ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

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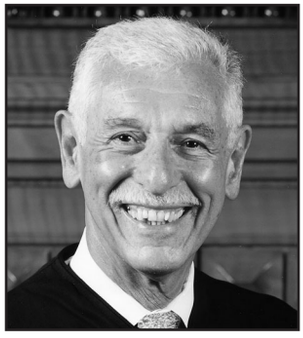
How the Ninth Circuit Works on Your Appeal

Although I argued my first case in the Ninth Circuit in 1959, I have been on the receiving end of appellate briefs for only two years. I thought I would pass on some suggestions about how to make your briefs more effective, from the point of view of a judge who reads them.

First, keep in mind the number of cases we review. Approximately 14,000 cases are filed in the Ninth Circuit each year. While a large percentage are determined by our screening and motions procedure or settled through our mediation program, each panel of judges sitting for a week hears 35 to 40 cases for determination. There is not much time to plow through briefs to get to the meat of the issues. I would like to take you through the process by which three-judge panel opinions are decided. First, the most common mistakes:



Hon. Carlos T. Bea

Frequently Dropped Balls

One of the most common mistakes counsel make is to file the notice of appeal or petition for review too late. In civil cases, the notice of appeal must be filed within 30

Continued on page 8

Also in this Issue

Litigating Against a Party That Files Bankruptcy

You've prepared your case for trial, and you're set to go. Then, it happens. The other side files bankruptcy. Now what?

Nothing can be more frustrating or challenging than the other side playing the "bankruptcy card." Apart from the obvious potential for more cost and delay, you now could find yourself in the strange land of bankruptcy court, waist deep in the highly specialized area of bankruptcy practice. This article will review the major concepts that every litigator needs to know about bankruptcy, discuss some of the potential trouble spots to avoid, and offer practical tips to ensure that you successfully navigate the bankruptcy process.

Robert S. Gebhard

Automatic Stay

Most attorneys have heard of the automatic bankruptcy stay, but a basic understanding of what it is and when it applies becomes critical when your opponent files bankruptcy. The automatic stay arises by operation of law upon the filing of bankruptcy. The stay acts as a nationwide injunction, and it protects both the debtor and property of the debtor's bankruptcy estate.

The automatic stay is self-executing and effective immediately upon the bankruptcy filing, even without prior notice to your client. Actions taken in violation of the stay — unknowingly or otherwise — are automatically void. The automatic stay is quite broad in scope as it is designed to give the debtor a "breathing spell" from creditors and protect the estate from piecemeal liquidation by creditors. With regard to litigation matters, the bankrupt-

Continued on page 2

Continued from page 1

Litigating Against a Debtor

cy code expressly provides that the stay prohibits the commencement or continuation of judicial, administrative or other actions against the debtor of the bankruptcy estate. 11 U.S.C. Section 362(a).

Sanctions

The stay is enforceable by the bankruptcy court, and actions taken in knowing violation of the stay may subject you and your client to sanctions, including attorneys' fees and punitive damages. Ignorance of the stay is no defense because any action taken with knowledge of the bankruptcy generally will suffice.

Many attorneys may assume that the stay means they need only refrain from taking any further steps with regard to their pending action against the debtor. They would be sadly mistaken, for the Ninth Circuit has confirmed that the stay imposes an affirmative duty upon a party to dismiss or stay a pending collection action against the debtor. *Eskanos & Adler v. Leetien*, 309 F.3d 1210, 1214 (9th Cir. 2002). Thus, any delay in dismissing the collection action may subject you and your client to sanctions for violating the stay. *Id.* at 1215.

Basic Test: Offense vs. Defense

One might assume that the filing of a bankruptcy would put a hard stop to any and all litigation in which the debtor is a named party. Not so. The stay only prohibits your client from commencing or continuing to prosecute an action *against the debtor*; it does not preclude your client from responding to an action *commenced by the debtor*. Thus, the stay would not preclude your client from answering the debtor's complaint; nor would it preclude your client from filing pre- or post-trial motions, or filing an appeal, in an action commenced by the debtor. For this reason, you should not assume that your opponent's bankruptcy filing automatically tolls the period for undertaking actions on behalf of your client in an action commenced by the debtor.

Multiple Claims or Parties

The Ninth Circuit applies a "disaggregation test" in which each claim, cross claim, counterclaim, or third party claim is reviewed independently to determine whether the commencement or continuation of further proceedings on the particular claim amounts to an offensive, rather than defensive, action against the debtor. *Parker v. Bain*, 68 F.3d 1131, 1137-38 (9th Cir. 1995). In applying this test, it does not matter who originally filed the action.

The filing of a bankruptcy also will not stay the continuation of litigation against the other non-debtor parties to the action. In short, the automatic stay does not prohibit your client from pursuing guarantors, sureties, corporate affiliates, or other non-debtor parties who are liable on the debts of the debtor. The stay will not protect these co-defendants even if your client will have to litigate similar claims against the debtor.

The automatic stay also does not preclude your client from propounding discovery to the debtor to gather evidence for separate claims against non-debtor parties, even if the information could later be used against the debtor. *In re Miller*, 262 B.R. 499, 507 (9th Cir. BAP 2001).

Relief from Stay

The bankruptcy court has the power to grant your client relief from stay to continue litigating the matter. This requires the filing of a motion for relief from stay in the bankruptcy court.

The bankruptcy court often considers a variety of factors when reviewing your motion, including: (1) whether granting relief to allow litigation to conclude outside of bankruptcy court will promote judicial economy; (2) whether state law or other non-bankruptcy issues predominate in the pending litigation; and (3) whether the relief will unduly interfere with the administration of the bankruptcy case. The bankruptcy court also will balance the hardship to the debtor or bankruptcy estate in having to litigate your client's claims outside of bankruptcy court — as opposed to the more summary bankruptcy procedures — against the potential prejudice to your client if the matter is not allowed to proceed.

What happens if the debtor delays filing bankruptcy until after the conclusion of the trial? Do you still need to file a motion for relief from stay so the judgment can be entered? Here, the answer is not quite as clear. The Ninth Circuit has adopted the so-called "ministerial act" exception to the automatic stay. *In re Pettit*, 217 F.3d 1072, 1080 (9th Cir. 2000). Pursuant to this judicially created exception, purely administrative or ministerial acts undertaken by a court clerk after a decision on the merits has been rendered are not stayed because they do not constitute a "continuation" of a judicial proceeding. However, this test has thus far been narrowly applied. *See In re Conceicao*, __ B.R. __, 2005 WL 2160035 (9th Cir. BAP 2005).

