

## The In-House Interview: Tram-Anh Nguyen of MicroVention, Inc., a TERUMO Group Company

By Tiffany Chukiat



*Tram-Anh Nguyen is the Associate General Counsel and Senior Director of Legal Affairs of MicroVention. Ms. Nguyen received her undergraduate degree from the University of Virginia, and she received her law degree from Western State University College of Law. She joined MicroVention in 2017.*

### Q: What does MicroVention do?

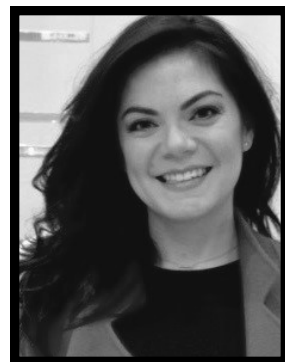
A: MicroVention develops and manufactures minimally invasive, neuroendovascular technologies that treat neurovascular disorders in order to provide meaningful im-

*-Continued on page 4-*

## Examining the C-Suite: Preparing For and Defending Apex Depositions

By Christina M. Zabat-Fran and Michael S. LeBoff

Not all depositions are created equal. They can run the gamut from the critical to the mundane, but there is nothing quite like deposing the chief executive officer or president of a major corporation. This apex deposition can make or break a case. This article discusses strategies to prepare for and defend these unique depositions.



### What Makes Apex Depositions Different than Other Depositions?

Apex depositions pose unique challenges, but also present extraordinary opportunity. They are different than other depositions for the same reason why the chief executive officer is different from other employees.



- Apex deponents are extremely busy, giving them little time to learn the nuances of the case and prepare for deposition. It can be a challenge to get them to devote a few hours, let alone a few days, to prepare.
- Apex deponents tend to be big-picture oriented, and thus, are less-versed in the minutia of a particular matter, transaction or event. Day-to-day management is often handled by a lower-level employee.
- Apex deponents are copied on emails and cc'd on countless letters per day that they may never read. Yet, once it is in writing, apex deponents may be deemed to have knowledge of whatever bad facts those unread emails may reveal.

*-Continued on page 6-*

### - IN THIS ISSUE -

- ◆ In-House Interview: Tram-Anh Nguyen Of MicroVention, Inc.  
By Tiffany Chukiat ..... Pg. 1
- ◆ Examining the C-Suite: Preparing for and Defending Apex Depositions  
By Christina M. Zabat-Fran and Michael S. LeBoff..... Pg. 1
- ◆ President's Message by Karla J. Kraft ..... Pg. 2
- ◆ ADA Accessibility Requirements for Websites from Coast to Coast  
By Jeffrey M. Goldman and Victoria D. Summerfield ..... Pg. 3
- ◆ Getting to Arbitration: A User's Guide to Establishing "Clear and Unmistakable Evidence" of Intent to Arbitrate Arbitrability  
By Richard W. Krebs and Krystal Anderson..... Pg. 3
- ◆ Young Lawyers Division Update ..... Pg. 4
- ◆ ABTL Community Service Update ..... Pg. 8

## The President's Message

By Karla J. Kraft



Summer is already drawing to a close. While that is hard to believe given the bright, hot days that we currently are enjoying, the kids will be back in school within a couple of weeks (if they aren't already) and college football season is about to kick off. I hope your summer provided fun for you and your loved ones, and a chance to recharge with some extra time away from the office.

It seems that work slows down a bit every summer, and so do the events and activities of the ABTL. With fall rapidly approaching, however, your to-do list likely is getting longer and your caseload is getting heavier. So, too, are the events and activities of the ABTL ramping up. I am looking forward to having our members gather together for our next cocktail hour, dinner, and CLE presentation on Wednesday, September 11. As usual, we will be at the Westin South Coast Plaza.

Then, just a few weeks later, our Orange County chapter will host ABTL's Annual Seminar on October 3-6 at the beautiful La Quinta Resort and Club in La Quinta, California. This year's seminar will focus on The Transforming Business of Business Litigation and feature a keynote speech by California Supreme Court Associate Justice Joshua Groban, the newest member of our Supreme Court. We hope to see many of you there! Registration is still open and rooms are still available - at the fantastic rate of \$269/night with no resort fee and complimentary parking. There is no excuse not to come enjoy the resort, the social time with members and judges from all ABTL chapters, and get 8.75 hours of CLE! Many thanks to our impressively organized annual seminar co-chairs Will O'Neill and Allison Libeu, who are putting in many hours of work to ensure an interesting and smoothly run event! They are doing our chapter proud.

Our chapter's summer was not without an important annual tradition: giving back to our community through ABTL members and their firms volunteering for Habitat for Humanity. On July 17, attorneys from several of our member firms worked together to improve a family's home in Fullerton. Charity Gilbreth, our philanthropy chair, did a great job coordinating our volunteers! Charity will soon be organizing our holiday giving opportunity for our November meeting, which is a meaningful way to help kick off the holiday season.

*-Continued on page 8-*

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**ADA Accessibility for Websites from Coast-to-Coast: Ninth Circuit Requires “Compliance” Despite Lack of Clear Standard; Southern District of New York Finds Post-Complaint Remediation Sufficient to Moot ADA Violation Claim**  
By Jeffrey M. Goldman and  
Victoria D. Summerfield



Content Accessibility Guidelines (WCAG) 2.0—a private industry standard widely adopted by federal agencies.

Any company doing business on the West Coast must be aware of the Americans With Disabilities Act (ADA) and how it applies to their website. In the absence of any official guidance from the DOJ regarding what type of private website formatting or accommodations must be provided to users in order to comply with the ADA, courts across the country have largely adopted, by consensus, the Web



The Ninth Circuit has concluded that the ADA put places of public accommodation on “fair notice” of their obligation to provide accessible websites and apps, at least when these websites and apps are used in conjunction with a physical location, in spite of the lack of a specific ADA standard for websites. *Robles v. Domino’s Pizza, LLC*, No. 17-55504 (9th Cir. Jan. 15, 2019). A recent case from the

Southern District of New York suggests that business owners may successfully challenge the ADA claim as moot by submitting an affidavit confirming that the deficiencies described in the complaint were corrected and the website is presently compliant with WCAG 2.0. *Diaz v. The Kroger Co.*, No. 18 Civ. 7953 (KPF) (S.D.N.Y. June 4, 2019).

