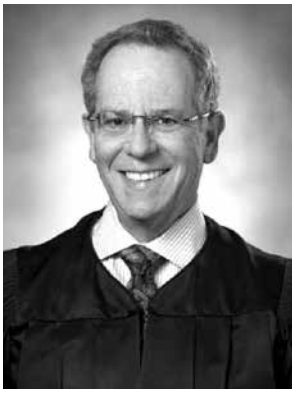
ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO

abtl REPORT

Volume XX No. 3 *Fall 2013*

Brown Bag Lunch: The Impact of Budget Cuts on San Diego's Independent Calendar Departments



Judge Ronald S. Prager

Judge Jeffrey B. Barton

By: Ben West

The Litigation Section of the State Bar of California and the Association of Business Trial Lawyers of San Diego presented a bench/bar brown bag luncheon on July 24, 2013. San Diego Superior Court judges Jeffrey B. Barton and Ronald S. Prager discussed the impacts the judicial budget cutbacks have had and will have on the Independent Calendar Departments. Here are some of the highlights from their presentation.

Budget Cuts

San Diego lawyers are familiar with the state's budget crisis and its impact on the superior court system. The San Diego Superior Court is experiencing the biggest financial crisis in its history. In 2008, the court's budget was $203 million. The court's budget was reduced to $157 million in 2013, a nearly 25 percent reduction from 2008 to the present. However, the court will receive $3.5 million from the $63 million Governor Brown restored to the courts in the 2013-2014 state budget.

(see "Budget Cuts" on page 9)

Protecting Your Clients From Alter Ego Liability Makes Good Business Sense

David M. Greeley

By David M. Greeley

Imagine this scenario. A long-time client calls you and tells you that she is closing one of her company's three stores and reminds you that, thanks to your advice, she set up separate entities for each store location, and thanks to your negotiating skills, the lease, which has three years left on it, is not personally guaranteed. She wants you to inform the landlord not to bother with suing the tenant, since that entity has no assets. The client thinks "This is a separate entity; I am safe." But it occurs to you that you set up those entities three years ago and have had very little contact with the client since that time. While a separate entity generally insulates the owners or related entities from liability, there are exceptions. One notable exception is the "alter ego" doctrine, which provides that in limited circumstances, a creditor may treat the debt of the entity as the debt of an individual or related entity. In other words, the very reason a client generally goes through the trouble and expense of retaining an attorney to set up a fictional en-

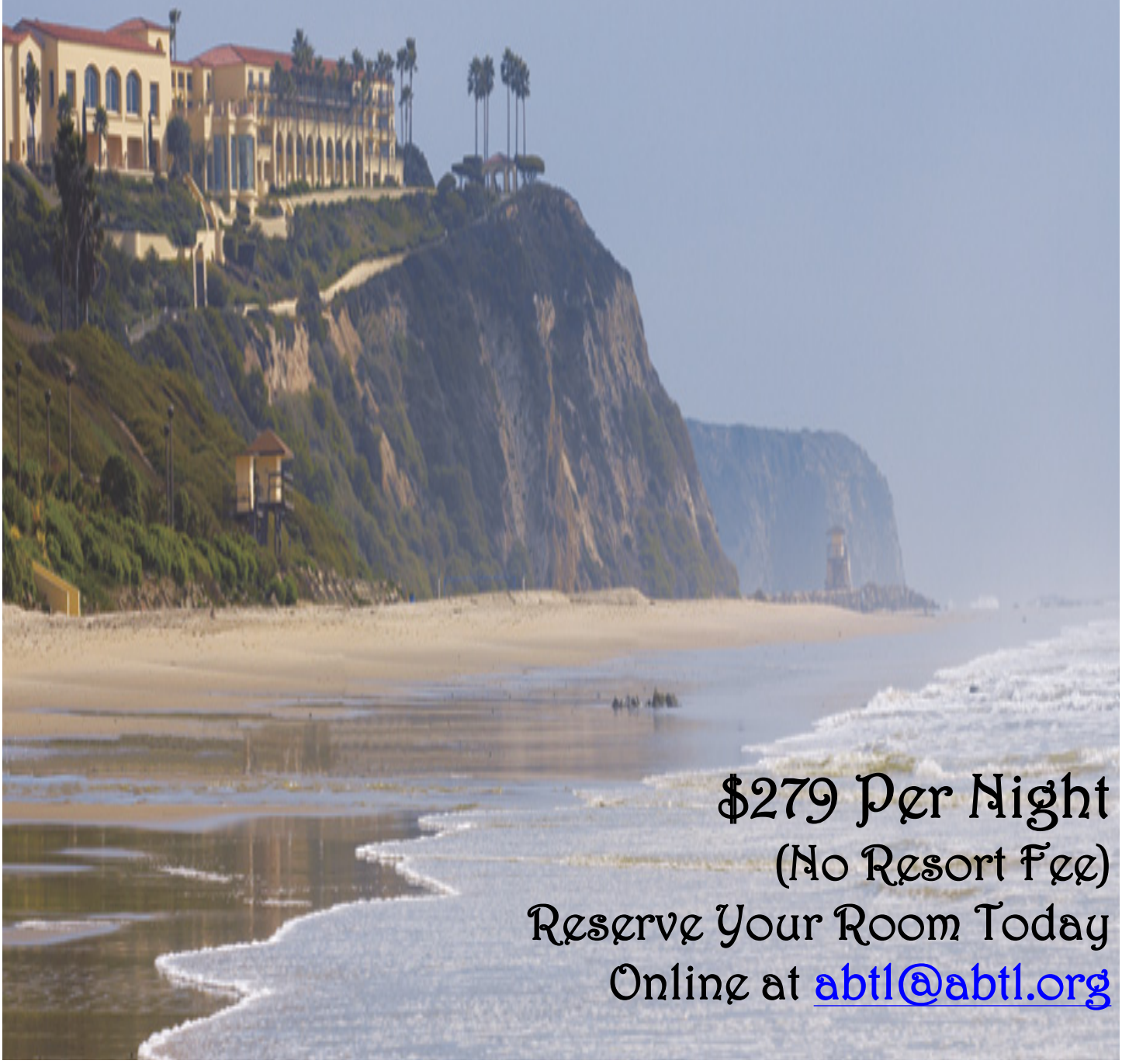
(see "David M. Greeley" on page 12)

Inside

ASSOCIATION OF BUSINESS TRIAL LAWYERS
abtl
40TH 1973 - 2013 ANNIVERSARY

40th Annual Seminar
The Art of Storytelling

The Ritz-Carlton, Laguna Niguel
October 3-6, 2013



$279 Per Night
(No Resort Fee)
Reserve Your Room Today
Online at abtl@abtl.org

President's Letter

By Richard D. Gluck

Richard D. Gluck

I can't believe that summer is over. Is it just me, or does time seem to be going by faster and faster each year? In any event, now that we are three-fourths of the way through 2013, I want to take this opportunity to recap what so far has been a jam-packed year for ABTL, and to preview what promises to be an exciting fall and winter.

