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ASSOCIATION OF BUSINESS TRIAL LAWYERS

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A Paperless Office Is Within Reach

Attorneys are drowning in paper. They have been forever, and over the past several years, as conservation and the environment become increasingly important issues, more and more lawyers have dabbled with the idea of a practice without paper. Others still cling to the notion that a paperless law office is impossible. Yet, technological advancements have brought a paperless office to our fingertips. It's also hard to argue that attorneys that take advantage of electronic document creation, storage and transmission to eliminate paper won't be more efficient, more effective and more competitive. The ability to maintain such a "green" working environment, eco-workflow, is here now.

William K. Mills

Attorneys practicing in Federal Court certainly have been exposed to electronic filing over the past several years. A Federal Court in Ohio developed Case Management Electronic Case Filing (CM/ECF) system in 1997 to help deal with massive amounts of paper involved with huge asbestos cases. Though an initial concern was eliminating paper storage space, the benefits of storing documents electronically was matched by the ease and speed of accessing documents electronically by judges, clerks and lawyers within the courts, and the public, including lawyers and law firms.

The CM/ECF system was implemented nationally in pilot programs in bankruptcy courts in 2001, district courts in 2002 and appellate courts in 2004. The CM/ECF system permits the electronic filing of all but a shortlist of documents, and provides for

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A plaintiff who sues a foreign party will often face a challenge to the assertion of personal jurisdiction. Many of these cases will involve the determination of fact issues that are common to the question of personal jurisdiction and the ultimate merits of the case.

As with any motion, it is important that the parties to the contest provide the trial court with as much useful factual information as practical. Counsel should be prepared to engage, through the discovery process, in detailed fact-finding to support or to defeat the exercise of personal jurisdiction. Quite often, discovery on the issues of jurisdiction is intertwined with the substantive merits of the case.

Hon. Socrates P. Manoukian

Appellate Considerations in Choice of Forum

Although an article on any topic of civil procedure often ends with a discussion of appellate issues, where personal jurisdiction is likely to be contested, the parties should consider it as a threshhold matter. Differences in the timing and nature of appellate review may weigh heavily in the decision whether to file in or remove the case to federal court, or to position the case to remain in state court.

In state court, jurisdictional issues are always resolved early. Parties must engage in expensive discovery which often will combine issues of jurisdiction with the merits of the case. In California, a trial court's order granting a motion to quash under C.C.P. 418.10 is directly appealable. C.C.P. 904.1(a)(3), 904.2(d). The defendant whose motion is denied must petition the court of appeal for a writ of mandate within 10 or 20 days after denial of the motion to quash. C.C.P. 418.10(c). Failure to raise this issue results in a waiver of the defense. C.C.P. 418.10 (e)(3).

In federal court, the defendant who challenges jurisdiction files a motion to dismiss under Federal Rule of Civil Procedure 12(b)(2). Unlike state court judges who are bound by a 90 day deadline for resolving submitted matters, federal court judges may delay ruling on the jurisdictional motion until after trial. The federal court judge can also deny the motion based on the pleadings, but allow the defendant to raise the issue as a defense at trial, after discovery has taken place. *Cf. Northern Laminate Sales, Inc. v. Davis*, 403 F.3d 14, 23 (1st Cir. 2005). Assuming the issue has been preserved by the filing of a motion to dismiss

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automated notice and service to counsel on court filings.

The system has been favorably accepted as it has been rolled out across the country, and as attorneys come to the inevitable realization that so much more can be transmitted, received, stored and communicated faster, easier and better without paper. But, when electronic filing became mandatory in California's Central District this past January, it signaled to Los Angeles attorneys an important opportunity for those practicing in both state and Federal Courts that the time has come to make a major shift in their manner of practice. Like it or not that change is paperless.

Beginning somewhere around the time that most attorneys got their first personal computer, they entered this new electronic age at varying paces and with differential levels of commitment. But now that even the courts (with state court still sporadically experimenting and hopefully soon to follow) are going paperless, there is no better time to reach out and embrace eco-workflow and the paperless revolution.

Just Say No — To Paper!

The primary obstacle to a paperless office is an attorney's fixation with paper. Resembling a cat's fascination with a ball of string, attorneys claim the need to hold it, write on it, and they insist that they absolutely need it to properly review their work. But, consider the amount of paper that passes through an attorney's hands each day — notices, faxes, letters, contracts, memos, receipts, reports, notes, etc. Attorneys assume that there is not much that can be done about incoming mail, or outgoing mail and the endless growing mounds of paper — or is there? Of course there is! Each attorney controls the amount and type of paper that exists and that is used within her workplace, whether she realizes it or not. If she has, uses or even receives paper it is her choice to do so. The need to hold on to paper is purely emotional and the ability to "go paperless" requires releasing that emotional bond.

Attorneys use any number of excuses to rationalize their need to hold on to paper. Yet, their excuses fail miserably when exposed to the bright light of day:

"The IRS Made Me Do It"

Attorneys hold on to paper based on the common misconception that, "*I have to retain client documents for 7 years*." Maybe it's six years, five years or three years, but regardless, they do it because somewhere someone (probably a tax consultant advising taxpayers on the risks related to carrying their burden of proof in an audit context, but certainly not someone advising attorneys about keeping non-original paper client documents), said it was important for "IRS audit purposes." Attorneys never bother to do any research to verify, or consider whether the paper documents to which they apply that particular standard would have any relevance to a tax audit, pending or imagined. Nevertheless, they retain *paper* rather than just electronic copies, incurring monthly and annual storage fees for years until they run out of money or space or finally decide that because they haven't thought about their former client or its papers since the papers were entombed, just maybe they really weren't important in the first place. The truth is, *there are few laws, including IRS Regulations, which require retention of paper documents*. Moreover, generally, attorneys do not intend to take indefinite responsibility for warehousing paper, even if some unthinking minion identified the paper as "original client documents," and shouldn't without assuring that they are adequately compensated for accepting that risk.

Attorneys also hold on to paper based on the equal misconception that, "*I have to keep original signed documents*." Based on some other vague notion arising from unverified anecdotal assumptions attorneys rationalize keeping paper original documents. But, many businesses don't have any paper *original documents*. The truth is — *most documents that are assumed to be originals are actually copies*. Applications, contracts, deeds, and similar legal documents most often are delivered to, or filed or recorded with the responsible company or agency. Copies that are maintained in an attorney's files, even certified *copies*, are merely copies. Unless there is some specific legal requirement, and there are a few, there is no need to keep signed original paper documents.

Another reason attorneys hold on to paper and permit it to pervade their workplaces is the unsupported presumption that "*I have to keep paper copies of important documents*." With technological advances, a copy is a copy, whether made from paper or from a digital source. The truth is, *no one needs to keep paper copies*; they simply choose to do so. In fact, because a digital copy can retain all of the characteristics of the document originally scanned, the digital copy is actually much better than the "original." Without reflecting on the implications of counterfeiting or unlicensed copying (visions of Andy Warhol's soup can prints), digital copies can be printed in color or on any paper in any manner and can be made to substantially resemble the document originally scanned. That flexibility, along with the ease of transmission, storage, retrieval and presentation (digital copies can be easily re-sized so that they are more legible than the original document), is making paper copies obsolete.

"Denial Is Not a River In Egypt"

Finally, even with the advent of rapidly changing technology, many attorneys cling to paper because they wrongly believe that "*stuff on paper makes me faster, smarter and more efficient*." That reliance is based in part on fear. Attorneys fear the technology, fear their own learning curve and ultimately fear making a mistake or looking less than proficient as they attempt to incorporate newer systems, processes and procedures into their business. The resistance to adopting eco-workflow principles, discussed below, whether based in fear or mere discomfort prevents attorneys from making an easy and logical progression to a paperless workplace.