Annulment

What happens if your client (or you) already has inadvertently violated the stay by continuing to prosecute the action after the bankruptcy is filed? The bankruptcy court has the power to annul the stay and, thereby, retroactively validate your client's actions. Though the Ninth Circuit has cautioned that annulment is appropriate only in "extreme circumstances," the majority of reported decisions have applied a test more akin to a balancing of equities of which the following three factors control: (1) whether the non-debtor party was aware of the bankruptcy filing; (2) whether the debtor engaged in unreasonable or inequitable conduct; and (3) whether the non-debtor party otherwise would be entitled to relief from stay on a prospective basis.

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Continued from page 2

Litigating Against a Debtor

Stipulations

Sometimes, the debtor or bankruptcy trustee may stipulate to relief from stay to allow the matter to go forward. However, they may seek to condition their stipulation upon an agreement either that no resulting judgment may be enforced against the estate without further order of the bankruptcy court, or that such judgment only will be enforceable against the debtor's available insurance. The stipulation must be approved by the bankruptcy court before it becomes effective.

Special care should be taken in drafting the stipulation to include a provision which makes the stipulation binding upon any subsequently confirmed Chapter 11 plan. Failure to do this can result in the unpleasant surprise of your client's hard-fought victory later being compromised or nullified by the debtor's subsequent, confirmed plan. *See In re Allen*, 300 F3d 1055, 1060 (9th Cir. 2000) (confirmed plan enabled debtor to retain property notwithstanding prior stipulated order granting secured creditor relief to foreclose on property).

Removal

The debtor also may seek to remove your client's state court action to the bankruptcy court for final disposition. Then what?

Removal to the bankruptcy court is accomplished by a two step process in which the state court action first is removed to the federal district court in which the state court action is pending and then transferred by the district court to the bankruptcy court in which the bankruptcy case was filed. Pursuant to the bankruptcy removal statute, any party may remove the action provided there is a basis for assertion of federal, bankruptcy jurisdiction. 28 U.S.C. Section 1452(b). The basic test for bankruptcy jurisdiction is whether the outcome of the lawsuit could conceivably have any effect on the bankruptcy case or estate, which is usually the case.

However, if the matter stays in bankruptcy court, the bankruptcy court cannot conduct a jury trial without the consent of all parties. 28 U.S.C. section 157(e). In addition, the bankruptcy court can only render a final judgment in a so-called "core" bankruptcy proceeding. Core proceedings are enumerated, but not exhaustively defined, by federal statute. 28 U.S.C. 157(b). Generally speaking, a core proceeding is a proceeding that invokes a substantive right created by the bankruptcy code or one that could only arise in the context of a bankruptcy case.

If the matter is deemed to be a "non-core" proceeding, then, absent consent by the parties, the bankruptcy court will act more like a magistrate or special master, issuing proposed findings of fact and conclusions of law for *de novo* review by the district court. The bankruptcy court also has no power to adjudicate personal injury tort or

Continued on page 6

Motions to Stay: Fifth Amendment Rights v. Civil Discovery

An individual defendant served with discovery in a civil action who is also a defendant, or the subject of an investigation, in a criminal action arising out of the same facts and circumstances, faces a Hobson's choice. He or she can either waive the Fifth Amendment privilege by responding to the discovery, or assert the Fifth Amendment privilege and face a potential finding of civil liability. In this situation, the individual defendant should consider seeking a stay of discovery in the civil action until the criminal issues are resolved.

This article will address why a discovery stay may be important for the individual defendant in these circumstances, legal support for discovery stays, who may seek discovery stays, how to evaluate when it is appropriate to seek a discovery stay, and how to seek a discovery stay.

Caroline McIntyre

Why Seek a Discovery Stay?

Forcing an individual defendant to respond to discovery in a civil case, when he or she is either a criminal defendant, or the subject of a criminal investigation, arising out of the same facts and circumstances as the civil case, could cause extreme prejudice. For example, different scopes of discovery apply under civil and criminal rules of civil procedure. It is possible the government could obtain, through monitoring the civil action, incriminating information it could not otherwise obtain under the rules of criminal procedure. This could unfairly prejudice the individual defendant. "To allow the prosecutors to monitor the civil proceedings hoping to obtain incriminating testimony from [the individual defendant] through civil discovery would not only undermine the Fifth Amendment privilege but would also violate concepts of fundamental fairness." *Pacers, Inc. v. Superior Court*, 162 Cal. App. 3d 686, 690 (1984).

In addition, individuals who object to discovery in the civil action based on the Fifth Amendment privilege may be subject to motions to compel further responses. This places the civil court, that is not as familiar with the issues in the criminal action, in the position of determining whether or not the individual defendant can continue to assert the Fifth Amendment privilege, or must provide a further response in the civil action. A seemingly innocuous response in the civil action could potentially waive the individual defendant's privilege with respect to an

Continued on page 4

Continued from page 3

important issue in the criminal action.

Also, where an individual defendant objects to discovery in a civil action based on the Fifth Amendment privilege, some courts have precluded those individuals from testifying or presenting evidence in the civil action, or have allowed an adverse inference to be drawn against the individual. Such penalties for asserting the Constitutional right to remain silent may lead to verdicts in the civil cases that would not otherwise occur if the individual could testify unburdened by the criminal proceeding. If the civil verdict results in a substantial monetary judgment against the individual defendant, that could deplete, or in some cases, completely eliminate, resources that could otherwise be used to defend the criminal action. This, in turn, could lead to a criminal judgment that might not otherwise have occurred — a catastrophic result.

A temporary discovery stay, until expiration of the relevant statute of limitations, or resolution of any pending criminal proceedings, addresses all of these concerns.