Thanks to the efforts of our past president, Judge Margaret McKeown, and our current vice-president, Marisa Janine-Page, our chapter was fortunate to have two sitting Supreme Court Justices speak at lunch programs. In February, Justice Ruth Bader Ginsburg spoke about her work as a civil rights lawyer and as a Supreme Court Justice. Justice Ginsburg provided several insights into the inner workings of the Court, as well as some light-hearted peeks into some of the social events in which the Justices participate. Then in August, Justice Antonin Scalia and Bryan Garner, co-authors of "Reading Law: The Interpretation of Legal Texts," discussed their views on constitutional and statutory interpretation and made their argument for "textual originalism." Even though both programs were a departure from our typical dinner program format, they were the two most well attended programs in our Chapter's history. I hope you enjoyed them as much as I did.

We also had two informative and highly entertaining dinner programs. The first, entitled the "ABCD's of Practicing before the Federal Magistrate Judges," featured Magistrate Judges Jan Adler, David Bartick, Karen Crawford, and Mitchell Dembin discussing the ins and outs of practice in their courts. Deftly moderated by the always entertaining Bob Rose, the program provided a wealth of information and tips on what to do — and what not to do — to maximize the chances of success in their courtrooms. The second program featured trial lawyers extraordinaire Rusty Hardin and Mike Attanasio regaling the audience with stories of how they successfully defended baseball legend Roger Clemens against charges that he perjured himself when he testified before Congress that he had never used performance enhancing drugs. Both programs were big hits.

An important goal of ABTL is to promote and enhance communications between the bench and bar. To further that goal, our Leadership Development Committee and Judicial Advisory Board in May hosted the Second Annual ABTL Judicial/Bar Mixer, which afforded ABTL members and local judges the opportunity to catch up with old friends and make new acquaintances. The turnout by judges and members was tremendous, and many attendees expressed their wish for more frequent mixers in the future.

In June, the Leadership Development Committee, which was created to give younger lawyers an opportunity to play an active role in ABTL, put on a very successful "nuts-and-bolts" seminar on using depositions at trial. The program featured District Court Judge Anthony Battaglia, Superior Court Judge Steven Denton, and attorney James Chodzko sharing with an audience of mostly younger lawyers tips and practical advice on how to use depositions at trial effectively. It was another in a long line of informative, well-attended seminars that the LDC has put on in the last few years.

ABTL also co-sponsored brown-bag lunches with several of our local judges. District Court Judge Irma Gonzalez hosted a lunch in her courtroom in January. Judge Gonzalez

(see "President's Letter" on page 4)

President's Letter

continued from page 3

shared her thoughts on such wide-ranging topics as the Southern District's pilot patent court project, how motions are handled in her court, and how she handles requests for sidebars at trial. District Court Judge Marilyn Huff hosted a lunch in her courtroom in April. Judge Huff discussed her court processes and procedures, shared her views and some tips on effective advocacy, and explained what lawyers should expect when appearing in her courtroom. And Superior Court Judges Jeffrey Barton and Ronald Prager hosted a lunch in July, at which they discussed the effects that judicial budget cuts have had, and will have, on the San Diego Superior Court Independent Calendar Departments. We are extremely grateful to Judges Gonzalez, Huff, Barton, and Prager for graciously allowing us into their courtrooms and for making time in their busy schedules.

Well that sums up what we've done so far this year. So what's on tap for the rest of the year? I'm glad you asked.

From October 3-6, ABTL will be celebrating its 40th anniversary at this year's Annual Seminar at the beautiful Ritz-Carlton in Laguna Niguel. The title of this year's program is "The Art of Storytelling," and the program will feature some of California's best trial lawyers and leading jury consultants demonstrating how to develop persuasive trial themes and how to tell your story at trial. The Capital Steps, which according to their website "put the Mock in Democracy," will provide the entertainment on Saturday night. They have recorded more than 30 albums, been featured on NBC, CBS, ABC, and PBS, and can be heard 4 times a year on National Public Radio stations nationwide during their Politics Takes a Holiday radio specials. If you have never seen or heard the Capital Steps, you are in for a real treat. It is not too late to register and attend what is sure to be an outstanding Annual Seminar.

As for future dinner programs, our next program, on November 12th, will feature a panel of in-house counsel who will provide their perspectives on litigating in San Diego and beyond. Moderated by ABTL Board of Governors Member, Rob Borthwick, of Sempra U.S. Gas & Power, the program will explore how in-house lawyers and their clients handle e-discovery, privacy, and other cutting-edge issues. I hope you will be able to join us for what promises to be an informative presentation on what we do well, and what we can do better, in representing our clients.

We also have in the works a couple of very exciting programs for our November/December and February programs. While I'm not yet at liberty to provide details, we are very excited about the programs and hope to announce the details soon. Our year-end program also is where we collect holiday donations from members for the Juvenile Court's Juvenile Delinquency and Dependency Incentive Program. Hope to see you there.

A few years ago, one of our past presidents, Ed Gergosian, wrote a column about the importance of making connections. He suggested that "life is enhanced by the connections we create and maintain." I couldn't agree more. Your board and executive committee are continually looking for ways to enhance the benefits of ABTL membership. In thinking recently about how we might do so, it occurred to me that the most valuable benefit we provide our members is the myriad opportunities for making connections. Our dinner programs, judicial mixers, brown-bag lunches, annual seminars, nuts-and-bolts programs, mini-annual seminars, committees, and boards offer countless opportunities to make or enhance connections with other members. Many of my dearest friendships developed from connections I made at ABTL events, and I look forward every year to spending time at the Annual Seminar with the many wonderful people I have met through ABTL. So Ed was right; my life has been enhanced by the connections I have made through ABTL. I hope that you, too, have made connections through your involvement with ABTL, and that you will continue to take advantage of the opportunities that ABTL affords to deepen those connections or to make new ones. In the meantime, please let us know if you have ideas about how we can enhance the benefits of membership in this terrific organization or create even more opportunities to make connections.