The truth is: *having stuff on paper is slower, dumber and less efficient*. Despite conservation efforts, using paper has substantial and avoidable environmental consequences too many to mention. Yet, the amazing speed and efficiency of reasonably available technology is a few key strokes away; Google finds a favorite restaurant faster than thumbing through the old fashioned Yellow Pages. Moreover, most attorneys still can't seem to put down the paper, though growing accustomed to using Adobe®, various Microsoft products like Word®, and Outlook® to create, transmit and manage their electronic communications. And, those who do are beginning to see how much easier those advancements have made their lives. Most importantly those same technological advances permit solo attorneys and small firms to compete effectively with large firms. Thus, any assertion that paper is somehow better merely demonstrates an illogical and emotional refusal to accept the reality of the present, and a blind denial of the inevitability of our not-too-distant paperless future.

A Case Study

Based on the lack of progress most law firms and attorneys have made down their path to a paperless office, it is abundantly clear that "going paperless" and installing some form of eco-workflow requires more than mere lip service. Even after buying a few scanners, deploying e-mail, or printing double sided on recycled paper, attorneys still have a fair distance to travel. One California law firm's experience with the Central District's CM/ECF system provides an interesting example:

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ABC Firm (so named to protect the innocent), has 10 lawyers in a single office. It practices substantially in Federal Courts throughout California, and has been aware of and involved in electronic filings with various district and bankruptcy courts for several years. ABC Firm has several networked multi-function business machines and regularly scans, e-mails, and prints double sided on recycled paper. It also considers itself substantially paperless.

ABC Firm has assigned one of its partners, Attorney Jones, who is apparently ABC Firm's most computer savvy attorney, as the designated CM/ECF User (as defined in Central District CM/ECF Rules contained in General Order 08-02), and recipient of the various communications emanating from the CM/ECF system, including the Notices of Electronic Filing (NEF), a notice automatically generated by the CM/ECF system at the time a document is electronically filed. He timely took the training, passed the test and received his user name and password in compliance with General Order 08-02 and is the only member of ABC Firm who has done so. When a document is filed with the Court on one of the many cases ABC Firm handles, ABC Firm succumbs to 12 missteps preventing its transition to a truly paperless office:

1. Attorney Jones e-mails to his secretary each NEF;

2. The secretary reads the NEF or forwards the forwarded NEF email to the secretary of the attorney who actually handles the case (but there is no centralized case management system and no centralized contacts, so it's often time consuming for the secretary to determine what effect a document e-filed by another party has on whatever party is actually represented by ABC Firm);

3. The secretary of the handling attorney places relevant information from the filed document (which she is required to review to obtain, thus using ABC Firm's one free download), into the ABC Firm calendar item;

4. The secretary then again forwards the forwarded NEF to ABC Firm's internal office services department;

5. ABC Firm's office services personnel clicks on the link in the forwarded District Court email and *prints a hard copy* of the e-filed document (but he or she likely receives a notification that the free download has been used and that a copy can only be printed using ABC Firm's PACER account, for which there is an $0.8 per page printing fee);

6. ABC Firm's office services personnel *photocopies* as many copies as are needed to distribute to those attorneys working on the matter (it is often time consuming to determine who gets copies without a procedure set up in advance, a case manager or shared contacts system indicating the proper recipients of such documents);

7. ABC Firm's office services personnel *scans to portable document format (pdf)* the hard copy of the CM/ECF filed document which has been printed from PACER, and profiles the pdf into ABC Firm's document management system (DMS);

8. ABC Firm's office services personnel then emails the pdf of the recently scanned CM/ECF filed document to all attorneys, paralegals or secretaries within the practice area or group most likely involved on the case (but he usually guesses because he does not have the information in any handy form);

9. Each of the recipients opens the pdf and some get confused, and many of them again profile the pdf or the e-mail transmitting the pdf back in to ABD Firm's DMS, causing further confusion and unnecessary duplications of the pdfs (no one can say which of the various pdfs, documents or copies of both should be saved or where);

10. Copies of the pdf are often printed again so that they can be mailed to clients or insurance adjusters, copies of which are

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Taking it to the Banc

"*En banc*": "With all judges present and participating; in full court." *Black's Law Dictionary* 546 (7th ed. 1999)

The recent increase in the number of "*en banc*" proceedings in the Ninth Circuit Court of Appeals has focused attention on that previously little-used procedure. Here are some practical tips regarding Ninth Circuit *en banc* proceedings, and some curious aspects and outcomes of those proceedings.

Marc J. Poster

The Ninth Circuit's Oxymoronic "Limited En Banc" Procedure

The Ninth Circuit does not ordinarily hear appeals *en banc* in the first instance. With thousands of appeals decided each year, it would be a logistical nightmare. Indeed, in a recent case the parties were startled when the court on its own motion suggested that the appeal be heard *en banc* in the first instance. Both sides objected that *en banc* review was not necessary. The court voted to hear the appeal *en banc* anyway. The parties then settled their dispute and the appeal was dismissed. *Foulon v. Klayman & Toskes, PA*, 520 F.3d 1009 (9th Cir. 2008).

Instead, in almost every case, a three-judge panel decides the appeal in the first instance. The party aggrieved by the outcome may then petition the full court for rehearing *en banc*.

The Ninth Circuit's version of an *en banc* rehearing is the "limited *en banc*." Like "giant shrimp" or "working vacation," "limited *en banc*" is an oxymoron, a contradiction in terms. It is not truly "*en banc*" because it is not the full court. There are twenty-eight active judgeships on the court, but the limited *en banc* consists of only eleven judges: The chief judge plus ten active circuit judges selected by lot. The *en banc* panel may or may not include judges from the three-judge panel.

The Ninth Circuit recently terminated an experiment with fifteen-member *en banc* panels. Besides the inherent logistical problems involved in coordinating a fifteen-judge panel, the court concluded there was little or no advantage to using more than eleven judges. From a pure probability standpoint, an eleven-member panel will likely reflect the views of a twenty-eight judge court. And from a practical standpoint, the majority in an eleven-judge hearing almost always includes enough votes to prevail as a majority in a fifteen-judge hearing.

Even with a limited *en banc* procedure, however, *en banc* rehearings have been few and far between. This is because *en banc* rehearing is reserved for appeals in which:

• the panel decision conflicts with a Supreme Court decision or another Ninth Circuit decision, or

• the case presents an issue of exceptional importance, which may include a conflict with a decision in another Circuit on an issue of which there is an overriding need for national uniformity.

These are tough standards for the average appeal to meet. Thus, although the court has about fifteen thousand cases on its docket and twelve hundred petitions for rehearing *en banc* are

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filed each year, the Ninth Circuit usually has only about two dozen appeals pending for *en banc* review at any one time.

As noted, in the past few months the Ninth Circuit has granted an unusually large number of rehearings *en banc*, albeit still a tiny number compared to the total number of appeals decided. (A list of all pending *en banc* Ninth Circuit appeals can be found on the Ninth Circuit's web site at http://www.ca9.uscourts.gov.) This increase could just be chance, a random blip in the number of appeals meeting *en banc* standards. Or, it could be a response to criticism that a court of Ninth Circuit's size — by far the largest and busiest Circuit in the nation — needs to work hard at preventing issue conflicts among its diverse three-judge panels.

How The "Limited *En Banc*" Works

Petitioning for rehearing *en banc* after a three-judge panel decision is relatively straightforward. The procedures are detailed in Federal Rules of Appellate Procedure rules 35 and 40, in the Ninth Circuit rules appended to Rules 35 and 40, and in the Ninth Circuit's General Orders. (See Fed. R. App. P. 35, 40; Gen. Orders 9th Cir. §§ 5.1 *et seq.*).

The *en banc* petition may be filed on its own or in conjunction with a petition for rehearing by the three-judge panel. The petition must be short and to the point; it may not exceed 4200 words, even if combined with a petition for panel rehearing. The petitioner must file an original plus fifty copies, and the panel decision must be attached as an appendix. Unless an extension of time has been granted, the petition must be received by the court by the fourteenth day after the panel's decision is filed. And, unless the court requests a response to the petition, no response may be filed. This prohibition on filing a response may sound harsh, but it is in fact a benefit to the vast majority of responding parties because petitions for rehearing *en banc* are so seldom granted. Moreover, the court ordinarily will not grant rehearing or rehearing *en banc* without first soliciting a response.

