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abtl REPORT

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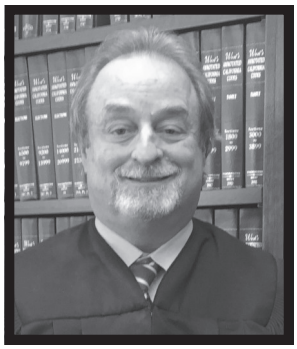
Q&A with the Hon. Andrew P. Banks
By Allina M. Hightower



[*Editorial Note: Judge Banks has served as a judge in Orange County since he was appointed by Governor Pete Wilson in April 1997. Prior to joining the bench, he graduated Cum Laude from University of San Diego School of Law and from California State University, Fullerton with a B.A. in Political Science. He has received numerous awards from Orange County organizations and has served actively on both the Judicial Advisory Council and Board of Governors for the Association of Business Trial Lawyers-OC.*]

Q: You started your judicial career in Municipal Court in 1997 and then you were elevated to the Orange County Superior Court in 1998. What was your first day like when you took the bench at Municipal Court?

A: It was very liberating. I knew I didn't have to do timesheets, so that part was great. I didn't know what it was going to be like, truly, but the first day I met all the other judges that sat at the West Municipal Court out in Westminster. They were great people, had a good time. The next morning I got a call from the Presiding Judge who said, "Well you say were a trial law-

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Are You Your Subsidiary's Keeper? "Control" Standards in Discovery for Corporate Affiliates"
By Mark Blake and Meredith Williams

A party that receives a document production request under Federal Rule of Civil Procedure 34 is required to produce responsive documents within its "possession, custody or control," but what if the party is a corporation, and the documents are with a corporate subsidiary, parent, or affiliate? For these situations, federal courts have developed different standards to determine whether a corporation has "control" of a related entity's documents for purposes of discovery. The Ninth Circuit uses a "legal control" test that focuses on legal rights to obtain documents, while the prevailing authority at the district court level in other circuits is to apply some form of a "practical ability" test. Understanding the different factors considered under both tests is crucial to fulfilling discovery obligations for corporate clients and effectively pursuing discovery from parties with corporate affiliates.

In the Ninth Circuit, "control" under Rule 34 is based on the "legal control" test. *7-UP Bottling Co. v. Archer Daniels Midland Co. (In re Citric Acid Litig.)*, 191 F. 3d 1090, 1107 (9th Cir. 1999). The Ninth Circuit in *Citric Acid* affirmed the district court's denial of a motion to compel party C&L-US to produce documents in the possession of non-party foreign parent C&L-Switzerland, *id.* at 1090, finding that "C&L-US lacks the legal ability to obtain documents from C&L-Switzerland." *Id*. at 1107. The two entities were "separate entities under the law," and there was "no contract giving C&L-US the right to compel C&L-Switzerland to furnish it with documents in C&L-Switzerland's possession." *Id.* In rejecting the "practical ability test," the Ninth Circuit recog-

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The President's Message
By Michele D. Johnson

Happy 2015 ABTL OC! As your new President, I am privileged to serve this year with Scott Garner as Vice President, Mark Finkelstein as Treasurer, and Dan Sasse as Secretary, as well as with all of the federal and state judges who honor us by serving on our Board of Governors and our Judicial Advisory Council. We are grateful for the assistance of Karla Kraft as this year's program chair, Adina Stowell as our membership chair, Maria Stearns as public service chair, Todd Friedland as sponsorship chair, Paul Gale and Matt Sonne as Annual Seminar committee members, Shiry Tannenbaum as our Young Lawyers Division chair, and Will O'Neill as editor of our esteemed publication the ABTL Report. Special thanks to Jeff Reeves, our chapter's 2014 President, for his leadership and enthusiasm over the past year, and to Linda Sampson, our Executive Director, without whom we might have ended up holding our meetings in the parking lot of a 7-11.

We are exceptionally honored to welcome the Honorable David O. Carter to our Judicial Advisory Council this year. Judge Carter embodies commitment to honor and service, with more than 16 years on the federal bench in Orange County and 16 years as an Orange County Superior Judge, after a distinguished career as an Assistant District Attorney and as a United States Marine and decorated Vietnam War veteran, earning a Bronze Star for valor and two Purple Hearts.

As 2015 begins, we mourn the loss of our dear friend, Robert Palmer, who passed away and left us brokenhearted on September 4, 2014. Robert was President of the Orange County Chapter of the ABTL in 2000, when he founded the tradition—which we have honored ever since—of dedicating our June dinner meeting to support the Public Law Center and its work to provide access to justice for those most in need in our community. Beginning this June, our annual PLC fundraiser will now be named the Robert E. Palmer Wine-Tasting Dinner for P.L.C. as a token of our great affection for Robert and our eternal gratitude for his dedication to PLC, ABTL, and the community of Orange County.

In the spirit of giving, we are pleased to report that through our November 2014 dinner program, we raised $1,175 for each of three deserving children's charities: family violence shelter Interval House, foster family organization Beta Foster Care, and Project Hope Alliance, which serves homeless children in Orange Coun-

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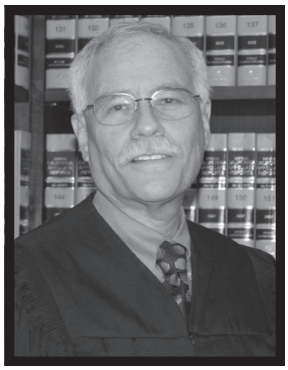
Tips From the Bench
By Hon. Charles Margines



A founding principle of ABTL has been fostering communication between the bench and bar. I have had many opportunities at ABTL functions to discuss with attorneys, young and seasoned, the ins and outs of courtroom experience. Indeed, judges reach a point where it is practically their duty to impart advice to attorneys on how best to represent clients in court. Having surpassed the 21-year mark as a judge, I offer the following 25 tips, in no particular order, to help you become a better trial attorney. The tips are short for space purposes, but please feel free to ask follow-up questions at the next ABTL event.

