

**XXth Anniversary  
Complete Annual Index**

**ASSOCIATION OF BUSINESS TRIAL LAWYERS**

**abt  
REPORT**

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**Letter from  
the President**

**W**hen I first began practicing law, some 22 years ago, the Los Angeles Superior Court, indeed many courts throughout the country, were going through the growth pains associated with increasing business activity and increasing litigation. I recall becoming involved in cases that had been filed not just when I was in law school or college, but in some cases when I was in high school. As Judge Malcolm Mackey noted in a recent article in the Los Angeles Lawyer, between "1975 and 1985 it took about seven years for a plaintiff's action to reach trial because of the large backlog of suits in the superior court." Commentators and critics, while exaggerating perhaps, cautioned that this delay in justice could well destroy the court system.



**David M. Stern**

Like most phenomena, delay produced both winners and losers. The legal rate of interest was 7%, while the prime rate was more than twice that. Inflation was also over 10% per year, meaning that defendants could,

through delay, pay their obligations with cheaper dollars at below market interest rates. That all this is behind us is, on the whole, a good thing, but just as delay was not all bad, what has replaced it is not all good.

Large numbers of cases are now routinely diverted to private judges. While arbitration has long been part of the American legal landscape, the notion of judges resigning to pursue second careers in the private sector, at vastly enhanced salaries, is a recent phenomenon. The emergence of private judging has, undoubtedly, helped reduce pretrial delay in the short term. Cases are resolved expeditiously by former judicial officers with substantial experience, skill, intelligence and wisdom. Hearings

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**Rumination of a Prez  
(The Founding Prez)**

*(Editor's Note: The following delightful article by the Founding President of ABTL marks the continuation of abtl REPORT's XXth anniversary year, which began with last fall's Special Edition. An Index of all articles published since inception begins on page 6.)*

**G**eorge Washington and I have several things in common. First, my last name has the same number of letters as George. Second, we both have wooden teeth in the front of our mouths and therefore never smile with our lips apart. Third, I never tell a lie. Oh, I almost forgot, each of us was the first President — George of course was President of the United States, and I was the first President of the Association of Business Trial Lawyers.



**Allan Browne**

It was 1973 and the livin' was easy. Law was practiced in the slow lane. Letters were still sent by regular mail. Fax machine and office computers were only glimmers in the eye of an up and coming young "techie". As a matter of fact, Bill Gates was still in high school reading *Captain Marvel* comic books and "Apple" was known as a piece of fruit. Manufacturers of carbon paper were still in big demand thanks to the legal profession and other businesses. Secretaries made a great wage of \$150.00 per week in law offices and partners of major law firms thought \$50,000 per year was all they would ever need to live handsomely. What a life! My kids were then 5, 6, 7, 8 and 11.

I was a young impetuous 35 year old lawyer in 1973. One of my pet peeves was the fact that I continually received brochures from various organizations like the California Trial Lawyers Association and the Los Angeles Trial Lawyers Association urging me to attend meetings so that I could learn how to properly cross-examine doctors in a medical malpractice case, prove damages in a personal injury suit, or cross-examine an expert in a products liability case. I was a business litigator. No legal organization or bar association ever thought to have a program about commercial litigation practice.

One day I came home and complained to Patricia, my wife, about the lack of an organization representing business litigators. "Start your own organization", she said. "What do you mean?", I asked. "You heard me — stop complaining — start a new organization," Patricia calmly said.

What a great idea. I called the Los Angeles County Bar Association and spoke with Carla Hills who was then head of the Trial Practice Committee at the time. I discussed with Carla the

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## Letter from the President

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are convened and concluded on time by judges who carefully read (at high hourly rates) all that the lawyers will submit. But those judges are no longer available to litigants who can't afford their rates; moreover, even the benefits of private judging may be short-lived. Who will replace these "retired judges" when they truly retire? If the cases that are now being diverted to the private judging system return to the public one, will there be sufficient judicial resources to handle them? The return to the delays of the past maybe a problem in waiting.

However, at least at the present time, the result of diverting large numbers of cases out of the public system has been to enable the courts to process cases more quickly. Speedy justice, however, is not always a virtue. While it is surprising to have come full circle, we now must ask the question: Is there too little pretrial delay?

To answer this question requires us to revisit, mentally, the situation as it existed before fast track, when trials routinely began, as Judge Mackey noted, seven years after a case was filed. Indeed, the only reason some of these cases were getting to trial at all was because they had to. The result of this state of affairs was that lawyers recognized that there was plenty of time for doing law and motion work, discovery, and for settlement discussions. Extensions on response times and continuances of hearings were regularly granted. Except for provisional relief, nothing moved very fast.

The dark side of this delay was that justice delayed is often justice denied. Parties died; memories faded. As cases are often not filed until months or even years after the events in question, and as more than half a decade regularly passed before trial, the quality of the fact finding process necessarily suffered. Moreover, litigants lost interest. They often returned to the master calendar department half a dozen times expecting their cases to be sent out for trial, only to learn that delays prevented it. Lawyers often stopped preparing for trial, knowing that if their case didn't have to be tried on pain of dismissal, it probably wasn't going out.