TIPS FROM THE TRENCHES:

Mark C. Mazzarella

How to Make Rain for Dummies

By Mark C. Mazzarella

In past Tips From The Trenches I've dealt with the practice of law. This edition turns to an equally important aspect of being a lawyer -- law as a business. In particular, it focuses on how the big hitters bring in the big bucks — and take them home.

When we dream of the big client we're going to bring into the firm, it seems we all think pretty much alike. We want a high profile, interesting client with challenging cases, who has both the money and the inclination to pay our bills — at "big firm" billing rates, of course. But when we wake up to reality, most of us have more modest expectations. It's not easy to develop business, any business, let alone the "A+" client. But whether you are angling for the big fish, or just dropping red worms in the shallows, the big rainmakers with whom I've talked over the years, and in preparation for this article, have a few simple, and consistent suggestions.

If you are expecting the standard litany of suggestions we've all seen many times in articles on this topic, you will be surprised. As it turns out, the four "golden rules" I heard over and over again from mega-rainmakers are very simple, and easy to apply with a little motivation, courage and confidence.

RULE NO. 1: Ask for it.

That's right. The number one suggestion is quit beating around the bush and come right out with it. How many times have you taken a potential client or referral source out to lunch or dinner as a business development exercise and never gotten down to brass tacks? I realize it may be uncomfortable at first to actually talk about what your guest knows is one of, if not the only, reason you asked him or her to join you for a meal (a ball game, or whatever), but it shouldn't be. After all, that's what you are there for. Your guest won't be offended if you handle it properly. Tell your target that you would like the opportunity to represent him or his company. Talk about specific expertise that you or your firm has and how it could be brought to bear for the benefit of the potential client. Suggest a fee arrangement that will reduce the natural desire not to change horses in the middle of the stream, like writing off the first 20 hours of time while you learn about the client and her needs.

Successful business developers caution that, as a good fly fisherman watches carefully to see what the fish are eating before deciding which fly to tie to his line, the successful rainmaker must do as much paying attention as talking, or perhaps even more. Ask about the company's or individual's legal needs. Find out if there is something planned for the future that will require a lawyer, and position yourself to be the one who gets the call when the need arises. Find out if the company or person tends to hire a lawyer, or a law firm. Perhaps you can explore the possibility of consolidating the client's work at your firm.

It might help to keep a check list of your goals, and ask yourself before saying "good bye" if you have achieved them. For example, at the end of any business development encounter, whether a three-hour meal, or a brief chat at a cocktail party, ask: (1) Did I explain what we have to offer? (2) Did I learn about any legal needs the target may need to fill, either now or in the future? (3) Have I given him or her my card or other source of contact info? (4) Have I set the stage for a follow up call, meeting, or mailing? and most important, did I tell him I want the opportunity to represent him?

(see "How to Make Rain" on page 6)

How to Make Rain

(continued from page 5)

RULE Number 2: Follow Up

Advertising experts will tell you that a target customer must be exposed to a product between five and 10 times before the product/advertising captures the customer's attention to a degree that will make him act in the desired fashion. I don't know that that concept translates directly to legal business development, but successful rainmakers know that a single contact, no matter how wonderful, is unlikely to bring in any work. Get your target's card, think of something that you could send her on a topic you discussed at your meeting/lunch/chat. At a minimum, send a note/e-mail saying it was nice to talk with him, and telling him that you will give him a call, or drop by in a few weeks. Again, as a way to gauge your success, if, for example at an ABTL meeting you speak with 10 people, you should have 10 cards, and send out 10 follow up e-mails. And, you should calendar to contact each person again in a few weeks or months depending upon the circumstances.

RULE Number 3: Make it Personal

Everyone has to have friends. Why not make ones who either are now, or someday will be, in high places. The gray haired rainmakers talk about the good old days when there was such a thing as client loyalty, and once you got a client, you had 'em for life. Not so any more. Clients can and do change lawyers all the time. There may be new leadership in the company or the legal department. Perhaps budget cuts have forced whoever is selecting a lawyer to emphasize cost above all else. Or maybe the client has met a lawyer at the tennis club who has done a great job telling the client all about his firm and the wonderful fit it would be with the client.

A purely professional attorney/client relationship just doesn't have the staying power it once had. But if the relationship is personal, the bond is likely to last a lot longer, and it certainly will weather rough seas better than a relationship that is "strictly business." It may seem "wrong" to suggest that a lawyer should search out and develop friendships with those who someday can do some good to the lawyer's bottom line, but if that is the case, most great rainmakers have come to terms with their moral dilemma. It doesn't matter if the personal relationship precedes the attorney/client relationship, or if the lawyer developed the personal relationship after landing the business. It only matters that you are not just another one of the million lawyers in America all looking for Mr. Good Client.

RULE Number 4: Walk the Walk

No matter how smooth you are, if your legal work is sub-par, you may be able to attract clients, but you won't keep them. Every rainmaker with whom I have ever discussed the topic has said that the most important part of building a big book of business is keeping the clients you have. And to do that, you have to consistently produce top rate work at a reasonable price. As hard as it is to bring in the good client, you would think every lawyer would move heaven and earth to keep them happy; but that isn't always the case. Never take a client for granted. Treat them all the same after 10 years as you did when you were trying your best to wow them when they gave you that first piece of business. And don't be shy about asking them if they are happy with the work, the service and the price they are receiving, especially if you have delegated a lot of it. If there is a problem, you can fix it if you catch it early enough. The last thing you want is to be told by a client you thought was happy that she wants all of her work transferred across the street. Once matters have degenerated to that point, damage control is almost impossible.

Well, there you have it. The simple secrets to making rain. Certainly some lawyers are naturally better rainmakers than others. And every lawyer won't have the same level of success if he or she follows these four simple rules. But they have been working for a long time for a lot of people with different personalities and skills. And they will work for you. Just give them a try.

Mark C. Mazzarella is a trial attorney with Mazzarella Lorenzana LLP, and is a past president of ABTL - San Diego.

U.S. Supreme Court Continues To Expand FAA Preemption

By Thomas Kaufman and Shannon Petersen

In its 5-3 decision of June 20, 2013, the United States Supreme Court issued another pro-arbitration decision in *American Express Co. v. Italian Colors*.[1] The opinion by Justice Scalia continues to build on similar recent authority enforcing the terms of arbitration agreements under the Federal Arbitration Act ("FAA") even when they include class action waivers.

