

**The In-House Counsel Interview: Michael Ray  
of Western Digital Corporation****By Jonathan D. Guynn**

*[Editor's Note: Michael Ray is Executive Vice President, Chief Legal Officer and Secretary at Western Digital Corporation. Mr. Ray earned a bachelor's degree, with honors, from Harvard College; and a law degree, with honors, from Harvard Law School.]*

**Q. What kind of career did you envision when  
you were in law school?**

A. I never could have imagined the career path that I ended up taking. Nobody in my family is a lawyer, so I went through law school with a fairly basic understanding of the legal profession and the opportunities that were available to me. When I graduated from law school, I thought my employment options were generally limited to a law firm, the academy, or the government. I didn't even know about the possibility of a career as an in-house attorney. It took me a while to find my way here, but my career has exceeded my expectations in almost every way.

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**Chatbot Contracts: Enforcing TOS Agreements  
in Computer-Generated Conversations****By Lily Li**

Humanity has long imagined self-aware computers that can pilot our vehicles, purchase goods, and even sing songs for us, whether as the malevolent Hal in *2001: A Space Odyssey* or the spunky Samantha in *Her*. Though fully sentient artificial intelligence is still science fiction (as far as we know), computer software has become "smart" enough to converse with us through text-based services like Facebook messenger, WhatsApp, or WeChat, or voice-operated services like Amazon's Alexa or Apple's Siri. As more e-commerce transactions are completed via these "chatbots" or "chatterbots" and away from browser-based websites, this begs the question: Will courts enforce the Terms of Service for chatbot contracts when the terms no longer appear on the same page—or even the same medium—as the transaction itself?

**The Rise of Chatbots**

Consumer appetite for on-demand goods and services continues to grow, but at the same time, consumers are consolidating their online attention on a limited number of platforms. For social media and messenger services, this means Facebook. In 2016, 79% of online users were on Facebook, with 76% checking in daily. (Pew Research Center, *Social Media Update* 2016.) Facebook's Messenger had approximately 1 billion users, with WhatsApp and WeChat following closely behind. (www.economist.com, "Bots, the next frontier", April 9, 2016.) On the e-commerce and voice front, Amazon reigns supreme. Amazon accounted for 53 percent of all online sales growth in the United States in 2016, capitalizing on sales of its popular Echo and Echo Dot devices. (Slice Intelligence 2016.) In light of these trends, e-retailers are increasingly leaving their own web-

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## The President's Message

By Mark A. Finkelstein



I am honored to serve as president for the Orange County chapter of ABTL in 2017, and I look forward to continuing to move this great organization forward. The bar for me, however, has been set particularly high by our past president, Scott Garner. Please join me in thanking Scott for his many contributions to ABTL, and for his commitment to Orange County. Under Scott's steady

leadership, this organization stayed true to its mission to "promote competence, ethics, professionalism, and civility in the legal profession and to encourage and facilitate communication between members of the Orange County bar and the County's federal and state judges on matters affecting business litigation and the civil justice system."

Fortunately, I have an incredibly dedicated Executive Committee to help me strive to measure up to the high standards set by Scott. Dan Sasse is our vice-president; Karla Kraft is our treasurer; and Tom McConville is our secretary. Linda Sampson is a vital part of this organization, and she will continue to serve as our Executive Director.

I also would like to particularly acknowledge the many state and federal judges who actively support this organization by serving on our Board of Governors and our Judicial Advisory Council. Orange County is very fortunate to have such a distinguished and talented judiciary.

Before discussing plans for 2017, let me welcome and introduce the newest members of our Judicial Advisory Council and Board of Governors.

Judge Nathan Scott of the Orange County Superior Court has joined our Judicial Advisory Council. Judge Scott was appointed by Governor Brown in 2012, and received his Bachelor of Arts from UCLA (Go Bruins!), and his J.D. from Harvard Law School.

We also welcome three new Board members: Judge Peter Wilson, Michele Maryott, and Alan Greenberg.

Judge Wilson serves on the Orange County Superior Court. Judge Wilson was appointed by Governor Schwarzenegger in 2010, and previously was a partner in the law firm of Latham & Watkins, and hails from South Africa.

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## Law Firm Divorces: Who Keeps the Cases? By Robert D. Estrin



Think law firm dissolutions aren't as messy as marital dissolutions? Think again. Law firms possess many assets. Who owns the building? The paintings on the wall? The furniture? The computers? It's not as easy to dissolve a law firm as you may think. The biggest problem: What happens to a law firm's most valuable assets, its cases? For over 30 years, California law has held that the dissolved firm keeps all

fees obtained from cases pending at the time of dissolution. However, this rule may change in 2017.