1) <u>Know Your Audience</u>: While it is difficult to rank the tips in order of importance, this one is at or near the top. It applies not only to attorneys as they prepare their cases but to most aspects of daily life. As an attorney, are you addressing a judge? A jury? Are you posing questions to a person who has difficulty understanding English? To a child witness? You certainly wouldn't use a single set of words, tone, or demeanor in each of these examples. To maximize effectiveness, carefully evaluate your audience. To make the fullest possible impact, the words you select, the complexity of your sentences, and your tone of voice should all conform to your audience.

2) <u>Know Your Judge</u>: To state the obvious, judges are human beings. They come from different backgrounds and have their unique predilections. What "sells" to one judge may not to another. Tailoring your arguments to your judge will often result in a better reception. Today, there are numerous resources available online which can be used to conduct "judicial intelligence." The attorney who fails to utilize them does his or her client a disservice.

3) <u>Run The Case By Your Mother</u>: As the trial date gets closer, you may be tempted to go over the case with your colleague down the hall. That's not a useless exercise, by any means. However, you should also run the case by your mother/brother/neighbor. It is they who will be your jurors, not your colleagues. And it is they who need to be sold on your case. After previewing your case, if your relatives or friends are not impressed, settle!

4) <u>Know Your State, Local, And Local-Local Rules</u>: The California Rules of Court are a "must read" for liti-

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President Obama Signs Needed Executive Order Bolstering Security Measures for Federal Credit Cards and Signals Increased Federal Regulation Over Data Breaches
By Robert Cattanach and Kate Santon

With an audience of regulators looking on approvingly at the Consumer Financial Protection Bureau, President Barack Obama signed an Executive Order to tighten security measures for federal credit cards. Among other things, the order requires microchips and PIN numbers for all government credit and debit cards. According to the White House, the "new BuySecure Initiative" will also provide consumers with more tools to secure their financial future by assisting victims of identity theft, improving the Government's payment security as a customer and provider, and accelerating the transition to stronger security technologies and next-generation payment security tools. "The idea that somebody halfway around the world could run up thousands of dollars in charges in your name just because they stole your number, or because you swiped your card at the wrong place in the wrong time, that's infuriating," the President said.

The executive order comes in the wake of the data breach announced in September in which Home Depot suffered what may be the world's largest credit card breach, with 56 million credit card numbers hacked. By comparison, the well-known Target breach during the 2013 holiday shopping season—that has resulted in numerous lawsuits, consumer class actions and shareholder derivative suits—resulted in 40 million credit card numbers hacked.

Signaling an end to problematic swipe-and-sign credit card processing, President Obama simultaneously urged banks and retailers to follow the executive order's suit in an effort to combat the growing threat of identity fraud. The White House said that Home Depot, Target, Walgreen, and Wal-Mart Stores will roll out secure chip and PIN-compatible card terminals in all their stores, most by January 2015. Along with retailers, banks also appeared to endorse the executive order. In statements, the American Bankers Association and the National Retail Federation each voiced their support for the new measures.

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yer, are you ready to preside over a criminal trial?" I responded "Yeah, send it down." And that was day two.

Q: Did you have any judicial role models or do you have any judicial role models?

A: Yes. The two people who have had the most influence on me at this court were Frank Briseno and Mike Brenner. Judge Briseno just recently retired and was on the Felony Panel, oversaw a lot of the capital cases and other serious cases. He displayed the dignity, the importance, always making sure that you made the right call by paying no attention to extraneous factors or the press or anything. You apply the facts to the law and you make the call whether it will make people happy or unhappy. Judge Brenner who was on the civil side, retired and is now sitting on assignment, had been at JAMS. His favorite phrase was "life is good" and it's been a real benchmark for me keeping focused and not losing my way, so to speak.

Q: Was there ever a moment in your legal career where the legal system disappointed you?

A: No. I wouldn't say the legal system disappointed me. Participants in the system may have disappointed me. For example, if there were unprepared lawyers who could have done a better job and obtained a better result but for one reason or the other they came across as unprepared or weren't listening to themselves and seeing what the jury was responding to, that disappointed me. But the system itself, no. Given the resources it has I think it does a great job of trying to administer justice. But everybody has to remember we live in an imperfect world, people are imperfect persons, and the best they can do will never be perfection. But the system hasn't disappointed me.

Q: Going forward what kind of changes would you like to see in the Orange County Superior Court system?

A: Actually, this is a pretty solid court. It has been financially prudent and efficient with resources. Years ago I headed a committee appointed by the Presiding Judge to reorganize the structure, the management structure of the court, and this was probably in about 2000, and we did that, we reduced the number of employees and all. But it's grown back as bureaucracies do. But even with that we were one of the most financially sound courts in the State. I chaired the finance committee for several years. We had a $60+ million surplus, reserve fund. That's all gone as of this July, but that's because the Legislature said we had to spend it or give it back to them. So we tried to do things at the court to use that money but in the past we were very good stewards of the money. We got cases on the civil panel to trial in 12 to 14 months if the lawyers really wanted to go to trial from the time it was filed. The criminal departments seem to be run very well. Despite the ten vacancies we have on the court right now, we are handling cases pretty well. Overall I give our court compared to so many in the State very high marks, and that's a credit to the leadership over the past years.

Q: Given everything that you've accomplished so far, where do you see yourself going in the next couple of years?