Legal Support for Discovery Stays

Pacers, Inc. v. Superior Court, 162 Cal. App. 3d 686 (1984), is the seminal authority in California for seeking a discovery stay when the Constitutional protections of the Fifth Amendment collide with the ability to defend oneself in a civil action. In *Pacers*, the trial court forbade the petitioners from testifying at trial because they had asserted their Fifth Amendment rights during their depositions and remained silent. *Id.* at 688. The appellate court found that this impermissibly forced the petitioners to choose between silence and a "meaningful chance of avoiding the loss through judicial process of a substantial amount of property." *Id.* at 689. Where a defendant's silence is constitutionally guaranteed, courts should fashion a remedy that recognizes both the privilege to remain silent and "the inherent unfairness of compelling disclosure of a criminal defendant's evidence and defenses before trial." *Id.* at 690. The court concluded that "[a]n order staying discovery until expiration of the criminal statute of limitations would allow real parties to prepare their lawsuit while alleviating petitioners' difficult choice between defending either the civil or criminal case." *Id.* The appellate court issued a writ of mandate directing the trial court to stay the petitioner's depositions until the expiration of the applicable five-year criminal statute of limitations. *Id.* at 687-88, 690-91.

Other California courts have recognized discovery stays as possible solutions to an individual defendant's dilemma of choosing between assertion of his Constitutional rights and adequately defending a civil action. *See Fuller v. Superior Court*, 87 Cal. App. 4th 299, 309-10 (2001); *Avant! Corporation v. Superior Court*, 79 Cal. App. 4th 876, 882-83 (2000) (recognizing application of Pacers discovery stay to individual, but not corporate, defendants).

Similarly, in *Perry v. McGuire*, 36 F.R.D. 272 (S.D.N.Y. 1964), a civil case alleging securities fraud, the federal district court addressed a defendant's motion for a stay of discovery until the termination of pending criminal proceedings involving substantially the same charges of securities fraud found in the civil complaint. *Id.* at 273. The court found that given the claims of fraud and deceit in the civil action, and the pending criminal proceedings, "it seems clear that to require [defendant] to respond to over 100 interrogatories at this time would be oppressive and would infringe on his constitutional rights." *Id.* The court stayed the defendant's obligation to answer the interrogatories and the defendant's and plaintiff's scheduled depositions pending the determination of the criminal proceedings. *Id.* at 274.

Who May Seek a Discovery Stay?

An individual defendant seeking a *Pacers* stay of discovery need not prove that he is a defendant in a criminal action, or the subject of a criminal investigation. *Pacers*, 162 Cal. App. 3d at 689 (stay of civil discovery granted despite federal grand jury's refusal to issue indictment against petitioners). Instead, it "need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered, might be dangerous because injurious disclosure could result." *Blackburn v. Superior Court*, 21 Cal. App. 4th 414, 427-28 (1993).

Corporations, on the other hand, which do not have the right to assert the Fifth Amendment privilege in response to discovery, have been denied stays of discovery. *Avant!*, 79 Cal. App. 4th at 883-84.

Evaluating Whether a Discovery Stay Is Appropriate

In evaluating whether a *Pacers* discovery stay is appropriate, the individual defendant should review the discovery requests in the civil action to determine whether there is a basis to assert the Fifth Amendment. If the individual defendant has only been served with a deposition notice, then he should compare the allegations in the civil complaint with allegations in the criminal complaint or the topics of any criminal investigation, to ascertain whether it is likely that deposition questions will be asked implicating the Fifth Amendment privilege.

The Fifth Amendment privilege against self-incrimination provides, generally, that a witness may refuse to testify if the answer would tend to incriminate the witness. ("No person…shall be compelled in any criminal case to be a witness against himself." U.S. Const., Amend. V.) The privilege applies in any proceeding, civil or criminal. *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972). In order for the privilege to apply to a demand for information, the information sought must be: (1) incriminating; (2) personal to the defendant; (3) obtained by compulsion; and (4) testimonial or communicative in nature. *Izazaga v. Superior Court*, 54 Cal. 3d 356, 366 (1991).

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Continued from page 4

Motions to Stay

The information sought does not have to be directly incriminatory. The information is considered incriminatory if it might provide a link in the chain of evidence of guilt. *See Hoffman v. United States*, 341 U.S. 479, 486 (1951). As the Supreme Court stated in *United States v. Hubbell*, 530 U.S. 27, 38 (2000), "[c]ompelled testimony that communicates information that may 'lead to incriminating evidence' is privileged even if the information itself is not inculpatory." *See also People v. Lucas*, 12 Cal. 4th 415, 454 (1995) ("[w]itnesses may refuse to answer questions calling for a potential link in a chain of evidence of guilt, as well as questions calling for clear admissions against penal interest.") The act of producing documents may constitute a testimonial act that could provide a link in a chain of incrimination. *Hubbell*, 530 U.S. at 41-42 (providing a catalog of existing documents fitting within any of the 11 broadly worded subpoena categories could provide a prosecutor with a "lead to incriminating evidence," or "a link in the chain of evidence needed to prosecute.")

Some courts have considered other factors, such as prejudice to plaintiff, in determining whether to grant a motion to stay discovery. In complex litigation involving multiple defendants, such as securities litigation, the prejudice to plaintiff from a discovery stay may be minimal, as plaintiff may be able to proceed with discovery against other defendants and third parties during the discovery stay. On the other hand, prejudice to the individual defendant if a discovery stay is denied includes electing either to waive the Fifth Amendment privilege, or assert the privilege, thereby compromising the ability to adequately defend the civil action. The individual defendant in these circumstances should generally be able to present a compelling argument to stay discovery. As the *Pacers* court stated: "We recognize postponing [defendants'] depositions…will cause inconvenience and delay to [plaintiffs]; however, protecting a party's constitutional rights is paramount." *Pacers*, 162 Cal. App. 3d at 689-90.

Preparing Motions to Stay Discovery

The motion to stay discovery should reference: (1) law supporting the motion to stay; (2) circumstances necessitating a stay, including reference to any pending criminal action or investigation against the individual defendant, and an explanation of how discovery in the civil action overlaps with the criminal action or investigation; (3) whether the individual defendant will suffer a particularly significant loss from any judgment against him in the civil action; and (4) any contention that plaintiff can obtain discovery from other sources before requiring the individual defendant to respond to discovery. A declaration attaching the relevant discovery requests, and outlining efforts to resolve the dispute informally, also should be included.