**Robles Case Analysis**

In *Robles*, the plaintiff, who is visually impaired, alleged that Domino’s Pizza violated the ADA and California’s Unruh Civil Rights Act by failing to design, construct, maintain and operate its website and mobile application in a way that was fully accessible to him.

Domino’s operates a website and app that allow customers to order pizzas and other products for at-home delivery or in-store pickup, and receive exclusive discounts. The plaintiff claimed that he attempted to order online a customized pizza from a nearby Domino’s, but he was unsuccessful because his screen-reading software could not

**-Continued on page 9-**

**Getting to Arbitration: A User’s Guide to Establishing “Clear and Unmistakable Evidence” of Intent to Arbitrate Arbitrability**  
By Richard W. Krebs and Krystal Anderson

Arbitration is an increasingly popular form of dispute resolution as an alternative to litigation. Benefits of arbitration over litigation can include faster results, increased flexibility, lower costs, confidentiality, and finality (arbitration rulings are typically difficult to challenge, and such challenges rarely succeed). Most arbitrations occur pursuant to contractual agreements to arbitrate between the parties, although parties can also arbitrate by consent. *See, e.g., First Options of Chi. Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (“[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.”).



The issue of “arbitrability”—*i.e.*, whether an arbitrator has the authority to rule on a dispute—arises when parties disagree over whether a particular dispute is to be submitted to arbitration. In these cases, often one party seeks or has filed arbitration proceedings, while the other party seeks or has filed a lawsuit in court, causing a conflict in jurisdiction. The general rule is that arbitrability disputes are to be decided by the court. *See id.* at 938 (“[T]he question ‘who has the primary power to decide arbitrability’ turns upon whether the parties agreed to submit that question to arbitration. If so, then the court should defer to the arbitrator’s arbitrability decision. If not, then the court should decide the question independently.”).

But there is an exception to the general rule: courts typically defer to the *arbitrator* to decide arbitrability disputes when there is “*clear and unmistakable evidence*” that the parties intended to arbitrate arbitrability. *Opalinski v. Robert Half Intl, Inc.*, 761 F.3d 326, 335 (3d Cir. 2014) (“It is presumed that the issue is ‘for judicial interpretation unless the parties clearly and unmistakably provide otherwise’”).

Parties seeking arbitration can benefit enormously by the arbitrator deciding arbitrability instead of the court, as it appears arbitrators are more likely than courts to rule in favor of arbitration. Thus, the outcome of arbitrability disputes can turn, in significant part, on whether the party seeking to arbitrate can establish “clear and unmistakable

**-Continued on page 12-**



## Young Lawyer's Division Brown Bag Lunch with Judge James V. Selna

On August 20, 2019 the Honorable James V. Selna hosted a brown bag lunch with the ABTL Young Lawyer's Division. The lunch was an informal Q&A with Judge Selna on any and all topics that came to mind. The conversation began with Judge Selna offering his tips to lawyers presenting oral argument. His first piece of advice—to slow down when presenting—was illustrated with an anecdote about news anchor's slow, deliberate cadence compared with the average American's quick cadence. His second piece of advice was to directly answer the question posed by the judge, as the sole decision-maker is asking the question. Another highlight of the conversation was Judge Selna's suggested strategies for handling overstated positions in opposing counsel's legal briefing.

There was also an extensive discussion on Judge Selna's experience with the Central District's Patent Pilot Program. In particular, the conversation centered around lawyers and judges gaining a working knowledge of technology in their cases and how this applies to the Patent Pilot Program. Judge Selna recounted notable examples from his own private practice where he had to learn different technologies and industries in order to understand complex cases, and how this led to better representation of his clients. The lunch concluded with a tour of chambers.



There was a great turnout for this event and the YLD thanks Judge Selna and his staff for their time and hospitality.

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

provement in patients' lives.

I am proud to be a team member of this company. MicroVention sets the standard of excellence in the neuro-endovascular device industry by developing new and innovative devices to treat strokes and aneurysms. MicroVention aims to produce the most reliable, easiest to use, and technologically advanced products as supported by proven clinical data.

Concurrently, MicroVention's mission is to improve the quality of its patients' lives. I have personally seen

this mission accomplished when attending MicroVention's annual "Patients' Day." On Patients' Day, MicroVention invites its patients to its Aliso Viejo campus so that they can make personal connections with the MicroVention associates who work tirelessly to design, manufacture, test, and market devices that have changed the lives of people around the world. The patients are also given the opportunity to share their stories of how MicroVention technologies have changed their lives for the better. It is a heart-wrenching and heart-warming experience to hear from a husband how MicroVention technologies saved the life of his wife; to hear from a father how MicroVention devices saved the life of his only son; as well as other stories from once ailing individuals who were able to become healthy again because of MicroVention products.

### **Q: Please describe a typical day as the Associate Counsel and Director of Legal Affairs of MicroVention.**

A: In my current role, I manage legal issues in corporate transactions, governance, clinical trials, employment, and litigation. My days are typically comprised of various combinations of meetings, management, and execution, with the ultimate goal to ensure that the actions of the Legal Affairs Department align with the business needs of MicroVention.

On most days, I conduct meetings with my Legal Affairs team so that we can determine our priorities for the day, ensure that deadlines are being met, and confirm that the legal and business issues overseen by our department are being properly addressed. I will also have one-on-one meetings with individual team members to discuss particular matters handled by that team member.

MicroVention is a large corporation, which necessitates efficient communication between its numerous departments. As the Director of Legal Affairs, I frequently meet with Sales Operations, Clinical Affairs, Human Resources, Regulatory, Field Assurance, and Supply Chain to address overlapping legal and business issues, to explain risks of taking certain actions, and to propose viable solutions to potential problems that are unique to MicroVention as a rapidly growing company in the medical device development and manufacturing industry.