A: Into retirement. I've been a judge for just almost 18 years so I've got a few more years and then I've got new grandchildren. Judge Brenner, who I talked about earlier, and Judge Richard Luesebrink, who has been retired for close to 20 years, sit on assignment job share and that intrigues me. Judge Luesebrink lives in another state and flies out and I thought well I could do that so I might come sit on assignment a couple months a year and see the lawyers in ABTL who I have made some great friends with lawyers in that organization.

Q: What kind of tips could you give a young advocate that appears in your courtroom?

A: Be prepared. Be concise in what you are saying. When the court asks you a question, then answer that question even though the answer may be bad for you. We know when you're avoiding a direct question and we all love taking you back to the question because it confirms what we thought. And the other thing I would say is read a book called *Making Your Case, the Art of Persuading Judges*. It is written by Bryan Garner and Justice Antonin Scalia from the Supreme Court. It is a very easy read. I keep it up on my bench. I have it bookmarked on a number of pages and what they tell you applies to whether you're in law and motion in the trial court or writing an appellate brief at the appellate level. It is just solid good advice. You will never go wrong. You will be a superstar if you adopt what they're telling you in all your written work.

Q: If you could say anything to lawyers that appear in your courtroom, what would you say?

A: Learn to be civil enough that you make all your opposing counsel a new friend or at least someone you would be willing to sit down with over lunch to talk about settling the case that you could get to that point. There is just so much fighting that young new lawyers do on discovery motions especially. That causes them to not be able to develop a collegial relationship with their friends. One of my closest friends, we had cases against one another, we remain friends to this day. I have made some good friends from opposing counsel and received a fantastic referral

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from an opposing counsel when I was an attorney. I thought that was great.

That is what lawyers should strive for because it really is a profession. If you ever want to be a judge, the Governor asks you to give a list of your ten most significant cases, listing the current address and phone number of every one of your opposing counsel in those cases. That is where they go for an evaluation of you. If all you've done is engaged in scorched earth and then some day you want to be a judge, good luck. But if you were a professional, extended obvious courtesy, somebody wants an extension and it's the first time, you give it to them. They need a second if you can give it you should give it to them. It makes life easier, your blood pressure stays down, you live longer and it keeps your options open. That would be what I would say.

The ABTL thanks Judge Banks for his time.

♦ *Allina M. Hightower is a business litigation associate at Rutan & Tucker LLP.*

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nized that any order to compel would be futile without a legal mechanism, such as a contract, to compel production from the foreign non-party entity. *Id*. at 1108. Hence, in the Ninth Circuit, "[c]ontrol must be firmly placed in reality and not an esoteric concept such as [an] inherent relationship." *United States v. Int'l Union of Petroleum & Indus. Workers*, 870 F. 2d 1450, 1453 (9th Cir. 1989).

Interestingly, while the Ninth Circuit established its "legal control" test citing sister circuit decisions with approval, courts in most other circuits have moved away from relying on legal rights alone. At this point, the Ninth Circuit's focus on "legal control" stands out because most federal courts use some form of a "practical ability" test to determine whether a corporation has "possession, custody or control" of its affiliate's documents. Under the "practical ability" standard, "control" is broadly construed to include not only the legal right or authority to demand documents, but also the practical ability to obtain the documents. Courts that use this standard apply various factor-driven tests to determine whether the closeness or transactional nature of the relationship between the corporations is sufficient to warrant a finding of "control."

To start, courts in the First Circuit embrace the "expanded" test for "control" which "include[s] not only 'legal right' [to control or obtain the documents] but also 'access to documents' and 'ability to obtain the documents." *Addamax Corp. v. Open Software Fund,* 148 F.R.D. 462, 467 , (quoting *Cooper Indus., Inc. v. British Aerospace, Inc.*, 102 F.R.D. 918, 919 (S.D.N.Y. 1984)). Thus, if a subsidiary can obtain documents of its parent to "meet its own business needs and documents helpful for use in the litigation," a subsidiary has "control" for the purposes of discovery. *Id*. In the First Circuit, then, a party can demonstrate control by presenting "information about interlocking corporate structure [and] the nature of the relationships between affiliates," in addition to evidence establishing a practical ability to obtain the relevant documents. *Capital Ventures Int'l v. J.P. Morgan Mortgage Acquisition Corp.*, No. CV 12-10085-RWX, 2014 LEXIS 51606 at *15 (D. Mass. April 14, 2014).

Similarly, courts in the Second Circuit have "long construed the term 'control' as meaning more than simple 'possession.'" *In re Ski Train Fire of Nov. 11, 2000 Kaprun Aus*, No. MDL 1428 (SAS)(THK), 2006 LEXIS 29987 at * 14 (S.D.N.Y. May 16, 2006). Courts in the Second Circuit consider "[1] the degree of ownership and control exercised by the parent over the subsidiary, [2] a showing that the two entities operate as one, [3] demonstrated access to documents in the ordinary course of business, and [4] an agency relationship." *DeSmeth v. Samsung Am., Inc.*, No. 92 CIV. 3710 (LBS)(RLE), 1998 LEXIS 1907 at *9 (S.D.N.Y. Feb. 20, 1998). In cases involving sister corporations, "control" has been found "only where the sister corporation was found to be the alter ego of the litigating entity, or where the litigating corporation has acted with its sister in effecting the transaction giving rise to the lawsuit and it litigating on its sister's behalf." *Parfums v. Perfumania*, No. 93 CIV. 9009 (KMW)(RLE), 1998 LEXIS 14713 at *7 (S.D.N.Y. Sept. 21, 1998).