In 1984, the California Court of Appeal, First District, held that "the Uniform Partnership Act requires that attorneys' fees received on cases in progress upon dissolution of a law partnership are to be shared by the former partners according to their right to fees in the former partnership regardless of which former partner provides legal services in the case after dissolution." *Jewel v. Boxer*, 156 Cal. App. 3d 171, 174 (1984). The Court of Appeal based its holding on California's Uniform Partnership Act ("UPA") at California Corporations Code ("Corp. Code") section 15018(f) which prohibited extra compensation for post-dissolution services. The partner who continued to work on cases post dissolution, however, could receive "reimbursement for reasonable overhead expenses (excluding partners' salaries) attributable to the production of postdissolution partnership income." *Jewel*, 156 Cal. App. 3d at 180.

*Jewel* established the law for contingency fee cases. Nearly a decade later, in *Rothman v. Dolin*, 20 Cal. App. 4th 755 (1993), the California Court of Appeal, Second District, extended *Jewel* to apply to hourly fee cases. The appellate court reasoned that treating hourly cases differently from contingency cases would result in attorneys "scrambling to get the hourly fee cases rather than the contingency fee cases upon dissolution." *Id.* at 758.

While *Jewel* and *Rothman* appear to discourage attorneys from working on cases in which the fees would go to the dissolved partnership, there are many reasons attorneys benefit from working on such cases. The attorney who continues the relationship with the client will be more likely to obtain future business. Today, clients increasingly view individual attorneys, and not firms, as their lawyers so maintaining relationships is

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## Raising Silent Gavel By William C. O'Neill

A United States Supreme Court law clerk once suggested changes in a draft opinion written by Justice Thurgood Marshall. Justice Marshall told the clerk: "you're missing two things: nomination by the President; and confirmation by the Senate." With a nearly unprecedented number of judicial vacancies, President Donald Trump has the opportunity to satisfy the first of Justice Marshall's "two things" by nominating more Article III judges in his first four years than any of his predecessors.



Our February 15, 2017 dinner program discussion inspired a deeper analysis of this historic vacancy scope. As discussed that night, President Trump inherited 108 Article III vacancies, which is over twelve percent of all Article III positions. For perspective, that figure is almost twice the number of vacancies as when President Obama entered office in 2008. Only President Bill Clinton inherited more vacancies. But President Clinton's figure is a bit misleading because Congress created 85 new Article III positions in 1990, after which President George H.W. Bush lost his re-election bid.

Another ten vacancies occurred after President Trump's inauguration. Fourteen more judges having already announced resignation or senior status dates in calendar year 2017. By the end of 2017, President Trump will be able to fill at least 132 Article III positions—assuming Senate consent.

According to a Ballotpedia study, over 140 more judges are currently eligible to take senior status and an additional 47 judges will be eligible in the 2017 calendar year.

The highest profile vacancy is currently on the United States Supreme Court, with Judge Neil Gorsuch nominated to replace the late Justice Antonin Scalia. Court observers wonder whether additional vacancies will exist given that Justice Ginsburg (83), Justice Kennedy (80), and Justice Breyer (78) could well retire.

Only four of the twenty-nine Ninth Circuit Court of Appeals positions are vacant currently. Only one of those four positions is California-based, which has been vacant since Judge Harry Pregerson took senior status in December 2015.

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## Young Lawyers Division Update

By Adrienne Marshack

2017 promises to be a great year for the Young Lawyers' Division. The year's first Brown Bag Lunch is currently scheduled for March 29, 2017 from 12:00-1:00pm with United States Magistrate Judges Karen E. Scott and Douglas F. McCormick of the Central District of California, Central Division. We will meet in Judge McCormick's courtroom, and look forward to a relaxed and informative time.

There are several upcoming YLD events to look forward to in the next several months. Members should look for emails and announcements about them. Upcoming events include:

### **Member Mixer with the Orange County Bar Association's Corporate Counsel Section—**

Anticipated for April 2017, the intention of this mixer is to give younger attorneys the opportunity to meet in-house counsel in Orange County to help establish relationships. Friends now may equal clients down the road. It is never too early to begin expanding your network.

**Path to Judgeship Panel—**We are putting together a panel of judges, former members of the Orange County Bar Association's Judiciary Committee, and members of the JNE Commission, all of whom are familiar with the process of becoming a state court judge, and what the teams tasked with vetting judicial candidates are looking for.

There will be additional events scheduled as the year progresses.

We hope to make 2017 one of the most fun and informative yet for YLD members, and the calendar is shaping up nicely so far. We hope to see you at our YLD events!

♦ *Adrienne Marshack is a partner at Manatt, Phelps & Phillips, and serves as chair of the Young Lawyers Division of the ABTL Orange County Chapter.*

*-In House Interview: Continued from page 1-*

### **Q. What do you enjoy most about your role as in-house counsel?**

A. My job is intellectually stimulating. I am regularly called upon to consider a remarkable range of legal, business, and policy issues. And unlike my time working as an associate at a law firm or as a judicial law clerk, my job isn't limited to finding the "right" legal answer to a given question. Instead, I am looking for effective solutions that improve or protect the strategic position of the company.