Additionally, I work closely with MicroVention's General Counsel to manage litigation, to determine disputes can be resolved internally, and to identify disputes that should be handled by outside counsel.

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

*-Continued on page 5-*

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

A: I thoroughly enjoy combining my expertise in law and business so that I can best serve MicroVention by counseling the company to take actions that ensure its own success. Prior to joining MicroVention, I was the Director - Corporate Counsel for loanDepot.com and before that, I served as the first in-house attorney and built the legal team for VolumeCocomo Apparel, Inc., a multi-national apparel company in Los Angeles. I am truly professionally fulfilled in my role because I can use my experience and knowledge to foresee where the company is headed and to help guide it in the right direction. Additionally, in my role as in-house counsel, I have the opportunity to see critical projects through from beginning to end, such as the expansion of our manufacturing facility in Costa Rica.

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

A: MicroVention seeks individuals who are experienced in their respective department fields (e.g. legal, regulatory, compliance) and are business-minded. In particular, potential team members should be able to demonstrate that they are able to understand the needs of MicroVention, including, but not limited to, the timely delivery of excellent service so that there is no hold-up of MicroVention's business objectives. Essentially, MicroVention in-house counsel team members need to understand that they are in service roles, similar to working at a private law firm; that they must deliver swift, outstanding work product; and that they must make themselves available to assist MicroVention when necessary.

**Q: What qualities do you look for when selecting outside counsel?**

A: Similar to the qualities sought in in-house counsel, MicroVention seeks outside counsel who have extensive experience the particular area of law for which their services are sought. Potential outside counsel should demonstrate an ability to be strategic when proposing a path or solution, in addition to creating outstanding work product. It is imperative that outside counsel comprehends that when MicroVention reaches out, there is an urgency that necessitates a quick, reliable response and/or recommendation. Additionally, MicroVention values outside counsel who can understand the needs of the medical device industry, with whom MicroVention can partner on a long-term basis, and who can help MicroVention navigate through the ever changing laws with which it must comply. In my experience as in-house counsel, outside firms who strive to provide strategic solutions and excellent work product in a timely manner are able to quickly set themselves apart, and they are likely to establish lasting relationships with MicroVention.

**Q: What organizations in the legal community are you involved in and what is their significance to you?**

A: Although I do understand it can be a challenge to remember to engage with our peers because we do not have the need to develop clients (as private law firms do), I think it is important for in-house attorneys to be active in the legal community. Connecting with our fellow attorneys allows us to understand issues that affect our profession as a whole. It also allows us to establish professional and social relationships that can be mutually beneficial in countless ways. In general, I gravitate towards events where I can both (1) learn useful information to help me guide MicroVention, and (2) connect with other in-house practitioners, such as CLE events.

I have developed priceless relationships through my involvement in specific organizations throughout my legal career. Currently, I serve on the board of the Vietnamese American Bar Association of Southern California (VABA - SC), and I have been a member for almost seven years. The VABA-SC Board is comprised of an equal balance of public service, private, and in-house attorneys. It is a wonderful organization that provides CLE and networking programs, and it offers a friendly, welcoming atmosphere at all events. Additionally, I have been a member of the Association of Corporate Counsel (ACC - So-Cal) since 2009. This organization is regional and allows me to network with in-house peers located outside of Orange County, including in Los Angeles and San Diego. I have also been a member of the OCBA's Corporate Counsel Section since 2013. This Section is thoughtful about the execution of its lunch CLE programs, which provide the best of both worlds: I can learn practical information that enables me to add value to MicroVention and, simultaneously, network with my corporate counsel peers. Lastly, I was on the board of the Orange County Asian American Bar Association (OCAABA) and co-founded OCAABA's In-House Counsel Committee and developed the well-attended program entitled "Must Know GCs in OC." Because I was responsible for obtaining the panelists and executing the logistics of that event, I was inevitably introduced to legal professionals from various backgrounds, and several of those introductions turned into mutually beneficial business relationships and/or genuine friendships.

In sum, I truly believe attorneys in all fields can benefit from being involved in their local bar community, and I would encourage all attorneys to do so.



♦ *Ms. Nguyen was interviewed by Tiffany Chukiat, a senior litigation associate at Stephens Friedland LLP.*

## **-Examining the C-Suite: Continued from page 1-**

- Apex deponents are de facto persons most qualified deponents for the company. From technology to finances to employment policy, apex deponents are expected to know everything that goes on in their company. Right or wrong, once an apex deponent testifies to a fact, you are probably stuck with it.
- Apex deponents are used to being in charge. Of course, that is not the case at deposition. It is then understandably a challenge for the apex deponent to cede control of deposition preparation to the trial attorney, and even harder to cede control of the process to the deposing counsel.
- Apex deponents place unique pressures on the company's outside counsel to perform like no other witness can. If the apex deponent is not pleased with outside counsel, there is a good chance outside counsel can get dismissed.

Despite their many challenges, a prepared, knowledgeable apex deponent can do wonders for a case. Apex deponents are used to being on the spot, and thus less likely to get overwhelmed by the moment. They are used to having to be careful with words. They are used to having to clearly communicate the corporate message and vision. They can often be among the smartest, savviest and well-liked people in the company, able to convey those characteristics to the trier of fact. Accordingly, the right apex deponent can often be the best person to communicate your message at trial.

### **Preventing Apex Depositions (Good Luck).**

When receiving a notice to depose your client's president or CEO, the first reaction may be to seek a protective order to prevent the deposition. Think twice. As noted above, the apex deponent may be the best person to communicate your message at trial. If you refuse to present them for deposition, there is little chance a judge will allow you to call that person as a witness at trial. Moreover, seeking a protective order may communicate the wrong message. It may signal that you are afraid what the CEO may say at deposition. If that's the case, you are inviting opposing counsel only to push harder.

