

ADR Comes of Age: What Can We Expect in the Future?

Important developments in dispute resolution are reported in the legal and popular press every day. We have recently seen, for example, major developments in arbitration ethics, mediator confidentiality, standards for mandatory consumer predispute processes and expansion of court-annexed ADR programs.



Richard Chernick

This is an opportune time to think about the future of ADR, because dispute resolution has survived its infancy and its sometimes awkward adolescence without any obvious body piercings, tattoos or felony convictions and is now thriving, energetic and poised for its most productive period.

It has been more than 25 years since Frank Sander announced the modern era of dispute resolution with his introduction of the multi-door courthouse at the ABA-sponsored "Pound Revisited" Conference in St. Paul, Minnesota.

The ABA conference intended to create an opportunity to rethink our justice system; the conference title refers to a pioneering speech on "The Popular Dissatisfaction with the Administration of Justice," delivered by Roscoe Pound (then the dean of the Harvard Law School) to the ABA House of Delegates in 1908.

Sander's concept of the multi-door courthouse led directly to our first three neighborhood justice centers. They were funded by Justice Department grants in locations selected by Griffin Bell, Jimmie Carter's Attorney General.

One of those three original neighborhood justice centers was

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Lis Pendens: Still a Lawyer's Liability

The *lis pendens* is an important weapon in any real estate litigator's arsenal.¹ This is because recording such an instrument in Official Records typically renders the affected landowner's title uninsurable, thus giving the recording party enormous leverage in settling any disputes. In recent decades, the perceived unfairness of *lis pendens* procedure has resulted in a number of legislative reforms, all of which have sought to protect landowners from being blackmailed by unmeritorious *lis pendens* recordings.

As this article is intended to demonstrate, the *lis pendens* pendulum has now swung too far in landowners' favor. Unless legislative changes are made to further amend the existent *lis pendens* law, no sensible lawyer should participate in recording such an instrument, lest both the lawyer and his or her client later incur slander of title liability to the affected landowner.



William McGrane

The Long and Winding Road

Approximately twenty years ago, I wrote a cautionary article discussing the exposure to the legal profession created by then-recent precedent limiting recovery of damages for an unmeritorious *lis pendens* to malicious prosecution actions.² Relegating landowners harmed by an unmeritorious *lis pendens* solely to malicious prosecution remedies, I asserted, created a situation rife with the potential for litigation against the former opposing counsel who originally recorded the *lis pendens* in question.³

My article argued that the *lis pendens* law should not require that landowners bring malicious prosecution actions, which all too often included former opposing counsel as additional defendants. It suggested that the *lis pendens* law be changed to make any party responsible for recording an unmeritorious *lis pendens* — but not that party's counsel — liable for all damages proximately caused thereby, all without the need for any second malicious prosecution action.⁴ Providing injured landowners with an easy alternative to bringing a malicious prosecution action was intended to shift liability away from counsel, and onto the parties who instructed such counsel to record what turned out to be an unmeritorious *lis pendens*.⁵

Approximately ten years ago, I served as a member of the Lis Pendens Committee of the Real Property Law Section of the *(Continued on page 2)*

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State Bar of California (“Lis Pendens Committee”). Among the many changes to the *lis pendens* law that it drafted, the Lis Pendens Committee wrote what became Code of Civil Procedure section 405.34. This section allowed the court to require any party who had previously recorded a *lis pendens* to post an undertaking, in such amount as the court deemed just, as a condition of maintaining the *lis pendens* of record. Subsequent recovery by an injured landowner on the undertaking only required that the party recording the *lis pendens* have ultimately failed to prevail on the real property claim alleged in the underlying case. The statute specifically did not require the injured landowner to bring any subsequent malicious prosecution action in order for that injured landowner to recover damages.

Code of Civil Procedure section 405.34 tracked my earlier suggestion for reform by placing the burden of paying for the damages occasioned by an unmeritorious *lis pendens* squarely on the party recording the *lis pendens*. Consequently, it lessened the risk of that party’s counsel becoming embroiled in a subsequent malicious prosecution action.⁶

However, forces other than the Lis Pendens Committee were at work respecting *lis pendens* reform in the years prior to the New Lis Pendens Law’s being enacted. Those forces wound up being at cross-purposes with what Code of Civil Procedure section 405.34 was aimed at accomplishing. Thus, sometime in 1990, an attorney named William H. Jennings wrote an article critical of *Albertson v. Raboff*⁷ and its core holding that recordation of a *lis pendens*, however unmeritorious, was always a privileged act.⁸ In his article, Jennings pointed out that there was no apparent remedy against persons who recorded *lis pendens* that were unsupported by real estate claims or — in the most extreme cases — *lis pendens* that were unsupported by any underlying action at all. The ultimate point of Jennings’ Article was that merely expunging such unmeritorious *lis pendens* was not a satisfactory way to punish those responsible for such behavior.⁹

To tackle the problem, Jennings proposed an amendment of the 1872 Field Code provision which defines the so-called “litigation privilege.” Jennings suggested that the litigation privilege, codified as Civil Code section 47, be amended to declare affirmatively that any *lis pendens* which failed to reference an action that properly involved a true real estate claim was outside the scope of the litigation privilege. The amendment would thus make anyone who recorded such an unmeritorious *lis pendens* potentially liable for slander of title.

As the legislative history of what is now Jennings’ Lis Pendens Law demonstrates, Jennings’ Article eventually came to the attention of California State Senator Quentin Kopp. In early 1991, Senator Kopp’s office verbally asked the State Bar what it thought of Jennings’ concerns. The State Bar then wrote to the Lis Pendens Committee and asked for its input.¹⁰ The Chair of the Lis Pendens Committee, Barry Jablon, Esq., responded to the State Bar’s inquiry by stating that, while “[t]he issues raised in Jennings’ article are certainly valid...Jennings’ approach...is piece-meal, and there appear to be less drastic cures than tackling Civil Code section 47.”¹¹

A year later, on January 2, 1992, the State Bar requested that Senator Kopp carry the New Lis Pendens Law in the California State Senate.¹² On February 21, 1992, Senator Kopp introduced the New Lis Pendens Law as part of Senate Bill 1804. On March 11, 1992, however, Jennings communicated his unhappiness with the New Lis Pendens Law to Senator Kopp’s office, complaining that the New Lis Pendens Law did not address the interim harm a landowner might suffer from an unmeritorious *lis pendens* prior to its expungement. Jennings advised Senator Kopp that only legislation creating an exception to the litigation privilege that would allow for slander of title actions in such situations would fully address his concerns.¹³

On March 25, 1992, and in apparent response to the force of Jennings’ argument, Senator Kopp dropped the New Lis Pendens Law from Senate Bill 1804. He then substituted what is now Jennings’ Lis Pendens Law in the place and stead of the New Lis Pendens Law. The Jennings’ Lis Pendens Law provides:

A recorded *lis pendens* is not a privileged publication unless it identifies an action previously filed with a court of competent jurisdiction which affects title or right of possession of real property, as authorized or required by law.¹⁴

Senate Bill 1804 became law on September 8, 1992. The New Lis Pendens Law was separately introduced by California State Assemblyman Bob Epple on February 21, 1992 as Assembly Bill 3620. Assembly Bill 3620 became law on September 22, 1992. SB 1804 and AB 3620 then became effective simultaneously on January 1, 1993.

Thus, the New Lis Pendens Law, a detailed piece of legislation which was intended by the Lis Pendens Committee to be a comprehensive measure for reform of *lis pendens* law, wound up passing into law in the same year as the Jennings’ Lis Pendens Law. The latter was an isolated measure to which the Chairman of the Lis Pendens Committee had previously objected on the grounds it was both piece-meal and too extreme. By creating such a wholesale exception to the litigation privilege, Jennings’ Lis Pendens Law has always had a great potential for mischief. As discussed below, that potential has now been realized.

