ASSOCIATION OF BUSINESS TRIAL LAWYERS

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REPORT

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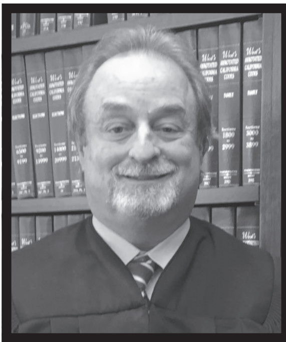
Q&A with the Hon. Andrew P. Banks

By Allina M. Hightower



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

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

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

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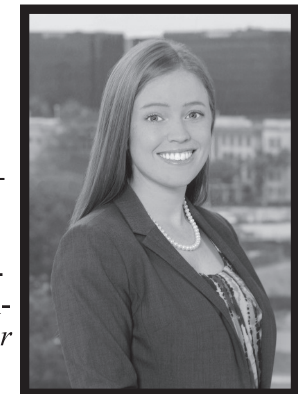
Are You Your Subsidiary's Keeper? "Control" Standards in Discovery for Corporate Affiliates"

By Mark Blake and Meredith Williams

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The ABTL thanks Judge Banks for his time.

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

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

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

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

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

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

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