If you do seek an order preventing the apex deposition, note there are only limited grounds for such a motion. In *Liberty Mut. Ins. Co. v. Superior Court* (1992) 10 Cal.App.4th 1282, 1289, the court held "when a plaintiff seeks to depose a corporate president or other official at the highest level of corporate management, and that official moves for a protective order to prohibit the deposition, the trial court should first determine whether the plaintiff has shown good cause that the official has unique or superior personal knowledge of discoverable information." If the

party seeking the deposition fails to make that showing, the court should first require the party attempt to obtain discovery through less-intrusive methods, such as interrogatories and person most qualified depositions.

Practically, it will be difficult to prevent an apex deposition if the other side can identify any facts showing the apex deponent had any personal involvement in the underlying transaction or events. If there is any question as to the propriety of the deposition, the vast majority of courts will allow it to proceed. Judges are often unmoved by the arguments that the witness is "too busy" or "too important" to be deposed. Thus, given judges will usually prevent an apex deposition only in the clearest of circumstances, a motion for a protective order is often a waste of time and money.

### **Preparing the Apex Deponent.**

Many people and departments are vying over the CEO's limited time and attention. When the CEO is to be deposed, deposition preparation is another task competing for the same attention. Nevertheless, time and attention is necessary to adequately prepare for the deposition that can make or break a case. Here are some tips:

First, let inside counsel do the heavy lifting. In particular, the general counsel is also in the C-Suite with a direct line to the apex deponent. More importantly, the general counsel works with the apex deponent on a daily basis, hopefully gaining their trust and confidence. This trusted relationship is an asset to leverage in your client's favor. If the general counsel tells the CEO they need to prioritize the deposition, the CEO should listen. That message may carry less weight coming from outside counsel, who likely has little direct contact with CEO and potentially little to no prior history. Inside counsel can communicate messages to the CEO that make the limited prep time available more valuable. Inside counsel can help get the apex deponent up-to-speed on the status and general nature of the case, the case themes, the testimony of other witnesses, and the key documents. Inside counsel can provide valuable insight on the apex deponent's personality and priorities, so that you can communicate effectively and persuasively with them.

Second, be flexible. Apex deponents have packed calendars. This means depo prep sessions may need to take place early mornings, late nights or weekends. You may need multiple shorter sessions, rather than a few longer sessions. Expect and accept cancellations and changes. For these reasons, depo prep should start well before the deposition. Trying to start depo prep with an apex deponent a few days or even a few weeks before the deposition is risky business.

Third, be prepared. When meeting with the CEO, make  
**-Continued on page 7-**

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## ***-Examining the C-Suite: Continued from page 6-***

sure you know the case frontwards and backwards. Spend time preparing mock examinations before the prep session. Have the documents ready and organized so you can move through them quickly. When the CEO needs information about the underlying transaction, have that information at the ready. Regardless of how good you think you are on your feet, the prep session with the CEO is not a time to wing it.

Fourth, be efficient and prioritize. The unfortunate reality is that you probably will not get the time with the CEO that you want. So, you need to make the most of the limited time you get. To do that, prioritize issues and themes, and be ready to prioritize even further. You may not get the opportunity to prepare the CEO on every single question or issue, nor may you get the time to show them every possible document. Identify what is most critical ahead of time and focus your prep time on those first.

Fifth, do not go it alone. Most likely, the CEO did not act alone in an underlying transaction or event. There were other corporate officers involved as well. Include those employees in the prep sessions. They will be able to help provide context to certain documents and facts. Moreover, by having multiple witnesses prepare simultaneously, you can identify those issues where the witnesses' recollections of the facts diverge and reconcile those inconsistencies before they are permanently captured in a deposition transcript. Be sure, however, everyone present is covered by the attorney-client privilege.

### **Game Day – Defending the Apex Deposition.**

When the big day finally arrives, it is time to put your pre-deposition preparations to the test. There are no second chances. A flippant remark or uncontrolled outburst caught videotaped at deposition will haunt your case through trial. Conversely, if the properly prepared CEO delivers the right message at deposition, it can take the air out of the other side's sail and may lead to a positive resolution.

At the deposition, like other aspects of life, first impressions matter. Therefore, it is important that the apex deponent dress the part. There is no one-size-fits-all approach for appearance here, but juries and judges will expect the apex deponent to embody the consummate professional. The CEO should dress as if they were presenting at a shareholder or board meeting. Even the most casual of CEO's should not wear shorts and a t-shirt when it comes to a deposition. Political messages should be avoided. Distracting or loud clothing will not help. In this case, boring is often best.

During the deposition, your instinct may be to protect

the client through frequent, aggressive objections and arguing with the deposing counsel. Fight those instincts. Constant objections are not only inappropriate, but they will hinder or prevent your apex deponent from clearly telling the client's story.

If you plan to ask your own apex deponent questions at depositions, be sure to prepare them on those questions. This is one of those situations where you never want to ask a question to which you do not already know the answer. You may think you and the deponent are on the same page. Make no assumptions here. You do not want to surprise the apex deponent with a series of questions they were not expecting.

Apex depositions should be completed in a single day. Constant objections and breaks serve only to delay the deposition and give the other side grounds to go beyond the seven-hour rule. Rarely, do you want to allow the other side a second session with the apex deponent, armed with a copy of the first session's deposition for cross-examination. If this means the deposition needs to continue an extra hour or so, that is okay. You are almost always going to be better off getting the deposition completed in a single session.

It often helps to have inside counsel present. Consider the inside counsel as your key ally. While defending counsel is often focused on the specific questions, quickly searching for objections, and jousting with opposing counsel, inside counsel can view the deposition with a wider lens to identify potential pitfalls. Additionally, at the deposition, the inside counsel can often be the most successful in keeping the apex deponent "on message."

Give the apex deponent the opportunity to perform. If they are performing well, give them more space. If they are struggling with the process, you may need to take them out of the room to refresh on what was covered in depo prep. But, you can only protect them so much. Ultimately, you are going to have to allow the apex deponent to struggle through the process and feel a stakeholder in the consequences.

