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How to Make Arbitration Work: Examples of Creative Techniques

When businesses first started using arbitration instead of court proceedings to resolve commercial disputes, arbitration was thought to be less expensive and time consuming than using the court system. Fifteen or 20 years ago it was not unusual for the parties to wait five years or more to get a trial date and then that trial date could be continued five, ten or more times. This expensive delay occurred after extensive discovery and was often followed by a long and expensive appellate process. The party who wanted a prompt resolution could not afford to await the courts' decisions, while the party who benefited by delay was happy to wait for years. The financial and lost opportunity costs simply became too much and parties began to insert arbitration clauses into contracts.

Hon. William Cahill (Ret.)

After years of experience with arbitration, some of those earlier complaints are now directed toward arbitration itself: It is taking too long and it is getting as expensive as court. However, if the parties are motivated and creative, arbitration can work, resolution of disputes can be expedited and costs can be contained.

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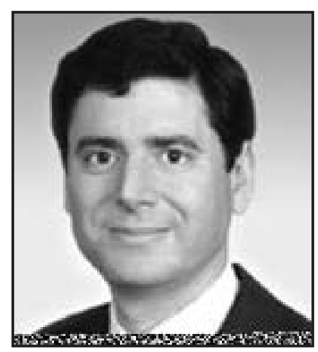
Appraisals Under the California Arbitration Act

Under California law, an arbitration clause in a contract is a litigation show-stopper. A party sued on a contract with an arbitration clause can file a petition to compel arbitration in lieu of an answer and obtain a stay of all proceedings pending determination of that petition. Code Civ. Proc. §§ 1281.7, 1281.4. The parties must be ordered to arbitration "unless the agreement clearly does not apply to the dispute in question," and "[d]oubts as to whether an arbitration clause applies to a particular dispute are to be resolved in favor of sending the parties to arbitration." *Vianna v. Doctors' Mgmt. Co.*, 27 Cal. App. 4th 1186, 1189 (1994). Arbitration clauses may sweep in non-contract claims and non-parties to the contract. *See, e.g., Larkin v. Williams, Woolley, Cogswell, Nakazawa & Russell*, 76 Cal. App. 4th 227, 230 (1999); *Metalclad Corp. v. Ventana Envtl. Organizational Partnership*, 109 Cal. App. 4th 1705, 1713-14 (2003). Any anti-arbitration order by a trial court is immediately appealable, while a party aggrieved by a pro-arbitration order cannot appeal until after the arbitration occurs and a motion is brought to confirm or vacate the award. Code Civ. Proc. § 1294.



Daniel B. Asimow

In a relatively obscure provision of the California Arbitration Act, California adds a wrinkle to this scheme by treating appraisals as a form of arbitration. Unlike the Federal Arbitration Act, the California Arbitration Act contains a broad definition of agreement that includes "agreements providing for valuations, appraisals, and similar proceedings. . . ." Code Civ. Proc. § 1280(a). The California statute does not thereafter distinguish between appraisal agreements and arbitration agreements, nominally making a contract with an appraisal clause subject to all of the

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Making Arbitration Work

This article will give examples of creative arbitration techniques developed by attorneys and will also share some ideas about how to make traditional arbitration work better.

A Creative Arbitration Procedure in a Large Complex Case

One of the best features of arbitration is counsel's ability to structure the entire procedure to meet the specific requirements of particular clients. Through arbitration innovations, counsel have found ways to streamline the more traditional, trial-like procedure of presenting live testimony, cross-examination and argument.

One example is an arbitration conducted last year outside California. Five years ago a massive warehouse fire destroyed a building and $50,000,000 in inventory. The parties filed suit and following the normal two to three years of expensive discovery and motion practice (costing $5,000,000 per party), the case was settled with the two major defendants paying tens of millions of dollars. However, the two defendants could never agree on who was "more" at fault, so they decided to split the settlement "50/50" between them and take the allocation dispute to binding arbitration.

Everyone agreed that a trial on the allocation issue would last seven to nine months. No one wanted that, so defense counsel invented a unique arbitration procedure, tailored to the needs of their clients and designed to get a fair and prompt resolution of their multi-million dollar allocation issue. What they agreed to was the following:

- Counsel chose three arbitrators and stipulated that the arbitration would be conducted under the Federal Rules of Evidence.
- The parties agreed to a maximum 15 day arbitration limit with 7-1/2 days per side, and they stipulated to the admissibility of all documents.
- With the exception of two fact witnesses and two expert witnesses, the entire arbitration was presented by playing excerpts of videotaped depositions.
- Counsel had stipulated beforehand to the admissibility of the videotaped testimony, and before playing of the videotaped testimony, counsel described to the arbitrators why they were presenting the particular testimony and what they were intending to prove. Both sides took full advantage of what turned out to be brief "closing argument" or "commentary time" to explain their case as it went along.
- The three arbitrators were required to issue a unanimous decision or the entire arbitration would be presented to a new panel. The entire arbitration was videotaped for use in a second arbitration if needed (the procedure for a second arbitration was the parties' way of providing for an "appeal").
- The parties stipulated to the wording of the arbitration award form. The arbitration was completed in 14 days and two days later the arbitrators issued their unanimous decision.

Everyone found the procedure to be fair and more efficient than seven to nine months of jury trial. However, the format probably will not be used frequently. First, to accept such a procedure, the clients and counsel must be confident and experienced enough to take the risk of adopting a procedure that is quite different from the "traditional" trial/arbitration format. Many lawyers would be uncomfortable with giving up live cross-examination and would not want to permit argument throughout the entire arbitration. In addition, counsel may worry about being second-guessed by the client if the client loses the arbitration and blames the unique format. In this case both the clients and attorneys were sophisticated and understood the risks and benefits of departing from the "traditional" arbitration format.