While individual defendants seeking a discovery stay should emphasize the constitutional burden on them, and address any prejudice or lack of prejudice to plaintiff, it also is useful to address three additional factors that the *Avant!* court identified as relevant to the consideration of whether to stay discovery: (1) convenience of the court in managing its cases; (2) interests of persons not parties to the civil litigation; and (3) the interest of the public in the pending civil litigation. *See Avant!*, 79 Cal. App. 4th at 887. With respect to convenience of the court, the individual defendant should consider addressing whether the parties and the court will be forced to evaluate the individual defendant's assertion of the Fifth Amendment in response to multiple discovery requests, thereby inconveniencing the court and wasting judicial resources, and whether denial of a motion to stay discovery may also result in duplicative depositions and discovery responses — before and after the criminal proceedings are resolved. Individual defendants likely will be able to assert that the interest of the public in resolution of the criminal proceedings is greater than resolution of the civil proceedings, and that resolution of the criminal proceedings may determine the role of the individual defendant in the alleged actions, potentially streamlining the civil action. Finally, the public has an interest in protecting the constitutional rights of individuals.

The motion should reference the length of stay, such as staying discovery until the expiration of the applicable criminal statute of limitations or the resolution of any criminal proceedings. This length of discovery stay is optimal because it allows the individual defendant to offer testimony in the civil action on his or her own behalf without compromising the criminal defense.

In the alternative, to the extent the court may have concerns regarding the length of stay requested, the individual defendant could ask for a temporary stay, to be reviewed by the court after a period of months. At that time, the court may consider whether plaintiff still has opportunities to obtain discovery from other sources, and whether the prejudice to plaintiff in keeping the discovery stay in place outweighs the prejudice to the individual defendant if the discovery stay were lifted.

Conclusion

When an individual defendant's right to assert the Fifth Amendment privilege in response to civil discovery collides with the ability to defend a civil lawsuit, a stay of discovery until expiration of the applicable statute of limitations or the conclusion of any criminal proceedings presents a practical solution. The discovery stay eliminates the Hobson's choice of either asserting the Fifth Amendment privilege or presenting a defense in the civil action. Although the civil plaintiff may suffer some prejudice by the delay in obtaining discovery, the prejudice often pales in comparison to the prejudice suffered by the individual defendant if a stay is not granted.

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Continued from page 3

wrongful death claims, and such claims must be adjudicated in the district court, if the matter is not remanded back to state court.

Remand

Upon successful removal of the action to bankruptcy court, your client then must consider whether to allow the action to be tried in bankruptcy court or to seek a remand of the action to the state court.

If the matter predominantly involves non-core matters or jury trial rights, your client also may seek to withdraw the action to the district court for trial. You will need to file a motion to "withdraw the reference" pursuant to 28 U.S.C. section 157(d), and the district court will decide the motion after considering a number of discretionary factors, including your client's jury trial rights and the effect of the action upon the administration of the bankruptcy case.

A paramount consideration is your client's right, if any, to a jury trial. Bankruptcy judges rarely, if ever, conduct jury trials and, in any event, cannot do so without the consent of all parties. If state law issues predominate, or the matter was close to trial before the bankruptcy filing, you should consider moving quickly to remand the action back to the state court where the presiding judge may be more knowledgeable about the applicable state law or already familiar with your case based on the pre-trial proceedings.

However, you may want to proceed in bankruptcy court if you perceive an advantage in trying the matter before a judge on a more expedited basis, with the attendant cost savings of a bench trial. On the other hand, your client may perceive that bankruptcy court offers a "home court" advantage for the debtor. Your task as the lawyer is to gather as much information as possible about the presiding bankruptcy judge and to counsel your client accordingly.

If you decide to seek remand, you may file the motion either with the district court to which the action was removed (if the district has not already transferred the matter to the bankruptcy court), or with the bankruptcy court. The reviewing court is vested with broad discretion to remand the action on "any equitable ground." 28 U.S.C. § 1452(b). The court will consider such factors as: (1) presence of jury trial rights; (2) extent to which state law issues predominate; (3) the potential effect of the action on the administration of the bankruptcy case; and (4) the potential prejudice to the non-removing party if the action is not remanded.

Preserving Your Client's Claims in Bankruptcy

Your opponent's bankruptcy filing also may require you to preserve your client's claims awaiting trial, by filing a proof of claim in the bankruptcy case and by continuing to track the progress of the bankruptcy case. For the unwary practitioner, this can be a minefield.

The bankruptcy court will set a bar date for the filing of claims, typically only a matter of months after the bankruptcy filing. The bankruptcy code broadly defines a claim to consist of any disputed, contingent or unliquidated right to payment, including certain equitable remedies. Failure to file a timely claim may cause your client's unsecured claim to be disallowed or subordinated, possibly yielding no recovery. Moreover, the claims for relief may be subject to the bankruptcy discharge.

The bankruptcy code has special rules with regard to the treatment of certain types of claims. There are limitations upon claims for attorneys' fees, unmatured interest, punitive damages, and breach of real property leases or employment contracts. The bankruptcy court also has the power to estimate any contingent or unliquidated claim, if the final determination of the claim would unduly delay the administration of the case. This is a powerful tool for the debtor, and it means that your opponent can seek to fix the amount of your client's claim in the bankruptcy, including final payment, without having to fully litigate the matter in state court.

All may not be lost, if you fail to file a timely claim. First, you may be able to file your claim after the bar date upon a showing of excusable neglect, particularly if your client did not receive timely notice of the bankruptcy filing or bar date notice. *See Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993). Second, the bankruptcy courts recognize "informal" proofs of claim, such as correspondence or other documents, as a substitute for the filing of a proof of claim, provided certain evidentiary requirements are met. Third and finally, your client still may be able to offset your client's damage claims against any recovery sought by the debtor in any post-bankruptcy litigation. *In re De Laurentis Entertainment Group, Inc.*, 963 F.2d 1269, 1276 (9th Cir. 1992).

On the other hand, there are clear, potentially adverse consequences to filing the claim. It will subject your client's claims to the equitable jurisdiction of the bankruptcy court. In so doing, you may be waiving your client's rights to a jury trial on the claims for relief, and on any counterclaims or other related claims that the debtor may assert against your client. Filing a claim also might be construed as opting into the claims allowance process in the bankruptcy court, at the expense of your state court trial.

Conclusion

Your opponent's bankruptcy filing undoubtedly will present challenges. The key to success is having a map of the basic bankruptcy concepts and procedures. In some cases, the best option may be consulting with an experienced bankruptcy attorney before plying the uncharted waters of the bankruptcy.