Impact of Jennings’ Lis Pendens Law

In *Palmer v. Zaklama*,¹⁵ two physicians, the Zaklamas, lost a residence in a sheriff’s sale. The two doctors then filed an appeal from the judgment which had resulted in the sheriff’s sale as well as their filing for personal bankruptcy. They recorded *lis pendens* in Official Records referring to both of these proceedings.

Despite the doctors’ argument that their appeal from the judgment which had resulted in the sheriff’s sale and their personal bankruptcy had the potential to reverse the effect of the sheriff’s sale, the Court of Appeal nonetheless affirmed a jury verdict against them, *inter alia*, for slander of title based on these two *lis pendens*. Relying on Jennings’ Lis Pendens Law, *Palmer* held:

[I]f the pleading filed by the claimant in the underlying action does not allege a real property claim, or the alleged claim lacks evidentiary merit, the *lis pendens*, in addition to being subject to expungement, is not privileged. It follows the *lis pendens* in that situation may be the basis for an action for slander of title.¹⁶

Thus, under *Palmer*, (i) anyone who records a *lis pendens* that fails to properly allege a “real property claim” — a term that was itself defined with deliberate ambiguity by the Lis Pendens Committee¹⁷ — or (ii) anyone who otherwise loses on the merits of a properly alleged real property claim, regardless of whether or not there was probable cause for filing the *lis pendens* in the first instance,¹⁸ can now be sued for slander of title.¹⁹

Consistent with a “the first thing we do, let’s kill all the lawyers” attitude,²⁰ legislative indifference to the new liability Jennings’ Lis Pendens Law and *Palmer* have created for the legal profession may seem inevitable. On the other hand, preservation of our adversary system of civil justice has a recognized social value. As allowing parties to sue their opponent’s litigation counsel is inimical to the proper functioning of such an adversary system, it can and should be forcefully argued that creating new causes of action of this type is not in the public interest.

Suggested Reforms

Jennings’ Article focused primarily on the prosaic problem posed by “real estate broker[s] [who]...[with] no interest in the [real] property...record...a *lis pendens* [to collect their commissions].”²¹ No data exists as to how often such *lis pendens* are recorded or how long they survive in Official Records following recordation — particularly in light of the provisions in the New
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Lis Pendens Law specifically addressing expungement in such situations.²² Absent strong empirical evidence that Jennings' Lis Pendens Law is needed, the most obvious reform would be to simply repeal it and thereby let the New Lis Pendens Law function as it was intended by the Lis Pendens Committee, without further interference from Jennings' Lis Pendens Law.

Even under the assumption that slander of title actions are an appropriate remedy for at least some types of unmeritorious *lis pendens*, Jennings' Lis Pendens Law — isolated as it is from the otherwise internally consistent provisions of the New Lis Pendens Law — should still be repealed and then replaced by proposed new Code of Civil Procedure section 405.62.

This new section would read as follows:

§ 405.62 *Liability for Injuries to Title from Notices of Pendency of Action Lacking Probable Cause*

Following withdrawal of a notice of pendency of action or upon recordation of a certified copy of an order expunging a notice of pendency of action, the owner(s) of the affected property have standing to bring an action on account of any injuries to title if it is determined that the claimant(s) had no probable cause for asserting a real property claim at the time the notice of pendency of action was first recorded. Nothing in this section is intended to limit any other rights or remedies provided by law.

The proposed new provision does several things. First, by moving the provision for a slander of title remedy out of the Civil Code and into the Code of Civil Procedure — where the rest of the New Lis Pendens Law is codified — the legislation eliminates all inconsistent uses of terminology. Some of the inconsistencies, as between the New Lis Pendens Law and Jennings' Lis Pendens Law, include the adoption of the term "*lis pendens*" by the former and the adoption of "notice of pendency of action," by the latter, and the confusion over whether the phrases "action... which affects title or right of possession" and "real property claim" refer to the same type of action.

More substantively, rather than imposing a strict liability standard for recording a *lis pendens* that winds up being expunged on the merits, proposed new Code of Civil Procedure section 405.62 requires that injured landowners must show there was no probable cause for recording the *lis pendens* in question. This requirement holds the real estate broker who records a *lis pendens* to collect his commission on a home sale liable for slander of title, while, at the same time, it exonerates any parties, and their counsel, who record *lis pendens*, from such liability in cases where the availability of a *lis pendens* is at least somewhat arguable.²³

The intended result is to limit the holding in *Palmer* substantially, while still providing a slander of title remedy in the most extreme cases of *lis pendens* abuse. On the one hand, the New Lis Pendens Law provides for no slander of title remedy, regardless of how unmeritorious the *lis pendens* in question is. On the other hand, Jennings' Lis Pendens Law, according to *Palmer*, provides for blanket slander of title liability on account of any *lis pendens* that winds up being expunged on the merits. Proposed new Code of Civil Procedure section 405.62 thus represents a workable compromise between these two statutory provisions.

Conclusion

Post-9/11, there has been tremendous pressure on legal malpractice insurance rates and availability.²⁴ Thus, *Palmer's* opening up the specter of slander of title liability for every lawyer 'guilty' of recording a *lis pendens* that later winds up being expunged could not come at a worse time for a legal profession already struggling with a serious insurance crisis. Given the legal

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The Benefits of Being or Finding 'A Friend of the Court'

Acme — maker of the "easy glider human transporter" — contracted with Borax, an axle manufacturer. Under the contract, Borax was to provide Acme with axles for its easy glider. The axles had to satisfy strict specifications dictated by Acme, but it was Acme's responsibility to inspect each shipment. Borax diligently shipped axles to Acme for the first six months without any problems. The next month, however, Borax knowingly shipped four boxes of axles that were "thicker" than Acme's specifications. Borax did not inform Acme about the "thick" axles, assuming that Acme's quality control inspection would discover any irregularity and fix the problem.

Acme did not immediately discover the "thick" axles. It did so only months later, when its quality control department noticed that a test lot of gliders "wobbled." Acme initiated a full investigation of the wobbly gliders, which concluded that roughly 10,000 easy gliders had been built and shipped with the faulty axles provided by Borax. Federal regulations compelled Acme to recall and replace all gliders with "thick" axles.

Acme sued Borax, alleging various breach of contract claims and that Borax intentionally defrauded them. Acme sought damages, including the cost of its internal investigation and recall and replacement program. Borax was found liable for breach of contract, breach of warranty and intentional fraud. The jury awarded Acme \$500,000 in compensatory damages and \$4,000,000 in punitive damages.

Borax appealed the case to an intermediate court of appeal in State X. This court concluded that Acme's claims were the exclusive domain of contract and warranty law. It vacated the punitive damages award. Acme petitioned State X's Supreme Court for review. The Supreme Court granted review.

Whether the Supreme Court agrees with Acme or Borax, the implications of the Court's decision will affect all businesses in State X. The interplay between tort and contract law and the proper scope of liability are issues that have far reaching effects. And certainly, there are compelling reasons supporting each side of the story. On the one hand, tort claims and damages should not be barred by the so-called economic loss rule where a defective unit causes damage to the product in which it is installed. Moreover, fraudulently concealing a breach of contract should be actionable because of the inherent wrongfulness of such behavior. On the other hand, delivering faulty goods may be bad business, but the proper remedy lies in contract or warranty law. Of course, when a faulty good causes harm or injury to persons or other property, tort liability may be appropriate. But, delivering a faulty good — in and of itself — is not open to tort attack and punitive damages. Acme's loss, including the money spent on the investigation and recall, is covered by consequential contract damages.

The Supreme Court's decision on the issue will establish precedent for every business that subsequently enters into a contract in State X. So, how can your client, Colgate company, express its concerns and interests to the Supreme Court in *Acme*



Eric R. Cioffi

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v. Borax? Moreover, will Colgate's efforts do any good?