During and after deposition, keep top of mind the purpose of this process, which is for opposing counsel to garner information they can use to prove their case against your client. Given that, it is likely opposing counsel will score at least some points during the deposition, particularly if there are bad facts in your case. Manage these expectations with the apex deponent, and for yourself. It is not realistic to expect perfection.

Finally, after the deposition, take care to review the transcript for errors, as those errors are only amplified when purporting to come from the CEO. Do not rely on the apex deponent to carefully review their own transcript. Remem-

***-Continued on page 8-***

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### ***-Examining the C-Suite: Continued from page 7-***

ber, their schedule may not allow for a detailed review of the 300-page transcript. Both outside and inside counsel who were present at the deposition can provide value to the client by carefully reviewing for reporter errors or other inaccuracies first, then discussing with the CEO whether to request those revisions.

#### **Above All – Tell the Truth.**

While the apex deposition may be a great opportunity to have the highest corporate officer tell the client's story, they are not a magician. They cannot make bad facts disappear. They cannot change the law or the written words in a document. If there are bad facts, the CEO must admit and address those bad facts. Nothing will derail your case more than a dishonest chief executive. That dishonesty will reflect company culture and infect all other client witnesses.

On the other hand, an honest apex deponent will demonstrate trustworthiness and professionalism. They will be impeccable with their word and confirm transparency, which will reflect company culture as a whole. Overall, your well-prepared, well-guided apex deponent can be the best person to communicate your message at trial.

- ♦ *Christina M. Zabat-Fran* is the Vice President, General Counsel and Corporate Secretary at St. John Knits.
- ♦ *Michael S. LeBoff* is a partner at Klein & Wilson.

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### ***-President's Page: Continued from page 2-***

Finally, as most of you likely are aware, our ABTL Orange County chapter is an affiliate bar of the Orange County Bar Association. There are a number of very significant changes to the practice of law being proposed at the state bar level, including a proposal to authorize non-lawyers to provide certain types of legal advice and services. Our current OCBA leadership is actively gathering feedback from OCBA members and providing detailed comments to the state bar on these issues, which if passed could change many aspects of how law is practiced in California. I encourage you to familiarize yourselves with the proposals being made by the state bar before the comment period closes on September 23, and to provide your thoughts to the OCBA and/or the state bar directly. The OCBA's work in relation to these proposed changes and others that may be proposed in the future will continue beyond this calendar year with the OCBA's next group of leaders, who will be elected next month. Voting for the 2020 OCBA slate of officers and directors opens on Tuesday, September 3, and closes three weeks later on Tuesday, September 24. I encourage you to vote in the upcoming OCBA election.

- ♦ *Karla Kraft* is a partner at *Stradling, Yocca, Carlson & Rauth*.

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### **ABTL Community Service Update**

The ABTL continues to serve the community in various ways. It has been an annual tradition for ABTL to volunteer with Habitat for Humanity for a build project each summer. This summer, on July 17, 2019, volunteers from Haynes and Boone, Rutan & Tucker, and Schilling Law Group came together to work at a build site in Fullerton. The volunteers dedicated their day to the cause and worked as a team to install exterior siding on a single family residence. After the build day Habitat for Humanity staff thanked the team and said that it is because of volunteers like ABTL, that Habitat for Humanity is able to make dreams come true for families in Orange County by providing a place to call home.



### ***-ADA Accessibility: Continued from page 3-***

read Domino's website or app. The lawsuit requested statutory damages for noncompliance with the ADA, and also requested equitable remedies, seeking a court order requiring the company's website and mobile app to comply with Web Content Accessibility Guidelines (WCAG) 2.0 — a private industry standard widely adopted by federal agencies in the absence of an express statutory standard.

#### **Lower Court Opinion:**

The district court held that the ADA's requirement to provide auxiliary aids and services to make visual materials available to visually impaired individuals applied to Domino's website and app because these visual materials (*i.e.*, the website and app) were used to order goods from Domino's physical restaurants. The court found, however, that imposing the WCAG 2.0 standards on Domino's "flew in the face of due process" because the Department of Justice had yet to offer any meaningful regulatory guidance to make clear to entities covered by the ADA what they need to do to make their websites accessible. The district court therefore invoked the "primary jurisdiction" doctrine to dismiss, which allows a court to stay proceedings or dismiss a complaint without prejudice pending the resolution of an issue within the special competence of an administrative agency.

#### **The Ninth Circuit Opinion:**

The Ninth Circuit agreed with the lower court that the ADA applied to Domino's website and app. The court noted that the ADA required Domino's to provide auxiliary aids and services to make its website and app accessible to disabled individuals, even though Domino's customers primarily accessed the website and app away from the physical restaurant. According to the court, "The statute applies to services of a place of public accommodation, not services in a place of public accommodation." The court specifically noted that the nexus between the Domino's website and app and its physical restaurants was critical to the court's analysis.

The appellate court disagreed with the lower court, however, on the due process issue in finding that the ADA's standards were clear and provided fair notice to Domino's. While Domino's argued that the plaintiff sought to impose liability on Domino's for failing to comply with the WCAG 2.0, which are private guidelines, the court concluded that the plaintiff did not seek to impose liability for the company's failure to comply with the WCAG 2.0, but, rather, sought compliance with that standard as a possible equitable remedy.

This leaves both companies and their customers with little guidance as to what constitutes an appropriately ac-

cessible website so as to foster early resolution of cases. Compounding this uncertainty, the Ninth Circuit also rejected the district court's ruling that it was not fair to hold Domino's liable since the DOJ has yet to issue specific guidelines for website and app accessibility. Rather, the court held that the lack of *specific* regulations under the ADA did not eliminate the company's statutory obligation to comply with the ADA. The court stated, "the Constitution only requires that Domino's receive fair notice of its legal duties, not a blueprint for compliance with its statutory obligations." Given the lack of specific guidance, however, it is difficult to say Domino's (or any other company) has "fair notice of its legal duties," other than a need to comply with generalized ADA guidelines. While the goal of website accessibility is certainly admirable, the lack of clarity is sure to encourage further litigation in this realm.