Likewise, in the Third Circuit, "control" under Fed. R. Civ. P. 34 is "defined as the legal right, authority or ability to obtain documents upon demand." *Camden Iron & Metal, Inc. v. Marubeni Am. Corp.*, 138 F.R.D. 438, 441 (D.N.J. 1991). When the parent corporation is litigating, courts have found the requisite control where "a subsidiary corporation acts as a direct instrumentality of . . . its parent corporation, and where the properties and affairs of the two [were] . . . inextricably confused as to the particular transaction." *Gerling Int'l Ins. Co. v. Comm'r of Internal Revenue*, 839 F.2d 131, 140 (3rd Cir. 1988) (internal quotations omitted). "Control" is satisfied when the subsidiary is wholly owned or controlled by the parent, or when the parent has the ability to elect a majority of the subsidiary's board of directors. *Id.* When the subsidiary is litigating, on the other hand, Third Circuit courts "have found control to exist on the following alternate grounds: [1] the alter ego doctrine which warranted piercing the corporate veil; [2] the subsidiary was an agent of the parent in the transaction giving rise to the

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lawsuit; [3] the relationship is such that the agent-subsidiary can secure documents of the principal-parent to meet its own business needs and documents helpful for use in litigation; [4] there is access to documents when the need arises in the ordinary course of business; and [5] subsidiary was marketer and servicers of the parent's product in the United States." *Camden Iron & Metal, Inc.*, 138 F.R.D. at 441-42.

Fourth Circuit courts accept the broad application of "control" as "the legal right, authority or practical ability to obtain the [documents] sought." *Steele Software Sys. V. Dataquick Info. Sys.*, 237 F.R.D. 561, 564 (D. Md. 2006) (internal quotations omitted). Courts in the Fourth Circuit have identified factors that focus on elements of "actual" or "inferred" control, including any "complicity in storing or withholding documents," as well as "(a) commonality of ownership, (b) exchanging or intermingling of directors, officers or employees of the two corporations, (c) exchange of documents between the corporations in the ordinary course of business, (d) any benefit or involvement by the non-party corporation in the transaction, and (e) involvement of the non-party corporation in the litigation." *Id.* In application, the Fourth Circuit recognizes "control" where one corporation is the alter ego of the other corporation, reasoning that this is a "decree [of] legal control based on actual control arising from misuse and abuse of the corporate form." *Id.* 305-06. This means wholly owned subsidiaries may be required to respond to a Rule 34 request for the parent's documents when there is an intermingling of directors, officers, employees or business relations. *Id.* The analysis for affiliate or sister corporations is similar: "if corporate formalities are observed and none of the other factors are presents, documents will not be deemed under the control of a sister corporation." *Id.*

Under Fifth Circuit precedent, "documents are considered to be under a party's control for discovery purposes when that party has the right, authority or practical ability to obtain documents from a nonparty to the suit." *Shell Global Solutions (US) Inc. v. RMS Eng'g, Inc.*, No. 4:09-CV-3778, 2011 LEXIS 85120 at *4—5 (S.D. Tex. Aug. 3, 2011) (internal quotations omitted). When determining the sufficiency of "control," courts focus upon the nature of the relationship between the corporation and its non-party affiliate. *Id.*; *see Goh v. Baldor Elec. Co.*, No. 3:98-MC-064-T, 1999 LEXIS 209 at *11 (N.D. Tex. Jan. 14, 1999) (holding that although three companies shared membership in the common corporate association, "control" was not present because each was a separate entity organized under its own country's law, controlled its own resources and held different partners, members and management). Fifth Circuit courts use the same five factors in determining "control" as in the Fourth Circuit, discussed above. *Id.* The specific form of the relationship between the two corporations is not determinative of the "control" inquiry. *Id.* The Fifth Circuit acknowledges that production of documents can be ordered from a litigating parent's subsidiary, from a litigating subsidiary's parent, and from a litigating corporation's affiliate. *Id.* (internal citations omitted).

In the Seventh Circuit, a subsidiary "need only be able to obtain the documents in question to 'control' them, and need not 'control' the parent that possesses the documents." *In re Subpoena Duces Tecum to Ingeteam*, No. 11-MISC-36, 2011 LEXIS 91431 at *4 (E.D. Wisc. Aug. 16, 2011) (internal citation omitted). Shared ownership alone does not warrant a finding of "control." *Appleton Papers Inc. v. George A. Whiting Paper Co.*, No. 08-C-16, 2009 LEXIS 71322 at *11 (E.D. Wisc. July 31, 2009). Instead, the Seventh Circuit examines the "closeness of the relationship between the entities," which could be sufficient to allow for production of documents of foreign parents or affiliates not subject to the personal jurisdiction of the court. *Flavel v. Svedala Indus.*, No. 92-C-1095, 1993 LEXIS 18730 at *10 (E.D. Wisc. Dec. 13, 1993). "Under the Rule 34(a) control analysis . . . a sufficiently close corporate relationship exists [between a domestic corporation and a foreign parent] to compel the former to produce documents held by the latter if their degree of interrelation is evidenced by (1) adequate ownership share in the subsidiary by the parent; (2) interlocking management structures; (3) sufficient control exercised by the foreign parent over the subsidiary's directors, officers, and employees; and/or (4) a connection to the transaction at issue." *Id.* at *13 (holding that none of these factors is an exclusive test, and thus, each factor need not be satisfied to prove "control").

Under Eighth Circuit jurisprudence, "'control' does not require that the party have legal ownership or actual physical possession of the documents at issue; rather documents are considered to be under a party's control when that party has the right, authority or practical ability, to obtain the documents from a non-party to the action." *Prokosch v. Catalina Lighting*, 193 F.R.D. 633, 636 (D. Minn. 2000) (internal citations omitted). When determining control, the Eighth Circuit looks to three factors: "(1) the corporate structures of the party to whom discovery is directed and the non-party in physical possession of the requested documents, (2) the non-party's connection to the subject matter of the litigation, and (3) whether the non-party will feel the benefits or burdens of any award in the case." *Orthoarm, Inc. v. Forestadent USA, Inc.*, No. 4:06-CV-730 CAS, 2007 LEXIS 44429 at *5 (E.D. Mo. June 19, 2007).