Being or Finding a Friend of the Court Matters

Courts routinely interpret laws and make policy decisions that dramatically affect certain industries or commerce as a whole. The ability of state courts to shape legal and public policy is, in many respects, on par with the United States Supreme Court and the federal and state entities actually charged with passing laws and setting policy. Indeed, the hypothetical above implicates the "economic loss rule," a rule announced first by the California Supreme Court and later adopted by the United States Supreme Court for purposes of tort liability under admiralty jurisdiction. *Jiminez v. Superior Court*, 29 Cal. 4th 473, 483 (2002) (California Supreme Court's reasoning regarding "economic loss rule" adopted in *East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 871 (1986)). Decisions by the highest state courts establish trends and set legal rules that reverberate on a national level. Most companies and business associations, however, fail to recognize the power of state-level judicial decisions and overlook the value of advancing their interests in these forums. This can be a very costly oversight.

Wasted Legislative Lobbying Efforts. Individual businesses and business associations spend enormous amounts of time and money lobbying state and federal legislative branches. The goal: to get "business friendly" laws enacted, or prevent the passage of unfriendly ones. But, a state court decision may interpret the critical language of a law in such a way as to undercut or gut the purpose for which the law was passed. In an instant, all the time, money and effort expended by businesses and their lobbyists are obliterated. Even slight variations or alterations of the law can be harmful to business interests. Many examples abound regarding how court decisions can quickly tap business resources and perhaps even foreclose certain opportunities. Interpretations of zoning, environmental, and workers' compensation laws immediately come to mind.

Moreover, legislative efforts generally do not reach judicial common law rules. The "economic loss rule" in *Acme v. Borax* illustrates this point. Thus, without businesses ever being heard on the issue, the outcome in *Acme v. Borax* will establish the contours of liability flowing from contractual relations between them. The economic consequences — for both sides of the story — are tremendous. For instance, if Borax loses the punitive damages award will be enforced. This type of potential loss could prevent some companies from aggressively entering a new market. One slip-up could result in a huge liability award that triggers bankruptcy. However, if Acme loses, it will only recover expectation and consequential damages. This may not make a company "whole" or compensate it for the damage to its reputation. And, it does nothing to deter a company from intentionally defrauding another in the future. It is these types of issues that lobbyists often bring to the attention of legislators. But, when the law at issue is a creature of judicial common law, legislative lobbying does no good. Interested parties must go to the source: the courts.

Missed Opportunity To Shape National Policy. If a case that is similar to *Acme v. Borax* someday winds up in State Y's supreme court, that court will most likely look to the decision in the *Acme* case, decided in State X, for guidance. State Court Y is apt to adopt the legal reasoning and decision of its sister court. When State Z is faced with the same issue, it will look to the decisions in State X and Y. And so on and so forth. Generally, courts are less inclined to swim against the tide as a trend develops regarding the resolution of a particular issue of law. This phenomenon — loosely termed the "interstate snowball effect" — can establish national legal trends that are hard to derail.

Businesses and organizations that seek to affect public policy

and influence the interpretation of law should not miss the opportunity to do so in appellate courts. Although most businesses heed this advice when a case reaches the United States Supreme Court, far too often they fail to do so in state supreme courts. According to a rudimentary Westlaw search, amici (discussed below) appeared in roughly 1,200 cases in which the California Supreme Court and Courts of Appeal issued a written opinion in the last ten years. Considering that the Courts of Appeal drafted about 12,000 opinions in 2002 alone (the Supreme Court drafted about 105 cases), the number of amicus filings is paltry in comparison (1,200 "amicus cases" versus more than 120,000 written opinions in the last ten years). Other regions of the country demonstrate similar statistics. For instance, amicus curiae have appeared in less than 450 cases in Massachusetts since 1994. Massachusetts' appellate courts decide more than 1,000 cases a year.

Getting Heard. Most appellate-level courts welcome written legal arguments — amicus briefs — filed by nonparties to a law suit — *amicus curiae* — that inform the court of the broad-based legal, social and economic issues involved in the case. The California Supreme Court notes that "[b]oth our rules and our practice accord wide latitude to interested and responsible parties who seek to file amicus curiae briefs." *Bily v. Arthur Young & Co.*, 3 Cal. 4th 370, 405, n.14 (1992). This is so because such presentations "assist the court by broadening its perspective on the issues raised by the parties." *Ibid.* They also "facilitate informed judicial consideration of a wide variety of information and points of view that may bear upon important legal questions." *Ibid.*

Modern amicus briefs invariably advance the policy arguments of a particular party to the dispute, and amici are understood to be — to some degree — judicial lobbyists. When larger policy or social issues are implicated by a decision, the amicus can provide facts and information that the parties cannot. A good brief can emphasize the policies and values at stake and help the court understand how a particular result will, for instance, favor or hurt business.

Associate Justice James E. Duggan of the New Hampshire Supreme Court states that "amicus briefs are most helpful when they shed new light on a case by, for example, citing and explaining case law from outside the jurisdiction, citing and discussing secondary sources — such as statistical studies, and discussing the policy matters involved in detail." Amicus briefs that provide this type of information, according to Justice Duggan, "tend to illuminate the historic and national perspectives involved in a case before the court."

Submitting amicus briefs provides important information to the courts that can influence and perhaps shape their decisions.

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In this way, individual businesses and associations can have a significant role in shaping policy and legal trends as nonparties to an action. Case studies show, according to Professor Thomas G. Hansford of the University of California, Davis, "that the arguments made by organized interests can have a real effect on the legal rules adopted by the court." (Thomas G. Hansford, *Organized Interest Lobbying Strategies and the Decision to Participate at the U.S. Supreme Court as Amicus Curiae*, presented at Conference on the Scientific Study of Judicial Politics, Columbus, Ohio, Oct. 20-21, 2000, at 5.) Statistical research conducted by Dr. Jon Bruschke of Baylor University lead him to conclude that "political support" in the form of amicus briefs "does make a difference" in a court's decision. (Dr. Jon Bruschke, *Appellate Court Decision-Making: Comparing Political And Stylistic Factors*, <http://commfaculty.fullerton.edu/jbruschke>, as of February 23, 2004, at 8.)

Case law in California support the conclusion that amici do make a difference in court decisions. In *Thorn v. Superior Court*, 1 Cal. 3d 666, 676, fn. 8 (1970), for example, the Court specifically noted that "[a] quite helpful amicus brief" was submitted "to which we are indebted for much of the discussion that follows." Indeed, the amicus in *Thorn* lead the Court to conclude that procedures be established to protect patient rights in involuntary intensive treatment cases. *Id.* at p. 675. More recently, in *City of San Diego v. U.S. Gypsum Co.*, 30 Cal. App. 4th 575, 581 (1994), the court stated that various "amicus curiae briefs" "have been helpful to the resolution of this appeal." See also *In re Marriage of Rosen*, 105 Cal. App. 4th 808, 823 (2002) (expressing agreement with position of amicus and noting its appreciation of amicus's contribution to the matter).

Finding or Being a Friend: Points to Consider

The Cost. It would not be cost effective for a business — big or small — to file an amicus brief in every case. Indeed, amicus briefs, depending on the complexity of the issues, can cost from thousands to tens of thousands of dollars. In order to mitigate these costs and pool their resources, businesses should look to their trade organizations and associations for help. A brief filed by an association will make good use of a small fraction of a company's overall membership fees paid to the association. Further, some associations are specifically created to advance the goals of a particular industry or business concern. For instance, the Product Liability Advisory Council, Inc. (PLAC), was created solely to submit amicus briefs in cases concerning product liability. Incidentally, PLAC's briefs are reported to be highly regarded by courts and practitioners for their scholarship and insight.