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On ANTITRUST

The Class Action Fairness Act of 2005 ("CAFA") is making it easier for defendants to coordinate the defense of indirect purchaser price-fixing claims. It also is federalizing state (including California) antitrust law relating to such claims.

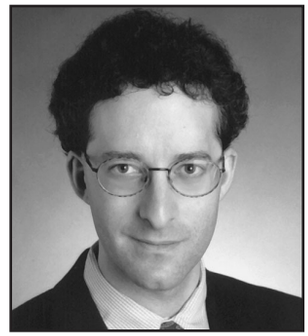
CAFA was enacted on February 18, 2005 (Pub. L. 109-2, 2005, § 5, 119 Stat. 14), and applies to all class actions commenced on or after the date of its enactment. *Id*. § 9. CAFA was enacted in response to the criticism that state courts (especially smaller and relatively unsophisticated state courts) were out of their depth in presiding over complex class actions affecting businesses and business practices on a nationwide scale. Prior to CAFA, various restrictions on removal of state cases to federal courts often made these class actions unremovable. For example, complete diversity between plaintiffs and defendants was required, and there were often sharp limits on aggregating class members' claims to satisfy the amount-in-controversy requirement.

CAFA relaxed the removal restrictions in several ways. CAFA amended the diversity removal statute (28 U.S.C. § 1332) by adding new subsection (d). Under new Section 1332(d), a district court "shall have" original jurisdiction of a class action with 100 or more members if, *inter alia*, the amount in controversy exceeds $5 million, and *any member* of the plaintiffs' class is a citizen of a state different from *any* defendant. *See* Section 1332(d)(2). Moreover, in any class action, CAFA specifies that the claims of the individual class members "shall" be aggregated in applying the amount in controversy requirement. *See* Section 1335 (d)(6). CAFA also eliminated the requirements that all defendants must consent to removal and that a diversity case must be removed within one year after commencement of the action. *See* Section 1453(b).

CAFA imposed some limits on this newly expanded federal court jurisdiction. For example, if more than one-third but less than two-thirds of the members of the plaintiff class and the primary defendants are citizens of the state where the action was initially filed, the district court may, "in the interests of justice and looking at the totality of the circumstances," decline to exercise jurisdiction. Section 1335(d)(3). And if more than two-thirds of the plaintiff class members are citizens of the state where the action was initially filed, and one of several other factors is also met (*e.g.*, the "primary" defendants are also citizens of that state), the district court "shall" decline jurisdiction. Section 1335(d)(4). *See* Cole, CAFA: A Changing Landscape, *ABTL Northern California Report*, Summer 2005, at 3 (www.abtl.org).

After CAFA, certain types of state law antitrust claims, which historically have been litigated in state courts, now are likely to be litigated in federal court. Under federal antitrust law, there is a sharp dichotomy between the price-fixing claims of so-called direct purchasers (who bought product directly from the defendants) and those of indirect purchasers (who bought product via a middleman, or some series of middlemen). In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the U.S. Supreme Court held that indirect purchasers cannot bring price-fixing claims under the Sherman Act. The Supreme Court subsequently decided that state antitrust law could allow indirect purchaser suits. *See California v. ARC America Corp.*, 490 U.S. 93 (1989). As a result, at least since these decisions, federal courts (which have exclusive jurisdiction over Sherman Act claims) have presided over direct purchaser class actions, while state courts in those states that allow indirect purchaser claims have usually presided over indirect purchaser class actions.

CAFA changes this landscape. For example, a typical indirect purchaser price-fixing case concerning widgets is likely to be removable under CAFA. Since most indirect purchaser cases are styled as class actions, district courts in states from Arizona to Vermont will now be interpreting their own states' indirect purchaser laws, while state courts in those states may have few, if any, future opportunities to do so.



Howard Ullman

Moreover, federal courts in one part of the country will now be interpreting the antitrust laws of states in a different part of the country. For example, in an alleged nationwide scheme to fix the price of widgets, plaintiffs may bring indirect purchaser suits in California as well as in a number of other states. Under CAFA, these suits will now be removed to federal court. Once removed, they will likely be consolidated and transferred to a single district court by the Judicial Panel on Multidistrict Litigation. As a result, a single district court — say in Iowa, Idaho, or West Virginia — may end up with indirect purchaser class actions from twenty or more states, including California.

The full impact of these developments remains to be seen. For one thing, it is not clear whether district courts have the appropriate resources, or will take the necessary time, to sort out complex state law issues in cases from multiple states.

On the other hand, CAFA also has positive implications, at least for antitrust defendants. In the pre-CAFA world, defendants would often face one set of federal, direct purchaser lawsuits, and another set of state, indirect purchaser lawsuits. While the federal suits would often go to the MDL panel, the state suits would not. By allowing the indirect suits to be removed and ultimately MDL'ed, CAFA will reduce the litigation burden on defendants and make it easier for them to coordinate multiple proceedings.

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Continued from page 1

Your Ninth Circuit Appeal

days from the time the judgment is entered, or 60 days if the United States or one of its officers or agencies is a party. Fed. R. App. P. 4(a). One important exception to the 60-day rule is that a petition for review in an immigration case must be filed within 30 days of the date the Board of Immigration Appeals files its order and sends it to the petitioner, not 30 days from when the petitioner receives it. 8 U.S.C. § 1252(b)(1).

In criminal cases, the defendant's notice of appeal must be filed within just 10 days from the time the judgment is entered or the filing of the government's notice of appeal, unless the district court grants an extension. Fed. R. App. P. 4(a). And the district court can only grant an extension if good cause is shown and the notice of appeal and request for an extension are filed within 40 days of the date the judgment is entered. *Id*.

These deadlines are statutory! If you are late — call your malpractice carrier; our hands are tied.

Other common mistakes usually happen because counsel is not familiar with the statutory limitations on this court's jurisdiction related to the subject matter of the appeal. For instance, if you appeal the denial of a petition for writ of habeas corpus, you must obtain a certificate of appealability from either the district court or the court of appeals for each issue you wish to raise. 28 U.S.C. § 2253.

Many statutes bar our court's consideration of issues, especially in the immigration area, so look for substantive jurisdictional bars, as well as procedural bars.