In *Stolt-Neilsen* (2010), the Court held that where an agreement was silent on the availability of class arbitration, only individual arbitration was allowed.[2] In *Concepcion* (2011), the Court held that the FAA preempted California Supreme Court law that made it difficult, if not impossible, to enforce a class action waiver.[3] In *Greenwood* (2012), the Court held that the FAA preempted any implied right to bring a federal claim in court.[4] Now, in *American Express*, the Court holds that the FAA preempts any claim that a class action is necessary to effectively vindicate a statutory right. According to the Court, a party cannot avoid a class action waiver in an arbitration agreement by showing that the cost of proving an individual claim will exceed any possible individual recovery.

This action arose from an antitrust claim brought by merchants against American Express. The second circuit invalidated the class action waiver contained in the arbitration agreement on the grounds that: (1) the FAA had no preemptive effect on the federal anti-trust law at issue; (2) previous U.S. Supreme Court authority invalidated arbitration terms that effectively precluded the enforcement of a federal claim; and (3) enforcement of the class action waiver effectively precluded the enforcement of the federal anti-trust law at issue because pursuing an individual claim was not economically rational.

In his majority opinion, Justice Scalia rejected each of these points. First, Justice Scalia wrote that the FAA can and does preempt other federal statutes, unless those federal statutes expressly state that a plaintiff has a right to sue in court or a right to bring a class action. The majority rejected any claim that a right to a class action could be implied in the federal anti-trust law. Justice Scalia pointed out that the anti-trust provisions at issue actually pre-dated the enactment of the federal class action statute, Rule 23 of the Federal Rules of Civil Procedure. According to the majority, the mere fact that class actions could aid in the enforcement of the anti-trust law was insufficient to trump the FAA, which enforces arbitration agreements according to their terms.

The majority also rejected the notion that class action waivers must be set aside if they interfere with the enforcement of federal rights. Justice Scalia described earlier Supreme Court authority in support of this proposition as *dicta*, which was only intended to apply if an arbitration agreement precluded a particular federal claim. It did not apply to procedural limits on how the claim might be brought—such as an agreement that a particular claim will be brought only as an individual claim in arbitration and not as a class action. As it did in *Concepcion*, the Court again rejected any implied federal right to a class action when the conditions of Rule 23 are met.

According to the Court, an arbitration agreement cannot forbid the assertion of a federal statutory right. However, courts cannot refuse to enforce a class action waiver merely because it would be economically impractical to pursue an individual federal claim.

In the face of such authority, plaintiffs' class action counsel are left only with the argument that an arbitration agreement is unenforceable as unconscionable. In making this argument, however, plaintiffs can-

(see "New and Noteworthy" on page 8)

(continued from page 7)

not argue that class action waivers are unconscionable because plaintiffs have an implied statutory right to a class action or because a plaintiff can only vindicate his or her statutory rights through a class action. Plaintiffs must instead show that other terms of arbitration are so one-sided as to shock the conscience. The *American Express* case also recognizes that courts may properly refuse to enforce arbitration agreements when the filing and administrative fees are so high as to make arbitration impractical.

The California Supreme Court is expected to address many of these same issues in *Sanchez v. Valencia Holding Company*, likely rendering a decision late in 2013 or early in 2014. Meanwhile, the consumer class action bar is also urging legislative and regulatory reform to limit the impact of this line of recent U.S. Supreme Court authority. For example, the federal Consumer Financial Protection Bureau, authorized by federal law, is currently considering regulations to limit the use of arbitration agreements and class action waivers in consumer financial contracts. Federal law already prohibits the use of arbitration agreements in mortgage contracts.

(ENDNOTES)

1 Slip Opinion No. 12-133. Justice Sotomayor recused herself.

2 *Stolt-Nielsen, SA v. AnimalFeeds International*, 559 U.S. 662 (2010).

3 *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 563 U.S. ____ (2011).

4 *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 565 U.S. ____ (2012).

Mr. Petersen is a business litigation partner with the law firm of Sheppard, Mullin, Richter & Hampton LLP in San Diego, where he specializes in consumer class action defense.

Mr. Kaufman is a labor and employment partner with the law firm of Sheppard, Mullin, Richter & Hampton LLP in Century City, where he specializes in wage and hour class action defense.

No Exemption for Managers Who Simultaneously Perform Exempt and Non-Exempt Tasks Where Primary Purpose of Task Is Not Related to Supervision or Operations of a Department

By Lois Kosch

An assistant manager of a grocery store brought suit alleging she was not properly classified as exempt because she regularly spent more than fifty percent of her work hours doing nonexempt tasks such as assisting with checkout and stocking shelves. An advisory jury returned a verdict for the employee and the employer appealed. On appeal, the employer argued that the trial court should have instructed the jury that the assistant manager should be considered to be engaged in exempt work so long he/she was simultaneously managing the store's operations. The court of appeal rejected this argument and held that the proper question was as the trial court stated: whether the reason or purpose for undertaking the task was to assist with supervising employees or contributed to the smooth functioning of the department for which the manager was responsible. Since the trial court instructed the jury to determine from an objective perspective the assistant manager's purpose in engaging in the nonexempt tasks, the court of appeal held there was no error and upheld the jury's finding that the employee was primarily engaged in nonexempt duties.

Heyen v. Safeway Inc. (2013) 216 Cal. App.4th 795

Budget Cuts

continued from page 1

Effects on the Court

These cuts are most prominently seen in the reduction of staff because 85 percent of the court's budget goes to personnel expenses. The court was forced to reduce staff by approximately 120 employees through a voluntary separation plan and layoffs. This in combination with past hiring freezes resulted in a 25 percent staff vacancy rate. Civil litigation took the most significant cuts; the court was forced to reduce the number of Independent Calendar Departments from 22 to 15. Since those closures, the 15 remaining Independent Calendar Departments have seen their caseloads nearly double. As a result, motions are being set further out. Judges assigned civil cases downtown have seen more than a 35 percent increase in caseload.

Looking Forward with Judge Prager

Judge Prager feels that things are not really as bad as they seem. With a few accommodations, he has been able to keep his courtroom running relatively smoothly. Judge Prager reported that use of student interns has helped relieve the pressure on the court. He also reported that trials do not seem to have been affected by the cut backs as the court's capacity to try cases remains unchanged. Eighty percent of cases filed in 2012 were resolved within one year. The timely resolution of motions is the greater issue and has caused the most clogging in the system.