There was, however, a bright side to this story. When a case is first filed, parties are often emotionally invested in their cases. This is true not only in traditional consumer areas of the law, such as personal injury, medical malpractice, divorce and the like, but also in business cases. Just because big corporations are the named litigants doesn't mean that real life people aren't involved, with emotions, agendas, cares and worries. They are, and those complex feelings often produce great belligerence in the early stages of a case. It takes time for the sting of injury — whether that injury results from something outside the legal process or simply from being sued — to fade. During the post trauma period, litigants are not in as good a position to make reasoned judgments. If their lawyers want to introduce reason into the process, clients may view them as "wimps" or worse. By contrast, if the first months of a case are routinely infected by delay, including motions, demurrers and the like, rationality can return to the process. With fast track, that is not possible. Without leave of court, which is routinely denied, even the courteous plaintiff can grant only 15 additional days to a defendant to answer. The case has to be moved and moved quickly. Discovery has to be started and completed in a few months. Law and motion matters have to be brought before the court rapidly, or lost. Motions for summary judgment must be heard; motions in limine must be filed. The trauma of injury or the sting of a lawsuit is replaced by the trauma of rapid activity during the early stages of the lawsuit. Bills escalate, and tempers do as well. The question is not whether the current situation is better than what we had twenty years ago, but whether there is a middle ground that provides a superior or alternative.

It is axiomatic that cases are better handled when they are set-

tled than when they are litigated. Parties, rather than judges or juries, make decisions. Creative solutions are possible, often the kind that the legal system cannot provide. Whether the solutions are long-term business arrangements, apologies, payments in kind, cross licenses or other exotic devices is beside the point. The simple fact is that our overall system always benefits when litigants make decisions about their own lives and businesses, rather than trust them to an impartial (but necessarily less informed and involved) judge or jury.

Among many judges, there is a dogma that preaches that by setting early and firm trial dates, and numerous other dates to complete discovery, file motions in limine and the like, parties will be more likely to settle. Not only do I question whether this is true, I question whether the types of settlement which are reached under such duress are necessarily the best ones.

While no one size fits every case, let me suggest that there might be alternatives, particularly in business litigation in which members of this association are routinely involved.

First, when a complaint is filed, unless there is a need for provisional relief or immediate discovery, discovery should be limited as should motions. If a defendant wishes to test the complaint by demurrer or motion to dismiss, then that process should proceed first. If that process results in the dismissal of the case, so be it. If not, then the defendant should answer, and file its counterclaims, cross-claims and the like until the case is at issue. Until and unless the case is at issue, nothing else should proceed.

Once the case is at issue, the parties should be required to submit to some form of mediation or early neutral evaluation. Obviously, there is nothing to prevent the parties from initiating this process in advance of the compulsory deadline. Moreover, the compulsory deadline need not be months or years from the filing of the complaint. The number of cases that result in success by demurrer or motion to dismiss is very small. Dilatory pleadings can be dealt with, as needed, including with sanctions where appropriate. As such, it is reasonable to assume that the average case will be "at issue" in a few months. However, if it takes longer, so be it, judicial statistics be damned. If this means that some judges have more cases on their calendar for more than a year or two, that should not send them to the judicial dog house. It often is simply a reflection of the vagaries of a system that randomly assigns numerous complicated cases to one judge and very few to another.

The importance, however, of early intervention cannot be over emphasized. Neither can the importance of a brief waiting period. A brief pause between the initial trauma and the commencement of expensive hostilities serves multiple functions. First, it allows some passions to cool. Second, it keeps costs from escalating needlessly. Third and most important, it gives parties the ability to choose a path for peaceful resolution at a pace that makes sense and that encourages or enables them to expend real energy towards a party-directed solution to their dispute. Even where there isn't a complete settlement, partial resolutions may reduce the cost, length and risk of all-out war.

There will be those who say that not all cases can be handled in this way nor should they be. That may well be true. However, one of the interesting consequences of fast track, both in the state and federal courts, is that it is a "one size fits all" approach. Lawyers who try to handle their cases creatively and who try to explore settlement and mediation often find enormous judicial resistance. I have been personally involved in cases, and know others with similar tales, in which the litigants and all their counsel recognized that mediation was appropriate, and decided to proceed with that approach before commencing expensive discovery, pretrial motions and trial preparation, but who received scheduling orders that mandated early discovery, motions and trial. Requests for delay to attempt to settle are not granted rou-

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## Letter from the President

Continued from page 2

tinely by many judges, as there appears to be little appreciation that settling a case properly, particularly a more complex dispute, can take time. The judicial response is often that when litigants decide to take their case to the system, they must abide by its rules. However, that system does not exist in a vacuum. It exists to provide private litigants with a dispute resolution framework. If the litigants are working on resolving the problem themselves, they ought to be given freedom and time to do so. And I would submit that in those cases in which the litigants and their counsel can't or won't discuss settlement, there ought to be a program to enable them to utilize public resources for this purpose. Public resources are available, in abundance, to support lengthy trials. Why not commit some of these resources to encourage settlement?