What happens in the Ninth Circuit after an *en banc* petition is filed is not so simple as filing the petition. Indeed, the court employs an *en banc* coordinator specifically to oversee the process. First, the petition is circulated to all active judges. No vote on the petition is even taken unless a judge requests one. If, while the petition is circulating, the three-judge panel on its own grants rehearing, then the petition for rehearing *en banc* is deemed rejected without prejudice. If not, any judge may still request that the three-judge panel make known its recommendation as to granting rehearing *en banc*. In addition, because strict internal time limits govern *en banc* requests, any judge can "stop the clock" for a period of time to consider whether to request a vote on the *en banc* petition. Internal memoranda may then circulate among the judges. If a vote is taken, it requires a majority of sitting active judges (there are twenty-seven right now, so a majority would be fourteen), to grant rehearing *en banc*.

If rehearing *en banc* is granted, the *en banc* panel may or may not solicit additional briefing, and may or may not hold oral argument, before issuing its decision.

"Limited *En Banc*" Oddities

The Ninth Circuit's "limited *en banc*" procedure can lead to strange results and, occasionally, entertaining reading.

• Fourteen Judges may vote for rehearing *en banc* because they believe the panel decision was wrong. But theoretically, the eleven judges on the *en banc* panel, ten of whom are chosen at random from the full court, may come to a different result. Indeed, six judges, a simple majority of the eleven-member *en banc* panel, could vote to reaffirm the three-judge panel decision that fourteen judges who voted for *en banc* rehearing would have reversed, thus establishing Ninth Circuit law that a majority of the Ninth Circuit judges does not support.

• Because it takes a vote of fourteen judges to hear an appeal of a three-judge decision *en banc*, the three-judge panel's decision may become law of the Circuit even though a substantially larger number of judges disagree with it. For example, in *Molski v. Evergreen Dynasty Corp.*, 521 F.3d 1215 (9th Cir. 2008), nine judges voted for rehearing *en banc* of a three-judge decision affirming an injunction barring an alleged vexatious litigant from filing new cases without permission. The nine judges couldn't convince another five judges to get involved, however, and the three-judge panel's decision stands as the law in the Ninth Circuit.

• Sometimes, even if the court does vote to hear an appeal *en banc*, the eleven-judge *en banc* panel cannot muster a majority decision. This recently occurred in *Bradley v. Henry*, 518 F.3d 657 (9th Cir. 2008). Bradley was convicted of murder in state court. The state court of appeal affirmed her conviction, rejecting Bradley's multiple contentions that she was denied constitutional rights. The federal district court denied Bradley's habeas corpus petition. On a two-to-one vote, a Ninth Circuit panel found Bradley had been denied constitutional rights on two grounds and ordered the district court to issue the writ. After rehearing *en banc* by an eleven-judge panel, five judges voted to grant habeas corpus on both grounds, four judges voted to grant habeas corpus on only one of the grounds, and two judges voted to deny habeas corpus altogether. Thus, a majority of nine favored granting habeas corpus, but there was no majority in agreement on the exact ground that it should be granted. In this situation, the four-judge decision, because it was reached on the narrowest ground, became the holding of the case. In other words, the four-judge plurality decision trumped the five-judge plurality decision as the rationale for the reversal and is the law in the Ninth Circuit.

• In cases where some judges may vote for rehearing *en banc*, but not enough for the required fourteen-judge majority to grant, there may be dueling opinions written in conjunction with the denial of rehearing. A judge who supports rehearing *en banc* may file a written dissent from the denial, either to lay the groundwork for reconsideration of the issue in some future appeal or to "send a message" to the Supreme Court that this case warrants a careful appraisal. On the other hand, a judge who thinks the panel decision is correct may file a concurrence in the denial, answering the dissenter.

Dissents and concurrences on denial of rehearing *en banc* can be shrill. For example, in *Defenders of Wildlife v. U.S. EPA*, 420 F.3d 946 (9th Cir. 2006), the three-judge panel reversed an Environmental Protection Agency ruling and remanded the cause to the Agency for reconsideration. Rehearing *en banc* was denied, 450 F.3d 394, but not without a heated tussle among those who grant rehearing and those who would not.

In *Defenders of Wildlife*, six judges dissented from the denial of rehearing *en banc*. The principal dissenter harshly criticized the three-judge panel's decision for making "five fundamental blunders," embarking on "a 17-page boondoogle," ignoring "at least six prior opinions of our own court," drawing a "nonsensical" conclusion, and reaching a "superfluous holding" that "flies in the face" of a recent Supreme Court decision.

Those were fighting words, and a fight did ensue. In reply, the three-judge panel opinion's author wrote a concurrence in the denial of rehearing *en banc*. The panel judge bemoaned the fact that written dissents from denial of rehearing *en banc* have become "a matter of routine" in the Ninth Circuit. According to the panel judge, such dissents "pose a dilemma for those who believe the original opinion correct, as they may raise issues not addressed by that opinion because not articulated by the parties before the petition for rehearing stage — or ever." In this case, the panel judge wrote, "[t]he problem is that [the dissenter's] accusations are either flat wrong or indicate a misunderstanding

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of the holdings in the panel opinion. As the author of the panel opinion, I have no choice but to try to set the record straight.…" Among other things, the concurring panel judge wrote that the reason the panel did not address the recent Supreme Court decision relied on by the dissenter was that the dissenter "is so wrong that there was no reason we would have addressed [the dissenter's] argument in the first instance."

For now, despite a clear difference of opinion on the court, the concurring panel judge has prevailed. Until rehearing *en banc* is granted in another case raising the same issue, the panel decision is the law of the Ninth Circuit. And it may be a while. You can banc on it.

— Marc J. Poster

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also then profiled into ADC Firm's DMS or saved in paper form as "Chron Files," as some of ABC Firm partners are distrusting of district website rules, and ABC Firm's procedures;

11. Calendar related items from NEF emails are placed by the secretary on ABC Firm's master calendar, which are integrated to Outlook calendars of only the two or three attorneys at ABC Firm who consider themselves to be sufficiently "techie" not to be intimidated by the entire process;

12. All of ABC Firm's attorneys meet once weekly to review *paper printouts* of the ABC Firm's master calendar to determine who is responsible for actually performing the appearance or completing the documents as a result of the CM/ECF filing related event.

If it is not already obvious, ABC Firm attorneys have no confidence in their system, because they have difficulty finding everything, and they fear many appearances and deadlines will be missed. But, in addition, the repeated printing and scanning of those printed copies back into the ABC Firm DMS, and the undisciplined and disorganized forwarding, saving and re-saving of e-mail, hopelessly converts a potentially efficient system into an anemic incompletely implemented replacement for even an old style paper system. It also necessitates the continued use by ABC Firm of paper files, because no one has any idea which of the numerous copies printed in the lifecycle of a CM/ECF document should actually be saved or recycled, so all of them are kept — IN PAPER FILES.

An eco-workflow approach involves many fewer steps, but begins with each attorney at ABC Firm taking the training and taking responsibility for CM/ECF filings, and related docketing and assignment of work on their own cases. The responsible attorney should take mental note of the NEF in his mailbox, *but is required to do nothing*, since the notice should be automatically forwarded to his secretary or paralegal, which has instructions to save the document to the ABC Firm's DMS and enter relevant dates to the master calendar. The responsible attorney would then review the document from the location it has been saved to, and thoughtfully determine who else should review it and whether copies are required to be printed; copies can be made in a paperless office, but they should be made with due consideration and an affirmative decision as to whether any copies are necessary or appropriate. The NEF e-mail is saved once, as is the document itself. No unnecessary copies are made, AND NO PAPER COPIES ARE RETAINED, but coordination, communication and organization are critical to give the attorneys comfort that the DMS is accessible and efficient. Further, catering to those who refuse to accept their part within the developing eco-workflow is counterproductive. The transition to a paperless office requires that users intellectually, emotionally and practically stick to their resolve to kick the paper habit.