Looking Forward with Judge Barton

Judge Barton advised ways in which lawyers can help reduce the budget-related impacts to the court. These include things such as looking at law and motion as a valuable asset, taking reserved motion dates off calendar if they will go unused (because the parties have resolved the issue on their own), and using e-filing. According to Judge Barton there was consideration of abandoning the Independent Calendar system as a way to address the court's financial pressures. Judge Barton and others appreciated the intrinsic value of the Independent Calendar system and joined with other judges in a decision to downsize and save the Independent Calendar structure. As a result, the Independent Calendar system survived and can now be built back up as finances improve.

Judge Barton does not believe things will get any worse. He believes that the court has already reached the lowest point, and is now turning the corner into recovery and improvement. However, we will continue to see the impacts of the budget cuts going forward for the foreseeable future. In the meantime:

1. The court is looking at how demurrers are being handled as nearly 4000 demurrers are filed each year.
2. The court will be implementing mandatory e-filing in the future.
3. The court is no longer scheduling Order to Show Cause hearings. Order to Show Cause hearings have been eliminated because they require a lot of personnel time and expense.
4. The court will continue to hold Case Management Conferences. The date for the CMC will be generated at the time the complaint is filed and will be about 150 days later.
5. Every judge continues to have at least one research attorney.
6. Independent Calendar judges whose departments closed are now trying cases. As a result, the court has had few cases go on "the wheel."
7. As Judge Prager mentioned, judges are now making greater use of student interns. Judge Prager has two full-time interns who help him keep up with his law and motion calendar (although on the date of this program, July 24, 2013, Judge Prager advised he was setting motions in December 2013.)
8. Most judges will consider requests to hear motions sooner.
9. All Independent Calendar judges are doing more to resolve party disputes during ex parte appearances. They are working to find creative solutions and keep matters from going to a formal motion if not absolutely necessary.
10. In some instances former Independent Calendar judges are hearing law and motion matters for other judges. For instance, Judge Barton described a class certification motion he heard for Judge Strauss.

Ben West is an associate at Caldarelli, Hejmanowski & Page LLP.

The Corporate Client's Perspective.

In-House Attorneys Discuss Litigation and the In-House Experience.

ABTL San Diego welcomes a distinguished panel including, *Robert Borthwick, Tristan Higgins, Phillip Rudolph, Robert Sloss* and *Christian Waage*, who bring their experience as in-house counsel for Sempra, Sony Electronics, Jack in the Box, Inc., Oracle and Websense, respectively, to a wide-ranging discussion of topics from the corporate client's perspective. Discussion topics will include the client experience in litigation, the role of the in-house attorney in litigation and beyond, the role of corporate culture, a "day in the life" of the in-house attorney, the corporate decision-making process and what corporate clients value in their relationships with outside counsel.

Event Details

Date:	Tuesday, November 12, 2013
Time:	Cocktails 5:30 p.m. / Dinner 6:00 p.m. / Program 6:45-7:45 p.m.
Location:	Westin Emerald San Diego, 400 West Broadway, San Diego, CA

Panelists:

Robert Borthwick is chief counsel at Sempra U.S. Gas & Power, leading the company's law department as well as the regulatory and compliance functions. With more than 20 years of experience as a lawyer, Borthwick most recently was Associate General Counsel at Sempra Energy. Prior to joining Sempra Energy, Borthwick practiced law at Gibson, Dunn & Crutcher LLP and served as a federal prosecutor in the United States Attorney's Office in Los Angeles.

YOU WON'T WANT TO MISS THIS EVENT!

Panelists:

Tristan E. Higgins is Director of the Law Department at Sony Electronics Inc. Tristan has a BA in Theater and went to law school to become an entertainment lawyer. She began her career as a prosecutor in San Diego, and went on to do entertainment law for the Screen Actors Guild in Los Angeles. After advising SAG in its video game contract negotiations, she joined Sega of America in San Francisco, where she oversaw Sega's legal needs for North America. She left Sega to join Sony Electronics in San Diego, where she helped establish the Digital Cinema business worldwide. Tristan now advises the component sales division in Silicon Valley and works frequently with Sony's headquarters in Tokyo on high tech licensing and sales. Last year, Tristan received the National LGBT Bar Association's Out & Proud Corporate Counsel Award and was named one of the 10 Amazing Gay Women in Showbiz by POWER UP, a lesbian filmmaking group.

Phil Rudolph has been Executive Vice President of Jack in the Box, Inc. since February 2010 and General Counsel and Corporate Secretary since November 2007. Prior to joining Jack in the Box, Inc., Phil was Vice President and General Counsel for Ethical Leadership Group, a partner with Foley Hoag, LLP, and a Vice President at McDonald's Corporation where, among other roles, he served as U.S. and International General Counsel. Before McDonald's, Phil spent 15 years with Gibson, Dunn & Crutcher, LLP, where he was a litigation partner in the firm's Washington, D.C., office. In addition to his Jack in the Box Inc. responsibilities, Phil is a member of the Board of Directors of The Alliance for Children's Rights.

Bob Sloss recently joined the Silicon Valley office of Procopio, Cory, Hargreaves and Savitch as a partner on the IP Litigation team after serving as Senior Corporate Counsel in the Litigation Group at Oracle Corporation. While at Oracle, Bob's responsibilities included managing patent cases brought in California and throughout the United States and working to resolve commercial disputes. Prior to working at Oracle, he was a litigation partner in firms in San Francisco and the Silicon Valley. Bob obtained degrees in mechanical engineering and history from Stanford University and earned his J.D. from the University of California, Hastings College of the Law.

Christian Waage most recently served as Vice President, General Counsel and Corporate Secretary of Websense, Inc. until August 2013. Christian was responsible for all legal affairs, including intellectual property, litigation and disputes, SEC reporting and compliance, corporate governance, and oversaw the acquisition of the company by Vista Equity Partners. He previously served for four years as Vice President, General Counsel and Corporate Secretary of Ardea Biosciences, Inc., a biotechnology company, where he was responsible for all legal affairs, including the strategic acquisition of the organization by AstraZeneca PLC. Christian was formerly a partner at DLA Piper US LLP, where he practiced as a corporate and securities attorney from September 1997 to February 2008. Christian received his B.A. in Economics from the University of California, San Diego, and a J.D. from the University of San Diego School of Law.