Finally, the court overturned the district court's exercise of the primary jurisdiction doctrine, finding that invocation of that doctrine was inappropriate since the DOJ was aware of, but has expressed no interest in, the subject matter of the litigation, and a referral to the agency would significantly postpone a ruling on the case. On June 13, 2019, Domino's petitioned the United States Supreme Court for writ of certiorari for a determination as to whether the ADA requires a website or app to satisfy "discrete accessibility requirements" for individuals with disabilities.

#### **Diaz Case Analysis**

In *Diaz*, the visually impaired plaintiff alleged that the Kroger Company supermarket chain violated the ADA, the Human Rights Laws of both New York state and New York City, and the New York Civil Rights Law by failing to design, construct, maintain and operate its website in a way that was fully accessible to the plaintiff, who uses screen-reading software to convert online content to audio. Notably, none of the supermarket chain's brick-and-mortar locations are in New York state.

Kroger operates a website that enables consumers to purchase goods for delivery and also provides information on promotions and coupons, as well as calorie content and recommended cook times for certain foods. The plaintiff claimed that he visited the Kroger website several times, but was unable to access information about products available for delivery or other available goods and services because the information on the web-site could not be rendered as text and, thus, was not compatible with his screen-reader software.

#### **ADA Claim Mooted By Affidavit Showing Present Compliance With WCAG 2.0:**

Kroger's motion to dismiss asserted that the court lacked subject matter jurisdiction over the complaint be-

***-Continued on page 10-***

## **-ADA Accessibility: Continued from page 9-**

cause Kroger already had modified its website to remove access barriers. Crucially, Kroger supported its motion by submitting an affidavit from its product design manager, which asserted that the website was now compliant with WCAG 2.0 standards and that he personally investigated the alleged deficiencies and confirmed that all alleged deficiencies were remedied.

In determining that it lacked subject matter jurisdiction due to the mootness of the ADA claims, the court noted that the Kroger product design manager's affidavit overcame the types of shortcomings often identified by courts when rejecting mootness arguments. Specifically, the court noted that, unlike in other cases where a remediation plan had been created but remediation was not yet complete, Kroger already had completed the remediation process. The product design manager's affidavit, which specifically addressed the website's current compliance with WCAG 2.0 standards, was attested to by the person whose job was well-positioned to understand and address the alleged accessibility problems. Furthermore, the affidavit stated that the company intended to remain compliant with the ADA, as well as any other applicable future standards.

The plaintiff's opposition did not dispute the affidavit's factual assertions regarding the remediation of the website, but merely argued that website content is, by its nature, constantly being modified and updated, which would jeopardize future compliance. The court rejected that argument and refused to find that an ADA-website claim can never be mooted based on the inherent characteristics of websites constantly being modified. This, of course, makes sense because to rule otherwise would mean that a company could never defeat an ADA-website claim and would be subject to endless litigation, notwithstanding the company's best efforts toward compliance.

### **Web Presence Without Reasonable Probability Of Commercial Transaction:**

The court held separately that it could not exercise personal jurisdiction over Kroger through New York's long-arm statute based on its website alone because the website did not provide grocery delivery to New York customers. The court looked to the Second Circuit's *Best Van Lines* test, which considers a website's level of "interactivity" on a spectrum ranging from passive informational websites, which do not confer jurisdiction, to fully interactive websites that knowingly transmit goods or services to customers in other states, which confer jurisdiction. The court required that the plaintiff establish a "reasonable probability" that the website actually was used to effect commercial transactions with New York customers in order to confer jurisdiction. The parties disputed

whether New York residents could order groceries from the Kroger website, and the court conducted its own review of the website and confirmed that delivery was not available to any New York state ZIP code.

### **Key Takeaways**

The *Robles* ruling makes it clear that places of public accommodation in the Ninth Circuit that use a website and/or app in conjunction with a physical space must ensure that the website and app are accessible to visually impaired individuals. While there continues to be a lack of certainty as to what constitutes "accessible" in this arena, the WCAG 2.0 guidelines are a resource to companies seeking to avoid this type of lawsuit.

However, it is important to note that the Ninth Circuit refused to opine as to whether the ADA would cover websites or mobile apps of companies "where inaccessibility would not impede access to the goods and services of a physical location." This comports with the Southern District of New York's use of the Second Circuit's *Best Van Lines* test to find that it lacked personal jurisdiction over Kroger under the long arm statute based only on its website.

The nation's courts continue to fill in the gap left by the Department of Justice's failure to promulgate rules governing commercial websites and ADA compliance. While it remains to be seen if other courts will adopt the *Diaz* court's rationale as it relates to mootness, at least one jurisdiction has held that completed remediation efforts may render an ADA claim moot. Perhaps the Supreme Court will put an end to the uncertainty surrounding ADA's website accessibility standards and certify the petition from *Robles*.

In the meantime, if they have not done so already, companies, universities and other organizations with a web presence are well-advised to develop and make demonstrable progress in implementing a website accessibility compliance plan.

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**-Arbitration: Continued from page 3-**

evidence” that the parties intended to arbitrate arbitrability disputes.

An arbitration clause on its own, even broadly worded, is not likely to constitute “clear and unmistakable evidence” of intent to have the arbitrator decide arbitrability (although some courts have been satisfied that broadly framed arbitration clauses satisfy the “clear and unmistakable evidence” test). Rather, adjudicators typically look for a *specific delegation of authority to the arbitrator* to decide arbitrability disputes. As described below, whether such specific delegation exists is generally a matter of contract interpretation. However, there are also some less obvious arguments parties seeking arbitration can raise to establish “clear and unmistakable evidence.”

If you find yourself litigating arbitrability, answering the following questions may come in handy.