Eco-Workflow Is Consistent With Overall Conservation Momentum

To review — Paper - bad, electronic data - good. Using electronic data, rather than paper permits attorneys to be more organized, working smarter and greener. The inability of attorneys to reach the goal of a paperless office is emotional and is not caused by any legal impediment. Federal Courts have lead the charge, creating an opportunity for attorneys to extend the CM/ECF system benefits to their own practices through eco-workflow techniques.

The transition of a law office through eco-workflow into a paperless office is easier than it may seem. However the transition requires a focus that joins in the growing trend toward affirmatively pursuing ecological sustainability. Eco-workflow and a paperless office embody the conservation principles of reduce, reuse and recycle. Initiatives in cities like Los Angeles to create sustainable building programs should be expanded to include the businesses that make those sustainable buildings their home.

Eco-workflow principles are pretty simple:

1. Release the emotional and intellectual rationalization that paper is an essential part of business operations!

2. Communicate electronically, and make e-mail, AIM or text messaging the preferred method.

3. View, create and edit documents electronically.

4. Convert all non-essential paper documents to electronic documents.

5. Shred and *recycle* all non-essential paper documents.

6. Store documents and data electronically.

It's difficult for attorneys to eliminate paper if they permit themselves to believe that they have no control over "mail" they receive. Clearly, in most law practices, internally generated paper can be controlled and eliminated. However, attorneys can also affirmatively encourage their colleagues, clients and others with whom they communicate, to eliminate paper by seeking agreements in advance that permit electronic service and notice beyond that of the CM/ECF system rules. Those agreements may be tailored to assure that the attorneys have complied with any ethical requirements contained in the *Business & Professions Code*, the *Rules of Professional Conduct*, State Bar Rules and advisory opinions, or other state and federal rules and statutes, and in case law pertaining to document requests, retention, and disposal.

Taking an eco-workflow approach to eliminating paper starts with a change of mind, and the intelligent use of technology to better organize information, so that work can be performed more efficiently, economically, and greener. A paperless office is within reach, and attorneys can also eliminate paper by believing that paper is not better and asking themselves WHY PAPER?

— William K. Mills

Using Discovery to Establish Jurisdiction

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or by affirmative defense, the defendant must await the outcome of the trial and entry of final judgment. If the appeal is successful, the judgment is reversed on the merits and the plaintiff's case is dismissed. *Toledo Ry. & Light Co. v. Hill*, 244 U.S. 49, 52 (1917). Thus, choosing a federal forum may delay resolution of the jurisdictional issue, leaving the issue in play for settlement considerations, but potentially frustrating a foreign party's attempt to seek early and conclusive resolution of the issue.

Contesting Jurisdiction: Burden of Proof, 170.6, and Jurisdiction to Determine Jurisdiction

When a nonresident defendant specially appears under C.C.P.

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418.10(a)(1) to challenge personal jurisdiction, the plaintiff must prove, by a preponderance of the evidence, the factual basis that would justify the exercise of jurisdiction. *Vons Companies, Inc. v. Seabest Foods, Inc*., 14 Cal. 4th 434, 449 (1996); *Pavlovich v. Superior Court*, 29 Cal. 4th 262, 273 (2002). If the plaintiff meets this burden, it is then up to the defendant to show that the exercise of jurisdiction would be unreasonable. *Pavlovich*, 29 Cal. 4th at 273.

In California, some thought should be given to whether peremptory challenge to the judge hearing the motion to quash should be made. The trial judge's ruling on a motion to quash service of summons for lack of jurisdiction is not a determination of contested fact issues relating to the merits for the purposes of a timely peremptory challenge to a judicial assignment under C.C.P. 170.6. See *School District of Okaloosa County v. Superior Court*, 58 Cal. App. 4th 1126 (1997).

California courts have jurisdiction to determine their own jurisdiction, and a court may raise the question of jurisdiction on its own motion. *Abelleira v. District Court of Appeal*, 17 Cal. 2d 280, 302 (1941).

Discovery Issues in Litigating Personal Jurisdiction

After the motion to quash or dismiss is made, the court will occasionally allow parties to conduct discovery prior to its ruling on the issue of personal jurisdiction. Indeed, "[t]he plaintiff has the right to conduct discovery with regard to the issue of jurisdiction to develop the facts necessary to sustain this burden" and "is generally entitled to conduct discovery with regard to a jurisdictional issue before a court rules on a motion to quash." *Mihlon v. Superior Court*, 169 Cal. App. 3d 703, 710 (1985); *Goehring v. Superior Court*, 62 Cal. App. 4th 894, 911 (1998). The granting of a continuance for discovery lies in the discretion of the trial court, whose ruling will not be disturbed in the absence of manifest abuse. *Beckman v. Thompson*, 4 Cal. App. 4th 481, 487 (1992).

The defendant should be allowed the same opportunity for discovery to defeat personal jurisdiction, but here a curious tension arises. Counsel for the defendant should always pay close attention to their litigation strategy so as to make sure that conduct does not lead to a general appearance by a waiver or by acquiescence. Under C.C.P. 418.10(e)(1), a party who moves to quash service does not make a general appearance under section 1014 until entry of the court's order denying the motion. It has been held that objections to interrogatories upon the ground they are oppressive, made during the pendency of a motion to quash, do not constitute a general appearance. *1880 Corp. v. Superior Court of San Francisco*, 57 Cal. 2d 840, 843 (1962). However, a defendant who has not yet answered has been held to have made a general appearance if he invokes the authority of the court on his behalf, or affirmatively seeks relief. A party who propounds discovery makes a general appearance, as does one who moves for summary judgment before filing an answer. *Roy v. Superior Court*, 127 Cal. App. 4th 337, 341 (2005). It is not difficult to imagine other scenarios where an overly aggressive defendant goes overboard with discovery or other litigation tactics that may be construed as going beyond issues pertaining to jurisdiction and which constitute litigation on the merits, thereby creating waiver or acquiescence. *Mansour v. Superior Court*, 38 Cal. App. 4th 1750 (1995).

Additionally, defense counsel should be alert to discovery that is an attempt to gain trade secret information under the guise of discovery to determine jurisdiction. Counsel will be well advised to obtain an appropriate protective order under C.C.P. 2019.210.

The plaintiff's prerogative to obtain jurisdictional discovery is reflective of the liberality of Section 2017.010 of the Code of Civil Procedure, providing that "any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence."

In seeking the right to undertake discovery, the parties should be ready to tell the court what the discovery will accomplish. Counsel should prepare proper briefs with proposed discovery designed to explore the respective claims on the issue of personal jurisdiction. This includes demonstrated familiarity with the substantive law and even proposed jury instructions. Discovery that does not establish a relationship with California either generally or specifically will probably not be allowed. For example, in *Beckman*, such discovery was properly denied where plaintiff's request for a continuance did not suggest that discovery was likely to produce evidence of additional California contacts by one defendant relating to the defendant's lending activities in California. *Beckman, supra* 4 Cal. App. 4th at 487.

In *In re Automobile Antitrust Cases I & II*, 135 Cal. App. 4th 100 (2005), the trial court had twice asked plaintiffs to offer facts that would justify a reasonable belief that additional relevant jurisdictional evidence existed and could be gathered if a continuance were granted. The plaintiffs were unable to make such an offer of proof, prompting the trial court to deny their request for further jurisdictional discovery against the three parent manufacturers under the effects test of demonstrating purposeful availment.

In *Terracom v. Valley Nat'l Bank*, 49 F.3d 555, 562 (9th Cir. 1995), the court observed that "[w]here a plaintiff's claim of personal jurisdiction appears to be both attenuated and based on bare allegations in the face of specific denials made by defendants, the Court need not permit even limited discovery…."

In many if not most cases, the discovery pertaining to jurisdiction will also serve as discovery on substantive issues. For example, in cases of relationships between foreign parent and subsidiary business organizations, the issues of agency, representative services and *alter ego* are the same for both establishing jurisdiction as well as on the merits. See *Sonora Diamond Corp. v. Superior Court*, 83 Cal. App. 4th 523 (2000).

