the purposes of this chapter."[14]

Going forward, a party who is seeking partition – where no partition agreement is in place – may be prevented and/or delayed in selling the property, and risks having to pay more than his/her share of the costs of such partition.

Purpose of the Law

The UPHPA, AB 633 (Calderon), was enacted to address what the California State Legislature recognized as a "longstanding problem: the exploitation of laws governing inheritance, ownership, and sale of property by unscrupulous speculators, who acquire a small ownership interest in real property owned by a group of heirs and then force the sale of the property at a below-market price."[15] Historically, communities of color particularly "Black property owners have [. . .] been the group most victimized" by these predatory practices.[16] The UPHPA aims to prevent the loss of family land and intergenerational wealth, and to ensure that any partition by sale that moves forward is commercially reasonable and at fair market value.

The Partition Real Property Act, AB 2245 (Ramos), essentially expands the "UPHPA's procedures to all actions to partition land owned by tenants in common regardless of how the land was acquired."[17] In doing so, the California State Legislature expressed that while UPHPA's "procedures are especially helpful for preventing families from losing intergenerational wealth and attachment to the land, UPHPA's heightened protections could be beneficial to anyone co-owning land under a tenancy in common."[18] The Assembly Judiciary also offered that these procedures would provide numerous protections for parties that are unrepresented, thereby reducing the "significant advantage" of a party who has counsel in a partition action.[19]

Planning for an uncertain future

It remains to be seen how the Partition Real Property Act may quell partition actions. To date, there is no published case law in California which delves into either the UPHPA or Partition Real Property Act, much less their application. However, case law from other states that have adopted the UPHPA in some form suggest that failure to follow the mandatory procedures of the UPHPA, and by extension the Partition Real Property Act, may jeopardize partition orders obtained and/or lead to additional delay.[20]

If tenants in common want to avoid this uncertainty and opt out of the new statutory scheme, partition agreements among tenants in common will likely become more key. For those who fail to plan for partition of the property, efforts to come to an agreement prior to suit will also take on a greater objective. If an agreement cannot be garnered, a party seeking partition risks being saddled with the costs of a lengthy action that is skewed in favor of the non-requesting co-owners – regardless of whether the co-owners have the means or intention to purchase the property – and may result in a partition in kind rather than a partition by sale.

In sum, co-owners would benefit from slowing down and analyzing whether their interests are better served by coming to a partition agreement in lieu of a protracted action.

Clarissa Cardes is an associate at Dixon Williams LLP where her practice focuses on commercial litigation and probate administration.

ENDNOTES continued on page 15

BACK to Inside this issue

Not So Fast!... | *Continued from 14*

ENDNOTES

[1] Cal Code of Civ. Proc. 874.311.
[2] Cal. Code Civ. Proc. 874.313.
[3] Cal. Code Civ. Proc. § 874.316.
[4] Cal. Code Civ. Proc. § 874.316 (e)-(f).
[5] Cal. Code Civ. Proc. § 874.317 (a).
[6] Cal. Code Civ. Proc. § 874.317 (b)-(c).
[7] Cal. Code Civ. Proc. § 874.317 (e)-(h).
[8] Cal. Code Civ. Proc. §§ 874.318 (a).
[9] Cal. Code Civ. Proc. §§ 874.319.
[10] Cal. Code Civ. Proc. §§ 874.318 (c)-(d).
[11] Cal. Code Civ. Proc. §§ 874.318 (b).
[12] Cal. Code Civ. Proc. §§ 874.320.
[13] Cal. Code Civ. Proc. § 874.320 (d).
[14] Cal. Code Civ. Proc. § 874.321.5.
[15] Assem. Floor Analysis, Assem. Bill No. 633 (2021-2022 Reg. Sess.) as amended June 24, 2021, Concurrence in Senate Amendments, p. 1-3.
[16] Id.
[17] Sen. Floor Analysis, Assem. Bill No. 2245 (2021-2022 Reg. Sess.) as amended March 24, 2022, Consent, p. 5.
[18] Id.
[19] Assem. Comm. On Judiciary, Assem. Bill No. 2455 (2021-2022 Reg. Sess.) as amended March 24, 2022, Proposed Consent, p. 6.
[20] *Faison v. Faison,* 811 S.E.2d 431, 434 (Ga. Ct. App. 2018) (reversing court's denial of motion for new trial and remanding for further proceedings where "In light of the mandatory language in OCGA § 44–6–181 (b), the trial court erred in not making an initial determination, prior to ordering the parties to mediation, whether the property was heirs property."); *Matabane v. Whatley,* 364 Ga. App. 56, 59-60 (Ga. Ct. App. 2022) (reversing and remanding for further proceeding where trial court failed to consider whether partition in kind was appropriate before dismissing the action as required by the Act); *Rubino v. Estate of Betancourt,* 21-CV-3992 (PKC) (RER), at *8 (E.D.N.Y. Mar. 29, 2023) (finding "that Plaintiff is not entitled to a partition and sale of the Building at this stage, given that the Building is "heirs property" under the UPHPA, and Plaintiff has offered no evidence that the Act's procedural prerequisites have been met."); *Antioco v. Antioco,* 2022 N.Y. Slip Op. 34420, 11-12 (N.Y. Sup. Ct. 2022) (denying summary judgment as "premature pursuant to RPAPL § 993 (5), which mandates that a settlement conference be held prior to determination of a summary judgment motion" and stating that "all parties must be provided with notice" that they "have the right to avert the partition by purchasing all interest held by plaintiff[.]").