The costs of litigation, both on the parties and on the system, are great. There is adequate justification for a diversion program to private or public mediation. It and early neutral evaluation may help to cut through the morass and get to solutions that are both quicker and better for the parties. Under no circumstances should the desire of speed, firm trial dates, and no continuances trump the parties' need for time to settle on their own.

Speedy justice is an admirable goal. Smart justice is even a more admirable one. A recognition that both can be accomplished more effectively by taking some trains off the fast track could well increase the speed and the quality of justice for all concerned.

—David M. Stern

### Help Us Celebrate ABTL's Silver Anniversary!

ABTL's 25th annual seminar is scheduled for October 9 to October 13, 1998 at the Four Seasons Resort in Maui. Save the date for a memorable weekend.

As always, the seminar will feature California's leading trial attorneys, jurists and experts in thought provoking sessions. There will also be opportunities to enjoy golf, snorkeling and other sports in an idyllic Hawaiian setting. For further information, contact ABTL at (310) 445-9555, extension 2.

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## Binding Arbitration Agreements With Clients: What You Should Know

Have you been as careful in drafting your engagement letters with clients as you are in drafting agreements for clients? If you are like most lawyers, the answer is probably not. Many lawyers act like lay persons in drafting their own fee agreements. They do not pay the kind of attention to the drafting of fee agreements that they routinely employ when representing a client. This is a serious mistake. Unfortunately, disputes with clients are a reality. A properly drafted engagement letter can reduce the incidence and impact of such disputes. However, ambiguities in engagement letters are typically construed against the lawyer as the draftsman. Such ambiguities can affect all aspects of the attorney-client relationship, from collecting fees, to conflict issues, the scope of representation, malpractice claims, the statute of limitations for asserting such claims, and alternative dispute resolution procedures.

This article considers one very important ingredient in engagement letters: arbitration clauses. Counsel may include a binding arbitration clause in a client's fee agreement with the expectation that doing so will expedite the collection of fees against a delinquent former client. Clients are not unknown to respond — following the old aphorism that the best defense is a good offense — by filing a cross-complaint for legal malpractice. You may prefer to resolve a client fee dispute through binding arbitration to save time and expense. You may also prefer a binding arbitration forum over the daunting prospects of a jury trial in a professional malpractice action.

However, both the Business & Professions Code and the Courts have circumscribed counsel's ability to have clients agree in advance to binding arbitration of disputes with counsel. Indeed, you may be surprised to learn that a binding arbitration clause in a fee agreement is unenforceable as to any subsequent dispute over counsel's fees or costs. Counsel should be familiar with the law governing lawyers' engagement letters with clients because it may substantially affect how counsel may wish to fashion their retainer agreements to shape the mechanism for dispute resolution with clients.

*Amended Business & Professions Code Section 6204 Permits Counsel to Have Clients Agree to Binding Arbitration of Disputes Over Counsel's Fees or Costs Only After Such A Dispute Arises.*

Business & Professions Code Section 6200 et seq. — the attorney fee statute — governs disputes over the fees or costs of counsel. Its scope is limited — it does not purport to govern other disputes with counsel not involving the fees or costs charged by counsel. Sections 6200(a) and (b). The attorney fee statute provides that if a lawsuit is filed by counsel against a client to collect unpaid fees or costs, the client may elect prior to the filing of a response to have the matter first submitted to arbitration. Section 6201(b). However, in the absence of a proper binding arbitration agreement, either side may elect a trial de novo if not satisfied with the arbitration result. Section 6204(a). Under

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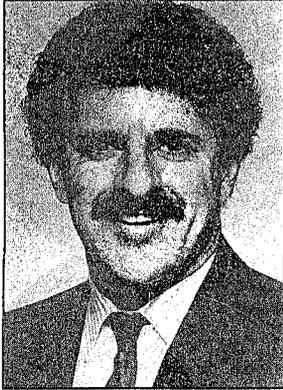


Alan Jay Weil

amended Section 6204, a client may agree to binding arbitration of a dispute over counsel's fees or costs only under limited circumstances.