Read the Ninth Circuit's Rules of Court and its General Orders, in addition to the Federal Rules of Appellate Procedure. They are available on the court's web site. The rules tell you quite a bit about how the court works internally.

Brief Writing

Write like a good Associated Press reporter. Put your best argument first. You only need one good issue to prevail. And you want the reader to consider your best argument before they get interrupted and set down your brief.

All good newspaper editors and novelists understand the importance of "hooking" the reader. The editors do it with memorable "leads." Dickens did it by evoking an era: "It was the best of times, it was the worst of times…." Your lead should hook the judge by directing his or her attention to an interesting issue of law or astonishing result.

After your lead, tell us the procedural posture of the case in the very next sentence of your introduction. This tells us what we should focus on. Is it an appeal from a summary judgment? If so, you want us to look for a material issue created by the non-movant's statement of undisputed facts. Do not waste time discussing the pleadings; we will focus on admissible *facts* in the record. On the other hand, if you are appealing the dismissal of a complaint under Federal Rule of Civil Procedure 12(b)(6), the pleadings may be sufficient to reverse the lower court. Telling us the procedural posture of the case also helps focus your own mind on the salient question.

You must also tell us early on what the standard of review is for each issue, and then remember to analyze the case in terms of the applicable standard. Frequently, litigants analyze every issue as if the standard of review were *de novo*, and throw in the proper standard only as an afterthought. The standard of review should be one of the first things you research because it is the lens through which we must analyze the issue. We see an enormous number of cases where the appellants raise several issues they have no prayer of winning under the standard of review, thus diminishing the amount of time we can devote to the key issue in the case that might be a winner.

Your brief is not the only one we will read that day. On a typical day judges read memoranda from law clerks, draft opinions and dissents, and several petitions for rehearing *en banc*, in addition to many briefs. So get to the point — quickly. The shorter your brief is, the more likely the reader will carefully read each page. If someone who knows nothing about the case cannot read your brief and understand it in two hours or less (preferably less), it is way too long.

Most cases turn on one key issue. Stick to that one issue. At most, you should have two to three issues. Whenever we see a brief with numerous issues, our first thought is that there must not be any issues of real merit.

I require my law clerks to keep all bench memoranda to 24 double-spaced pages or less, and I am one of the most generous judges in that regard. Anyone can write a 50 page brief, but virtually no one has 50 *good* pages in them.

We can research the law. What we do not know, and what we count on you for, is a thorough and accurate recitation of the record. Your statement of facts should read like a story. Above all, you must be honest — scrupulously honest — and accurate. Do not refer to matters that are outside the record. Support every sentence with a citation to the precise pages in the Excerpts of Record where the evidence was introduced. Do not simply cite to the district court's findings of fact. Do not include a citation to the witness' entire testimony. Searching the record because a pinpoint citation was not given is perhaps the most frequent way in which a law clerk's time is wasted.

When compiling your Excerpts of Record, make sure the decisions of all lower courts that have ruled on the case are included at the beginning. Also, place an index in the front of each volume and bind the volumes so they can be ripped apart easily for inclusion in a judge's bench book. Do not include documents that are not necessary to the decision.

Do not ignore facts that are not in your client's favor — your opponent certainly won't. If you do ignore the bad facts, then all we hear is your opponent's explanation.

Continued on page 10

JAMES YOON

On PATENTS

For years, courts have searched for a practical standard to interpret patent claim terms in a consistent and predictable manner. The courts hoped that such a standard would be easy to apply, reduce unnecessary litigation, and increase confidence in the judicial process. They are still searching. The standards of claim construction provided by the Federal Circuit have not provided the district courts with the tools they need to reliably interpret patent claims in a manner that survives appellate review.

The absence of a reliable standard for claim construction has greatly increased the uncertainty of patent litigation. A patent claim is intended to put the public on notice regarding the nature and scope of a claimed invention, thereby enabling patent owners and potential licensees to determine the value of the claimed technology and reach reasonable settlements. However, today, patent litigants fail to mediate or negotiate settlements early in litigation because it is impossible to develop a common understanding regarding the patent claim and the relative strength and weaknesses of their opposing claim construction positions.

Faced with millions of dollars in litigation costs, clients understandably require their attorneys to predict how a court will interpret key claim terms so that they will be able to predict the likely outcome at trial. Clients asserting patents against a competitor demand predictions regarding whether a court will interpret patent claim terms in a manner that supports the novelty and validity of their invention. Clients accused of patent infringement demand predictions regarding whether a court will interpret claim terms in a broad manner to cover their products. How can a patent attorney provide a reliable claim construction prediction?

Unfortunately, the doctrines of patent claim interpretation frequently preclude attorneys or even district courts judges from predicting how the Federal Circuit will rule on claim construction. These doctrines are comprised of contradictory maxims that provide little guidance regarding how they should be applied in real world situations. For example, the case law instructs judges to "read claims in light of the specification" but that it is improper to "read limitations from the specification into the claims." The case law further declares that the scope of claim terms should only be limited by the specification where there is a "clear disavowal" of coverage in the specification but, nevertheless, a specification may be used to define a claim term by "implication." It is no wonder that the Federal Circuit reverses district court claim constructions over 40% of the time, and that certain judges in the Federal Circuit have declared claim construction to be "interpretative necromancy."

In July 2005, the United States Court of Appeals for the Federal Circuit issued its long awaited *en banc* decision in *Phillips v. AWH Corporation*. Over thirty *amici curiae* briefs from legal groups and technology companies were filed in the case. The case focused on resolving a divide in the Federal Circuit regarding the methodology courts should use when interpreting a patent claim term: the *Texas Digital* line of cases that emphasized the use of dictionaries to determine the presumed meaning of a claim term; or the older *Vitronics* line of cases that emphasized a whole text approach that determined the meaning of a claim term by analyzing how the term was used in the patent claim, the patent specification, and the patent prosecution history.

In *Phillips*, the Federal Circuit repudiated the *Texas Digital* line of Federal Circuit cases. Reaffirming the *Vitronics* approach, the court ruled that patent claims are part of a "fully integrated written instrument" and that claim terms should be given their meaning in the context of the entire patent including the claim and patent specification. Nice in theory, but difficult in practice. The frustrated dissenting judges in *Phillips* declared that reaffirming the "fully integrated written instrument" approach was "akin to rearranging the deck chairs on the Titanic."