BACK to Inside this issue

Weight is not enough: Recent amendment to Federal Rules of Evidence makes it clear that reliability is the touchstone for expert testimony

By Janice L. Chase and Eric J. Beste

When faced with an attempt to exclude their expert witness's testimony, many trial lawyers respond with the old adage, "It goes to weight, not admissibility." In addition to confirming the central role of the trier of fact, lawyers seem to hope that the mere incantation of this "rule" will convince the court to leave for the jury the (sometimes difficult) task of assessing the reliability of a proffered expert witness. Now, however, federal courts have made clear that more than simply an appeal to "weight" is required before a trier of fact will be asked to sift through complex expert testimony. Rather, the proponent of the evidence must carry its burden of demonstrating the reliability of the proffered opinion, and its relevance to the facts of the case. Only expert testimony that satisfies these preliminary tests will be allowed before the jury, likely leading to more frequent and targeted challenges to expert witness testimony in federal court.

Effective December 1, 2023, Federal Rule of Evidence ("FRE") 702 was amended to include the additional language **emphasized** below:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise **if the proponent demonstrates to the court that it is more likely than not that:**

a. the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
b. the testimony is based on sufficient facts or data;
c. the testimony is the product of reliable principles and methods; and
d. the expert has reliably applied **expert's opinion reflects a reliable application of** the principles and methods to the facts of the case.

Although the Advisory Committee made clear these amendments were clarifications of the prior Rule and were not intended to work a substantive change to FRE 702,[1] application of this new language should lead federal courts to exclude expert testimony that is not sufficiently supported by the proponent.

The first amendment clarifies that expert testimony may not be admitted unless the proponent demonstrates to the court it is "more likely than not" that the testimony meets all four of the admissibility requirements set forth in FRE 702 (a) through (d). According to the Advisory Committee's Note, this amendment was intended to address a common—but incorrect—conception by some courts that "critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight, not admissibility."[2] The new language makes explicit that the proponent of the expert testimony bears the burden of proof, and that courts should not admit testimony when the proponent cannot satisfy every one of the elements of the test. To be sure, and as the Advisory Committee observed, many challenges to expert testimony are better left for the trier of fact to resolve.[3] As stated by one district judge in the Northern District of California, "the Court's role is to evaluate the usefulness of the testimony and the reliability of the expert's process, not to exclude expert testimony merely because it disagrees with the expert's conclusions."[4] Nonetheless, by clearly putting the burden of proof on the party proffering the expert witness, courts should be less willing to admit testimony of questionable provenance.

The second amendment emphasizes that the expert's trial testimony must stay within the bounds of a reliable application of the expert's principles and methodology to the facts of the case.[5] This restriction recognizes that jurors likely do not have the specialized knowledge to appreciate when an expert has drawn conclusions that are too remote from their methodology or principles to be relevant to determine a fact in issue in the dispute.[6] The amended version of FRE 702 "does not require perfection" on behalf of the expert, or direct the district court to "nitpick an expert's opinion in order to reach a perfect expression of what the basis and methodology can support."[7] Nonetheless, courts should endeavor to limit expert testimony at trial to only those opinions flowing reliably from the principles and methods that the court has separately found to be reliable and supported under FRE 702.

While prior precedent interpreting FRE 702 remains intact—including the seminal cases of *Daubert*[8] and *Kumho Tire*[9] —litigators should also be prepared to address how these recent amendments either support or undermine the admissibility of proffered expert testimony. In discussing the amended version of the rule, one district judge in the District of Oregon

Continued on page 17

BACK to Inside this issue

Weight is not enough... | *Continued from 16*

has concluded that while the proponents of expert testimony must show by a preponderance of the evidence that the expert's opinions are *reliable*, they do not have to demonstrate by a preponderance of the evidence that the assessments of their experts are *correct*.[10] But those litigators who can effectively explain why anticipated expert testimony is (un)reliable now have a powerful tool in their toolbox.