Effective January 1, 1997, Business & Professions Code Section 6204 was amended to provide that an attorney and client may agree in writing to be bound by an arbitration award in connection with a dispute over fees, costs, or both only after such a dispute has arisen. Amended Section 6204 now provides in pertinent part:

"The parties may agree in writing to be bound by the award of the arbitrators at any time after the dispute over fees, costs, or both, has arisen. In the absence of such an agreement, either party shall be entitled to a trial after arbitration if sought within 30 days.... If there is an action pending, the trial after arbitration shall be initiated by filing a rejection of arbitration award and request for trial after arbitration in that action within 30 days after mailing of notice of the award.... If no action is pending, the trial after arbitration shall be initiated by the commencement of an action in the court having jurisdiction over the amount of money in controversy within 30 days after mailing of notice of the award." [emphasis added]



Steven S. Davis

Under amended Section 6204, an agreement for binding arbitration of a fee or cost dispute made at any time before the dispute arises – typically at the inception of the attorney-client relationship – cannot be enforced and is likely void. Although the issue has not been litigated, if a motion to compel arbitration were presented to a court, two results are possible. First, a court could conclude that the provision is void, that as a matter of law the parties had not agreed on the subject of arbitration at all, and thus eliminate the provision altogether. Alternatively, a court could save the arbitration clause by eliminating the binding nature of the arbitration so that the parties had agreed to nonbinding arbitration.

Before the 1997 amendment to Section 6204, the lawyer could compel binding arbitration of a fee dispute as long as his engagement agreement clearly provided for it. The client could refuse binding arbitration of a fee dispute in any other situation. See former Business and Professions Code Section 6204(a).

The 1997 amendment was apparently enacted so that clients were not forced to sign engagement letters providing for binding arbitration of fee disputes. This client benevolence appears very short-sighted and counterproductive. First, only fee disputes are covered since that is the limit of jurisdiction of the fee arbitration statute. Indeed, the statute expressly excludes malpractice claims from the scope of any arbitration. Section 6200(b)(2). As discussed below, the parties are free to agree to binding arbitration of all other disputes, including claims of malpractice, breach of fiduciary duty, and fraud. As a matter of common sense and public policy, it is hard to justify excluding fee disputes from binding arbitration clauses in engagement agreements when much more serious claims can be forced to binding arbitration upon the same agreement.

Second, the notion that clients cannot intelligently decide for themselves whether they want binding arbitration of fee disputes is patronizing. Clients can and do negotiate fees, and clients can and do negotiate other terms of the engagement. If a client does not desire an arbitration clause, he can refuse to sign an engage-

ment letter containing such a clause. Why should a client and lawyer not be able to agree up front that all disputes, including fee disputes, will be decided by binding arbitration? As long as the agreement is clear and the client is not deceived in any way, lawyers and clients should be free to make such agreements.

Third, amended Section 6204 may play havoc even with carefully crafted and clear agreements for binding arbitration of non-fee disputes. The question: what is a fee dispute and what is not? If a client truly desired to avoid binding arbitration of a malpractice claim even though he had agreed to it in the engagement agreement, the amendment may give him the means to do so. It does not take much imagination to construct a malpractice claim that also involves a fee dispute. Indeed, the attorney fee statute envisions that very circumstance. See Sections 6200(b)(2) and 6203(a). If the fee issues are inextricably intertwined with the malpractice issues, will the client succeed in convincing a court that binding arbitration is not permitted because of the amendment? No one can be sure what the result would be. The parties should be able to contract at the commencement of the engagement and know whether disputes will be subject to binding arbitration or not.

What is clear under amended Section 6204 is that you can no longer have your client agree in your fee agreement to resolve through binding arbitration disputes over your fees or costs. At best (or worst), your including such a clause in your fee agreement may obligate you to participate in non-binding arbitration of a dispute over your fees or costs – even if the client failed timely to elect non-binding arbitration in response to an action by counsel to collect counsel's unpaid fees or costs.

*Fee Agreements Which Unambiguously Require Binding Arbitration of Non-Fee Disputes Should Still Be Enforced.*

As noted above, because of its limited jurisdiction over fee arbitrations, the attorney fee statute places no restriction on agreements providing for binding arbitration of claims which do not concern a fee or cost dispute. California courts do uphold such provisions. However, despite the courts' oft-repeated mantra that arbitration agreements are to be liberally construed in favor of finding a dispute arbitrable, the courts have employed several ancient rules of construction to deny a lawyer's motion to compel arbitration of a client dispute in the face of a seemingly broad binding arbitration agreement.

California has a long history of liberally favoring resolution of disputes through binding arbitration where the parties have agreed in writing to do so. In *United Transportation Union, AFL/CIO v. Southern California Rapid Transit District*, 7 Cal.App 4th 804 (1992), the Court of Appeal reversed the trial court's denial of an arbitration petition. The trial court had concluded that its doubts about the scope of the arbitration clause should be resolved against arbitration. The Court of Appeal held that this violated California's strong public policy favoring arbitration of disputes because any doubt had to be resolved in favor of arbitration unless it is clear that the agreement could not be interpreted to cover the dispute:

"Doubts as to whether an arbitration clause applies to a particular dispute are to be resolved in favor of sending the parties to arbitration. The court should order them to arbitrate unless it is clear that the arbitration clause cannot be interpreted to cover the dispute.... Thus, we see that if there is a rule of thumb regarding contractual arbitration, it is that such arbitration is a highly favored means of dispute resolution.... The Supreme Court has stated that broad contractual provisions for arbitration are to be liberally construed." *Id.* at 808-09. (Emphasis added)