I've also found that, when you work for a single client, you become enormously invested in your work and the people with whom you work. My legal team and I are totally integrated into the business of Western Digital. Every interaction that we have with business executives, engineers, accountants, marketing personnel, etc., is geared towards advancing the strategic direction of our company. That is a very powerful dynamic, and it is immensely stimulating because your energy and efforts are not diffused in any way.

Another aspect of my practice that I really like is that I have grown up with many of my colleagues in various functions throughout Western Digital. I have been with the company for more than 16 years, and I have worked with many leaders of our different functions for practically that entire stretch. You can forge much deeper professional relationships in a setting like ours than you can elsewhere. And those types of relationships lend themselves to much more productive teams, since you develop a deeper sense of loyalty and camaraderie and you learn how to leverage your co-workers' strengths.

### **Q. Describe a typical day as Chief Legal Officer for Western Digital Corporation.**

A. I am a member of two teams. First, I work as a member of the Company's executive leadership team with the CEO and his other direct reports. On most days, I am called upon to weigh-in on strategic decisions or initiatives for the entire company. For a growing technology company like ours in an industry that is constantly evolving, we are frequently considering strategically critical projects, investments, and acquisitions. We also spend a fair amount of time evolving the company's culture—we are always trying to be better as an organization. In addition to participating in those discussions, it is my job to determine and explain how my legal team will support and implement the decisions that we make together as an executive committee.

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***-In-House Interview: Continued from page 4-***

Second, I lead Western Digital's legal team. When I arrived at the company, we only had 4 lawyers. We now have more than 110 lawyers embedded with our clients in 8 countries. I spend most of my time working with my direct reports and with team leaders who are spearheading key projects, ensuring that we fulfill all of the company's urgent and important needs.

**Q. What are some key characteristics of the culture you have developed in the legal team?**

A. Culture is often dispositive of the type of legal talent you will be able to attract and ultimately develop. As a result, we have done everything we can to foster a highly dynamic culture at Western Digital. We want our lawyers to understand our business and then determine for themselves how they can be effective leaders at the company. We focus on three objectives:

First, we strive for excellence in all that we do. Our lawyers don't need to be perfect at everything they do all of the time, but we are always trying to put forth our best effort so that we can obtain the best results for our teams and our company.

Second, we put an immense premium on collaboration. Our lawyers understand that we rise and fall together as teams and as a company. As a result, attorneys at Western Digital can't have blinders on and focus on narrow tasks before them. Our people all need to see themselves as problem solvers who are part of cross-functional teams helping to move forward entire projects. As such, they need to be humble enough to ask for help and they need to be generous enough to give it.

Third, we challenge our lawyers to become leaders and problem solvers. Members on our legal team get an opportunity to really sink their teeth into issues, and we give them significant responsibility. In this environment, lawyers have the opportunity to take risks—with the appropriate stakes—so that they can become better leaders and decision makers. What I mean by that is, we provide an environment where our people can exercise discretion, knowing that they will still be supported by the leadership team if things don't go quite as they expected. I think this offers attorneys an opportunity to develop crucial skills and judgment. Over time, our people learn how to diagnose problems and then act to solve them without second-guessing themselves.

**Q. How does the culture at Western Digital impact your practice?**

A. I think that our lawyers deliver their best work and best thinking. But while we work incredibly hard, we are not overly concerned with facetime or the traditional work schedule—all we expect is excellent work. For some people, that might mean leaving the office every day at four and then checking back in later that evening. With lawyers working in multiple countries all over the world, I can't and don't police when my team members are checking in and out of the office. Instead, we set the expectation that they need to deliver the best work product and counsel to their clients and then we empower them to do just that.

Our practice is designed to credibly offer our lawyers with an opportunity to flourish professionally—our people have opportunities to work on issues and lead teams that they couldn't find in many other places. We encourage our lawyers to think about their professional growth and development, and then we help them find opportunities to advance themselves. Our lawyers generate tremendous value for Western Digital as they capitalize on opportunities to develop and expand their skill-sets.

**Q. What do you look for when hiring someone to join your in-house team?**

A. First and foremost, we need to ensure that the lawyer will be a good cultural fit. We readily acknowledge that our culture probably isn't for everybody, since we drive our lawyers to work hard, become indispensable to their clients, and get comfortable weighing in on more than just legal issues. As a result, I am completely up front about the expectations for members of our in-house team.

We need people who will arrive at Western Digital with experience and maturity so that they can feel empowered by our culture instead of overwhelmed by it. In general, our lawyers arrive with four to eight years of experience at a law firm. Lawyers with that much experience can usually make a contribution from day one, since they understand what good work looks like and have a firm grasp on how to manage multiple projects at once.

We also want what we call "relentless learners." These are the types of people who love learning about new issues and problems, and who have no fear of asking questions and admitting when they don't know something.

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**-In-House Interview: Continued from page 5-**

**Q. What do you look for when you need to hire outside litigation counsel?**

A. Our primary consideration is the result that outside litigation counsel can offer us. While budget is very important, we care more about obtaining the best result possible. In any event, our experience has been that the most experienced advocates actually cost less in aggregate.