It makes good sense for a business to find out whether their current associations and trade groups actively file amicus briefs in state courts, not just at the federal level. If so, businesses should be aware of the protocol for requesting amicus support when they are party litigants. For instance, the Pacific Legal Foundation maintains projects designed to promote its position on specific legal issues. Deborah La Fetra, the Foundation's amicus coordinator, states that parties seeking amicus support should send a letter explaining the case and how it fits within PLF's mission and its particular projects. The party should also include copies of any briefs or relevant papers for the Foundation's review.

Businesses should know whether their associations track important cases for the purpose of filing amicus briefs, and if so, what criteria it considers. If their associations are not actively engaged in such activities, businesses should consider joining an association that does protect its members' interests at the judicial level. Or, at the very least, monitor associations and organizations that track review grants of the California Supreme Court and other state courts.

Alternatively, business lawyers themselves should consider affiliating with appellate practitioners — who are generally more in touch with cases pending in appellate courts that may be of some interest to the business lawyer's clients. Moreover, appellate practitioners can act as the "judicial watchdog" for business lawyers, keeping them abreast of cases nationwide that may warrant an amicus filing. In this way, business lawyers can add value to their overall client representation.

Avoid "Me Too" Briefs. Don't waste the court's time with a brief that regurgitates the legal issues already briefed by the parties to the lawsuit. In a notorious opinion authored by Judge Posner of the Seventh Circuit Court of Appeal, he cautioned that amicus briefs should be more than "me too" arguments. *Ryan v. Commodity Futures Trading Comm.*, 125 F.3d 1062, 1062 (7th Cir. 1997) (amicus briefs that duplicate arguments made in litigants' briefs are an abuse and should not be allowed). Most states have specific court rules regarding the content of amicus briefs. (See, e.g., Cal. Rules of Court, rules 13(c); 28(g); 29.1.) These rules must be followed. If a business is a party litigant seeking amici to file briefs on its behalf, seek out amici that will bring something unique to the party.

Three's Not A Crowd. With amicus briefs, the more groups and associations that sign-on to one brief, the better. This serves two important purposes. First, it reduces the number of individual amicus briefs filed — flooding the court with briefs inevitably results in a bunch of "me too" briefs. Furthermore, courts don't like unnecessary filings. Second, a collective effort is like a petition with thousands of voter's signatures, it demonstrates that the political, social and economic issues at stake are very important to a large and vocal group.

The Brief Itself. An entire article could be spent discussing how to write an effective amicus brief. Suffice it to say here that drafting an amicus brief takes time and a unique understanding of appellate courts. In today's specialized legal market, hiring an appellate lawyer to handle appellate matters often makes the best sense.

Not Just For Appellate Courts Anymore? What about filing an amicus brief in a superior, district or municipal court or an administrative tribunal? No court rule or regulation governs amicus briefs (or letters) in California trial courts and agencies, at least during actual litigation in these forums. (See Cal. Court Rules, rule 105(b) [amicus briefs allowed in *appeals* to superior court].) These forums have the inherent power to conduct their affairs and thus they may very well be amenable to amicus-type filings during litigation proceedings. Seeking amicus support from the beginning, so to speak, could be a potent tool for business litigators. At the very least, amicus briefs that address critical legal issues at the summary judgment stage, for example, could have a dramatic impact on a trial court's ruling.

Conclusion

It is important to reiterate the importance of protecting and advancing business interests in state courts. A study on state courts and politics conducted by Paul Brace, Melinda Hall and Laura Langer in 2000, concluded that "state supreme courts are powerful institutions with a dramatic impact upon the American political landscape." (Paul Brace, Melinda Hall, Laura Langer, *Placing State Supreme Courts in State Politics*, State Politics and Policy Quarterly, vol. 1, no. 1, Spring 2001, at 90.) The study implies that businesses that are interested in shaping this landscape and protecting their interests should not overlook the opportunity to voice their opinions in state supreme courts by filing amicus briefs, or seeking amicus support in cases where the business is a party litigant. In this day and age, any opportunity to gain an advantage or protect business interests should not go unchecked.

profession's instinct for self-preservation, the predictable result of all this will be an absolute refusal by many attorneys to sign off on *lis pendens* in even the most meritorious of cases.

Jennings' Article that led to the adoption of Jennings' Lis Pendens Law was entitled "There Oughta Be a Law." Maybe so. But there certainly shouldn't be a Jennings' Lis Pendens Law — at least not if we want to keep the *lis pendens* available as a practical litigation remedy in the first place.

¹ "*Lis pendens*" is a Latin term meaning "a pending lawsuit." See Webster's Third New International Dictionary (Merriam Webster 2000 ed.). California Code of Civil Procedure sections 405 *et. seq.* ("New Lis Pendens Law") does not employ the term "*lis pendens*" and instead adopts the phrase "notice of pendency of action" to refer to a *lis pendens*. See C.C.P. § 405.2. Because Civil Code section 47(b) (4) ("Jennings' Lis Pendens Law"), which this article discusses at length, continues the usage of "*lis pendens*" in its text, this article uses the term "*lis pendens*" rather than the more modern "notice of pendency of action" to describe its subject matter.

² See William McGrane, *Lis Pendens: A Lawyer's Liability*, L.A. Law., March 1983, at 11 ("Lis Pendens I") (citing *Woodcourt II, Ltd. v. McDonald Co.*, 119 Cal. App. 3d 245 (1981)).

³ *Id.* at 14-16.

⁴ *Id.* at 16-17.

⁵ *Id.* at 17 (noting that, while this solution still leaves a recording party's counsel at risk for any professional negligence in advising the recordation of the *lis pendens*, such malpractice risk can be insured against). In contrast, liability for malicious prosecution is uninsurable other than as respects cost of defense. See *Downey Venture v. LMI Ins. Co.*, 66 Cal. App. 4th 478 (1998) (citing Insurance Code section 533); see also Steven R. Yee, *The Blame Game*, L. A. Law., Dec. 2002, at 22.

⁶ C.C.P. § 405.34, of course, does not purport on its face to eliminate the possibility of both client and counsel's subsequently being sued for malicious prosecution. Malicious prosecution, however, is a disfavored tort. See Yee, *supra* note 6, at 20; Jerome I. Braun, *Increasing SLAPP Protection: Unburdening the Right of Petition in California*, 32 U.C. Davis L.R. 965, 990 (1999) (citing *Babb v. Superior Court*, 3 Cal. 3d 841 (1971)); John C. Barker, *Common Law and Statutory Solutions to the Problem of SLAPPS*, 26 Loyola L. A. L. Rev. 395 (1993). Malicious prosecution actions are, moreover, subject to C.C.P. § 425.16, the so-called Anti-SLAPP statute. See *Jarrow Formulas, Inc. v. Lamarche*, 31 Cal. 4th 728 (2003). Thus, an injured landowner bringing a subsequent malicious prosecution action faces considerable obstacles including the significant risk of early dismissal followed by an award of attorney's fees and costs in favor of the malicious prosecution defendant.

⁷ 46 Cal. 2d 375 (1956).

⁸ William H. Jennings, "*There Oughta Be a Law — What Remedy Is There For the Wrongfully Recorded Lis Pendens?*" ("Jennings' Article"). While references to Jennings' Article in the "Legislative Bill File on Senate Bill 1804" of California State Senator Quentin Kopp date Jennings' Article sometime in late 1990 (and the same source contains a photocopy of the article itself), there is no indication where Jennings' Article was first published. Jennings, who formerly practiced law with the Los Angeles, California law firm of Chrystie & Berle, is now listed as deceased by the State Bar of California.

⁹ Implicit in Jennings' Article is the notion that malicious prosecution is irrelevant where the underlying action is appropriate but does not support a *lis pendens*.

¹⁰ Letter from Larry Doyle, Director of the Office of Government Affairs, State Bar of California, to Barry Jablon, Chair of the Lis Pendens Committee (Jan. 29, 1991) (photocopy on file with author).