*Accord, Hayes Children Leasing Co. v. NCR Corp.*, 37 Cal.App.4th 775, 787-88 (1995) ("Any ambiguity in the scope of the arbitration, however, will be resolved in favor of arbitration.");

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## Binding Arbitration Agreements With Clients

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*Vianna v. Doctors' Management Company*, 27 Cal.App 4th 1186, 1189 (1994) ("Because California has a strong public policy in favor of arbitration, arbitration agreements should be liberally interpreted, and arbitration should be ordered unless the agreement clearly does not apply to the dispute in question. Doubts as to whether an arbitration clause applies to a particular dispute are to be resolved in favor of sending the parties to arbitration.")

Trial courts have been reversed for refusing to compel binding arbitration of a legal malpractice claim under a fee agreement providing for binding arbitration of all disputes. In *Powers v. Dickson, Carlson & Campillo*, 54 Cal. App. 4th 1102 (1997), the Court of Appeal reversed the trial court for construing the scope of an arbitration agreement in a legal malpractice action too narrowly in denying counsel's petition to compel arbitration of the client's action. The fee agreement provided for binding arbitration of "any dispute relating to attorney's fees" before the Los Angeles County Bar Association. The fee agreement further provided that "any other dispute (other than attorney's fees) between the parties hereto arising out of or relating to this contract or attorney's professional services rendered to or for client, shall be resolved by binding arbitration before the American Arbitration Association..." *Id.* at 1106-07. Although the trial court refused to compel arbitration of the client's legal malpractice claim, the Court of Appeal held that the scope of the arbitration provision before it was sufficiently broad to encompass such claims — even though it did not specifically mention them.

However, counsel runs the risk that binding arbitration of a dispute not involving fees or costs will not be compelled under a retainer agreement's binding arbitration clause unless the clause is specific and clear that it covers such a non-fee or cost dispute. That is because California's strong public policy favoring arbitration may give way to other doctrines which may lead the court to construe a binding arbitration agreement between attorney and client narrowly against the attorney where the client resists arbitration — under the theory that any contractual ambiguity perceived by the court should be construed against the party responsible for the drafting, particularly where that party is a lawyer.

For example, in *Lawrence v. Walzer & Gabrielson*, 207 Cal. App. 3d 1501 (1989), the law firm in this legal malpractice action had included an arbitration clause in its retainer agreement which appeared to be as broad as possible: "In the event of a dispute between us regarding fees, costs, or any other aspect of our attorney-client relationship, the dispute shall be resolved by binding arbitration." *Id.* at 1504. (Emphasis added) However, the arbitration agreement did not specifically provide for arbitration of malpractice claims.

The defendant law firm in *Lawrence* contended that the arbitration clause compelled arbitration of "any dispute arising out of the attorney-client relationship, including legal malpractice." *Id.* at 1505. The Court of Appeal concluded otherwise, holding that the phrase "any other aspect of our attorney-client relationship" was limited by the words which preceded it ("a dispute...regarding fees, costs...") and should be narrowly construed to cover only disputes involving fees or costs. *Id.* at 1506.

In so holding, the Court of Appeal noted, but paid little heed to, the long line of cases requiring that "every intendment must be indulged in favor of finding an agreement to arbitrate." *Id.* at 1505. Instead, the *Lawrence* court applied other principles which compel a court to do just the opposite. First, the *Lawrence* court cited the Supreme Court's admonition that "All dealings between an attorney and his client that are beneficial to the attorney will be closely scrutinized with the utmost strictness for any unfairness." *Id.* at 1507. Second, the *Lawrence* court also noted

that counsel drafted the retainer agreement and that under Civil Code § 1654, "[T]he language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist." *Ibid.*

The *Lawrence* court's determination runs afoul of numerous rules of contract interpretation, including (1) California's strong public policy favoring enforcement of arbitration agreements which requires that any ambiguity in the scope of an arbitration agreement be resolved in favor of arbitration unless it is clear that the arbitration clause cannot be interpreted to cover the dispute [*Vianna, supra*, at 1189]; (2) that the words used in an agreement should be given their ordinary meaning [*Powers, supra*, at 1112]; (3) that an agreement should not be construed so as to render a portion meaningless [*Manufacturers Life Insurance Co. v. Superior Court*, 10 Cal.App. 4th 257, 274 (1995)]; and (4) the canon that any ambiguity in a contract should be construed against the party who prepared it "applies only as a tie breaker, when other canons fail to dispel uncertainty." [*Powers, supra*, at 1112]

If the *Lawrence* court had attributed the ordinary meaning to the expansive words used in the arbitration agreement involved there — "any other aspect of our attorney-client relationship" — the *Lawrence* court could not have concluded that the plaintiff client's malpractice claims were not arbitrable. Instead, the *Lawrence* court all but rendered these words meaningless by concluding that only disputes concerning "financial" matters, such as "fees" and "costs," are covered by the arbitration agreement. For example, if the contract language had read "a dispute regarding trees, flowers, or any other aspect of life on the planet," it would appear to make no sense to limit the meaning of the phrase "any other aspect of life on the planet" to only trees and flowers. But the Courts of Appeal have shown a willingness to be unduly restrictive in construing the scope of an arbitration agreement included in counsel's engagement letter if there is any perceived ambiguity which would permit the Court to do so.