We will not consider a firm for one of Western Digital's matters unless it has genuine, deep trial experience that is fresh. We hire outside litigation counsel to render excellent situational advice throughout the litigation in general and at trial in particular. It is therefore essential that this advice be based on years of meaningful experience. Experienced lawyers know what information is needed and how to get it—this leads to efficient and effective fact-finding, which actually drives down costs. Just as importantly, the more recent experience the better. My observation is that lawyers who have not recently been in front of juries want to cover the waterfront so that they don't miss anything—this leads to more expensive litigation and less focused jury presentations.

We need outside counsel who are excellent listeners. Only excellent listeners can respond appropriately to changing circumstances and objectives during a representation. Outside counsel must listen to and understand Western Digital's objectives, especially as they shift during the matter. Outside counsel must also listen carefully to the evidence, the judge, and opposing counsel so that they can accurately evaluate Western Digital's position.

Relatedly, I look for outside counsel who can be honest with us. It takes courage to deliver bad news or to give me an answer that you don't think I'll like, but I need lawyers who will tell me the truth. I respect that, especially because it helps me know where Western Digital really stands in each matter.

**Q. What sets apart those outside counsel with whom you have been most impressed?**

A. Results matter. If you deliver a tremendous result, we are much more likely to work with you again. Lawyers need to realize that each representation is an audition for future business.

I like working with effective briefers. I appreciate when outside litigation counsel can communicate effectively with non-lawyers and provide important peo-

ple within the Western Digital organization with the proper attention and focus.

♦Jonathan D. Guynn is a litigation associate at Hueston Hennigan LLP.

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**-Chatbot Contracts : Continued from page 1-**

sites and apps, and developing custom, conversational chatbots to sell through these platforms.

**Internet Contracts 101: Mutual Assent and Notice**

The majority of e-commerce sales are regulated by online Terms of Service ("TOS"), also known as Terms and Conditions or Terms of Use ("TOU"). These internet contracts usually contain arbitration, forum, and venue provisions that govern the conduct of litigation. As a threshold matter, courts will only enforce these TOS if they find mutual assent to their provisions. In other words, consumers must be put on reasonable notice of online TOS, then provide objective outward manifestations of their agreement to the contract. *Long v. Provide Commerce, Inc.*, 245 Cal. App. 4th 855, 862 (2016).

Courts have generally found mutual assent in "clickwrap" or "clickthrough" contracts, where the consumer clicks on an "I agree" or similar box or button, in tandem with a presentation of the TOS. *In re Facebook Biometric Info. Privacy Litig.*, 185 F. Supp. 3d 1155, 1166 (N.D. Cal. 2016) (upholding California choice-of-law provision where plaintiffs clicked a box affirming they had read and agreed to the TOS, or where a separate plaintiff clicked a "Sign Up" button, with language immediately below stating that clicking the button constituted assent to the TOS). In contrast, courts are more hesitant to find mutual assent in situations where a link to the TOS appears on the online platform, but consumers do not affirmatively "click" to agree to those provisions. *Compare Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1178–79 (9th Cir. 2014) (conspicuous hyperlink on every webpage not enough to demonstrate assent, where users were not prompted to take affirmative action), *with Small Justice LLC v. Xcentric Ventures LLC*, 99 F. Supp. 3d 190, 197–98 (D. Mass 2015) (court distinguishes *Nguyen* and enforces TOS, where, in addition to hyperlink on each page, TOS were visible before the "continue" button on the final screen). For these "browsewrap" contracts, courts will analyze the conspicuousness of the TOS on the page, in context with the rest of the site or application, to determine

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## ***-Chatbot Contracts: Continued from page 6-***

whether “a reasonably prudent Internet consumer [is] on inquiry notice of the browsewrap agreement’s existence and contents.” *Long*, 245 Cal. App. 4th at 123 (declining to impose TOS where hyperlink appeared in light green font on a page with light green background); *see also Lee v. Intelius Inc.*, 737 F.3d 1254, 1257 (9th Cir. 2013) (TOS written in small, light grey print, next to a misleading “YES” button, caused customer confusion and was designed to deceive).

### **Chatbots via Messenger: More of the Same**

Existing precedent on internet contracts is well equipped to handle text-based chatbots, and courts should be favorable to TOS presented conspicuously through such services. These chatbots have the ability to fashion contracts analogous to “clickwrap” or “clickthrough” agreements, by featuring conspicuous hyperlinks to online terms in a messenger window, and requiring consumers to affirmatively click to agree, type “YES” or “I Agree”, or words to that effect.

The guided nature of text-based chatbots should in fact promote the enforceability of their TOS in court. Unlike a normal browser window, which may hide terms amidst other content, a messenger window limits consumer attention to a single step-by-step process. If done properly, consumers cannot proceed directly to an online shopping cart and bypass the terms completely. Instead, consumers can be required to outwardly manifest their assent to the TOS by typing or clicking for each transaction - a process favored by the courts. *See Nguyen*, 763 F.3d at 1177.