YOU WON'T WANT TO MISS THIS EVENT!

tity—protection from personal liability—may not always be present. While case law describes the imposition of alter ego liability as an "extreme remedy" that is "rarely invoked," the client's lack of awareness of the factors that determine alter ego liability means that exposure is much higher than generally recognized. Moreover, what makes business sense, such as streamlining operations of related entities, may inadvertently cause exposure to alter ego liability.

It is an important issue. According to the latest statistics available, in December 2010 there were 3.2 million corporations registered in California and more than 700,000 limited liability companies (LLCs). While these numbers include domestic, foreign, active and inactive entities, between 2000 and 2010, about 97,000 corporations registered per year, with annual LLC registrations jumping from 33,264 in 2000 to 75,051 in 2010. Even accounting for dissolved and inactive corporations, there are a lot of fictional people in California!

Because of the factual nature of alter ego liability, in order to advise on a client's exposure to such liability, an attorney must be familiar not only with how the business is set up, but also with how the business is being maintained. This article is not suggesting that by setting up an entity, an attorney has any continuing duty to advise a client as to alter ego liability; rather, the article suggests that a client's potential exposure to alter ego liability is a great reason to follow up with clients. Below, the article provides a legal overview of the alter ego doctrine and then sets forth some reasonable guidelines for business attorneys to advise clients to follow to protect against alter ego liability.

A. Overview of the Alter Ego Doctrine

It is well-established under California law that a corporation or LLC is regarded as a legal entity, separate and distinct from its stockholders, officers, directors or members.[1] "Since society recognizes the benefits of allowing persons and organizations to limit their business risks through incorporation, sound public policy dictates that disregard of those separate corporate entities be approached with caution."[2] However, in certain situations, a court will disregard the separateness of the entity from its shareholders or equitable owners, thus holding such related persons liable for the debts of the entity. When a plaintiff seeks to hold an individual or related entity liable for the debts of the corporation or LLC, it is known as "piercing the corporate veil" or seeking to establish such related persons as the "alter ego" of the corporation or LLC.

B. Two-Prong Test for Alter Ego Liability

Case law has developed a two-prong test which must be met before the corporate veil will be pierced and the alter ego doctrine will be invoked: (1) there must be ***such a unity of interest and ownership*** between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist; and (2) there must be an ***inequitable result*** if the acts in question are treated as those of the corporation alone.[3]

C. *Associated Vendors* "Unity of Interest" Factors

The seminal alter ego case in California is *Associated Vendors, Inc. v. Oakland Meat Co.*[4] *Associated Vendors* surveyed existing case law and set out a non-exclusive list of factors that courts examine in order to determine whether a unity of interest between the corporation and its owner exists such as to disregard the separateness. For the last fifty years, courts have looked at the *Associated Vendors* factors in determining whether such unity of interest exists so as to disregard the separateness of the corporation and its shareholders. The *Associated Vendors* factors are as follows:

1. An individual commingling personal assets with the corporation, diverting corporate funds for personal use or otherwise treating the assets of the corporation as his or her own.
2. An individual holding himself out in verbal or written communications as personally liable for the debts of the corporation.
3. The failure to maintain minutes or adequate corporate records or otherwise follow legal formalities required under State law for the entity.
4. Sole ownership of all of the stock in a corporation by one individual or the members of a family.
5. The use of the same office or business location, employees, attorneys or other professionals.

(see "David M. Greeley" on page 13)

continued from page 12)

6. The failure to adequately capitalize a corporation.
7. The use of a corporation for a single purpose in such a manner that the entity is a mere shell, and in reality merely acts as a conduit for an individual or a separate entity with ongoing operations.
8. In situations in which there are multiple fictional entities, identical equitable ownership of the entities or identical domination and control of the entities, such as, for example, where two or more entities have identical directors and officers.
9. The concealment or misrepresentation of the identity of the owners, managers or individuals controlling the corporate entity or the concealment of personal business activities run through the corporation.
10. The failure to maintain arm's length relationships among related entities.
11. The use of the corporate entity to procure labor, services or merchandise for another person or entity.
12. The diversion of corporate assets by a stockholder or other person or entity, to the detriment of creditors, or the manipulation of assets and liabilities between entities so as to concentrate the assets in one and the liabilities in another, such as by transferring to a corporation the existing liability of another person or entity in a manner that is not an arm's length transaction.
13. The contracting with another with intent to avoid performance by use of a corporate entity as a shield against personal liability, or the use of a corporation as a subterfuge of illegal transactions.
14. The formation and use of a corporation to transfer to it the existing liability of another person or entity.[5]

It would be unusual if a business and its owners or related businesses did not exhibit a few of these traits; that does not mean the business has any alter ego concerns. Courts tend to give more weight to undercapitalization, lack

(see "David M. Greeley" on page 14)

of segregation of corporate and personal assets, and any indication that an individual is shifting corporate assets with an *intent* to avoid personal liability.[6]

For instance, in the seminal case of *Associated Vendors, Inc. v. Oakland Meat Co.*, the trial court found, and the appellate court affirmed, that the related entities were not alter egos of each other. The issue was whether a well-established meat wholesaler, Oakland Meat Co. ("Meat Co."), was the alter ego of a newly formed entity, Oakland Meat & Packing Co. ("Packing Co.") The landlord had obtained a judgment against its former tenant, Packing Co., and sought to enforce the judgment against Meat Co. as the alter ego of Packing Co. On the one hand, the landlord introduced evidence that: (1) one individual controlled both entities, (2) Packing Co. had one shareholder, the President of Meat Co., (3) the officers and directors of the two companies were almost identical, (4) there were undocumented inter-company loans, (5) the licenses and permits permitting Packing Co. to operate were in the name of Meat Co., and (6) many vendors did not understand there was any difference between Packing Co. and Meat Co.[7] On the other hand, (1) the president of Meat Co. and sole shareholder of Packing Co. made it clear during lease negotiations that he would only sign a lease in the name of a separate corporation, (2) the companies maintained separate minutes, (3) the companies maintained separate bank accounts and separate payrolls, and used different fiscal years for tax purposes, and (4) the companies were represented by different counsel.[8] In essence, the evidence gave "conflicting impressions on the unity or separateness of the two corporations."[9] The trial court found after a bench trial that Packing Co. was a separate and distinct entity from Meat Co. On appeal, *Associated Vendors* surveyed existing published decisions, set forth the factors listed above and then concluded that there was substantial evidence to uphold the trial court's decision.[10]

The goal, however, is not to be in the position of having to go through the time and expense of a bench trial or post-trial motion to establish the separateness of related businesses. Moreover, the trial court may not rule in your client's favor, and given the factual nature of the inquiry, it will be difficult to overturn such a fact-intensive finding on appeal. Below is a discussion of a sampling of reported alter ego decisions, to illustrate how different courts have addressed this issue.