In the Tenth Circuit, "control comprehends not only

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possession but also the right, authority or ability to obtain the documents." *Comeau v. Rupp*, 810 F. Supp. 1127, 1166 (D. Kan. 1992); *see also McCoo v. Denny's, Inc.*, 192 F.R.D. 675, 692 (D. Kan. 2000). Accordingly, production of documents is required if a party has "any right or ability to influence the [corporation] in whose possession the documents lie." *Lone Star Steakhouse & Saloon, Inc. v. Liberty Mutual Insurance Group, et. al.*, No. 02-1185-WEB, 2003 LEXIS 12160 at *5—6 (D. Kan. Jun. 4, 2003). A parent corporation has "control" of documents of its wholly-owned subsidiary. *Cotracom Commodity Trading Co. v. Seaboard Corp.*, 189 F.R.D. 655, 663 (D. Kan. 1999). When determining whether a subsidiary has "control" over the parent's documents, the Tenth Circuit courts look to several factors to understand the "nature of the transactional relationship" between the two. *NXT, Inc. v. Aerodata Sys., LLC*, No. 12 -mc-111-EFM, 2012 LEXIS 122500 at *4-5 (D. Kan. Aug. 29, 2012) (finding a lack of requisite "control" when movant presented no evidence that defendant has access or the ability to obtain the other corporation's documents, and considering alter ego principles such as agency and practical business relationship between entities).

Following the majority of courts in other circuits, courts in the Eleventh Circuit broadly construes the term "control" to "include not just a legal right, but also a practical ability to obtain the materials on demand." *Costa v. Kerzner Int'l Resorts, Inc.*, 277 F.R.D. 468, 471 (S.D. Fla. 2011). Eleventh Circuit courts consider the following three factors to determine "control:" "(1) the corporate structure of the party and nonparties; (2) the nonparties' connection to the transaction at issue in the litigation; and (3) the degree to which the nonparties benefit from the outcome of the litigation." *Id.* While a showing of "an intracorporate relationship *and* additional indicia of control . . . may be necessary for a subsidiary to reach up the corporate ladder and demand documents in its parent's possession," a parent corporation always has "control" of documents in possession of a wholly-owned subsidiary. *Platypus Wear, Inc. v. Clarke Modet & Co.*, No. 06-20976-CIV, 2007 LEXIS 94327 at *14—15 (S.D. Fla. Dec. 21, 2007). Applying the expanded test, a subsidiary has "control" over documents in the possession of a foreign parent when there is a "close working relationship on a common transaction and the subsidiary could easily obtain the documents when it is in its interest to do so." *Costa*, 277 F.R.D. at 472.

Finally, the D.C. Circuit Court of Appeals agrees that "'control' is defined as the legal right, authority or ability to obtain documents upon demand." *United States ITC v. ASAT, Inc.*, 411 F.3d. 245, 254 (D.C. Cir. 2005) (internal quotations omitted). The D.C. Circuit follows *Camden Iron* in recognizing a subsidiary's "control" over documents in its parent's possession where: "(1) the alter ego doctrine warranted piercing the corporate veil; (2) the subsidiary was an agent of the parent in the transaction giving rise to the lawsuit; (3) the relationship is such that the agent-subsidiary can secure documents of the principal-parent to meet its own business needs and documents helpful for use in litigation; (4) there is access to documents when the need arises in the ordinary course of business; and (5) the subsidiary was a marketer and servicer of the parent's product in the United States." *Id*.

As in these other jurisdictions, it is established in the Ninth Circuit that a parent corporation has "legal control" over a wholly-owned subsidiary, and therefore must produce documents possessed by the latter. *United States v. Int'l Union of Petroleum & Indus. Workers*, 870 F. 2d 1450, 1452 (9th Cir. 1989). Yet, even when there is significant evidence of common ownership, overlapping management, connected sales and marketing networks and joint commercial efforts, courts in the Ninth Circuit find a lack of requisite "control" where "there is no specific showing that [the party corporation] has the legal right to obtain any documents set forth in the document requests upon demand." *Tessera, Inc. v. Micron Tech., Inc.*, No. C-06-80024-MISC-JW (PVT), 2006 LEXIS 25114 at *17 (N.D. Cal. Mar. 22, 2006); *see, e.g., Carrillo v. Schneider Logistics, Inc.*, 2012 U.S. Dist. LEXIS 146903, 46-47, 2012 WL 4791614 (C.D. Cal. Oct. 5, 2012) (granting motion to compel, noting that "actual possession is not required" because "control" includes "the legal right to obtain documents upon demand"); *In re NCAA Student-Athlete Name & Likeness Litig.*, No. 09 -cv-01967 CW, 2012 U.S. Dist. LEXIS 5087 at *12-16 (N.D. Cal. Jan. 17, 2012) (denying motion to compel and recognizing that Ninth Circuit has rejected "practical ability" standard); *but see AFL Telecomms. LLC v. SurplusEQ.com Inc.*, 2012 U.S. Dist. LEXIS 92892, 5-6 (D. Ariz. July 5, 2012) (noting that the Ninth Circuit, in adopting the legal control test, approved the more expansive rationale behind legal "control" in *Gerling*).