Of course, by relying on third-party messenger platforms, chatbot services need to remain vigilant and ensure that TOS remain visible to consumers. In-messenger advertisements, large swathes of text, or strange fonts or colors imposed by a third-party platform may hide terms and render them unenforceable. For instance, in *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 23–30 (2d Cir. 2002), the court refused to enforce a software download TOS where consumers had the ability to click a “Download” button for free software, and consumers had to scroll down the page below the “Download” button to access a link to the TOS. Since the link was essentially subsumed under a “Download” splash screen, consumers had no inquiry notice of the TOS. *Id.* Similarly, consumers have all faced scenarios where third-party applications create splash screens above the content on websites, such as survey notices, advertisements, and videos, which may obscure small chatbot windows.

Furthermore, chatbot services need to be aware of the TOS of third-party messenger platforms, which often require incorporation of specific licensing, privacy, and usage agreements within the chatbot terms. Here, clear access and delineation between these two competing sets of TOS is key, as the courts may refuse to enforce TOS where there is confusion as to which TOS apply, or refuse to enforce TOS that are only accessible through a series of pages and links. *See Specht*, 30 F.3d at 23–30; *see also Cvent, Inc. v. Eventbrite, Inc.* 739 F. Supp. 2d 927 (E.D. Va. 2010) (refusing to enforce TOS, where it was one of a series of links, and TOS page consisted of more links to other TOS).

### **Voice Recognition - Hello World!**

For now, voice-based chatbots still rely on written TOS provided during online account sign up, which are subject to the same notice and assent requirements discussed above. Thus, when the TOS change for an underlying voice-activated device—or the third-party chatbot using such a device—consumers need to review, and generally provide affirmative assent, on a separate platform or application from the voice-activated service. Courts have often refused to enforce updated TOS, absent such express notice and affirmative assent from consumers, prior to ongoing use of an online service. *See Douglas v. U.S. District Court*, 495 F.3d 1062, 1066 (9th Cir. 2007) (court refuses to enforce arbitration agreement in revised TOS, holding that “[p]arties to a contract have no obligation to check the terms on a periodic basis to learn whether they have been changed by the other side”); *Diverse Elements, Inc. v. Ecommerce, Inc.*, 5 F. Supp. 3d 1378, 1381 (citation omitted) (“Parties can . . . provide for modification in the contract and subsequently modify the contract with no new and independent consideration. This principle does not, however, allow parties to reserve the unfettered right to amend contracts without notice and at any unspecified time . . .”). *But see Klein v. Verizon Commc’ns, Inc.*, 920 F. Supp. 2d 670, 680–84 (E.D. Va. 2013) (upholding Verizon’s TOS where they provided that notice of revisions could be given by email, and new arbitration provisions were in fact provided by email).

The ongoing requirement for consumers to access a separate device or application and “accept” new and revised TOS may become more onerous over time, however, as consumers move towards pure voice services through dozens (if not hundreds) of providers. Indeed, the whole impetus behind voice-based chatbots, as opposed to text-based solutions, is consumer desire for 24/7 on-demand services without the need to login or access physical devices.

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Consequently, courts will increasingly face scenarios where notices of new TOS or amended TOS are provided solely by voice. The chatbot will ask users to verbally agree to updated TOS, and then provide the terms separately by email or other text-based application. In these situations, it is not practicable to expect consumers to sit through an audio recitation of the TOS prior to purchase. Nor can TOS be provided concurrently with the verbal agreement, like “clickthrough” contracts, as there is no hyperlink, scroll-through, or pop-up window to view (absent VR/AR applications). Thus, in a pure voice paradigm, consumers will give—and will generally want to give—assent *before* they have an opportunity to review terms, if they review them at all.

At first blush, this situation may appear to completely defeat the notice and mutual assent requirements for contract formation. Early case law surrounding “shrinkwrap” agreements, however, suggests that at least in certain jurisdictions, courts may still enforce these contracts. In *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451 (7th Cir. 1996), for example, Judge Easterbrook of the Seventh Circuit enforced the terms of a software license that was visible to plaintiff only *after* he had purchased a consumer package and downloaded the software. In enforcing this “shrinkwrap” agreement (named after the plastic cellophane around software boxes), the court noted that “[t]ransactions in which the exchange of money precedes the communication of detailed terms are common,” and quoted examples such as airline tickets, concert tickets, and standard warranties with consumer products. *Id.* at 1451. The court also recognized situations where “[a] customer may place an order by phone in response to a line item in a catalog or a review in a magazine. . . . There is no box; there is only a stream of electrons, a collection of information that includes data, an application program, instructions, many limitations . . . , and the terms of sale.” *Id.* at 1451–52. Judge Easterbrook reaffirmed this position in *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir. 1997), by enforcing an arbitration agreement shipped in a computer box, where the consumer ordered the computer by phone and had the opportunity to return the computer in 30 days. The court noted, “[i]f the staff at the other end of the phone for direct-sales operations such as Gateway’s had to read the four-page statement of terms before taking the buyer’s credit card number, the droning voice would anesthetize rather than enlighten many potential buyers. Others would hang up in a rage over the waste of their time.” *Id.* The Seventh Circuit’s adoption of “order by