¹¹ Letter from Barry Jablon to Larry Doyle (Jan. 30, 1991) (photocopy on file with author).

¹² Letter Larry Doyle to Dan Friedlander at the Office of Senator

Quentin Kopp (Jan. 2, 1992) (photocopy on file with author).

¹³ Memorandum from William H. Jennings to Tuyen Ho at the Office of Senator Quentin Kopp (Mar. 11, 1992) (photocopy on file with author).

¹⁴ C.C. 47(b) (4).

¹⁵ 109 Cal. App. 4th 1367 (2003), *review denied* by the California Supreme Court on October 22, 2003.

¹⁶ 109 Cal. App. 4th at 1380. *Palmer* cites a series of three commentators in support of its holding: California Lis Pendens Practice, § 2.8, at 36-37 (C.E.B. 2001 ed.); 5 Miller & Starr, California Real Estate, § 11:45 at 119 (3d ed. 2000); and Greenwald & Asimow, Cal. Practice Guide: Real Property Transactions, ¶11:608 at 11-99 (The Rutter Group 2002). Despite *Palmer's* implication to the contrary, none of these treatises anticipates that a properly pled real property claim could still result in slander of title liability for a real property claimant and his or her counsel should the court later determine to expunge a *lis pendens* based on the court's determination that the underlying properly pled real property claim is simply unlikely to succeed on the merits at trial. See C.C.P. § 405.32 (authorizing expungement where "the court finds that the claimant has not established by a preponderance of the evidence the probable validity of the real property claim").

¹⁷ See Code Comment ¶ 5 to C.C.P. § 405.4 (noting that whether "cases claiming a constructive trust or equitable lien" are real property claims justifying a *lis pendens* was subject to conflicting precedent in 1992 and that the Lis Pendens Committee "neither includes nor excludes claims of constructive trust or equitable lien," relying on "judicial development" to ultimately answer this important question as to the proper scope of the term "real property claim").

¹⁸ In *Gudger v. Manton*, the California Supreme Court adopted the definition of slander of title set forth in the Restatement of Torts section 624, which reads:

One who, without a privilege to do so, publishes matter which is untrue and disparaging to another's property in land, chattels or intangible things under such circumstances as would lead a reasonable man to foresee that the conduct of a third person as purchaser or lessee thereof might be determined thereby is liable for pecuniary loss resulting to the other from the impairment of vendibility thus caused.

21 Cal. 2d 537, 541 (1943). See also *Seeley v. Seymour*, 190 Cal. App. 3d, 858-59 (1987) (citing to Second Restatement of Torts section 624); *Truck Ins. Exchange v. Bennett*, 53 Cal. App. 4th 75, 84 (1997) ("The elements of the tort are (1) publication, (2) absence of justification, (3) falsity and (4) direct pecuniary loss"). It is clear from the above authorities that there is no probable cause defense associated with a cause of action for slander of title.

¹⁹ Research reveals no case law holding a lawyer who signs a *lis pendens* liable for slander of title under Jennings' Lis Pendens Law. Given that C.C.P. § 405.21 provides that a *lis pendens* cannot be recorded in Official Records without the signature of the recording party's attorney of record, it seems obvious that any lawyer who signs a *lis pendens* to enable its recordation has thereby "published" it for purposes of incurring personal liability under Jennings' Lis Pendens Law.

²⁰ William Shakespeare, Henry VI, Part 2, act 4, sc. 2, l. 76-7.

²¹ Jennings' Article, *supra* note 11, at 179.

²² See, e.g., C.C.P. § 405.31 (requiring expungement without undertaking where action does not contain real property claim); C.C.P. § 405.32 (requiring expungement without undertaking where claimant has not established by a preponderance of the evidence the probable validity of the real property claim).

²³ It is important to note that proposed new Code of Civil Procedure section 405.62 is not seeking to require proof of malicious prosecution, with its additional requirement of actual malice, for landowners to prevail in subsequent slander of title actions.

²⁴ See Alexei Oreskovic, *Desperately Seeking Insurance: Soaring Malpractice Coverage Rates Have Lawyers Up In Arms*, The Recorder (San Francisco), April 1, 2002, at 1.

Contributory Copyright Infringement

In *Ellison v. AOL, Inc.*, Case No. 00-04321 FMC, 2004 WL 235466, ___ F.3d ___, (9th Cir. Feb. 10, 2004), the Ninth Circuit reversed the lower court's grant of summary judgment on the issue of whether AOL satisfied one of four statutory safe harbor liability limitations set forth in the Digital Millennium Copyright Act (17 U.S.C. Section 512) ("DMCA") for internet service providers ("ISPs") and other network service providers.

AOL is an ISP providing internet access and access to news groups, such as USENET postings, on which the plaintiff alleged infringing works were being distributed and stored. Plaintiff learned that his work was being posted and distributed via the USENET group without authorization and notified AOL by e-mail. AOL claimed never to have received the e-mail notice but blocked subscriber access to the news group in question soon after receiving the complaint. AOL then moved for summary judgment under the ISP safe harbor provisions of the DMCA. The trial court granted summary judgment and the plaintiff appealed.

The Ninth Circuit held that there were triable issues of fact regarding the contributory copyright claim against AOL and whether AOL met the standing threshold for the safe harbor provisions of the DMCA. The Ninth Circuit affirmed the dismissal of the vicarious copyright infringement count, however, as there was no evidence that access to the USENET postings provided a "direct financial benefit" in attracting or retaining customers.

The Court reasoned that AOL could be liable for contributory copyright infringement, because its service materially contributed to the infringement and it was a question of fact whether AOL "had reason to know" that infringing copies of the plaintiff's works were being stored on AOL's USENET network. The evidence was that AOL had changed its contact email address for copyright infringement complaints but failed to notify the Copyright Office for several months of the changed e-mail address or to cause the messages sent to the old address to be forwarded to the new address or returned to the sender. Because there was evidence that "AOL changed its e-mail address in an unreasonable manner," it should have been on notice of infringing activity occurring on its USENET network.

The Court also found that it was a question of fact whether AOL could meet the standing threshold of Section 512(i) of the DMCA. In order to qualify for safe harbor protection under the DMCA, an ISP must (1) adopt a policy for termination of services for repeat copyright infringers; (2) implement the policy in a reasonable manner; and (3) inform its subscribers of the policy. Here, AOL's failure to notify the Copyright Office of the change in email address as well as failure to take steps to ensure that copyright violations were reported to AOL constituted evidence "for a reasonable jury to conclude that AOL had not reasonably implemented its policies."

Independent Economic Benefit of Trade Secret Defined

In *People v. Laiwala*, Case No. C9767100, filed February 10, 2004, the California Court of Appeal for the Sixth Appellate District held that information cannot constitute a trade secret unless it possesses "independent economic value" because it is not generally known to the public *and* not generally known to competitors in the industry. To qualify as a trade secret under Penal Code Section 499c, the information must "derive independent economic value, actual or potential, from not being generally known to the public or to other person who can obtain economic value from its disclosure." See Penal Code Section 499c(a)(9)(A) and Civ. Code Section 3426.1(d)(1). The Court reasoned that information that was generally known to competitors could not be a trade secret as it could not provide any competitive advantage. Accordingly, evidence that information is "readily ascertainable by proper means" is a defense to a claim of misappropriation.

In this case, the defendant secretly accessed a fellow employee's office computer after hours and copied a "master key" consisting of five hexadecimal (16 digit) codes licensed by his employer, Odeum Microsystems, from another company for use with the Content Scramble System to provide copy protection for DVDs. When confronted, he denied any taking, but the master key was discovered at his house on a printout with the handwriting "DVD Copy Protection — Odeum Microsystems." In a court trial, defendant was found guilty of grand theft by misappropriation and sentenced to six months in jail.