I will commonly ask lawyers questions about just what is expected to be accomplished by engaging in the type of discovery that is sought, or why certain parties are being added, or what is the possible theory of liability against existing or contemplated parties. All too often, the lawyers are unable to answer these questions.

A really smart lawyer begins case preparation with careful and thoughtful compilation of possible jury instructions on the elements of each cause of action. Given the trial court's discretion to grant discovery, plaintiffs seeking jurisdictional discovery should identify clearly what discovery they seek, and how they contend it will assist them in establishing a basis for jurisdiction. Consideration should be given to both general jurisdiction and specific jurisdiction theories, though with an emphasis on the more commonly successful specific jurisdiction basis. Jurisdictional discovery is particularly effective in developing an agency theory to extend the foreign party's contacts to a U.S. subsidiary or other affiliate.

Regardless of the theory, as with any discovery issue, a request for jurisdictional discovery should be linked to the substantive facts that will govern the outcome. California has followed the Restatement, 2d, Conflicts of Laws, § 27(1) in determining what kind of relationships with California may allow a California court to assert jurisdiction over a defendant. A list of jurisdictional factors is also set forth in the Judicial Council comments to C.C.P. 410.10. These include:

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Using Discovery to Establish Jurisdiction

Continued from page 6

"In the case of natural persons, such bases currently include presence, domicil, residence, citizenship, consent, appearance, doing business in a state, doing an act in a state, causing an effect in a state by an act or omission elsewhere, ownership, use or possession of a thing in a state, as well as other relationships to a state."

"In the case of corporations and unincorporated associations (including partnerships), such bases currently include incorporation or organization in a state, consent, appointment of an agent, appearance, doing business in a state, doing an act in a state, causing an effect in a state by an act or omission elsewhere, ownership, use or possession of a thing in a state, and other relationships to a state."

On the defense side, the principal defense to jurisdictional discovery is showing that it will not change the result. Showing the court that jurisdictional discovery will be an expensive and time-consuming diversion, with no change in the ultimate result, will help overcome the presumption that such discovery should be granted. By showing that the discovery sought does not relate to any legally significant or cognizable theory of jurisdiction, the defense can argue that plaintiffs should be prevented from pursuing "fishing-expedition" jurisdictional discovery.

Discovery Sanctions in Contests Over Jurisdiction

"It is a cardinal rule of California discovery practice, probably of constitutional origin, that discovery sanctions must be suitable to enable the party seeking discovery to obtain the objects of discovery; the sanction must not put the prevailing party in a better position than if discovery had been obtained nor may the sanction be a form of punishment." *See Motown Record Corp. v. Superior Court*, 155 Cal. App. 3d 482, 489-90 (1984).

Where a party in a contest to establish jurisdiction fails to provide discovery, the Court cannot know whether sanctions would put the party seeking discovery in a better position than if the discovery had been obtained. The trial court's uncertainty is caused by the recalcitrant party's wrongful refusal to play by the discovery rules. In those circumstances, the party that has refused to provide discovery must bear the consequences of the uncertainty. *See Highland Ranch v. Agricultural Labor Relations Bd.*, 29 Cal. 3d 848, 863 (1981) ("In fashioning an appropriate remedy, we must be guided by the principle that the wrongdoer, rather than the victims of the wrongdoing, should bear the consequences of his unlawful conduct, and that the remedy should be adapted to the situation that calls for redress); *County of El Dorado v. Schneider*, 191 Cal. App. 3d 1263, 1282-83 (1987) (defendant in an action to establish paternity who refused to comply with blood testing orders deemed to be the father).

A trial court may deem the issue of personal jurisdiction as having been established (and apparently not established) for willful violation of discovery law and orders.

To comply with C.C.P. 2023.040, counsel should confirm that their notice of motion for sanctions and supporting papers identify every person, party, and attorney against whom the sanction is sought, and specify the type of sanction sought.

Even in the best of circumstances, obtaining jurisdiction over a foreign defendant is expensive and time- consuming. Counsel should keep in mind that a global picture of the litigation strategy is necessary. Discovery to build a case for or against jurisdiction should be detailed, well-documented and well-thought out.

— Hon. Socrates P. Manoukian

Aloha to ABTL's 35th Annual Seminar

The ABTL Annual Seminar, alternating each year between great locations in Hawaii and on the "mainland," is always topical, educational, and fun for ABTL members and their families. This year we make our first visit to the lovely island of Kauai for our 35th Annual Seminar, entitled "Businesses in the Courtroom: Getting Your Message Across." The seminar events all will be held at the beautiful Grand Hyatt Kauai Resort & Spa, Poipu, Kauai, Hawaii. http://kauai.hyatt.com/hyatt/hotels/index.jsp

We are on track for a record annual seminar attendance. And no wonder. Our keynote speaker will be the Honorable Joyce L. Kennard, Associate Justice of the California Supreme Court. This spectacular CLE event focuses on the craft of trying business cases, and topics vary from day to day.

On Thursday, September 25, panels will address ***"Getting Your Message to the Jury."*** Panels will address "Rethinking Jury Selection," voir dire, and representing the corporate defendant. Noted jurists, members of the plaintiff and defense bars, and respected jury consultants all will be joining us to share their views.

On Friday, September 26, panels will address ***"Teaching Complexity to Communicate with the Fact Finder,"*** and topics include "An Effective Story — Is Your Theme Connecting?," Seeing Is Believing – Using Graphics to Enhance Your Message," and "Experts as Educators — Making the Complex Understandable" are on tap. In addition to high-profile legal professionals, expert witnesses and graphics consultants will be on these panels.

Finally, on Saturday, September 27, the panels will focus on ***"Working With the Storytellers."*** Panel topics include "Preparing the Corporate Witness to Testify," "Direct Examination — Telling a Compelling Story," and to quote Yogi Berra, "Cross-Examination — If You Don't Know Where You Are Going To Might Wind Up Somewhere Else."

Saturday evening, at a special banquet dinner for attendees and their guests, island entertainment will be provided by *The Barefoot Natives*, featuring artists Willie K and Eric Gilliom.

Space at the hotel is filling rapidly, and reservations for the great room rates we have negotiated with the Grand Hyatt likely will no longer be available. ***You are responsible for booking your own hotel accommodations by contacting the hotel at 808-742-1234***, and must register for the seminar in order to hold a room at the ABTL rates.

Annual Seminar registration is available online, and early registration is available only through August 1, 2008. Registration, and additional information about the Annual Seminar and hotel facilities, is available on the ABTL's website, at http://www.abtl.org/ annualseminar.htm, including a downloadable brochure listing the agenda and schedule for the program. Any questions about the Annual Seminar, please contact the event planner, Linda Sampson, at 714.602.2505 or via email at annualseminar @abtl.org.

We hope you can join us in Hawaii!

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U.S. Supreme Court's Recent Decision in *Exxon Shipping Co. v. Baker Limits* the Amount of Punitive Damages Available under Federal Maritime Law and Comments on Due Process Limitations on Punitive Damages in Class Actions

In *Exxon Shipping Co., et al. v. Baker, et al.*, 554 U.S. __ (2008), the U.S. Supreme Court vacated a $2.5 billion punitive damages award as excessive under federal maritime common law, and set an upper limit on such awards of a 1:1 punitive-to-compensatory damages ratio. The case arose from the highly publicized 1989 Exxon Valdez oil spill. Following a jury trial, the district court entered judgment for respondents in the amount of $507.5 million in compensatory damages and $5 billion in punitive damages. The Ninth Circuit later remitted the punitive damages award to $2.5 billion. Petitioners sought review of the remaining $2.5 billion punitive damages award under both federal maritime common law and the Due Process Clause of the Fifth Amendment, but the Supreme Court granted review on only the federal maritime law question.