phone now, see terms later” in *ProCD* and *Hill* seem like apt analogies for voice-based chatbots, where consumers verbally assent to an order, then view written terms at a later time. These cases, and their progeny, thus provide potential bases for enforcing TOS agreements for voice chatbots, so long as consumers have a reasonable opportunity to rescind the terms or refund the transaction later. See *O’Quin v. Verizon Wireless*, 256 F. Supp. 2d 512, 516 (M.D. La. 2003) (“Several other federal and state courts have come to similar conclusions under similar factual scenarios [to *Hill* and *ProCD*], which were all premised on the consumer having the opportunity to return the product in order to avoid any term or condition that he found to be unacceptable.”).

Not all jurisdictions recognize the reasoning in *Hill* and *ProCD*, however. See *Specht*, 150 F. Supp. 2d at 592; *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1337 (D. Kan. 2000); *Arizona Retail Sys., Inc. v. Software Link, Inc.*, 831 F.Supp. 759 (D. Ariz. 1993) (license agreement shipped with computer software not part of agreement). The Tenth Circuit, for instance, has stated outright that Kansas law rejects the reasoning of *ProCD*, holding that “a seller’s later-arriving written contract constitutes at most only a proposal to modify a preexisting oral contract, and . . . a buyer’s assent to the proposed modification won’t be inferred simply from the buyer’s continuing the preexisting oral contract.” *Howard v. Ferrellgas Partners, L.P.*, 748 F.3d 975, 982 (10th Cir. 2014). Consequently, chatbot providers must tread carefully before offering pure voice-based TOS agreements.

### **Chatbots and Policy: Keeping it Simple**

Smart chatbots have immense potential to make consumers’ lives easier. Instead of navigating through endless webpages, dense text, and the inevitable click-bait ads, chatbots can provide an intuitive, conversational platform for e-commerce. Given the many consumer benefits of chatbot technology, everyone will benefit from clear case law governing the enforceability of chatbot contracts, and prior “clickthrough” and “shrinkwrap” doctrines provide useful guidance for the courts.

♦ *Lily Li is a commercial and intellectual property litigator at Brown Wegner McNamara LLP.*



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*-Silent Gavel: Continued from page 3-*

California's District Court vacancies are just slightly under the national vacancy rate. We in the Central District of California have five vacancies among twenty-seven positions while the Southern District of California has only one vacancy among thirteen positions. Neither the Northern nor Eastern Districts of California currently has vacancies.

How President Trump will choose nominees to fill these vacancies remains to be seen. President George W. Bush was the last Republican president in office. During his term, President Bush's team worked with Senators Barbara Boxer and Diane Feinstein to create a somewhat controversial review process called the Parsky Commission. The two then-Senators appointed twelve Democrats, and Republican businessman Gerald Parsky selected twelve Republicans, to create regional pre-selection review panels. Mr. Parsky and the Senators would then submit a list of acceptable nominees to then-President Bush, with the understanding that the President would only nominate candidates approved by the Commission, and in return the Democratic Senators would not oppose an approved nominee. It seems unlikely in this climate that President Trump would create the same style of review in even heavily blue states like California.

Without a bipartisan commission, Senators Feinstein and Harris may still use the so-called blue slip process to prevent Trump's judicial nominees from even being considered by the Senate Judiciary Committee. The Senate Judiciary committee chairperson delivers blue-colored papers to a judicial nominee's two home-state Senators. Unless both Senators signal their approval by returning the slips, the committee will not consider the nomination. Judiciary Committee Chairman Chuck Grassley has stated his intent to continue the practice, but that remains to be seen.

To borrow a phrase from George Will, judges—like baseball umpires—“aspire to unnoticed excellence.” While the nominations process does not lend itself readily to “unnoticed,” we should all hope for true excellence.

♦ *Will O'Neill is a partner at Ross Wersching & Wolcott LLP and is currently serving as Dinner Program Chair for the ABTL's Orange County Chapter.*

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*-President's Message: Continued from page 2-*

Michele Maryott is a partner in Gibson, Dunn & Crutcher's Orange County office, and is a member of the firm's litigation department and its labor and employment class actions practice groups.

Alan Greenberg is one of the founding partners of Greenberg Gross, and specializes in high-stakes and complex cases, with an emphasis on finance, mergers and acquisitions, and other business matters. Alan was previously an ABTL Board member, and we welcome him back.

As we look ahead to 2017, this promises to be a great year for ABTL. Will O'Neill will serve as Program Chair, and he is already working hard to make sure we continue our tradition of having interesting and educational dinner programs. Our first program, which took place on February 15<sup>th</sup>, was entitled “*The Future of Business Litigation: How the Trump Administration Will Shape the Judiciary*,” and featured Scott Baugh and Jim Lacy, with Judge Guilford moderating what was a lively and insightful discussion.