While in other circuits, then, evidence of connections between affiliate corporations will often satisfy the "practical ability" standard, the Ninth Circuit is unique in generally requiring a legal right to the documents. For wholly-owned subsidiaries, this puts courts in the Ninth Circuit on the same footing as most courts in other circuits. In other situations involving affiliate corporations, however, most courts in other circuits are open to an expansive definition of "control" that includes the legal right, authority *or practical ability* to obtain documents from the related non-party corporation. Only courts in the Ninth Circuit have insisted on looking more exclusively to the litigating corporation's *legal right* to obtain the documents. Although the

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Ninth Circuit's approval of *Gerling* in adopting its "legal control" test suggests that more practical relationship considerations may someday gain a foothold in the analysis, for now, litigants in the Ninth Circuit should be sure to argue that a party has a legal right to its affiliate's documents to establish "control" for the purposes of Fed. R. Civ. Proc. 34.

♦ *Mark Blake and Meredith Williams are associates in the Irvine office of Jones Day.*

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[1] Notably, the Ninth Circuit cited *Gerling* with approval when it established the "legal control" test as the proper standard in *Citric Acid*, 191 F.3d at 1107 (citing *Gerling*, 839 F.2d at 140-41). The *Gerling* court had adopted a "legal control" test as well, but noted in its analysis situations in which an affiliate corporation could have the requisite control even without a legal right to documents, such as "where the litigating corporation had acted with its sister in effecting the transaction giving rise to suit," *Gerling*, 839 F.2d at 145. There is thus tension in *Citric Acid* between the Ninth Circuit's approval of *Gerling*, with its hints at the importance of practical ability, and the Ninth's Circuit's explicit rejection of practical ability. This tension could ultimately provide a foothold for the practical ability rationale in the Ninth Circuit, *see e.g., AFL Telecomms. LLC v. SurplusEQ.com Inc.*, 2012 U.S. Dist. LEXIS 92892, *4-6 (D. Ariz. July 5, 2012) (holding that subsidiary was obligated to produce parent corporation's source codes in view of licensee relationship based on *Gerling* rationale implicitly approved in *Citric Acid*), but at present, the exclusive "legal control" analysis is still predominant.

[2] While courts in the Sixth Circuit have defined "control" as the "ability to obtain . . . derived from the closeness, connection and practical interaction between the parties," *Halliburton Energy Servs. v. M-I, LLC*, 2006 LEXIS 78434 at *2 (S.D. Ohio Oct 27, 2006), a more recent decision held that "a party has control for the purposes of Rule 34 if it has the legal right to obtain the documents on demand." *In re Porsche Cars N. Am., Inc.*, 2012 LEXIS 136954 at *18 (S.D. Ohio Sept. 25, 2012) (finding a lack of requisite "control" and denying a motion to compel discovery when the party corporation had no legal right to demand documents from its corporate affiliates and/or parents) (citing *In Re Bankers Trust Co.*, 61 F.3d 465, 469 (6th Cir. 1995)). Cases in the Sixth Circuit, then, indicate that there has not yet been a definitive decision as to which standard is appropriate.

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ty. Thank you to everyone who attended our November dinner and to those who gave online, for helping us make these donations possible.

This summer, we will continue our tradition of sponsoring a work day with Habitat for Humanity of Orange County, in support of its mission to create a world where everyone has a decent place to live. Please reach out to our public service chair Maria Stearns to participate, as this popular service event fills up quickly.

Our dinner programs this year are not to be missed. On February 4, the Honorable Daniel J. Buckley, Supervising Judge of the Civil Division of the Los Angeles County Superior Court, together with the Honorable Brian M. Hoffstadt of the California Court of Appeal, will engage us with their popular presentation, "Admissible or Not: You Be The Judge." Audience members will rule on evidentiary objections in real time during the presentation of a hypothetical case, using interactive hand-held technology. On April 1, we are thrilled to welcome Kathryn Ruemmler, former White House Counsel to President Barack Obama, to regale us about her three years as the President's chief legal advisor.

Finally, mark your calendars for the ABTL's California-wide Annual Seminar, held this year at the beautiful Ojai Valley Inn & Spa on October 1-4. I look forward to seeing you there, and at all of our exciting events this year.

♦ *Michele D. Johnson is managing partner of the Orange County office of Latham & Watkins LLP.*

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gators. The rules affect not only procedural matters, they address substantive issues as well. A violation of the State rules can be harmful -- even fatal -- to your case. For example, California Rules of Court, rule 3.1354(b) dictates the format of written objections to evidence submitted in support of, or in opposition to, a motion for summary judgment or for summary adjudication of issues. In the case of *Hodjat vs. State Farm Mutual Automobile Ins. Co.* [(2012), 211 Cal.App.4th 1], the appellate court held that the trial judge did not err in refusing to rule on objections because they were not submitted separately, as the rule requires. A lack of familiarity with local and "local-local" rules (better known as courtroom guidelines) may not result in the loss of your case, but will likely result in additional work on your part and attendant fees assessed to your client.

5) <u>Think Hard Before Filing a Demurrer</u>: A demurrer is usually appropriate only when, on its face, the complaint demonstrates that the case is certainly, or probably, "dead on arrival." Such circumstances include time-barred claims. But even in those circumstances, the opposition often claims an ability to "plead around the statute of limitations," and judges invariably give plaintiff an opportunity to do so. Rather than permitting plaintiff to rectify deficiencies, consider instead allowing the case to proceed to trial on a flawed pleading. The light bulb above opposing counsel's head may go on too late, at which point you may have a solid objec-

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tion to a belated motion to amend the pleading on the ground that your client will be prejudiced by having to conduct additional discovery, line up additional witnesses, etc.