In *Mayhew v. Benninghoff*, 53 Cal.App 4th 1365 (1997), a broad agreement to arbitrate was also held insufficient to require the client to arbitrate a claim against counsel. In *Mayhew*, the Court of Appeal affirmed the trial court's denial of counsel's motion to compel binding arbitration of the client's claim that the lawyer had converted the client's funds. The retainer agreement included a seemingly expansive — but generalized — binding arbitration provision:

"As a material inducement for attorney's execution of this Engagement Agreement, it is agreed that all disputes between attorney and client... arising directly, or indirectly, against attorney on account of attorney's representation of client, shall be resolved pursuant to binding arbitration before the American Arbitration Association..." *Id.* at 1368, n. 1.

The Court of Appeal, following *Lawrence v. Walzer, supra*, held:

"Despite the expansive language 'any other aspect of our attorney-client relationship' and despite the clause's warning that such arbitration would be 'binding,' Lawrence refused to extend the arbitration clause to cover legal malpractice claims. It held a reasonable client would construe the arbitration clause as only extending to straightforward fee disputes.

"If anything, Benninghoff had a greater responsibilities [*sic*] to ensure clarity in his written agreements with Mayhew than did the family law attorney in Lawrence because he chose to enmesh himself in suspect financial dealings with his client Mayhew. As in Lawrence, there is nothing to indicate Mayhew was advised by Benninghoff that his assent to arbitration of fee disputes in conjunction with the dissolution proceeding also impliedly included an assent to arbitrate Benninghoff's alleged conversion of sums entrusted to him for investment." *Id.* at 1370.

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— Compiled by Stan Bachrack, Ph.D.

Below are highlights of recent federal court decisions prepared by the ABTL Federal Courts Committee. The Federal Courts Committee meets monthly to review recent developments in federal civil practice. The committee has taken an active role in commenting upon the past three sets of revisions to the federal local rules for civil practice and supports research, articles, and dinner programs on federal practice. For more information, contact Michael Grace, committee chair, at 310/553-3610.

**Federal Procedure**

*Campbell v. The Aerospace Corp.*, 123 F.2d 1308 (9th Cir. 1997). On appeal from a judgment for defendant in a removed wrongful termination action, the Ninth Circuit ruled that the lower court had no subject matter jurisdiction and ordered the case remanded to state court. The court held that plaintiff's allegations that "defendant knew that terminating plaintiff after long years of service would minimize plaintiff's right to recover and to build adequate retirement benefits" did not result in ERISA preemption, because the alleged loss of benefits was a consequence of, rather than a motivating factor behind, the termination. Second, the court held that plaintiff's claims of tortious discharge in retaliation for "blowing the whistle" on "illegally billing the U.S. Air Force," in violation of the public policy expressed in the federal False Claims Act ("FCA") did not raise a sufficiently substantial federal question to confer federal question jurisdiction. The court reasoned that the federal interests expressed in the FCA "strongly militate against allowing a backdoor FCA state claim to form the basis of federal jurisdiction"; moreover, California statutory law expresses the same public policy element as the FCA and therefore provides an alternative state law theory to support plaintiff's case.



Michael K. Grace

*Chase-Riboud v. Dreamworks, Inc.*, Case No. CV 97-7619 ABC (Jgx) (C.D. Cal. December 8, 1997). In a widely followed action for copyright infringement brought by the author of *Echo of Lions*, a historical work on the 1839 L'Amistad slave ship uprising, the court denied a motion for a preliminary injunction against the release of the motion picture "Amistad." Using the substantial similarity test set out in *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977) as modified by *Apple Computer Inc. v. Microsoft Corp.*, 35 F.3d 1435 (9th Cir. 1994), the court considered each of the alleged similarities in characters, events, and scenes between the book and movie and concluded that plaintiff had not met her burden of showing probable success at trial in proving substantial similarity of protectable elements. The court found that there were serious questions going to the merits of the copyright infringement claim but concluded the balance of hardships did not tip "sharply" in her favor. Accordingly, the motion for a preliminary injunction was denied.

**Intellectual Property**

*Cybersell v. Cybersell*, No. 96-17087, filed December 2, 1997 (Wood, Jr., Rymer and Tashima). The panel affirmed the dismissal of the case below for lack of personal jurisdiction. A defendant in Florida offered consulting services for strategic management and marketing on the Web using a trademark that ultimately was registered by the Arizona plaintiff. As part of their marketing effort, the defendant created a web page with a logo at

**Personal Jurisdiction**

the top with "CyberSell" and a local Florida phone number. The Web page included a hypertext link to allow browsers to introduce themselves and invited people to e-mail the Florida defendant. The Florida defendant entered into no contracts in Arizona, made no sales in Arizona, received no telephone calls from Arizona, earned no income from Arizona, and sent no messages over the Internet to Arizona. The only message it received over the Internet from Arizona was from the Arizona plaintiff.