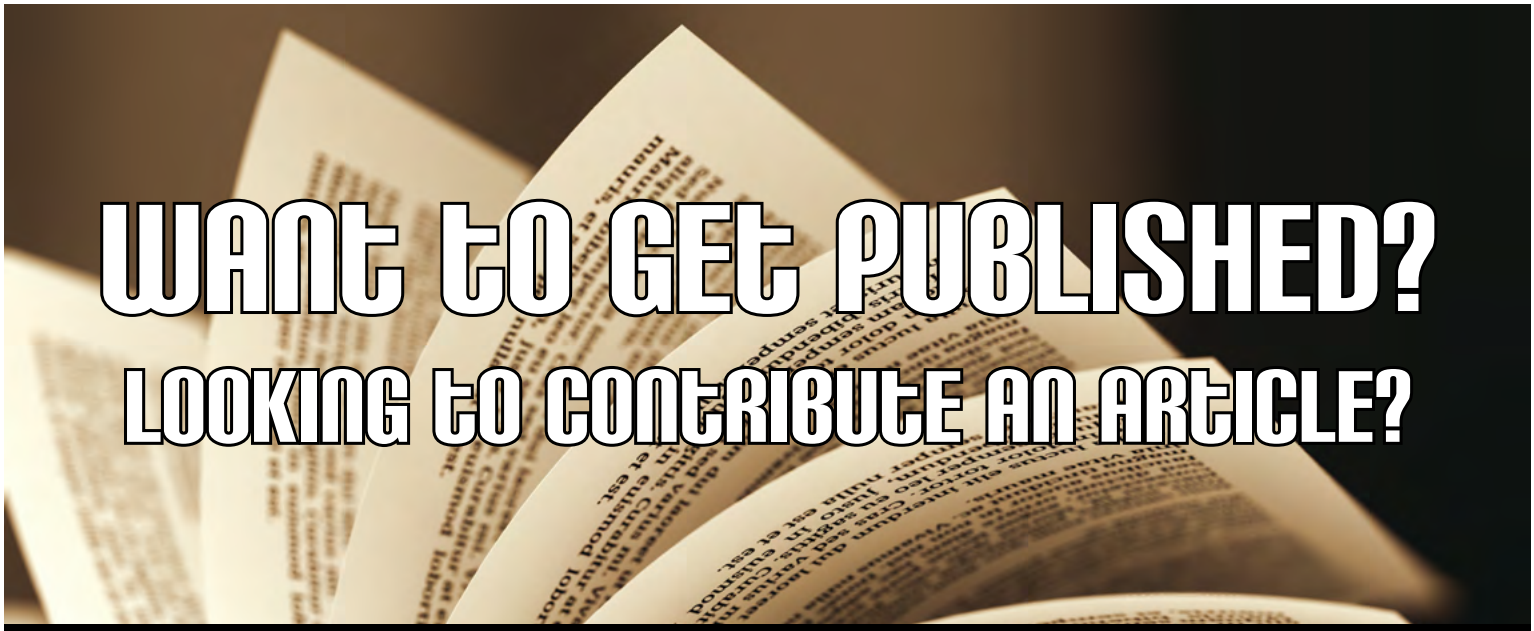
Janice L. Chase is an associate at Barnes & Thornburg LLP and a member of ABTL.

Eric J. Beste is a partner at Barnes & Thornburg LLP, and an editor on the ABTL Report Committee.

ENDNOTES

[1] FRE 702 Advisory Committee's Note to 2023 Amendments ("[n]othing in the amendment imposes any new, specific procedures" but instead clarifies the analysis that was intended all along); Al Qari v. American Steamship Company, --- F. Supp. 3d ---, No. 21-CV-10650, 2023 WL 5628583, at *4 (E.D. Mich. Aug. 31, 2023).
[2] FRE 702 Advisory Committee's Note to 2023 Amendments.
[3] Id.
[4] ALIVECOR, INC., Plaintiff, v. APPLE, INC., Defendant., No. 21-CV-03958-JSW, 2024 WL 591864, at *4 (N.D. Cal. Feb. 13, 2024) (White, J.).
[5] FRE 702 Advisory Committee's Note to 2023 Amendments.
[6] Id.
[7] Id.
[8] 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)
[9] 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)
[10] Thomsen v. NaphCare, Inc., No. 3:19-CV-00969-MO, 2024 WL 551426, *2 (D. Or. Feb. 12, 2024).

BACK to Inside this issue



ABTL is always looking for articles geared toward business litigation.