6) Declarations By Counsel: We've all seen them: "I am counsel for Plaintiff. I have firsthand knowledge of the matters set forth herein and could testify competently as to these matters." Thereafter follow factual allegations of which counsel clearly has no firsthand knowledge, such as: "On or about January 2, 2014, Defendants John Smith and Mary Williams downloaded Plaintiff's client list from their work computer." Really? Declarant was there and observed their actions? Don't claim firsthand knowledge if you don't have it. A crafty lawyer can designate you as a percipient witness if you do and notice your deposition. On a more practical level, if you rely on no other declaration concerning these facts, you may not meet your burden of proof in the motion.

7) Ingratiate Yourself With The Court Staff: It's been often said that court staff actually run the court. When in trial against a skilled opponent, the last thing you want is a cold stare from the clerk or a reminder from the courtroom attendant that you are violating the judge's guidelines.

8) Ex-Parte Applications: The first question judges ask themselves when evaluating an ex parte application is: Where's the fire? The applicant is clearly trying to go to the front of the line, but on what basis? Ex-parte applications are frequently abused because they are de facto noticed motions disguised as requests for emergency relief. Judges will not consider the merits of an ex parte application unless you demonstrate that irreparable harm will befall your client if the application is denied. If the harm is a loss of money, and if the money is equally likely to be recovered later as part of a judgment, then the harm is probably not irreparable. Another form of abuse we see is the emergency counsel bring upon themselves. I am referring to counsel who did not commence discovery until shortly before trial day or is otherwise not ready for trial because they failed to timely prepare the case and who now skid into court seeking a continuance and/or order shortening time to bring a discovery motion. Remember, poor planning on your part does not constitute an emergency for the court. Unless counsel has a satisfactory explanation for their indolence, a judge most likely would not be abusing discretion in denying the ex-parte application.

9) A Word About Motions In Limine: An entire article can be devoted to this sole topic. I implore attorneys to become better educated about these motions, starting with *Kelly vs. New West Federal Savings* (1996) 49 Cal.App.4th 659. The *Kelly* decision's first sentence introduces a thought every judge has expressed at some point in their career: "This case demonstrates misuse and abuse of motions *in limine* …." I also suggest reviewing an instructive concurrence by our own Justice William Rylaarsdam in *R&B Auto Center, Inc. vs. Farmers Group, Inc.*, 140 Cal.App.4th 327, 371-372. Suffice it to say that the first step should be a good faith effort by counsel to meet and confer concerning the issues before filing motions in limine. Most importantly, truly consider whether the motions are even necessary (In more than one case I have had motions seeking to exclude irrelevant evidence!)

10) Answer The Judge's Questions: In a hearing on a legal issue, a judge poses questions not to simply put counsel on the spot or to engage in a scholarly discussion. The judge does so for a good reason: to help the court reach the correct decision. Answer the questions even if the responses hurt your client's case. You will enhance your credibility with the court by doing so. If, on the other hand, you try to dodge the question, you won't fool the court. You will simply be damaging both your client's case and your credibility.

11) Know The Evidence Code And Trial Objections: This, of course, is a "gimme." I have been surprised at the number of litigators whose failure to object allows damaging evidence to be introduced to the jury. I have also observed a number of attorneys who fail to introduce crucial evidence because they are unable to get around a sustained objection. Such shortcomings can mean the difference between victory and loss.

12) Be Yourself: We've all seen great lawyering, whether in the movies or in real life. We've seen the jurors listening with rapt attention and watched as their facial expressions changed from disbelief to skepticism to finally nodding in full agreement. You may believe – perhaps correctly – that what worked in the movies will work with your jurors. However, unless you're an excellent actor, the jury will realize that you are putting on an act and may wonder why you need to do that if the evidence and law favor your client (but see the next tip).

13) Sound And Look Like You Truly Believe In Your Client's Cause: If jurors sense you don't, they are not likely to either. This is an important exception to the prior tip. If you have come to the belief that your client will likely be found liable, and you are unable to settle the case, you absolutely cannot let the jury know – by your body language, the tone of your voice, or in any other way – that you doubt the validity of the case.

14) Be Civil: If there is one thing on which all judges agree, it is that attorneys should never engage in *ad hominem* attacks on opposing counsel. Doing so is counterpro-

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ductive; it is a concession to the court that you have no winning argument on the merits.

15) Make The Jurors Your Friends: To be effective in a jury trial, you need to connect with the jurors. Get them to like you. Memorize their names during the voir dire process, especially if you are the second attorney to address them. Never mispronounce their names, as doing so shows disrespect. Ideally, you should turn these 12 strangers into your friends who will try their hardest to render a favorable verdict because they like you and want to help your client.

16) Humanize Your Client, Even If It's A Large Corporation: At the outset of the trial, many jurors are sympatheticto the "little guy" who is battling the big corporation. You need to level the playing field. Emphasize to the jury that your client is made up of employees, working-class people just like the jurors, who depend on your client for their support and the support of their families.

17) Speak Up!: You would think that this tip is unnecessary. After all, you're a litigator, for heaven's sake, and the jury needs to hear you. However, there have been a few occasions where it became obvious to me that the jury was having difficulty hearing an attorney. I called counsel to sidebar and advised the attorney of the problem to spare him the embarrassment of being admonished in open court. Some judges may not be that solicitous of counsels' feelings.

18) Don't Ask Questions Beginning With "Do You Remember …": You are not testing the witness's memory. What you really want is an answer to the rest of the question. Unfortunately, as posed, the question is ambiguous and confusing. Consider, for example, the following question: "Do you remember if Ms. Jones was present during discussions about the contract?" If the witness answers "No," what does the answer mean? That the witness doesn't remember if she was there, or that Ms. Jones was not there? Invariably, the attorney is compelled to ask a follow up question to clear up the ambiguity. Moreover, if there is no clarifying question, for appellate purposes the ambiguous answer will probably not be viewed as a denial that Ms. Jones was present.