The 9th Circuit affirmed the lower court's dismissal by applying the minimum contacts analysis of *International Shoe*. The 9th Circuit held that it would not comport with "traditional notions of fair play and substantial justice" for Arizona to exercise personal jurisdiction over an allegedly infringing Florida web site advertiser who has no contacts with Arizona other than maintaining a home page that is accessible to Arizonans, and everyone else, over the Internet." Factors to be considered include whether the web page is passive or interactive, and whether there were any traditional contacts between the defendant and the forum, such as sales made to the forum, contracts with forum residents, etc. A web site without more is not enough for personal jurisdiction. See also, *Bensusan Restaurant Corp. v. King*, 126 F.3d 25 (2d Cir. Sept. 10, 1997) (no personal jurisdiction found in general access web site case).



Jeffrey W. Kramer

**Arbitration**

*Lapine Technology Corp. v. Kyocera Corp.*, 97 Daily Journal D.A.R. 14835 (Dec. 9, 1997). The Ninth Circuit held that the district court erred in concluding that judicial review of an arbitration award was limited to the grounds set forth in the Federal Arbitration Act, even where the parties had agreed otherwise. The parties' contract specified that "the Court shall vacate, modify or correct any award: (i) based upon any of the grounds referred to in the Federal Arbitration Act, (ii) where the arbitrators' findings of fact are not supported by substantial evidence, or (iii) where the arbitrators' conclusions of law are erroneous." The Court noted that the FAA does not confer jurisdiction, and "is not an apotropaion designed to avert overburdened court dockets; it is designed to avert interference with the contractual rights of the parties." In a brief concurring opinion, Judge Kozinski reasoned that the arbitration provision in question required the court to perform work no different from other work the court performs, for example, on appeals from administrative agencies. Judge Kozinski conceded that he "would call the case differently if the agreement provided that the district judge would review the award by flipping a coin or studying the entrails of a dead fowl."

**Trademark Infringement**

*Lockheed Martin Corp. v. Network Solutions, Inc.*, Case No. CV 96-7438 DDP (ANx) (Nov. 1997). Judge Pregerson granted NSI's motion for summary judgment on Lockheed's claims of direct and contributory federal trademark infringement and federal trademark dilution for accepting Internet domain name registrations containing SKUNK WORKS, a service mark federally registered by Lockheed, even after receiving Lockheed's cease and desist letter.

NSI is the registrar of Internet domain names by agreement with the National Science Foundation. Lockheed holds two federal service mark registrations for SKUNK WORKS for services in

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## Federal Court in Los Angeles Goes On-Line

In November 1997, the U.S. District Court for the Central District of California unveiled its Internet web site at <http://www.cacd.uscourts.gov/>. The site provides instant access to the current Local Rules, the "local local rules" of individ-

ual judges, helpful forms, the Court Master Calendar, recently published opinions, and links to other legal websites. Steer your browser to this web site to check it out.



### United States District Court Central District of California

Welcome! Today is Sunday, 01/11/98. The time is 10:45:10 AM.

Welcome to the Web Site of the  
US District Court,  
Central District of California.

**NEW** Check out our [Download](#) page and download all the Local Rules. Other downloadable files will be added in the future.

For useful links to other District, Bankruptcy and Appeals court sites Click on [OCE](#) - the 9th Circuit's Office of the Circuit Executive - Web Site.

To go to the Federal Judicial Center Web Site click [FJC](#).

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### Significant Decisions

Continued from page 10

aerospace engineering design and development. The Court held that NSI does not infringe Lockheed's trademark by allowing registration of Internet domain name addresses containing the words "skunk works," as the domain name by itself is not necessarily used to identify the source of goods or services. The court also dismissed the dilution claim, as NSI had not made any commercial use of the domain names in question as trademarks.

On the contributory infringement claim, the Court found that NSI had not intentionally induced another to infringe the mark and had not knowingly supplied a product used to engage in infringement. Because of the inherent uncertainty over the scope of protection accorded to trademarks and the absence of any duty by NSI to police the content of the web sites whose domain names are registered by NSI, the court granted summary judgment for NSI. Importantly, the court ruled that NSI could not be liable for contributory infringement even after receipt of Lockheed's demand letters, because the letters could not provide "reason to know that the holders of SKUNK WORKS-type domain names were infringing."