Julian W. Poon

In an opinion authored by Justice Souter (in which Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas joined, and Justices Stevens, Ginsburg and Breyer joined in part), the Court held that a 1:1 ratio represented the "upper limit" as a matter of federal maritime law, and vacated the punitive damages award. The Court thoroughly surveyed academic studies that have documented the frequency and amounts of punitive damages verdicts. It also examined various states' punitive damages laws and regulations, and noted that the median punitive-to-compensatory damages ratio for all American jury and bench trials is 0.65:1. This figure "probably marks the line near which cases like this one largely should be grouped," the Court found, because it expected that this median ratio "would roughly express jurors' sense of reasonable penalties in cases with no earmarks of exceptional blameworthiness [or] modest economic harm."

The Court considered and rejected two other ratios. It first discussed the 2:1 ratio adopted by federal treble-damages statutes, and rejected it because that ratio was intended to encourage lawsuits with low amounts of compensatory damages — an issue not relevant to this case where the compensatory damages exceeded $500 million. The Court found the 3:1 ratio limit adopted by a (slim) majority of states too high, because such a limit applies not only to cases such as *Baker*, "where the tortious action was worse than negligent but less than malicious," but also to those involving "the most egregious conduct, including malicious behavior and dangerous activity carried on for the purpose of increasing a tortfeasor's financial gain." For the conduct at issue in *Baker* — "reckless action, profitless to the tortfeasor, resulting in substantial recovery for substantial injury" — even a 3:1 ratio would be too high, the Court reasoned. A 1:1 ratio, well above the median, provided a "fair upper limit."

The *Baker* decision is important not only for the limit it establishes in federal maritime common law, but also for the broader guidance that it provides to courts throughout the country in interpreting the scope of the limits on punitive damages awards under the federal Due Process Clause and state common law. In a far more detailed and pointed manner than it had previously, the Court noted, for example, the problem of the "stark unpredictability of punitive awards." It found that the "spread [between punitive damages awards] is great, and the outlier cases subject defendants to punitive damages that dwarf the corresponding compensatories," and that this disparity results not from fine-tuned judgments by judges and juries based on varying fact-patterns, but from "the inherent uncertainty of the trial process" (quoting *BMW of N. Am., Inc. v. Gore*, 646 So. 2d 619, 626 (1994) (per curiam)). The Court relied on several scholarly studies in establishing the factual basis for this disparity in punitive damages awards, and in doing so lent its imprimatur to statistics demonstrating the low median ratio for punitive-to-compensatory damages and the wide disparity in the multipliers from that median. The Court concluded that this "implication of unfairness" is in tension with our system "whose commonly held notion of law rests on a sense of fairness in dealing with one another." Even those defendants characterized as the worst offenders should be able to "look ahead with some ability to know what the stakes are in choosing one course of action or another."

Blaine H. Evanson

Notably, in fashioning its 1:1 limit as a matter of federal admiralty law, the Court repeatedly reaffirmed and drew upon its prior decisions in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Auto Insurance Co. v. Campbell*, 538 U.S. 408 (2003). The same concern in *Baker* with the disparity in punitive damages awards for similar or identical conduct was present in *Gore*, where similar conduct resulted in a $4 million punitive damages verdict in one case and zero punitive damages in another (citing *Gore*, 517 U.S. at 565 n.8). The Court drew on *Gore* and *State Farm* in establishing the 1:1 ratio limit, noting *State Farm's* presumption that single-digit multipliers are more likely to comport with due process, and stating that in cases involving large compensatory damages a 1:1 ratio "can reach the outermost limit of the due process guarantee." Because concerns over unpredictability and "fair notice" to defendants are unquestionably at the heart of federal due process review, the *Baker* decision should prove quite helpful to state and federal courts around the country as they seek to set appropriate standards for bringing arbitrary awards under control.

Finally, the Court elaborated upon a statement it made in *State Farm* regarding situations in which a low, 1:1 punitive-to-compensatory-damages ratio is the "outermost limit of the *due process* guarantee" (emphasis added), and in doing so noted that punitive damages in class actions "when large numbers of potential plaintiffs are involved" are often if not always limited by a 1:1 ratio. The Court in *State Farm* stated that such a ratio is appropriate "[w]hen compensatory damages are substantial," 538 U.S. at 425 (emphasis added), and in *Baker*, the Court clarified that "substantial" refers not to the damages awarded an individual plaintiff, but the aggregate amount awarded *against a defendant*:

> The criterion of "substantial" takes into account the role

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> of punitive damages to induce legal action when pure compensation may not be enough to encourage suit, a concern addressed by the opportunity for a class action when large numbers of potential plaintiffs are involved: in such cases, individual awards are not the touchstone, for it is the class option that facilitates suit, and a class recovery of $500 million is substantial. In this case, then, the constitutional outer limit may well be 1:1.

To the extent that punitive damages may ever be awarded in a class action, the Court's observation would appear to limit such damages, as a matter of due process, to a maximum 1:1 ratio on a classwide basis — regardless of the size of any individual class member's claim. Of course, the maximum permissible ratio in any particular class may well be lower, particularly given the coordinate due process requirement that any due process award bear a reasonable relationship to an *individual's* injury.

Ninth Circuit Clarifies the Availability of CERCLA Claims Under §§ 107 and 113

In *Kotrous v. Goss-Jewett Co. of Northern California*, 523 F.3d 924 (9th Cir. 2008), the Ninth Circuit addressed long-standing confusion in the law of hazardous waste cleanup because of conflicting interpretations of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). In short, the court found that the Supreme Court's opinion in *United States v. Atlantic Research Corp.*, — U.S. —, 127 S. Ct. 2331 (2007), overruled prior Ninth Circuit precedent, *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997).

After *Kotrous*, a potentially responsible party ("PRP") that incurs cleanup costs voluntarily may bring an action for "cost recovery" under § 107 of CERCLA. The now-overruled *Pinal Creek* had held that a PRP could not bring a § 107 action, but could only seek "contribution" under § 113 of CERCLA. This is significant because a § 113 contribution action requires that the plaintiff first be the subject of a qualifying civil action, administrative order, or settlement. Section 107 requires only that the plaintiff have incurred qualifying costs.

Kotrous is a consolidated decision covering four separate appeals that each addressed the availability of § 107 actions to PRPs — *Kotrous* itself, and *Adobe Lumber, Inc. v. Hellman*, which were discussed in the opinion; and *Goodrich Corp. v. United States*, and *City of Rialto v. United States*, which were addressed in a separate memorandum disposition (note: the author represents Goodrich Corporation in the latter two matters and in related litigation).

Both *Kotrous* and *Adobe Lumber* involved actions by property owners seeking contribution under CERCLA for costs associated with the voluntary cleanup of hazardous waste sites. In the first appeal, James Kotrous sought contribution for costs he incurred to clean up soil and groundwater contamination on land he owned. One of the defendants filed a motion for judgment on the pleadings based on the argument that Kotrous was a PRP and therefore had no right to recover under CERCLA § 107. The district court denied the motion, but granted a motion for certification for interlocutory appeal.

In the second appeal, Adobe Lumber, Inc., also a property owner, sued several defendants for contribution for costs it had incurred or would incur to address contamination of the property, among other claims. The defendants filed a motion to dismiss the complaint for failure to state a claim. The district court denied the motion as to the contribution claim, and certified its order for appeal. The Ninth Circuit agreed to hear both interlocutory appeals.

These appeals raised the common question whether a PRP "could request contribution under § 113(f) without first being sued under § 106 or § 107(a)." *Kotrous*, 523 F.3d at 928. The Ninth Circuit concluded that the Supreme Court answered this question in *Atlantic Research* when it found that "the plain language of [§ 107(a)(4)(b)] authorizes cost-recovery actions by any private party, including PRPs." Atlantic Research, 127 S. Ct. at 2336. The Ninth Circuit further adopted the Supreme Court's reasoning that the difference between § 107 and § 113 liability is based upon the procedural circumstances, not the plaintiff's status as a PRP. "CERCLA § 113(f) grants an explicit right to contribution to PRPs 'with common liability stemming from an action instituted under § 106 or § 107(a).' Section § 107(a), by contrast, 'permits recovery of cleanup costs but does not create a right to contribution. A private party may recover under § 107(a) without any establishment of liability to a third party,' but a PRP may recover only the costs it has incurred in cleaning a site, not the costs of a settlement agreement or a court judgment." *Kotrous*, 523 F.3d at 932 (quoting *Atlantic Research*, 127 S. Ct. at 2338). Thus, the court concluded, "[a] PRP cannot choose remedies, but must proceed under § 113(f)(1) for contribution if the party has paid to satisfy a settlement agreement or a court judgment pursuant to an action instituted under § 106 or § 107. If, however, the private party has itself incurred response costs, it may seek recovery under § 107." *Id.* (footnote omitted). To avoid any future ambiguity, the Ninth Circuit further "conclude[d] that *Pinal Creek's* holding that an action between PRPs is necessarily for contribution [under § 113] has been overruled." 523 F.3d at 933.