**Does the Parties’ Contract Include a “Delegation Clause”?**

The simplest way to establish “clear and unmistakable evidence” of the parties’ intent to arbitrate arbitrability disputes is to identify express language in the parties’ contract delegating that authority to an arbitrator. Because arbitration is a matter of contract, many courts have held that the presumption that the court, not the arbitrator, decides issues of arbitrability can only be overcome if the parties have included language in the contract which “clearly and unmistakably provide otherwise.” *Opalinski*, 761 F.3d at 335 (“The burden of overcoming the presumption is onerous, as it requires express contractual language unambiguously delegating the question of arbitrability to the arbitrator”). This explicit language is often referred to as a “delegation clause.” See *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 538 (2019) (citing *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68–69 (2010)) (“A delegation clause gives an arbitrator authority to decide even the initial question whether the parties’ dispute is subject to arbitration.”). Some common forms of a “delegation clause” are: “[t]he arbitrator(s) shall determine all issues regarding the arbitrability of the dispute,” and “[a]ll determinations as to the scope or enforceability of this arbitration provision shall be determined by the arbitrator, and not by the court.” As an additional example, JAMS provides the following model language:

Any dispute, controversy or claim arising out of or relating to this contract, including the formation, interpretation, breach or termination thereof, *including whether the claims asserted are arbitrable*, will be referred

to and finally determined by arbitration in accordance with the JAMS International Arbitration Rules.

JAMS Clause Workbook, Standard Arbitration Clauses, <https://www.jamsadr.com/clauses/#Standard> (emphasis added).

**Does the Delegation Clause Unambiguously Establish That the Parties Intended the Arbitrator to Decide Arbitrability?**

Ordinary principles of contract interpretation apply to the determination of whether the parties expressly delegated the authority to resolve arbitrability disputes to the arbitrator. See *First Options of Chi.*, 514 U.S. at 944 (“Courts generally should apply ordinary state-law principles governing contract formation in deciding whether such an agreement [to arbitrate arbitrability] exists”); see also *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59–60 (1995); *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1199–1200 (2d Cir. 1996).

For example, in *PaineWebber Inc.*, the court applied the New York common law rule that, “[i]n interpreting a contract, the intent of the parties governs,” and therefore “[a] contract should be construed so as to give full meaning and effect to all of its provisions.” *PaineWebber Inc.*, 81 F.3d at 1199–1200 (citing *American Express Bank Ltd. v. Uniroyal, Inc.*, 164 A.D.2d 275, 277, 562 N.Y.S.2d 613, 614 (1st Dep’t 1990), appeal denied, 77 N.Y.2d 807, 569 N.Y.S.2d 611, 572 N.E.2d 52 (1991); *Tigue v. Commercial Life Ins. Co.*, 631 N.Y.S.2d 974, 975 (4th Dep’t 1995)). The court further applied the New York rule that, in interpreting a contract, “[w]ords and phrases are given their plain meaning. Rather than rewrite an unambiguous agreement, a court should enforce the plain meaning of that agreement.” *Id.* (citing *American Express*, 164 A.D.2d at 277, 562 N.Y.S.2d at 614). It was with those principles in mind that the court looked to the specific language of the agreement at issue to discern that the parties unambiguously intended to arbitrate arbitrability, as the plain language of the broad arbitration agreement suggested that result, and nothing contradicted it in the rest of the agreement. *Id.* California law similarly dictates that (1) “[t]he words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed,” Cal. Civ. Code § 1644, and (2) the court must interpret the language in context, with regard to its intended function in the policy, because “language in a contract must be construed in the context of that instrument as a whole, and in the circumstances of that case, and cannot be found to be ambiguous in the abstract.” *Bank of the West v. Super. Ct.*, 2 Cal. 4th 1254, 1264 (1992).

**-Continued on page 13-**

### Is the Arbitration Clause Broadly Worded?

While an express delegation clause is the surest path to establishing the parties' intent to arbitrate arbitrability, even in the absence of a clear delegation clause, all hope is not lost.

Some courts have held that broad arbitration provisions, such as those recommended by arbitration providers like the American Arbitration Association ("AAA") and International Chamber of Commerce ("ICC"), are themselves clear delegations of authority to arbitrators to decide questions of arbitrability—even without an express delegation clause. See, e.g., *Luzerne Cty. v. D.A. Nolt, Inc.*, No. 3:14-cv-00831, 2014 WL 4411070 (M.D. Pa. Sept. 5, 2014); *Shaw Group, Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115, 124-125 (2d Cir. 2003) ("[B]ecause the parties' arbitration agreement is broadly worded to require the submission of 'all disputes' concerning the Representation Agreement to arbitration, and because it provides for arbitration to be conducted under the rules of the ICC, which assign the arbitrator initial responsibility to determine issues of arbitrability, we conclude that the agreement clearly and unmistakably evidences the parties' intent to arbitrate questions of arbitrability"); *PaineWebber Inc.*, 81 F.3d at 1199-1200 (2d Cir. 1996) (holding that even absent an express contractual commitment to arbitrate arbitrability, a referral of "any and all" controversies reflects such a "broad grant of power to the arbitrators" as to evidence the parties' clear "inten[t] to arbitrate issues of arbitrability").

For example, the parties' agreement in *Luzerne* incorporated the AAA's recommended arbitration provision, which reads: "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules," but had no additional language concerning arbitrability or a delegation clause. *Luzerne Cty.*, 2014 WL 4411070, at \*3. The court held that this was "clear and unmistakable evidence" of intent to arbitrate arbitrability because "[t]he question of who decides arbitrability does not fall under any exception listed in the contract, and [arbitrability] clearly and unmistakably counts as '[a]ny controversy or Claim arising out of or related to the Contract, or breach thereof.'" *Id.*

Thus, even if the parties' contract does not include an express or sufficiently broad delegation clause, the party seeking arbitration may still prevail in arbitrating arbitrability if the contract's arbitration clause is sufficiently broad, particularly if, as addressed below, the arbitration clause incorporates by reference specific arbitra-

tion providers' rules.