Our next program, which will feature the attorneys who obtained a \$500 million verdict on behalf of ZeniMax against Oculus, will take place on April 5th.

Tom Vincent and John Holcomb are the co-chairs of the Annual Seminar, and this year's event will be held on October 5-8 at the beautiful Omni La Costa resort in Carlsbad. This is already shaping up to be a “can't miss” event, so please mark your calendars!

If you haven't had a chance to renew your ABTL membership yet, now is the time. Todd Friedland is our Membership Chair this year, and he knows how to find you. Membership provides many benefits, including access to our Annual Seminar. In addition, this summer we are going to have a members only rooftop cocktail event with our judiciary.

I also would like to thank our other 2017 Board volunteers: Matt Sonne (Sponsorship Chair); James Carter (Public Service Chair); Todd Lundell (Social Media Chair); Justin Owens (ABTL Report Editor); and Adrienne Marshack (Young Lawyers Division Chair).

I look forward to seeing everyone at the 2017 events!

♦ *Mark A. Finkelstein is a partner at Jones Day and is the 2017 ABTL Orange County Chapter President.*

crucial to success. Also, while *Jewel* prohibited reimbursement for partner salaries, the partner who continued to work on cases could still receive payment for work performed by associates, paralegals and secretaries.

Partners who feel that *Jewel* and *Rothman* do not adequately compensate them for their work post dissolution probably had this same feeling pre-dissolution. Almost every law firm has its share of over-performing and underperforming partners. Such is the nature of a partnership. Therefore, the problem of inequitable results may not lie with *Jewel* and *Rothman*, but instead with the partnership model.

As early as 2017, the California Supreme Court will finally weigh in regarding what should happen to a law firm's cases post dissolution. In 2008, Bank of America declared Heller Ehrman LLP ("Heller") in default leading Heller's shareholders to dissolve the firm. *In re Heller Ehrman LLP*, 830 F.3d 964 (9th Cir. 2016). Heller's dissolution plan contained a waiver of the *Jewel* doctrine allowing former Heller attorneys (or their new firms) to retain all legal fees generated from former Heller hourly cases. *Id.* at 971. In 2010, a plan administrator responsible for recovering assets for Heller's creditors filed an adversary proceeding against sixteen law firms who received fees from former Heller cases. *Id.* The plan administrator claimed the *Jewel* waiver amounted to a fraudulent transfer. *Id.*

Twelve of the sixteen law firms settled, but the remaining four firms filed motions for summary judgment. *Id.* at 972. The bankruptcy court ruled in favor of Heller and certified the case for the district court to conduct trials on damages. *Id.* The district court, however, reviewing the bankruptcy court's rulings de novo, granted the four law firms' summary judgment motions. *Id.* U.S. District Judge Charles Breyer based his ruling on the grounds that the logic of *Jewel* no longer applied because California replaced the UPA with the Revised Uniform Partnership Act ("RUPA") in 1996. *Id.* In particular, Judge Breyer focused on the fact the legislature had replaced Corp. Code section 15018(f), which prohibited extra compensation for winding up partnership business, with Corp. Code section 16401(h), which permits partners to obtain "reasonable compensation" for winding up partnership business. *Id.*

Heller appealed the district court's ruling, arguing that if former Heller cases resulted in profits beyond "reasonable compensation" the former Heller attorneys had a fiduciary duty to Heller to account for such profits. *Id.* The Ninth Circuit reasoned that it needed guidance from the California Supreme Court to determine whether a dissolved law firm still maintains a property

interest in fees generated from cases pending at the time of dissolution. *Id.* at 973.

On August 31, 2016, the California Supreme Court agreed to address whether "[u]nder California law, what interest, if any, does a dissolved law firm have in legal matters that are in progress but not completed at the time the law firm is dissolved, when the dissolved law firm had been retained to handle the matters on an hourly basis?" First, the California Supreme Court must answer whether continuing to work on hourly fee cases amounts to "winding up the business of the partnership." See Corp. Code section 16401(h). If the California Supreme Court answers this question in the affirmative, this would allow former partners to receive "reasonable compensation" for their work on hourly fee cases. This could mean dissolved partnerships would not receive any funds from ongoing work on its former hourly fee cases. After all, shouldn't "reasonable compensation" equal an attorney's hourly rate?

Heller, represented by Christopher Sullivan of Diamond McCarthy LLP, filed its opening appellate brief on November 30, 2016. Heller's brief argues that Corp. Code section 16404(b)(1) obligates partners "[t]o account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partners in the conduct of winding up of the partnership business." Heller's argument thus hinges on the conclusion that partners have a duty to continue to work on hourly fee cases for the benefit of the dissolved partnership. Heller admits that a partner is entitled for "reasonable compensation for services rendered in winding up the business of a partnership." So for Heller to prevail it must convince the California Supreme Court that continuing to work on hourly fee cases is not merely a service rendered in winding up the business of the partnership, but instead implicates a duty the partner owes the dissolved partnership.