Lindsay Rae Pennington

Applying this reasoning to the appeals at bar, the Ninth Circuit held, "*Atlantic Research* overruled our holding in *Pinal Creek* that an action between PRPs is necessarily for contribution. Under *Atlantic Research*, Kotrous and Adobe are entitled to bring a claim for recovery of costs under § 107(a), even if they are PRPs. The Supreme Court's holding, however, has made it clear that they must seek costs recovery under § 107, not contribution under § 113, because they have not been subject to an action under § 106 or § 107." *Kotrous*, 523 F.3d at 934. While this ruling left Kotrous and Adobe in a precarious position, as their § 113 claims appear to be invalid, the court expressly stated that they should be given leave to amend their complaints, presumably to ensure that they could pursue claims under § 107. *Id.*

Kotrous was the third U.S. Court of Appeals opinion to apply the Supreme Court's opinion in *Atlantic Research.* The other two cases are *E. I. DuPont De Nemours & Co. v. United States*, 508 F.3d 126, 135 (3rd Cir. 2007) ("Following *Atlantic Research Corp.*, there is no doubt that, contrary to our precedents, a PRP may bring a cause of action for cost recovery under § 107 and need not rely upon § 113 as its exclusive remedy."), and *ITT Industries v. BorgWarner, Inc.*, 506 F.3d 452, 458 (6th Cir. 2007) ("Although *Atlantic Research* was not decided at the time the district court dismissed Plaintiff's claims, it is now controlling precedent. Thus, Plaintiff, as a PRP, may now state a claim for cost recovery upon which relief can be granted.").

There is no apparent momentum in the lower courts to cling to their pre-*Atlantic Research* jurisprudence, and the basic question of the availability of cost recovery claims for PRPs is relatively clear. Generally, any party may bring an action at any time (within the six-year statute of limitations) against a PRP to recover incurred costs, provided that the costs are otherwise recoverable (*i.e.*, NCP-compliant). A party may bring an action for contribution once it has either become the subject of a civil action or an enforcement action, or it has resolved its liability to the United

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Cases of Note

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States or a State in a qualifying settlement. While other CERCLA issues remain, at least this one is settled, for now.

Confidentiality Provisions Included in Arbitration Clauses Are Fully Enforceable and May Be the Subject of Injunctive Relief

In *ITT Educational Services, Inc. v. Roberto Arce et al.*, No. 07-20438, 2008 U.S. App. LEXIS 13629 (5th Cir., June 27, 2008), the Court of Appeals for the Fifth Circuit held that confidentiality provisions in arbitration agreements are neither unconscionable nor contrary to public policy. In so doing, the court upheld a preliminary and permanent injunction granted in favor of ITT Educational Services, Inc. ("ITT Tech") which prohibited appellants, former students and their common counsel, from using or revealing "any aspect" of an arbitration proceeding, including any evidence, rulings, decisions or awards by the arbitrator.

Each of the former students (or "claimants") of ITT Tech had entered into enrollment agreements containing arbitration clauses that included strict confidentiality provisions. Pursuant to these clauses, the claimants (save one) pursued arbitration against ITT Tech; the arbitrator found in the claimants' favor. Following these initial arbitration proceedings, the remaining claimant demanded arbitration against ITT Tech. Counsel for the remaining claimant, who had represented the other former students in the initial arbitration proceedings, informed ITT Tech that she intended to rely on evidence and findings from those proceedings in the pending arbitration, which she asserted amounted to a finding of fraudulent inducement. ITT Tech subsequently filed suit for declaratory relief under the Declaratory Judgment Act, 28 U.S.C. § 2201, seeking (1) a finding that the confidentiality provisions contained in the enrollment agreements were enforceable and (2) a permanent injunction precluding the claimants or their counsel from revealing any aspect of the initial arbitration proceedings. The district court granted the relief sought by ITT.

On appeal, the court considered and rejected arguments that enforcing a confidentiality clause would be unconscionable and contrary to public policy because it would deny prospective plaintiffs the benefits of evidence elicited in the prior proceeding and was contrary to the intent of consumer laws. The court also considered and rejected the argument that a fraudulent inducement claim rendered the contract at issue void, including the confidentiality provision, and thus that claimants and their counsel could publicly announce any arbitration decision. The court adopted ITT Tech's position that the arbitration provision, including the confidentiality clause, was severable under the doctrine articulated in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), and thus remained in full force and effect, since no direct fraud challenge had been made to the arbitration provision itself.

In *Prima Paint*, the Supreme Court held that unless the parties to an agreement intend otherwise, "arbitration clauses as a matter of federal law are 'separable' from the contracts in which they are embedded." 388 U.S. at 402. Accordingly, when the contract is being challenged, but not specifically its arbitration provisions, "those provisions are enforceable apart from the remainder of the contract." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006). At bottom, noted the Fifth Circuit, "Prima Paint favor[s]…the separate enforceability of arbitration provisions." No. 07-20438, 2008 U.S. App. LEXIS 13629 at *5.

Moreover, the Fifth Circuit affirmed the district court's grant of preliminary and permanent injunctive relief to enforce the confidentiality provision, agreeing with the district court's conclusion that the threat of disclosure of the contents of the arbitration and/or the arbitrator's award constituted irreparable harm, because there is "no cure for the breach of the confidentiality agreement." No. 07-20438, 2008 U.S. App. LEXIS 13629 at *12. It rejected appellants' argument that the balance of hardships favored them on the ground that a prospective plaintiff would be deprived of the right to introduce evidence developed in prior proceedings, noting that such a person's burden was "exactly what he voluntarily contracted for when he signed the [Agreement]…."

In short, the Fifth Circuit unanimously adopted ITT Tech's arguments in full, holding that the agreed-upon confidentiality provision was severable and fully enforceable in the absence of a challenge to the arbitration clause itself.

— Julian W. Poon, Blaine H. Evanson and Lindsay Rae Pennington

Businesses in the Courtroom: Getting Your Message Across!

10.5 hrs. MCLE Credit approved by The State Bar of California

Keynote Speaker
HONORABLE JOYCE L. KENNARD
Associate Justice, California Supreme Court

Wednesday, September 24, 2008

3:00 – 5:00 p.m. ABTL Joint Board of Governors Meeting
4:00 - 5:00 p.m. Young Leadership Division Networking
6:30 – 9:30 p.m. Opening Reception

Thursday, September 25, 2008

7:00 - 9:00 a.m. Buffet Breakfast
8:00 - 8:15 a.m. Welcome & Announcements

Getting Your Message to the Jury

8:15 - 9:40 a.m. Rethinking Jury Selection – Contemporary Techniques & Trends
9:50 - 10:50 a.m. Voir Dire for the Complex Case
11:00 - 11:50 a.m. Humanizing the Corporate Defendant
Free Time to Relax and Enjoy Kauai

Friday, September 26, 2008

1:00 - 1:15 p.m. Welcome and Announcements

Teaching Complexity to Communicate with the Fact Finder

3:00 - 3:50 p.m. Experts as Educators – Making the Complex Understandable
4:00 - 5:00 p.m. Breakout Sessions – Open Forum with Members of the Judiciary
6:00 - 10:00 p.m. Kids Dinner and Activities
6:00 - 6:30 p.m. Reception
6:30 - 7:30 p.m. Keynote Address
7:30 - 10:00 p.m. Dinner

Saturday, September 27, 2008

7:00 - 9:30 a.m. Buffet Breakfast
8:15 - 8:30 a.m. Welcome & Announcements

Witnesses: Working With The Storytellers

8:30 - 9:40 a.m. Preparing the Corporate Witness to Testify
9:50 - 10:40 a.m. Direct Examination – Telling a Compelling Story
10:50 - 11:50 a.m. Cross Examination – If You Don't Know Where You Are Going You Might Wind Up Somewhere Else
Free Time to Relax and Enjoy Kauai
6:00 - 10:00 p.m. Banquet & Hawaiian Entertainment Performance by *The Barefoot Natives featuring artists Willie K & Eric Gilliom*

Sunday, September 28, 2008

8:00 - 10:30 a.m. Networking Breakfast

Thanks for joining us. Safe travels returning home!