Las Palmas Assoc. v. Las Palmas Ctr. Assoc. upheld the finding, made first by an advisory jury and then by the trial court, that two related corporations were the alter egos of each other.[11] *Las Palmas* involved the sale of a shopping center. The seller was a limited partnership. Buyer sought to hold a related general partnership liable as the alter ego of the limited partnership. The jury found the limited partnership breached the lease guaranties and the related general partner and its principal fraudulently misrepresented their intent to honor the guaranties and acted with oppression, fraud and malice.[12] After the jury was dismissed, the trial court found that the general partner was the alter ego of the limited partner.[13] The appellate court affirmed the trial court's finding of alter ego, holding the general partnership and its principal "formed a single enterprise for the purpose of committing a continuing fraud against buyers."[14] The finding of alter ego liability was unsurprising here, given the explicit finding of fraud.

In *Pan Pacific Sash & Door Co. v. Greendale Park, Inc.*, a supplier filed suit against the owner for money owed on supplies; the supplier had contracted with the general contractor and not the owner for the supplies.[15] The owner and general contractor were two corporations with almost identical shareholders and identical individuals controlling them.[16] The only business of either corporation was the acquisition of property and construction of homes on that property. During the course of construction, there were numerous inter-company loans that were not well documented. Both entities were heavily in debt and unable to pay their obligations. Based on this evidence, the trial court found, and the appellate court affirmed, that "each corporation was but an instrumentality or conduit of the other in the prosecution of a single venture, namely, the construction and sale of houses upon the tract in question." Here, the court did not in any way address the second prong of the alter ego test, nor was there any evidence of an intent to deceive or fraudulent behavior; in essence, so many of the "unity of interest": fac-

(see "David M. Greeley" on page 15)

continued from page 14)

tors were present that the court concluded that it would be inequitable to respect the separateness of the entities.

In *Zoran Corp. v Chen* (2010) 185 Cal.App.4th 799, the trial court granted an individual defendant's motion for summary judgment on the issue of whether such defendant was the alter ego of the corporate defendants.[17] Plaintiff sued for more than $8 million owed from various corporate defendants. An individual defendant successfully moved for summary judgment on the issue of whether he was the alter ego of these corporate defendants. *Zoran* listed the *Associated Vendor* "unity of interest" factors, and concluded that a question of fact existed as to whether the individual defendant dominated and controlled several of the corporate defendants. As to the second element, "inequitable result," *Zoran* merely commented that at trial, the plaintiff will be obligated to show that an injustice would result from the recognition of separate corporate entities.[18] This case is another example of the illusory nature of the second prong of the alter ego test—that an inequitable result will follow. The *Zoran* court essentially assumed that triable issues of fact existed as to the second prong if triable issues of fact exist as to the first prong.

Because of the fact-intensive nature of the test for alter ego liability, the goal is to avoid litigation altogether on this issue. Thus, the remainder of this article focuses on some common-sense steps that a business owner can take to ensure that, if scrutinized, the business entity's separateness will be respected.

D. Common Sense Guidelines to Protect Against Alter Ego Liability

From a cost-benefit perspective, it may not make sense to reach a level of 100 percent compliance with the *Associated Vendor* factors. For instance, to hire separate legal counsel (factor 5) to negotiate a lease for related entities or to draft loan documents for related entities often is cost-prohibitive. However, to recognize in a short written lease or sublease that one entity is a tenant or subtenant or to have a one-page document acknowledging a loan and repayment terms, even if drafted by the same attorney, does usually make sense. The golden rule is to ac-

(see "David M. Greeley" on page 16)

continued from page 15)

knowledge the existence of each of the separate entities. This will provide the client value from a business and accounting standpoint as well as from a legal standpoint. How far to go requires an *ad hoc* analysis based on client goals and particular facts in a given situation. However, below is a list of 10 guidelines generally to follow to protect against unintended exposure to alter ego liability:

15. Create and maintain indicia of the separateness of the fictional entity, such as a bank account, letterhead and e-mail addresses.
16. Keep accurate financial records that reflect the expenses and revenues of each entity.
17. Know, understand and follow the legal formalities for a corporation or LLC. Generally speaking, there are fewer formalities for LLCs than corporations.
18. Document in writing inter-company loans; it does not have to be anything fancy; a simple one-page agreement will suffice.
19. Make sure vendors, clients, officers, managers and employees understand the difference between and among related entities or an entity and its owners. For instance, do not send out invoices on the wrong company's stationery or have a signature block that inaccurately identifies on whose behalf a letter is being sent.
20. Note on any lease or sublease which fictional entities will "occupy" the space. This avoids unnecessary disputes with the landlord. If an entity has no employees and is simply using an address as a principal place of business, it probably is not necessary to charge the entity rent; putting the landlord on notice of the entity "occupying" the premises should suffice.
21. Don't create confusingly similar names of related entities.
22. In procuring insurance policies, ensure each entity is named as an insured or additional insured.
23. If an entity is running short on capital, don't take shortcuts by paying corporate debts directly; either invest money as additional equity or loan the entity money and pay the debts through the correct corporate bank account.
24. Do not blur the lines between related entities or between an entity and its owner on web sites and social media platforms. What is posted on a web site remains forever. With a little forethought, a unified marketing strategy can still respect the legal separateness of related entities.

Alter ego liability is an important issue to revisit from time to time because business clients often assume that if a separate entity exists, then the individual owners or related entities are insulated from liability. Asking questions related to the list above will provide a framework to understand better the role of a given entity and whether potential alter ego liability is an issue requiring further attention and at the same time will allow the attorney to better understand the client's business.

(ENDNOTES)

1 *Sonora Diamond Corp. v. Sup. Ct.* (2000) 83 Cal.App.4th 523, 538-39.

2 *Pacific Landmark Hotel, Ltd. v. Marriott Hotels, Inc.* (1993) 19 Cal.App.4th 615, 628.

3 *Sonora Diamond*, *supra*, 83 Cal.App.4th at 538-539.