19) Pin Down Hostile Witnesses On Their Answers: We've all encountered witnesses who repeatedly dodge the tough question. Too many times I have seen the attorney give up and move on to another area. That's a mistake for two reasons. First, the question must be important, or else you wouldn't have repeated it a number of times. Second, you forego an opportunity to score points with the jury. Don't give up – ask the court to direct the witness to answer the question. The judge will probably do so, and that will send a subliminal message to the jury: The judge is on my side, and he/she is unhappy with the witness.

20) Use Visual Aids: This is especially important in a document-heavy case. I have seen attorneys place documents in front of witnesses, quote several lines, and then pose questions to them, to which the witnesses respond by reading from different parts of the documents. Without seeing the document in question, a jury will invariably get lost in the back-and-forth. If you want the answer to be meaningful, you must show the document to the jury by, for example, projecting it onto a screen.

21) Cross-Examination Is Not Obligatory: As an experienced, skillful litigator put it, a good surgeon knows when to cut; a great surgeon knows when not to cut. Too often, I have seen an unnecessary cross-examination during which the witness gave testimony harmful to the inquiring attorney's client. If a witness for the opposing side has not hurt your client in the direct examination, and if the witness has nothing to offer that aids your case, don't ask any questions!

22) Be Cognizant Of That Fine Line In Closing Argument Between Being Condescending To Jurors And Talking Over Their Heads: Clearly, you need to ensure that jurors understand the case from your client's perspective. However, don't talk down to them in discussing the facts and explaining the law. Know their backgrounds. Consider that if some of them are college-educated citizens, they will understand the higher-level concepts and, if questions arise during deliberations, they will likely answer them for the rest of the panel.

23) In Closing Arguments, Give The Jury Guidance So They Can Reach A Favorable Verdict: Jurors, as laypersons, may not be familiar with the factual and legal concepts underlying your case. I have observed that this is especially true in cases involving trade secrets, interference with prospective business advantage, and other business disputes. Without dumbing down the presentation (which can seem insulting), explain the case in terms they can understand and show them how, applying the jury instructions, they can reach a result favorable to your client. When you discuss dollar amounts, put up numbers on the screen and show the jurors how the math adds up. Don't say you trust them to come up with the amount themselves (and I have seen attorneys do that), as they've never had to engage in that type of analysis and may disappoint you.

24) Make A Record For Appeal: There is a saying that the trial is half the battle and the other half is collecting the judgment. However, there is a "third half" to the battle, and that is the appeal. From the moment you file the first paper in a case until notice of appeal is filed, you must be aware of the effect on the appellate record of your written and

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oral presentations. Simply put, if something is not in the record, it does not exist for appellate purposes. Make sure that the effort you put into the trial is not wasted. That means, for example, insisting as much as you can – respectfully, of course – that the judge rule on every one of your objections; and it means stating on the record whatever transpired off the record that you believe is important and asking that the record reflect what occurred.

25) <u>Get Feedback From The Judge</u>: Take advantage of the opportunity, if it's available, to have an experienced, objective observer point out any flaws in your presentation. It will help you be a better trial lawyer. Many judges will share their thoughts with you after the case, including post-trial motions, is over.

I thank and appreciate the judges and attorneys who spent time teaching and mentoring me through my years as both an attorney and a judge. As oft-stated, ours is a profession that *practices* the law. Hopefully this article will allow you to avoid pitfalls and make you a more accomplished litigator.

♦ *Judge Margines is assistant presiding judge of the Superior Court of Orange County.*

-Data Breaches: Continued from page 3-

The President's Executive Order underscores the importance of a national response to protecting consumer's personal information. Currently, no central government agency is charged with the responsibility for addressing this problem. Nevertheless, increased enforcement activity by the Consumer Financial Protection Bureau, the FTC and the FCC underscores the importance of a unified federal approach. For example, the FTC and FCC recently joined the Global Privacy Enforcement Network (GPEN) in October 2014, composed of data protection authorities from across the world; the GPEN conducts global sweeps analyzing the transparency of business and mobile apps.

As part of his announcement of the Executive Order, the President also urged Congress to enact cyber security legislation that would create a nation-wide standard and process for reporting data breaches. There are currently 47 states that require varying, and in some cases different and conflicting, notification requirements for data breach events. The President also expressed the need for a strong and coordinated response by the federal government to address the ever-increasing problem of data breaches, not only from a remedial perspective, but also more aggressive steps to prevent the occurrence of breaches in the first instance.

While there is considerable support for the concept of a single, national standard for reporting data breach incidents, a legislative solution has proven evasive because of differences in the approach to federal preemption of state data breach laws, and the balance to be struck regarding the possible responsibilities of merchants and card issuers. The President's Executive Order only addresses the problem on the margin, since its reach is essentially limited to federal procurement. Nor is there any national standard on best practices to deal with protecting consumer information and instituting the best possible technology to protect consumers from criminal groups perpetrating identity theft. Cybersecurity has now replaced terrorism as the number one threat to national security.

Proposed legislation for a national breach notification approach has failed to gain significant traction. For example, the Personal Data Protection and Breach Accountability Act of 2014, S.1995, introduced by Sen. Richard Blumenthal, (D-Conn.) in February 2014, proposed to protect consumers by mitigating the vulnerability of personally identifiable information to theft through a security breach, providing notice and remedies to consumers in the wake of such a breach, holding companies accountable for preventable breaches, facilitating the sharing of post-breach technical information between companies, and enhancing criminal and civil penalties and other protections against the unauthorized collection or use of personally identifiable information. This bills remains in the Committee on the Judiciary.

It remains to be seen whether the Republican-led Congress—which has consistently opposed Executive Orders that make substantive public policy—will move forward with a national law on breach notification.

♦*Robert Cattanach is a partner and Kate Santon is an*

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