Heller's opening brief dismisses the notion that the change in the RUPA should impact the holdings of *Jewel* and *Rothman*. Heller argues that the duty for partners to account to the partnership for fees earned on pending cases is based on common law, specifically, the "Unfinished Business Rule." Heller argues that the "Unfinished Business Rule recognizes that cases and matters brought into a law firm are the products of the efforts of the partnership as a whole and is built on long-established and basic partnership principles."

On February 9, 2017, the four law firms (Davis Wright Tremaine LLP, Foley & Lardner LLP, Jones Day, and Orrick Herrington & Sutcliffe LLP) filed their Respondents' briefs. Respondents argue that Heller cannot rely on pre-RUPA cases such as *Jewel* and *Roth-*

**-Continued on page 11-**

man. Respondents also draw a distinction between hourly cases and contingency fee cases. Respondents argue that in hourly cases the client has chosen to work with the new firm and paid the new firm accordingly. Forcing the new firm to pay the dissolved firm for these hours worked, Respondents claim amounts to “reverse confiscation,” which can impair the attorney-client relationship by discouraging attorneys from performing post-dissolution work for former clients of the dissolved firm. Respondents compare firm dissolution to one of client termination or an illness by an attorney which prevents him or her from working on a client file. In these situations, the attorney does not provide any further services so he or she does not get paid. Respondents argue this “no work, no pay principle” should prevent the dissolved firm from receiving any hourly fees since it did not perform the work.

Respondents rely heavily on the New York Court of Appeals’ decision in *In re Thelen LLP*, 24 N.Y.3d 16 (2014). The New York Court of Appeals rejected the notion that a dissolved law firm had a right to unfinished law firm business under New York’s partnership law. “[T]he Partnership Law does not define property; rather, it supplies default rules for how a partnership upon dissolution *divides* property as elsewhere defined in state law.” *Id.* at 28. “As a result, the Partnership Law itself has nothing to say about whether a law firm’s ‘client matters’ are partnership property.” *Id.* Dismissing partnership law’s impact on the question, the New York Court of Appeals held that “no law firm has a property interest in future hourly legal fees because they are too contingent in nature and speculative to create a present or future property interest, given the client’s unfettered right to hire and fire counsel.” *Id.* (citation omitted).

Anticipating Respondents’ reliance on *In re Thelen LLP*, Heller addressed the case in its opening brief. In essence, Heller argued that California should view *In re Thelen LLP* as an outlier. Heller stated in its opening brief that “*Thelen* actually puts New York out of step with virtually every other jurisdiction in the nation by essentially creating a lawyers’ exception to the Unfinished Business Rule.” Heller then attacks the reasoning of *In re Thelen LLP*, including the conclusion that having to work for the benefit of a dissolved partnership would hurt lawyer mobility and clients. The California Supreme Court will have the benefit of reviewing the analysis of the New York Court of Appeals, and many other state courts, in deciding whether to overturn the law set forth in *Jewel* and *Rothman*.

While the certified question only addresses hourly fee cases, hopefully the California Supreme Court will

provide guidance on contingency fee cases as well. *Jewel* itself involved only contingency fee cases. Since some of the work on a contingency fee case likely occurred at the dissolved firm, the dissolved firm should receive a portion of any contingency award. How to apportion the contingency fee is a difficult question. One method could apportion the fee based on the percentage of hours worked pre-dissolution versus post-dissolution. Another approach could permit the dissolved firm to keep the contingency award, but pay the former partner all expenses, including the billable rates for all professional hours worked on the case post dissolution.

No matter what the California Supreme Court holds in *In re Heller Ehrman LLP*, unanswered questions likely will remain. Just as with a divorce, dissolving law firms can avoid unsettled law and protracted legal battles by agreeing on dissolution terms before any sign of trouble. The first sentence of the *Jewel* opinion states, “[i]n this case we hold that in the absence of a partnership agreement . . .” *Jewel* at 174. Thus, law firms that address in their partnership agreements what happens to pending cases at the time of dissolution can avoid *Jewel* or any new legal doctrine entirely by contract. Large firms should draft partnership agreements that state upon dissolution pending cases do not remain assets of the partnership. If Heller’s shareholders had set forth its *Jewel* waiver in a partnership agreement, instead of in its dissolution plan, then Heller’s plan administrator likely would have had no grounds to recover legal fees generated from former Heller cases.

While smaller firms may choose not to make a blanket *Jewel* waiver, partners at these firms should still include in their partnership agreements terms concerning what happens to pending cases if dissolution occurs. Just as with marriage, no one likes to think about divorce when entering into a partnership. However, firms that have a plan for dissolution in their partnership agreements may save themselves from costly litigation (and a headache) in the end.

♦ Robert D. Estrin is counsel at Klein & Wilson in Newport Beach, CA, where his practice focuses on complex business and intellectual property litigation.



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