*Schedule is subject to change.

Letter from the President

It is with some degree of sadness (along with an element of relief) that I pass the torch this month to our incoming President Travers Wood of the White & Case firm. Having served on our Board now for eight years, the last four as an officer, I have come to gain a particular appreciation for how important the ABTL is to the legal community in Los Angeles, and why now, more than ever, we should be ramping up our membership and generating enthusiasm and excitement for our primary mission to bring together members of the bar in community with members of the bench through our educational programs and other events. The California State Bar reports that there are approximately 48,000 active, practicing lawyers in the Los Angeles area, and the size of law firms from intrinsic growth and merger activity continues to climb. There is one way, I have found, to make the seemingly unwieldy legal community in Los Angeles manageable and indeed almost have the appearance of a true "local bar." Get involved with the ABTL. Those who come to our events regularly and make the modest effort to introduce themselves to other attendees and share stories of their respective practices soon learn that we have something very special to offer.

This has been a good year for our organization, and one filled with extraordinary programs. We stated last fall with two outstanding dinner programs that attracted a large cross section of attorneys and judges, the first "What Makes a Great Trial Lawyer" featuring legal legends Terry Bird, Tom Mesereau, my partner Bob Warren, and our own Judge Stephen Czuleger (Presiding Judge, LASC) as moderator. We next welcomed to a *packed* house Dean Kenneth Starr (Pepperdine) and now Dean Erwin Chemerinsky (U.C. Irvine) for a program focusing on the recent decisions, and the perceived direction, of our United States Supreme Court. It proved to be a fascinating and informative evening with two of the great legal minds of our time sharing stories and exchanging frequently divergent views on the cases decided by, and the future of, the Supreme Court. Our dinner programs continued in 2008 with two excellent panels addressing topics of great interest to our members and the judiciary. For the first time ever, we featured a panel of four practitioners from leading public interest law groups in town (Bet Tzedek, Legal Aid Foundation, Western Center on Law and Poverty, and Consumer Law Project), moderated by our own Judge John Wiley (LASC) to talk about "The High Stakes Public Interest Case" and how our members can get plugged in to the great work these groups are doing in our community. Our dinner programs closed out the year with the April 2008 dinner on "Managing the Difficult/High Profile Client" featuring two lawyers whose practices connect regularly with the "rich and famous," Mark Geragos and Robert Baker. Judge Jacqueline Connor (LASC SM), who recently joined our Board, moderated that very interesting discussion. Thanks goes to our Dinner Program chair this year, Theresa Kristovich, for an excellent job.

We also presented several fantastic, and extremely well attended, lunch programs dealing with a variety of more "nuts and bolts" issues facing lawyers and judges in their daily lives. Many thanks to Michael Fields who served ably as our Lunch Program Chair this last year. We opened our lunch program schedule with a topic of interest to all: "Avoiding E-Filing Mistakes." This was available to attorneys and support staff alike, and was probably our best attended lunch program in the organization's history. We offered two "trial practice" lunches this year which were well received and extremely valuable. The first, "The Art of The Opening Statement" featured two of the state's finest trial lawyers, Carl Douglas and Mike Hennigan, with Judge Jane Johnson (LASC) serving on the panel to bring the judiciary's perspective on opening statements. The second was our most recent lunch program on "The Art Of Jury Selection." We were privileged to feature two very fine, and extremely experienced trial lawyers, Bart Williams and Jerome Ringler, and our Board member Judge Rita "Sunny" Miller (LASC) offered her perspectives and presided over the jury selection exercise. We also featured an important program on the ever-increasing intersection between the courts and the arbitration process, hearing perspectives on this topic from our panelists Justice Raymond Ikola (3rd Appellate District), Judge Florence-Marie Cooper (USDC), and attorney Kenneth Zeutel who brought to the program great experience with contract arbitration provision and the issues of court intervention. We now have our sold-out Hawaii 2008 Annual Seminar to look forward to at the end of September, about which you may read in another section of this issue of our Report. Kudos to this year's Annual Seminar Chair Phil Cook (from our Board) who has worked tirelessly to bring together what promises to be the best attended and most successful Annual Seminar in our history.

Steven E. Sletten

I am quite proud of what we have achieved in our public service activities this past year, and wish to acknowledge and thank Warren Rissier of the Bingham firm for his leadership in this area as our Public Service Committee Chair. We launched our ABTL Speakers Bureau and are now in the process of matching community organizations with ABTL members who have registered with us and are interested and willing to speak on subjects such as law, politics, and other topics of interest. ABTL continues to award annual Public Service Scholarships to one law student from each of the five accredited law schools in Los Angeles as selected by the deans of those schools, to recognize the student's contribution in the area of public interest law. Many of our members participated in the "Power Lunch" program which was coordinated with the Los Angeles Superior Court during which approximately 60 high school students came to the Stanley Mosk Courthouse for a discussion with judges and attorneys about the law, what we do in our profession, and to have an opportunity to ask questions and seek guidance about their own goals and career ambitions.

And speaking of our colleagues on the bench, ABTL has an active Courts Committee which was overseen by Robert Scoular who for the second year led (with enthusiasm) our various activities to stay connected with, and actively support, our judicial officers and the court systems in Los Angeles. Rob and those involved participated in several important initiatives, including petitioning

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Contributors to this Issue

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Letter from the President

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the United States Congress to act on the federal judicial compensation initiatives that have been pending for the last couple of years, and also expressing our opposition to an ill-conceived local initiative seeking state legislation prohibiting voluntary pro-bono mediators from handling certain kinds of cases pending in the Superior Court. In these times of tight budgets and limited resources, where mediation of disputes should be actively encouraged and as widely available as possible, it is frankly perplexing to even try to conceive of the logic behind such a proposal except that it is in the financial interests of certain sponsors who charge for mediation services and "compete" for mediation business against those who are willing to serve on the pro-bono mediator panel. Under current conditions, it is unfathomable that the California state legislature would seriously consider wiping out a volunteer army of experienced mediators who are working hard to reduce (and are reducing) the heavy case load in the court system and thereby contributing to keeping the wheels of justice turning.

So many others who took leadership positions on our Board contributed to our success this last year. Trav Wood as Vice President was my right-hand man and helped with any number of projects and issues during the year. Scott Carr kept us on the "straight and narrow" with our finances as Treasurer. Mike Maddigan served as Secretary and among other things kept excellent notes of our meetings. David Babbe served as Membership Chair and pulled out every stop to spread the word about our Chapter and to encourage Los Angeles lawyers to join up and get active in the organization. Extra special thanks again to our "Editor Extraordinaire," Denise Parga, who for years has served diligently as the editor of this publication, without whose long hours and constant reminders to deliver her the copy she needs this would never be in your hands. If you have never written for the ABTL Report and are interested in contributing, I encourage you to contact Denise with your ideas for an article or story. We'd love for your voice to be heard through this vehicle. And finally, our extremely capable Executive Director, Adrienne King, managed all of our day-to-day business affairs with a smile on her face and a "can do" attitude that allowed our Board to have the confidence that all the details of our operations have been attended to.

Enjoy the rest of your summer, and I look forward to seeing you in Hawaii in September.

— Steven E. Sletten

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