If you are interested, please contact: ***abtlsd@abtl.org***

Association of Business Trial Lawyers – San Diego

2024 Officers and Board Members

Officers

President —
Andrea Myers

Vice President —
Jenny Dixon

Treasurer —
Jon Brick

Secretary —
Dave Lichtenstein

Board of Governors

Christian Andreu-von Euw
Ben Anger
Alexandra Barlow
Eric Beste
Benjamin Brooks
Callie Bjurstrom
Gary Brucke
Bill Caldarelli
Ryan Caplan
David M. Greeley
Randy Grossman
Dan Gunning
Rachel Jensen
Frank Johnson
Randy Jones
Mary Dollarhide
Rachael Kelley
Jason Kirby
Robert Knaier
Chris Lyons
Katie McBain
Joe McGeady
Andrea Myers
Brett Norris
Joseph Mellano
Kelly O'Donnell
Sarena Kustic
Rebecca Reed
Maggie Schroedter
Logan Smith
Cheryl Dunn Soto
Colin L. Ward
Anne Wilson

Judicial Board of Governors

Hon. Katherine A. Bacal
Hon. Michael Berg
Hon. Carolyn Caietti
Hon. Karen Crawford
Hon. Kevin Enright
Hon. Allison H. Goddard
Hon. Marilyn Huff
Hon. Linda Lopez
Hon. Margaret Mann
Hon. Marcella McLaughlin
Hon. Janis Sammartino
Hon. Michael T. Smyth

Judicial Advisory Board

Hon. Cynthia Bashant
Hon. Anthony J. Battaglia
Hon. Wendy Behan
Hon. Roger Benitez
Hon. Victor E. Bianchini
Hon. Matthew Braner
Hon. Larry Burns
Hon. Daniel E. Butcher
Hon. Timothy Casserly (Ret.)
Hon. Gonzalo Curiel
Hon. Robert Dahlquist
Justice William Dato
Hon. Peter Deddeh
Hon. Mitch Dembin
Hon. Steven Denton (Ret.)
Hon. Ronald Frazier
Hon. Loren Freestone
Hon. Irma E. Gonzalez
Hon. Charles Hayes (Ret.)
Hon. Judith Hayes (ret.)
Hon. William Hayes
Hon. Christopher Latham
Hon. Joan Lewis (Ret.)
Hon. Robert Longstreth
Hon. Kenneth J. Medel
Hon. John Meyer
Hon. Jinsook Ohta
Hon. Laura Parsky
Hon. Victor Pippins
Hon. Ronald Prager (Ret.)
Hon. Linda Quinn
Hon. Todd W. Robinson
Hon. Andrew Schopler
Hon. Bernard G. Skomal
Hon. Nita Stormes
Hon. Eddie Sturgeon
Hon. Timothy Taylor
Hon. Randa Trapp (ret)

Past Presidents

Mark C. Mazzarella, 1992-1994
Michael Duckor, 1994-1996
Peter H. Benzian, 1997
Hon. Ronald L. Styn, 1998
Claudette G. Wilson, 1999
Meryl L. Young, 2000
Alan Schulman, 2001
Howard E. Susman, 2002
Hon. J. Richard Haden, 2003
Frederick W. Kosmo, Jr., 2004
Charles V. Berwanger, 2005
Hon. Maureen F. Hallahan, 2006
Hon. Jan M. Adler, 2007
Robin A. Wofford, 2008
Edward M. Gergosian, 2009
Mark C. Zebrowski, 2010
Anna F. Roppo, 2011
Hon. M. Margaret McKeown, 2012
Rich Gluck, 2013
Marisa Janine-Page, 2014
Jack R. Leer, 2015
Brian A. Foster, 2016
Paul A. Tyrell, 2017
Michelle L. Burton, 2018
Randy Grossman, 2019
Alan Mansfield, 2020
Rebecca Fortune, 2021
Hon. Lorna Alksne (Ret.), 2022
Paul Reynolds, 2023

Annual Seminar

Christian Andreau von-Euw, chair

Membership

Rebecca Reed, chair
Colin Ward, vice chair

Sponsor Relations

Alex Barlow, chair
Dan Gunning, vice chair

Dinner Programs

Hon. Michael Berg, chair (resource)
Maggie Schroedter, chair
Anne Wilson, vice chair

Community Outreach

Hon. Linda Lopez, chair
Tess Esqueda, vice chair
Rachael Kelley (resource)

Judicial Advisory Board

Hon. Carolyn Caietti, chair
Hon. Marcella McLaughlin, vice chair

Leadership Development Committee

Rachel Jensen, chair
Vivian Torres, vice chair
Dzvinka McKie, vice chair

Specialty MCLE Lunches

Ivana Torres, chair
Brittany Salamin, vice chair

Bi-Annual Seminar 2025

Frank Johnson, chair

Mock Trial

Ryan Caplan, chair
Paul Belva (LDC), vice chair
Caitlin Macker, vice chair

The ABTL Report

Lori McElroy, design
Eric Beste, editor
Paul Reynolds, editor
Kate Fine, content coordinator

---

www.abtl.org

BACK to Inside this issue

abtl SD

The Association of Business Trial Lawyers
8030 La Mesa Blvd., #127
La Mesa, CA 91942

PRSRT STD
U.S. POSTAGE PAID
PERMIT 751
SAN DIEGO, CA