James Yoon

Did *Phillips* change anything regarding the predictability of claim construction? Yes and no. At one level, *Phillips* improved predictability of the litigation process by ending the Federal Circuit's internal dispute regarding what standard should be used in interpreting claim terms. At a more fundamental level, however, *Phillips* did not enhance predictability of substantive patent law. The now rejected *Texas Digital* line of cases was a failed attempt by a group of judges in the Federal Circuit to improve upon the older, now re-established written instrument approach to claim construction. It was unacceptable to the *Texas Digital* judges that the Federal Circuit was reversing district court claim interpretations in such a high percentage of appeals. The *Texas Digital* judges hoped (incorrectly) that the dictionary approach would provide certainty in patent law.

By re-establishing the written instrument approach to patent claim construction, the Federal Circuit maintained the status quo. Although well-reasoned, the *Phillips* decision fails to resolve a fundamental defect in patent law. In theory, individuals (and companies) reading a patent should be able to understand the technology and design products that avoid infringing the claimed invention. But absent predictability in claim construction, there is no way for patents to meet their public notice function. Consequently, needless, time-consuming patent litigation will continue to be a fact of life for many companies.

Mr. Yoon is a partner with the Palo Alto office of Wilson Sonsini Goodrich & Rosati. jyoon@wsgr.com.

Continued from page 8

Your Ninth Circuit Appeal

Behind the Scenes: How the Court Functions

The Motions and Screening Process. All cases that are not settled through mediation are assigned a "weight," designed to reflect how much work the case is expected to require.

The Ninth Circuit's central pool of staff attorneys analyze most of the lower weighted cases through what is called the screening process. Cases are sent to the screening program only if the result is clear and oral argument would not assist the judges. Death penalty cases are never handled through the screening process.

One week each month, a panel of randomly chosen judges hears cases and motions presented orally by the staff attorneys and reviews proposed orders and memorandum dispositions. The parties do not participate in the conference. As many as 300 cases *and* 400 motions are decided in just one week, so very little time is devoted to any one case. Although the staff attorneys are peppered with questions about the law and record by the three-judge panel, the only person to look at your brief or the record in great detail may be a staff attorney. If you are presenting a novel argument or are in a new or developing area of the law, you will want to do some educating.

Calendars. If a case is not resolved through the screening process, it is set on an oral argument calendar. Panels are organized into week-long sittings, called "calendars." A calendar consists of about 35 to 40 cases. A three-judge panel is chosen at random to hear the group of cases. The composition of the panel is confidential until the week before oral argument.

The Law Clerk's Memoranda. Just as most of your briefs are written by associates, the first person who will read your brief is the writing judge's law clerk. The writing judge is the judge on the panel who is tentatively assigned to analyze the case and write a disposition.

Our law clerks are very talented but typically just out of law school. Do not presume they are experts in the law that applies to your case. This court's docket is made up of roughly 40% immigration cases, 20% criminal cases, 10% habeas petitions, and everything else falls into the remaining 30%. Your case may be the first one of its type the law clerk has ever analyzed. The writing judge's law clerk will write a memorandum to the panel, called a bench memorandum, summarizing the entire case and making a recommendation. Not all our judges share bench memoranda, but most do.

The law clerk must include the following in the bench memorandum: (1) the standard of review for each issue; (2) an analysis of whether the issues raised were preserved or waived in the trial court; (3) a summary of the legal rulings and factual findings of the court below; (4) an in-depth summary of the record with a citation to where the evidence was introduced; and (5) an analysis of the relevant law with a pinpoint citation to a case or statute. Be sure you cite to the Excerpts of Record on appeal, not the district court's record. If a document is relevant enough that you cite it in your brief, then it should be included in the Excerpts of Record. File Supplemental Excerpts of Record if needed. The judges may not read the briefs until they have read the bench memorandum, so you want to help the law clerk in their task any way you can.

Other than mass torts, what catches a law clerk's eye? A bizarre legal result; excessive damages; or an odd theory of causation, such as the case where a plaintiff sued on the theory that hearing the bell on the San Francisco cable cars caused her to become a nymphomaniac. She prevailed at trial. (No, really.)

Some non-writing judges assign a law clerk to write a comment memorandum after reading the bench memorandum, briefs and the record. The judges then take notes and reach their own tentative decision before oral argument. The judges rarely confer before oral argument.

Oral Argument

The person who wrote the brief and read the district court record should be the one to argue. Preparing for oral argument does not mean preparing a speech. The primary purpose is for you to be able to answer our questions.

If you know the record inside and out — as well as the facts, procedural history and holding of all relevant cases — you should do fine.

If you represent the appellant, you may want to reserve a few minutes for rebuttal. If you represent the appellee, realize that you are not required to use your time. If you are clearly winning, ask if there are any questions. If not, give your time back to the court. You can only lose the case at that point.

The Panel's Disposition

Following the day's oral arguments, the judges confer for the first time to determine the resolution of each case. The presiding judge then assigns the final writing responsibility, usually to the judge whose chambers prepared the bench memorandum if that judge is in the majority.

The writing judge prepares a disposition and circulates it to the other two panel members. When all the judges have voted, the writing judge files the disposition, along with any dissent or concurrence. A disposition is either unpublished (a memorandum disposition) or published (an opinion). Refer to Ninth Circuit Rule 36-2 for the factors determining whether a disposition is published.

If you lose the appeal, what can be done? Read my article in the upcoming Spring 2006 issue of the *ABTL Northern California Report* on how to win a petition for rehearing *en banc*.

Carlos T. Bea sits on the United States Court of Appeals for the Ninth Circuit, and is also a member of the Board of Governors of the Northern California Chapter of ABTL. *He gratefully acknowledges the assistance of his chief law clerk, Polly J. Estes, in preparing this article.*

MICHAEL SOBOL

On CLASS ACTIONS

In the current era of "tort reform" focused on protecting business — not consumer — interests, the California Supreme Court's unabashed statement of the "important role of class action remedies in California law," this past summer in *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 157 (2005), serves as a reminder that class actions continue to provide an important protection against corporate overreaching. The Court conveyed that in a case addressing the enforceability of a form contract's waiver of class action remedies, the stakes are high because class actions are "often inextricably linked to the vindication of substantive rights." *Id.* at 161. With that in mind, it held that a waiver of class action remedies which effectively exculpates an alleged wrongdoer is something California law just won't countenance.