4 *Associated Vendors, Inc. v. Oakland Meat Co* (1962) 210 Cal.App.2d 825

5 *Id.* at 837-38

6 *Associated Vendors, Inc., supra,* 210 Cal.App.2d at 838-840; *Zoran Corp. v. Chen* (2010) 185 Cal.App.4th 799, 811-812; *VirtualMagic Asia, Inc. v. Fil–Cartoons, Inc.* (2002) 99 Cal.App.4th 233, 245.

7 *Associated Vendors, supra,* 210 Cal.App.2d at 828-834

8 *Id.* at 835.

9 *Id.* at 835

10 *Id.* at 840-41

11 *Las Palmas Assoc. v. Las Palmas Ctr. Assoc.* (1991) 235 Cal.App.3d 1220

12 *Id.* at 1237

13 *Id.* at 1238

14 *Id.* at 1250 (emphasis added)

15 *Pan Pacific Sash & Door Co. v. Greendale Park, Inc. (1952)*166 Cal.App.2d 652, 657

16 *Id.* at 658

17 *Zoran Corp. v Chen* (2010) 185 Cal.App.4th 799

18 *Id.* at 811

ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO

abtl

The views and opinions expressed in this newsletter are solely those of the authors. While these materials are intended to provide accurate and authoritative information in regard to the subject matter covered, they are designed for educational and informational purposes only. Nothing contained herein is to be construed as the rendering of legal advice for specific cases, and readers are responsible for obtaining such advice from their own legal counsel.

Use of these materials does not create an attorney-client relationship between the user and the author.

Editor
Lois M. Kosch
(619) 236-9600
lkosch@wilsonturnerkosmo.com

Editorial Board
Eric Bliss, Richard Gluck, Alan Mansfield, Olga May and Shannon Petersen

Main Areas of Expertise:

Catastrophic Personal Injury
Professional Malpractice
Employment
Business/Commercial
Insurance Bad Faith
Real Estate

Association of Business Trial Lawyers – San Diego

2013 Officers and Board Members

President
RICHARD D. GLUCK

Vice President
MARISA JANINE-PAGE

Secretary
JACK R. LEER

Treasurer
BRIAN A. FOSTER

ABTL Report Editor
LOIS M. KOSCH

Judicial Advisory Board Chair
HON. JANIS L. SAMMARTINO

Leadership Development Co-Chairs
BRIAN A. FOSTER
ANNA F. ROPPO

Membership Chair
ROSS H. HYSLOP

Program Chair
PAUL A. TYRELL

Immediate Past President
HON. M. MARGARET McKEOWN

Past Presidents
HON. JAN M. ADLER
PETER H. BENZIAN
CHARLES V. BERWANGER
MICHAEL DUCKOR
EDWARD M. GERGOSIAN
HON. J. RICHARD HADEN (RET.)
HON. MAUREEN F. HALLAHAN
FREDERICK W. KOSMO, JR.
MARK C. MAZZARELLA
ANNA F. ROPPO
ALAN SCHULMAN
HON. RONALD L. STYN
HOWARD E. SUSMAN
CLAUDETTE G. WILSON
ROBIN A. WOFFORD
MERYL L. YOUNG
MARK C. ZEBROWSKI
ANNA ROPPO
HON. MARGARET MCKEOWN

Executive Director
DIANE MCCLOSKEY

Board of Governors
HON. LORNA A. ALKSNE
MICHAEL A. AMON
FELIPE J. ARROYO
DAVID J. AVENI
COURTNEY L. BAIRD
HON. JEFFREY B. BARTON
HON. ANTHONY J. BATTAGLIA
HON. CATHY ANN BENCIVENGO
ROBERT J. BORTHWICK
GARY K. BRUCKER, JR.
MICHELLE L. BURTON
HON. GONZALO P. CURIEL
HON. DAVID J. DANIELSEN
HON. WILLIAM S. DATO
ROGER A. DENNING
MARY C. DOLLARHIDE
HON. KEVIN A. ENRIGHT
CHAD R. FULLER
DANIEL E. GARDENSWARTZ
RANDY S. GROSSMAN
CHARLES T. HOGE
ROBERT M. HOWARD
VALENTINE S. HOY
HON. MARILYN L. HUFF
HON. JOAN R. IRION
ROBERT G. KNAIER
ALAN MANSFIELD
GUILLERMO MARRERO
BRIAN D. MARTIN
THOMAS W. MCNAMARA
HON. THOMAS P. NUGENT
WILLIAM V. O'CONNOR
HON. RONALD S. PRAGER
HON. JOEL M. PRESSMAN
ROBERT D. ROSE
ANTHONY M. STIEGLER
SUSAN G. TAYLOR
HON. TIMOTHY B. TAYLOR

Judicial Advisory Board
HON. CYNTHIA G. AARON
HON. PATRICIA YIM COWETT (RET.)
HON. STEVEN R. DENTON
HON. IRMA E. GONZALEZ
HON. WILLIAM Q. HAYES
HON. HERBERT B. HOFFMAN (RET.)
HON. RICHARD D. HUFFMAN
HON. JOAN M. LEWIS
HON. FREDERIC L. LINK
HON. WILLIAM H. McADAM
HON. WILLIAM R. NEVITT, JR.
HON. LEO S. PAPAS (RET.)
HON. LAURA H. PARSKY
HON. RONALD S. PRAGER
HON. RANDA TRAPP

Emeritus Board Members
WILLIAM S. BOGGS
HON. PETER W. BOWIE
LUKE R. CORBETT
CHARLES H. DICK
HON. IRMA E. GONZALEZ
HON. JUDITH L. HALLER
HON. WILLIAM J. HOWATT, JR. (RET.)
HON. J. LAWRENCE IRVING (RET.)
HON. RONALD L. JOHNSON (RET.)
HON. ARTHUR W. JONES (RET.)
MICHAEL L. KIRBY
MICHAEL L. LIPMAN
HON. JEFFREY T. MILLER
DAVID E. PERRINE (IN MEM.)
ABBY B. SILVERMAN
ROBERT G. STEINER
WILLIAM F. SULLIVAN
REG A. VITEK
MICHAEL J. WEAVER
SHIRLI F. WEISS

ASSOCIATION OF BUSINESS TRIAL LAWYERS
abtl
SAN DIEGO

PRSRT STD
U.S. POSTAGE
PAID
PERMIT 2325
SAN DIEGO, CA

PMB #386
1010 University Avenue #113
San Diego, CA 92103