—Michael K. Grace, Jeffrey W. Kramer  
and James A. Henricks

### Binding Arbitration Agreements

With Clients

Continued from page 5

The *Mayhew* decision may be distinguished from the usual case because the lawyer there had not merely represented the client in a legal matter but also had entered into a business transaction with the client which raises a presumption of undue influence. Nevertheless, the lesson is clear: If you want maximum assurance that your fee agreement will require binding arbitration of legal malpractice disputes — or other disputes not involving fees or costs — it should expressly specify the disputes to be covered and demonstrate a clear intent to employ binding arbitration to the maximum extent permitted by law. Additionally, your agreements should contain a clause expressly stating that if any provision is found to be ambiguous, it will not be construed against the draftsman but will be construed to effectuate the expressed intentions of the parties. And while you are taking care of arbitration clauses, you might also revisit the other provisions in your engagement letters and give them the attention you pay to agreements you draft for others.

—Alan Jay Weil and Steven S. Davis

possibility of adding a business litigation section to the Los Angeles County Bar Association. Carla said "Great idea — I'll get back to you". I never heard from her again. Next I called the Beverly Hills Bar Association and spoke to the President (I can't recall his name at this time) and was given the same encouragement — "Terrific idea! I'll call you back," said the Beverly Hills Bar President. That was the last I heard of him.

Finally, frustrated and really irritated, I called Judge Isaac Pacht, father of then Judge Jerry Pacht, and told him my tale of woe. Judge Isaac Pacht, who was retired, was then a spry octogenarian and had great stature within the legal community. He liked my idea and didn't say "I'll call you back." Judge Pacht said "let's get together and talk about it." We did. The result is that we invited 15 or 20 of the top litigators from major firms in the city to a meeting at Judge Pacht's office. Eventually each contributed \$100.00 toward the "seeding" of the organization. The biggest challenge was deciding upon a name. Those that were considered included "Association of Commercial Litigators," "Association of Trial Lawyers," "The Litigators," "The Fighting Litigators," and "The Business Litigators of America." After a hot debate we finally settled on the present name.

The next order of business was to decide how the organization would be run. Every other legal organization had luncheon meetings and we came up with the idea of a dinner meeting. The nay sayers said "no one will ever attend a dinner meeting" and "people either want to go home for dinner or they're working late at the law office." Over fierce opposition we held our first dinner meeting at the Hyatt Regency in Downtown Los Angeles. I called Justice Bob Thompson (my former boss at Nossman, Thompson, Waters and Moss) to speak on the subject of "Personal Jurisdiction and the Long Arm Statute." To our complete surprise over 350 hungry attorneys attended the first meeting. This was more attendees than the Los Angeles County Bar Association or the Beverly Hills Bar Association ever commanded at any luncheon meeting.

Soon after our first dinner meeting word spread quickly throughout the community that ABTL had turned into a powerhouse organization. Guess what? Immediately thereafter I began receiving calls from the Los Angeles County Bar Association. Carla Hills wanted to know whether ABTL would be willing to become an "arm of the Los Angeles County Bar Association." Carla offered to give us independent status as a separate section in the Bar Association. I received calls from the Beverly Hills Bar Association suggesting a similar arrangement. When I brought these ideas to the Board of Directors they were soundly defeated. We had established an independent existence without the need for any organized bar association and decided to stay the course.

We now have chapters in San Francisco and San Diego boasting several thousand members statewide. ABTL is clearly a model for other similar organizations and chapters in states across the country.

One of the great byproducts of ABTL is the fact that it has developed wonderful camaraderie amongst litigators in commercial and business matters. All of us share similar concerns in the courthouse as well as the legislature. Committees have been formed to protect business litigators from unwise legislation which would adversely affect our profession. Similarly, we have on numerous occasions urged passage of legislation which would have great benefit to the public at large and attorneys practicing within our field of specialty.

The rest is history. Clearly, the founding of ABTL is my proudest achievement as a lawyer practicing in this fair city for the past 34 years. Each time I receive an ABTL mailing for a seminar, dinner meeting, newsletter, etc., a warm sense of pride spills on to my

face and produces a smile and twinkle in my eye. I feel privileged to have been the first president of ABTL and to have been succeeded by some of the finest trial lawyers and Judges in Los Angeles: Justice William A. Masterson, John H. Brinsley, Murray M. Fields, Richard H. Keatinge, Loren R. Rothschild, Thomas J. McDermott, Jr., Howard P. Miller, Marsha McLean-Utley, Laurence H. Pretty, Justice Charles S. Vogel, Judge Elihu M. Berle, Robert A. Schlacter, H.O. (Pat) Boltz, Peter I. Ostroff, Robert H. Fairbank, Harvey I. Saferstein, Mark A. Neubauer, Richard R. Mainland, Bruce A. Friedman, William E. Wegner, Jeffrey I. Weinberger and Karen Kaplowitz.

Now, as I write this message in the privacy of my padded cell at the old age home for retired attorneys, I am swept by the impulse to start another new organization — in fact, I came up with the greatest idea yesterday. The problem is I can't remember what I had in mind. Oh well, perhaps the idea will flash back in my mind after dinner tonight while I am washing my dentures.

—Allan Browne

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