The Court of Appeal reversed, because there was no evidence that access to the master key by itself had any value (e.g., enabling the pirating of DVD content). While the master key was a part of the CSS, other keys also were needed to descramble DVD content. In addition, there was evidence that the master key could be easily deactivated, rendering it wholly unusable for any purpose, and evidence that any competitor could obtain a master key by licensing it for a "mere pittance." Because the master key was readily available to competitors, not useful by itself, and easily cancelled, the court held that the master key did not qualify as a trade secret as a matter of law and reversed the conviction.



Michael K. Grace

Contractual Predispute Jury Waivers are Not Enforceable

In *Grafton Partners LP v. Superior Court*, Case No. A102790, filed February 6, 2004, the Court of Appeal overturned *Trizec Properties, Inc. v. Superior Court*, 229 Cal. App. 3d 1616 (1991), and concluded that the California Constitution provides that only the Legislature has the power to prescribe a method for waiving a jury trial (e.g. Cal. Civ. Proc. Section 631). Because that section does not authorize the waiver of jury trial by contract pre dispute, any agreement between the parties to do so was unenforceable.

The written agreement between Grafton Partners LP and its auditor, PriceWaterhouseCoopers ("PWC"), provided that in the event of "differences" between the parties each of them agreed "not to provide a trial by jury in any action, proceeding or counterclaim arising out of or relating to...services and fees for this engagement." The stated purpose of the clause was "to facilitate judicial resolution and save time and expense of both parties."

In an attempt to fall within written consent method for waiving a jury trial — by written consent filed with the clerk or judge — PWC filed the engagement letter with the Court in support of its motion to strike the jury trial demand. Because the statute does not expressly state that the written consent must be executed after the dispute arises, PWC asserted that the requirements of Section 631 had been satisfied.

The Court of Appeal disagreed, noting that the Supreme Court in *Madden v. Kaiser Foundation Hospitals*, 17 Cal. 3d 699 (1976), decided that only parties to a pending action could exercise the jury waiver methods of Section 631. "If only parties to a pending action may waive a jury under section 631, then it is logical to conclude that both the *execution* of the written consent and the *filing* of that consent must occur during the pendency of the civil action." (Emphasis in original.) The court was not persuaded by PWC's argument that because predispute arbitration agreements may be enforceable, so should predispute jury waivers, as the former is an agreement to opt out of the judicial forum entirely, while the latter is designed to modify the procedure for a judicial proceeding that has not yet commenced.

— Michael K. Grace and Annah Kim

ADR Comes of Age

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located in Venice, California. It grew to become the Dispute Resolution Services of the Los Angeles County Bar Association, one of the most successful bar-based dispute resolution programs in the nation.

ADR was truly launched in the late 1970s by Prof. Sanders's concept. The image of a multi-door courthouse is not only a perfect metaphor for Sanders's creative vision but also for the way dispute resolution has infiltrated our justice system in the past 25 years. Some of the more important results of this ADR revolution include the following:

- Creation of neighborhood justice centers for the mediation of community disputes
- Court-annexed mediation of small civil disputes and later expansion into judicial arbitration and early neutral evaluation programs in many state and federal courts.
- Numerous statutes and executive orders on the federal level mandating ADR in the courts and federal agencies.
- Peer mediation programs in our schools .
- Statutes requiring the resolution of professional disputes through dispute resolution (e.g., Bus. & Prof. Code § 6200, attorney-client fee disputes).
- Routine use of mediation and arbitration in the settlement of

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Stan Bachrack, Ph.D.

class actions and in the distribution of settlement funds for mass tort claims. Wendy's Trachte-Huber's Dow Corning settlement facility is an example of this.

There have been parallel developments in the teaching of ADR. Naturally, Prof. Sander and Harvard Law School were early leaders, but many law schools have by now established dispute resolution teaching and research programs, and negotiation, mediation and arbitration have made their way to the core curriculum in most leading law schools.

The most important contribution of these academic programs is to raise the awareness of law students who, over time, will become the bar of the future. But academic programs also contribute essential research and scholarship, program design and evaluation and training to the profession.

It is not surprising that community and court based programs primarily designed for small disputes have been expanded to handle larger and more complex matters. Many lawyers have been exposed to mediation and arbitration for the first time in these programs; some of us took our first trainings there to qualify to serve as volunteer mediators.

Many judges have become familiar with dispute resolution in the same way. Their first hand observation of the successes of these court-annexed programs have aided them in developing skills in sending cases to the right process at the right time and encouraged them to send larger and more complex cases to appropriate neutrals –sometimes within existing court-based programs, sometimes to neutrals in the private market.

This in turn has helped to create a viable and vibrant private market for mediation. There is now a growing expectation that large commercial disputes will be mediated at some point in their life-span. If the parties do not initiate it on their own, their lawyers will suggest and recommend it. They do so either because they believe in the process or because they know the court will require or at least encourage it.

Because it started from next to zero, the most dramatic developments in dispute resolution since Prof. Sander heralded the age of ADR have occurred in mediation.

On the other hand, arbitration has been present in our justice system since the early 20th century so it has appeared to change very little. Nothing could be further from the truth.

Although arbitration has been around in some form for centuries, it was not until the adoption of the United States Arbitration Act in 1925 (and the formation of the American Arbitration Association at about the same time) that it became a permissible alternate to the courts. And it was not until the 1990s that it really came into its own.

This growth is principally attributable to the Supreme Court's broad embrace of the commercial arbitration process and its rejection of legal doctrines that try to limit the scope and relative importance of arbitration.

Arbitration was transformed in the 1980s and 1990s by a series of United States Supreme Court decisions which have made it more accessible and its enforcement more predictable. This in turn has encouraged businesses to consider arbitration for its disputes and has encouraged individual neutrals and providers to promote arbitration.

I cannot overemphasize the importance of the courts in creating a hospitable environment for the growth of arbitration. The key doctrines of the U.S. Supreme Court cases are that (1) arbitration is a preferred dispute resolution choice and that courts must therefore err on the side of enforcing rather than limiting agreements to arbitrate; and (2) arbitration, being a contractual process, encourages parties to create their own unique processes which courts will respect and enforce.

In this context, parties and counsel have come to appreciate the value of fashioning their own process to suit the individual case and expect that a court will enforce those process choices

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ADR Comes of Age

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(or, more usually, defer to the arbitrator and the parties in determining what the parties' agreement was and how it should be effectuated). The benefits to the parties are obvious, and the value in high-dollar cases where much is at stake and where the issues are complex is inestimable in the hands of skillful lawyers and neutrals.

Counsel and clients who have figured this out now clearly prefer private to public resolution, including at least one effort at mediation prior to arbitration. This is especially so in cases of importance to the parties.

The skilled neutral is an essential element of this scheme. It does not work if there are not mediators and arbitrators up to the task of managing the most complex and difficult disputes. Parties know this and regard their opportunity to choose the neutral in each case as the most important of their rights. They know what they want and they usually know who can provide it for them.

There is not a law firm of any size that does not have sophisticated (albeit sometimes *ad hoc*) procedures for vetting proposed and possible neutrals. Lawyers' organizations also keep records on their members' experiences with particular neutrals, share that information regularly, and occasionally meet together for the sole purpose of comparing notes and experiences about particular mediators or arbitrators.

Nowhere is the private market for dispute resolution as vibrant as in California. This is where private judging began. The stars were perfectly aligned over California for private judging to flourish as it has, since 1980. We had an existing statutory framework for temporary judge and reference cases; we had calendar congestion which motivated parties to look for quicker resolution options; and we had a number of respected retired judges who were ready and able to provide what the parties were looking for. Our justice system (public and private) has been the great beneficiary of these conditions.