In *Discover Bank*, plaintiff sued on behalf of a class of credit card customers who were allegedly assessed late payment fees for payments they actually made on time, albeit not until the *afternoon* of the due date. The defendant bank sent customers a "bill-stuffer" imposing an arbitration clause containing a prohibition against classwide arbitration. The bank moved to compel arbitration and to dismiss the class action. The trial court first granted the bank's motion in its entirety, but upon reconsideration in light of a decision by the Court of Appeal, ruled that the class action waiver clause was unconscionable, ordering the case to arbitration and leaving open the possibility for classwide arbitration. *Id.* at 155.

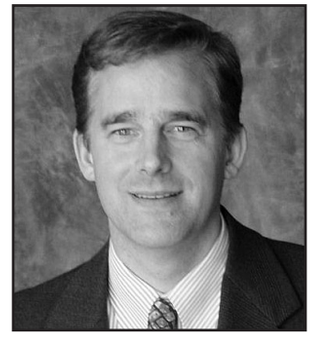
The Court of Appeal reversed the trial court, holding that the Federal Arbitration Act ("FAA") preempts California law to the extent it governs aggregation of claims in arbitration. The Supreme Court granted review. It reversed, reasoning that the FAA subjects arbitration clauses to state law contract defenses of general application, and that under California contract law, the prohibition against classwide arbitration was unenforceable.

The Legislature's declaration in Civil Code section 1668 that contracts which exempt one from responsibility for one's own fraud are against "the policy of the law," compelled the Court to its holding. The Supreme Court found that the bank's class action waiver constituted a self-exculpating contract clause because the only practical vehicle to redress the alleged fraud was a class action:

> [W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then…the waiver becomes in practice the exemption of the party "from responsibility for [its] own fraud, or willful injury to the person or property of another." Under these circumstances, such waivers are unconscionable under California law and should not be enforced. *Id.* at 162-63.

The impact of *Discover Bank* is significant. Companies conducting substantial business in California can no longer rely on arbitration clauses to avoid classwide adjudication. Even in cases involving consumer contracts that invoke another state's law, choice of law principles may nonetheless apply California contract law. That's because a class action may be the only way to protect the fundamental policy to police unfair business conduct in situations where California has a materially greater interest than other states. This is also true for cases pending in the federal courts, since the interpretation of these clauses is a matter of state contract and choice-of-law principles. In fact, the Ninth Circuit recently agreed with *Discover Bank*, including its take on the lack of FAA preemption. *See Tamayo v. Brainstorm USA*, 2005 U.S. Dist. Lexis 20669 (Sept. 21, 2005) (unpublished).

Further, since arbitration determinations are largely immune from reversal, businesses may not relish the idea of classwide arbitration. For that reason, business lawyers may think twice about inserting an arbitration clause when drafting form contracts. In disputes covered by existing arbitration clauses, it may now be too late, absent a stipulation, for businesses to avoid classwide arbitration.



Michael Sobol

Practically speaking, it may be wise to plead, and be ready to prove, specific facts regarding unconscionability of arbitration clauses or class action waivers. This means considering allegations that the costs of individual arbitration exceed a potential individual recovery, or that practical impediments of seeking an individual remedy outweigh the possible benefits of making that effort.

The Court's holding also logically extends beyond allegations of willful misconduct. Civil Code section 1668 voids contracts exempting a party from not only its own fraud, but also its "violation of law, whether willful or negligent." So, actions founded on defendants' alleged violation of law, such as those brought under the Unfair Competition Law or the California Consumer Legal Remedies Act should trigger the same protection as actions sounding in fraud. *See International Association of Mailbox Owners v. Superior Court*, __ Cal.App. 4th __ (Oct. 13, 2005) (remanding for possible classwide arbitration of claims brought under the UCL).

Let's be clear: *Discover Bank* holds that business interests cannot escape accountability for their own dishonest business practices by divesting consumers of the right to class action protection. While the case was decided on ordinary principles of statutory interpretation, it may well live on as a force against the trend of favoring corporate, not consumer, protections.

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Letter from the President

Business cases make up a small percentage of the docket in the trial courts, state and federal, but these cases generally take up more time and attention than most others. There are exceptions, of course. Heavy felonies, especially capital cases, probably outstrip any other kind of judicial business for sheer consumption of court resources. Overall, however, there is no question that our clients and our needs, as business trial lawyers, consume a disproportionate amount of judicial time and resources. With that reality comes a responsibility to advocate for increased court funding.

Jon B. Streeter

Complex case departments in state court, once considered an "experiment," are increasingly well-accepted around the state. We need more of these departments, with greater capacity. We need more programs like San Francisco's voluntary mediation program, in which parties can select a settlement conference before one of a panel of judges who devote the kind of time to a mediation that we generally see only with massively expensive private mediation. We need more courthouse technology that is specifically suitable to the kinds of cases we bring. And we need more courtrooms that are appropriately sized to large, multiparty cases.

There is a price for all of this. When the judiciary comes under budget-cutting pressure, the civil trial courts will always be the first targets for cutbacks. We already are seeing this in counties where courtrooms go dark periodically and the clerks' offices limit their hours in order to achieve savings. In order to protect the core public safety function of the criminal justice system, keep up with the high volume work that we in commercial litigation never see (*e.g.* domestic relations, juvenile justice, drug court), and deal with the increasingly high volume of *pro se* litigants in the courts, a gradually declining quality of justice in business cases may be inevitable.

To meet these challenges, Chief Justice Ronald George, with the bipartisan support of Senators Joseph Dunn and Richard Ackerman, is spearheading a drive to adopt certain amendments to Article VI of the California constitution. These reforms are designed to protect the neutrality of the judiciary, ensure equal access to justice for all citizens, and insulate the courts from the vagaries of year-to-year budget politics in Sacramento. For excellent background information on the amendments, look at the Reference section on the Judicial Council's website.

ABTL has a stake in all of this, and a role to play. We, as business trial lawyers, should make the case for judicial independence at every opportunity, but we also have a specific brief to carry because, over time, our cases will be impacted first and most severely by cuts. How can we help? Each of us can talk to our legislators about the proposed revisions to Article VI, look for opportunities to speak or write on the topic, and donate and encourage clients to donate should the matter wind up at the ballot box.

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