It should be noted, however, that there is disagreement among the courts as to whether a broad arbitration clause alone is sufficient to establish intent of the parties to arbitrate arbitrability; multiple courts have held it is not. See, e.g., *McLaughlin Gormley King Co. v. Terminix Int'l Co.*, 105 F.3d 1192, 1194 (8th Cir. 1997) (finding that a clause requiring arbitration of "any controversy arising out of" or "relating to" the agreement did not clearly and unmistakably evidence arbitrator's authority to determine arbitrability); *Spahr v. Secco*, 330 F.3d 1266, 1270-71 (10th Cir. 2003) (finding that the use of "any controversy" or "any and all disputes" does not clearly and unmistakably demonstrate an agreement to arbitrate arbitrability).

### Does the Parties' Contract Incorporate a Particular Arbitration Provider's Rules?

As illustrated by *Luzerne*, some courts have held that parties' decisions to "explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, [] serve [] as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator." *Contec Corp. v. Remote Sol., Co.*, 398 F.3d 205, 208 (2d Cir. 2005); see also, e.g., *Schneider v. Kingdom of Thailand*, 688 F.3d 68, 72-74 (2d Cir. 2012) ("Where 'parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator.'"); *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012) ("[T]he express adoption of [the AAA] rules presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability."); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009); *Oracle Am., Inc. v. Myriad Group A.G.*, 724 F.3d 1069, 1072-1077 (9th Cir. 2013) (holding that the parties' incorporation of arbitration rules of the United Nations Commission on International Trade Law delegated questions of the arbitrability to arbitrator). Because the current JAMS, AAA, and ICC rules all delegate the power to decide arbitrability to the arbitrator, being able to point to the incorporation of any of their rules into the arbitration clause of a party's contract may be "clear and unmistakable" evidence of intent to have the arbitrator decide arbitrability on its own.

While incorporation of the rules of these arbitration providers may significantly increase the likelihood that courts will defer to the arbitrator to decide arbitrability, it is not bulletproof. For example, in *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 758-66 (3d Cir. 2016), though the parties incorporated the AAA rules into their contracts underlying their class action dispute, because the contracts did not explicitly provide for class arbitration, incorporation of the AAA rules alone was not "clear and

-Continued on page 14-

unmistakable” evidence of intent to arbitrate arbitrability. In considering whether the agreements to allowed for class arbitration, the court found that the contracts could be read to speak only to issues related to bilateral arbitration because they consistently used singular and defined terms to describe respective parties to any arbitration proceeding and dispute to be arbitrated, despite that the AAA rules cover class arbitration. *Id.*

### **Does the Parties’ Conduct Before or Following Execution of Their Contract Evidence Consent to Arbitrate Arbitrability?**

The absence of any contractual language evidencing “clear and unmistakable evidence” of the parties’ intent to arbitrate arbitrability strongly suggests the court will decide arbitrability disputes. But that outcome is not guaranteed. The parties’ conduct may reflect consent to arbitrate arbitrability regardless of their written contract. *See, e.g., Patton v. Johnson*, 915 F.3d 827, 835 (1st Cir. 2019) (even without a contractual agreement, “a court must defer to an arbitrator’s arbitrability decision when the parties submitted that matter to arbitration.”) (citing *First Options of Chi.*, 514 U.S. at 943); *Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1105 (2d Cir. 1991) (“[A]n agreement [to arbitrate] may be implied from the party’s conduct.”); *OMG, L.P. v. Heritage Auctions, Inc.*, 612 Fed. Appx. 207, 210 (5th Cir. 2015) (“[B]y their actions, the parties may agree to arbitrate disputes that they were not otherwise contractually bound to arbitrate.”).

For example, in *Patton*, a party claimed that a JAMS arbitrator’s arbitrability decision was invalid because “that issue already had been resolved by the Texas state court when it rejected the jurisdictional challenges [of the parties],” while the opposing party argued that, *though* the parties had briefed the issue before the court, they agreed to have an arbitrator make the final decision. *Patton*, 915 F.3d at 835-36. The opposing party pointed to the facts that each of the parties previously submitted briefs to a JAMS arbitrator in the same dispute concerning the issue of whether the claims asserted were arbitrable, and none of the parties questioned or challenged the arbitrator’s authority to decide that issue. *Id.* Nor did any party seek to vacate the arbitrator’s decision on such a ground. *Id.* Given that history, the court concluded that the parties clearly and unmistakably accepted the proposition that the arbitrator possessed the requisite authority to determine whether the claims were arbitrable. *Id.*

Thus, even if the parties were never *contractually* bound to arbitrate arbitrability, the parties’ *conduct* can constitute an agreement to arbitrate arbitrability.

### **Conclusion and Takeaway**

When an opposing party seeks to block an arbitration and force litigation by challenging the arbitrability of the claims brought by the party seeking arbitration, the party seeking arbitration would benefit from having that challenge decided by an arbitrator rather than the court. For a court to defer to the arbitrator on the arbitrability issue, the party seeking arbitration generally *must* establish “clear and unmistakable evidence” that the parties intended to arbitrate arbitrability. There are several arguments the party seeking arbitration can make to establish this requirement, as it is not yet settled what exactly is required for “clear and unmistakable evidence.”

Where there is an arbitration clause in the contract upon which a controversy arises, the party *seeking* arbitration may have an argument that the arbitration clause itself is “clear and unmistakable” evidence that the parties intended to arbitrate arbitrability. Because the decision of who decides arbitrability is a matter of contract interpretation, the more express the contract is as to delegating the issue of arbitrability to an arbitrator, the more likely that outcome is. However, some courts find inclusion of arbitration clause language recommended or supplied by an arbitration service provider that itself directs arbitrability issues to the arbitrator, or even the sole incorporation of such an arbitration service provider’s rules for any claims brought under the contract, to be “clear and unmistakable” evidence of the requisite intent on its own. Finally, even when nothing in the contract binds a party to have an arbitrator decide arbitrability, a party may imply a binding agreement to arbitrate arbitrability through its conduct.

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