It must also be said that the public court system has not earned the confidence of many litigators. Judges' busy calendars, aggressive calendar management and budget constraints have combined to make the trial of even the largest civil cases prohibitively expensive and usually unpleasant. A prominent Federal Circuit Judge recently wrote a lead article in the ABA Journal bemoaning the "disappearing civil trial." He noted that less than one percent of civil filings in the federal court result in a verdict after trial. He cited the confluence of available private options and the restraints on the courts to deal effectively with civil matters as prime reasons for this unfortunate development.

In California there are several hundred full-time private neutrals and scores of part-time arbitrators and mediators. Virtually every case is mediated, and it is likely that more commercial disputes are resolved by award than by court judgment. This trend will likely continue, because parties appear to be satisfied with private dispute resolution.

It is a "canon" of mediation that a settlement fashioned in a facilitated mediation process will be more satisfying to the parties than one imposed on them by a third party. The skilled mediators who practice employment and commercial mediation have high success rates and surely create high levels of satisfaction in their clientele — parties and counsel.

Some arbitrators mistakenly believe that every arbitration produces one temporary friend and one permanent enemy. Satisfaction surveys conducted by JAMS of its clientele suggest that parties who go through arbitrations generally rate the process and their satisfaction as high as or higher than our mediation clients.

What does all of this signify for the future? I would like to venture six observations:

The private dispute resolution market will continue to

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Reinventing the Los Angeles County Bar Association

Why do we have bar associations?

Not too long ago, no one would have thought to ask this question. Membership in multiple associations was a given. It was just what lawyers did.

Things are different today. Lawyers face many conflicting demands on their time and resources, and they have a right to expect that any organization they join will serve their particular needs. That is why over the past several years the Los Angeles County Bar Association has focused on reassessing what it does for its members and on finding ways to use technology to deliver more and better services to them.

Many of the Association's most popular services would have been impossible just a few years ago. Today, they reach many thousands of lawyers daily through their computers. Giving members what they need, when they need it, right at their desks is becoming central to the Association's mission — "to meet the professional needs of Los Angeles lawyers and to advance the administration of justice."



Robin Meadow

Support for Litigators

"Ebriefs." The fastest way to learn what the courts did today is the "ebrief" that arrives in your computer at the end of every business day. Published in collaboration with the Metropolitan News, each ebrief summarizes the day's U.S. Supreme Court, Ninth Circuit and California Supreme Court and Court of Appeal decisions. The service is free to all Association members.

Searchable Civil Register. In advising a client about the likelihood that a case will actually go to trial, wouldn't it be useful to know how many days the judge is actually in trial during a given year? That information is easy to find in the Association's up-to-date, fully-searchable copy of the Superior Court's docket. Registered users can also find out how many cases your opposing counsel has tried; how many lawsuits your opposing party has filed; how often your opposing counsel has been sanctioned; how often a judge grants a particular kind of motion; how often the judge receives section 170.6 challenges; and many other kinds of information. More than 1,500 firms use this service.

Judicial Profiles. In the world's largest trial court, sooner or later you'll be assigned to a judge you know nothing about. What to do? Go to "Know Your Judge" at the Association's website. Association members work with judges to prepare profiles that provide in-depth information about the judge's views and about how the judge runs his or her courtroom. The process involves a lengthy interview that is condensed into a detailed profile that the judge reviews for accuracy.

"Judge Your Judge." Some judges have unique ways of doing things — not necessarily the forbidden "local local rules," but just personal preferences about case and trial management. How do you find out about their practices? In addition to the profiles, one way will be through the Association's most recent initiative. About 9,000 Association litigators received an email requesting information about Los Angeles Superior Court judges, directing them to the Association's website to provide a submission. A similar request appears in the *March County Bar Update*. The solic-

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tation asks about courtroom practices that lawyers appearing before a particular judge would want to know about (e.g., law and motion calendar practices, how *ex parte* applications are handled, *voir dire* limitations, etc.). After being verified with the judge, this information will be posted on the Association's website along with the judicial profiles. This part of the program should make life easier for both lawyers and judges by improving lawyers' ability to meet judges' expectations.

What about the small minority of judges whose courtroom behavior presents such difficulties that lawyers feel compelled to try to avoid them? The Judge Your Judge initiative seeks to address this problem, too, by requesting complaints about judges and allowing anonymous submissions. The submissions will not be made public. Rather, the Association will use them as part of its long-standing collaboration with the Superior Court's leadership, in which the Association and the Court jointly try to identify and solve problems of judicial behavior in an efficient and confidential way. The submissions will be evaluated by a small group of Association officers and judges, who will decide which issues merit the Court's attention.



Margaret Stevens

Assistance For New and Young Lawyers

The future of the Los Angeles litigation community depends on the effective professional development

of new and young lawyers. Two new Association projects focus on this all-important group.

"Your First." The Barristers will shortly launch their "Your First" project. Presented in a special part of the Association's website, it will provide weekly offerings for lawyers facing their first encounters with a variety of key litigation tasks — their first set of interrogatories, first deposition, first demurrer, first appeal, and so on. These will appear as "top ten" lists with hyperlinks to relevant information, and will be designed to anticipate key questions that might otherwise go unasked.

Mentoring. The Association has launched a pilot mentoring project that uses an email list service to connect groups of 20-25 mentees — all lawyers in practice up to three years — with groups of 5-7 mentors. This approach allows the mentoring process to be continuously available and accessible from the participants' computers. The mentees comprise lawyers from all sizes of firms and types of practice. The mentors include not only a wide variety of experienced litigators and in-house counsel, but also such distinguished jurists as Court of Appeal Justices Candace Cooper and Paul Boland and Superior Court Judges Victor Chavez and Lee Edmon.

Support for the Judiciary

As important as these initiatives are, there is a very low-tech problem that could make them meaningless: the budget crisis, which threatens to starve the California courts of resources. Because of severe cuts in the 2003-04 budget, litigants are facing courtroom closures, shortened work weeks and a general slowdown in court business. The impact of the 2004-05 budget will be worse. The tremendous gains the courts have made over the last decade in moving cases to trial are regressing ever more quickly.

As we did with last year's budget crisis, we expect to be actively involved in working with other bar associations to lobby the Legislature in hopes of staving off the worst cuts. Edith Matthai, the Association's Senior Vice-President, is coordinating our

efforts. But lawyers shouldn't expect bar associations to do the whole job. Everyone should do what they can to make our Governor and Legislature understand that the judiciary isn't just another state agency, but rather an indispensable pillar of our system of government.

For more information on the Association and its programs, please visit www.lacba.org.

— **Robin Meadow and Margaret Stevens**

ADR Comes of Age

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grow robustly. It will grow locally and regionally and it will particularly develop nationally. Many larger and even mid-size cases now involve a national search for the best mediator and/or arbitrator because counsel have learned that the cost of the neutral is a relatively insignificant portion of the total cost of the process and the benefits to be gained by having the right person at the table far outweigh any additional cost. A corollary of this proposition is that the fees neutrals charge are not, in such cases, a very important selection criterion.

This will create career opportunities for neutrals, who increasingly will be full-time rather than continuing their law practice or other professional activity. In part this trend to full-time practice is controlled by the preferences of the parties; in part it is necessitated by other forces which I will address in a moment.

The expectations of professionalism and skill levels for neutrals will continue to heighten: It goes without saying that in a sophisticated market of high-value and high-profile cases, expectations about performance levels are enhanced and the participants' observations about the skills of the neutral will drive that neutral's reputation and acceptability for future assignments.

Informal credentials for neutrals will also be important. Membership in organizations such as the College of Commercial Arbitrators, the National Academy of Arbitrators, the International Academy of Mediators and the Chartered Institute of Arbitrators, is relevant to users of neutral services and provide a referral network among members of those organizations.

Pressure from courts and legislatures to regulate the profession will increase: It is inevitable that this significant market segment will attract the attention of courts and legislatures, which must respond to constituencies who object to or have concern about the wide availability of such services.

Ethics rules such as those adopted by the Judicial Council for court-annexed mediations and the disclosure rules adopted to regulate the activities of providers and neutral arbitrators in contractual arbitrations are only the beginning. The profession needs to be vigilant that such regulations are warranted and, at least, will not undermine the intrinsic value of the process.

It is also likely that legislatures will seek mandatory certification of mediators, arbitrators and providers as an additional means of controlling or regulating the practice. Those regulatory standards are not likely to be compatible with the needs of the private marketplace and may create artificial barriers to entry (of neutrals and providers) which will not be helpful.

We can also expect to see adoption of more national and international standards of conduct, such as the Uniform Mediation Act and the Revised Code of Ethics for Arbitrators of Commercial Disputes. Those efforts are more likely to be designed to shape the best practices of the profession, not disguised efforts to prevent the growth and efficacy of arbitration and mediation.

(Continued next page)

It will be increasingly difficult for part time neutrals to thrive in this market. Conflict issues with law practice clients and prospective clients will make both the neutral practice and the law practice more difficult for arbitrator hyphenates and mediator hyphenates. Codes of legal ethics have been slow to recognize the unique needs of lawyer-arbitrators and lawyer-mediators. The ABA's most recent revision of its Model Rules of Professional Conduct did not effectively deal with these issues.

Another law practice issue is multi-jurisdictional practice limitations on arbitrators and mediators who try to develop a national practice.

There will be increasing efforts to make claims against neutrals, particularly arbitrators, in high stakes cases. For example, disclosure rules and the possible consequences of non-disclosure resulting in a vacated award is an obvious target for frustrated litigants who have the resources to discover mistakes and omissions in disclosure statements. Arbitral immunity may not protect this aspect of arbitrator performance.

Finally, the more success the private dispute resolution market experiences, the more aggressively opponents will push the underlying policy issues:

Since the early days of private judging in California, concerns have been expressed that an extensive private dispute resolution system takes away from the public system in several distinct ways.

First, it is argued that a viable private system undermines support for the public system somewhat in the way that private schools undermine support for public schools. And like private schools, people with means can choose to exit the system and thereby create a two-tiered justice system, one for the rich and one for the poor.

Second, critics assert that a robust private system also is likely to tempt the best judges to retire early – the so-called “brain drain.”

Lastly, a related effect of the private system is said to be to move “interesting” cases to private resolution where they are not part of the development of the common law and the development of legal doctrine. This is said to be the reason for the “vanishing civil trial.”

Much of this debate is fueled by opposition to one controversial form of dispute resolution — imposed arbitration of employment, health care and consumer disputes. But the policy at issue there is the voluntariness of predispute arbitration agreements, not the use of private resolution. The issue of voluntariness ought to be addressed by the courts and the legislatures, and can be severed from this discussion.

That leaves the principal issue of the appropriateness of the resolution of disputes on a private basis which could be brought in a court but are not. To oppose voluntary resolution at any level, one must deal with the vast majority of “disputes” which never progress beyond two disputants who successfully work out their issues on their own, or perhaps with the aid of a third party. None of these disputes ever sees a court or even a lawyer, and no one suggests that the courts ought to be involved at all.

There is little difference from this and a private resolution market in which parties, independent of the courts, choose to use mediation or arbitration services. That some of the participants are former public judges is of minimal relevance to the propriety of parties choosing to solve their problems privately rather than in the court system.

Finally, the issue of the vanishing civil trial is more an issue for the courts to address, and to look at their own operations and processes to assess why that is happening.

Business trial lawyers are privileged to be entrusted with the resolution of some of the more challenging issues facing

(Continued next column)

Letter from the President

If you were among the six hundred lawyers who attended our sold-out February dinner program on the Complex Court, you heard an alarming report from State Senator Joseph Dunn on the impact of the budget crisis on our courts. In the past eighteen months, the Los Angeles Superior Court budget has been cut by \$100 million, 600 employees have been laid off, and 29 courtrooms have been closed. More cuts are coming. In the triage to follow, amidst the demands of criminal, domestic violence, conservatorship, landlord-tenant, writs and receivers, and other priority cases, civil business cases will come dead last on the calendar.

The ABTL is doing something to relieve the burden on the courts and we need your help. Beginning in the next few weeks, our ABTL members will be serving as volunteer settlement officers on business cases in the West and Central Districts of the Los Angeles Superior Court. The cases will be screened and matched to our expertise; we will not be mediating fender-benders and soft tissue injuries.

In case you didn't know, it's fun to be a settlement officer. When you settle a case the parties are at least relieved, if not delighted, and the court is unfailingly grateful. One of the most rewarding experiences of my career came when I was a volunteer settlement officer some years ago. I settled a toxic cleanup case involving eleven carriers at the pleading stage. There had been no formal discovery! I got such a charge out of it I could understand why lawyers and retired judges branch out into mediation. I also learned a lot.

Being a volunteer settlement officer itself will make you a better lawyer, but if you'd like to hone your mediation skills, your ABTL will be offering more. By arrangement with the Straus Institute for Dispute Resolution at Pepperdine University (ranked number one in the field by US News and World Report) and other providers, we will offer mediation training at reduced rates. In fact, our settlement officer program already has the support of Pepperdine, JAMS, and ADR Services.

As our ABTL annual membership drive moves into the spring, we are nearing one thousand members — one thousand of the best and most influential business trial lawyers to be found anywhere in California. We can make a difference. It's up to you. To volunteer, e-mail Settlement Officer Program Chair Wayne Flick: wayne.s.flick@lw.com. Better yet, download the sign-up form from www.abtl.org/losangeles.htm, and fax or mail the completed form to the ABTL or .pdf it to abtl@abtl.org.

— Alan E. Friedman



ADR Comes of Age

Continued from previous column

civil litigants; together with neutrals who serve that market, they have a responsibility to improve and maintain the entire system of dispute resolution. The growth and development of private dispute resolution as a complement to the civil justice system is an important responsibility for all of us, and its future seems bright.

— Richard Chernick

On the Passing of Judge Harry L. Hupp



Judge Harry L. Hupp

On January 30, 2004, the justice system suffered a terrible loss with the sudden death of Harry L. Hupp, Senior Judge of the Federal Court, Central District of California. Judge Hupp was on the bench in Los Angeles for a total of 32 years, and his impressive biography is readily available to all who are interested. But what the biography won't reveal is the enormous void his death has created in the lives of so many of his friends and colleagues. He has been described to me as a "prince," a "gem," a "giant," and a "truly great man." He was unfailingly helpful to judges and lawyers alike, and never seemed to lose his enthusiasm for the law.

Judge Feess spoke with great affection of Judge Hupp, who was his mentor and a source of continuing help and support. Judge Feess talked as well of how much he loved reading Judge Hupp's orders. "No one ever said more in fewer words than Harry Hupp."

People I spoke to about Judge Hupp repeatedly mentioned his eagerness to tackle new issues, his indefatigable energy, his sense of excitement at the emergence of new problems to solve. He was described as someone who "bounded" onto the bench every morning. Although he worked long, hard hours on the bench, exhausting everyone in the courtroom by the end of a trial day, he was never mean or unreasonable. He had a keen and unerring sense of personal responsibility and

professional ethics, and managed to both live and express them without making others feel they were being criticized.

He had a vast store of knowledge and experience, and quickly understood issues and problems, but was willing to listen and change his mind when it was warranted — truly the mark of a great judge. In recent years, he was plagued by illness and a course of treatments that should have defeated him, but he remained cheerful, continued to come to work, handle his case load, and help other judges at the same time.

As Judge Manella said at the end of our interview, "We will not see his like again."

— **Hon. Florence-Marie Cooper, U.S. District Court Judge**

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REPORT

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