Obviously, this unique procedure only works if you have all witnesses' depositions videotaped. Playing videotaped testimony is a vast improvement over the old practice of reading deposition transcripts to the trier of fact, which is deathly boring. In addition, videotape permits the arbitrator to actually observe the witnesses to help in evaluating credibility.

From the arbitrators' point of view, there were certain unexpected advantages to the procedure invented for this arbitration. First, in a traditional trial or arbitration, the evidence is presented through individual witnesses. In this arbitration, the evidence was presented by issue and subject matter, not by individual witness. That format made the evidence easier to follow and understand.

A traditional arbitration format might feature five witnesses, each testifying on different days, giving conflicting testimony on the same issue. Because of the lapse of time that testimony sometimes gets confused because arbitrators cannot always remember previous witnesses' testimony given days or weeks earlier.

However, in this format, all five witnesses testified by videotape about one issue, such as the weather on the day of the fire. When the testimony on that issue was over, the same witnesses would be seen testifying about a different topic, such as what they saw or smelled immediately before the fire. Then the witnesses would continue to a new issue until all the evidence was in. This format made the evidence clear and easy for the arbitrators to follow.

The "commentary time" also made the evidence easier to understand. In a traditional trial/arbitration, the trier of fact sometimes does not understand what certain testimony is supposed to show (this is true with judges and very true with lay jurors). In trial, the evidence comes in and days or weeks later counsel explains what it all meant when he or she gives closing argument. By that time, much has been forgotten or misremembered.

In this arbitration format, the statements of counsel during the "commentary time" provided a more clear understanding of the meaning of the evidence as it was presented and also had the effect of forcing counsel to be very precise in explaining what he or she was trying to accomplish by presenting the evidence. It became immediately clear if the evidence did not support the proposition for

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which it was introduced.

Counsel spent considerable time preparing for this arbitration: deposition testimony had to be reviewed and presented in only 7-1/2 days and a trial strategy had to be organized. However, preparation was not as extensive as in a normal case where counsel has to schedule witnesses, prepare witnesses for testimony, prepare direct and cross-examination every night plus attend to all the other things entailed in presenting a professional arbitration case in 15 days. Significantly, clients received what arbitration was intended to do, a less expensive and faster procedure to get a fair resolution of their multi-million dollar dispute.

Other Techniques to Make Arbitration Work

• There are less elaborate ways to make arbitration work better. A time limit on the length of the arbitration hearing is an obvious example. Some arbitrators conduct a pre-arbitration conference when time limits are discussed and counsel objects. When the clients are present, they are often seen by the arbitrator to be nodding their heads "yes, time limits are good" in concert with their counsel arguing "No." Time limits contain arbitration costs.

• Counsel should consider stipulating to having direct testimony submitted by declaration and having their witnesses available only for cross-examination on their declarations. It probably takes less attorney time to prepare direct testimony declarations than it does to actually prepare the live witnesses for their testimony and then present them for live testimony at the arbitration. Also, a careful declaration makes the testimony clear for the arbitrator and avoids the inevitable objections of "leading." If the opposing counsel chooses not to cross-examine, the witness need not even appear at the arbitration and that time and cost can be avoided.

I would suggest that direct testimony of an expert be an exception to this general rule. Some expert testimony is complex and takes time to understand. A live expert witness, instead of a declaration, provides the arbitrator the opportunity to ask questions to make sure the testimony is understood properly.

• When drafting an arbitration clause, find some language that limits discovery to that which is critical to the case. Have a procedure to promptly and informally exchange documents and limit written discovery to vital areas only. Set a limit on depositions, and try to find a way to preserve objections and shorten the length of depositions.

• Treat the pleadings and motion practice in arbitration with the same close and precise care that you do in court proceedings. In court, one has precise pleadings outlining exactly what the plaintiff wants and the defendant files an answer putting forward its affirmative defenses. On motions in court, counsel presents a carefully worded

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The Revised Uniform Partnership Act: An Introduction

A man named Colin comes into your office and begins telling you his legal problems:

Eight years ago, Colin and his friends George, Dick and Condie formed "G.O.P.," a California general partnership, to buy, sell and manage foreign oil and real estate. After operating successfully for years, Colin believes that George, the managing partner, began to make very bad decisions regarding the partnership business. Colin confronted George, the partners argued, and now Colin wants to do whatever it takes to get out of the partnership while getting paid fairly for his share of G.O.P.

You agree to take the case, and head for the library to refresh your knowledge of California general partnership law.

Richard F. Munzinger

It is a good thing you are diligent, because if your knowledge about partnerships pre-dates 1997, then it may no longer represent the law. Colin's situation will be governed by the Revised Uniform Partnership Act ("RUPA"), which California adopted almost verbatim in 1997 (Corp. Code § 16100, *et seq*.) and which establishes an entirely new framework for partnership law.

Although RUPA has been around almost ten years, there are few cases in California or elsewhere that interpret or apply it. Accordingly, you should learn the statute and official commentary inside and out if you face litigation under RUPA. Your case is likely to raise issues of first impression for your judge, with no controlling appellate authority.

Because Colin wants to leave the partnership, his case will involve a "dissociation," a "dissolution," or both. We will return to these terms in a minute, but first a very brief history.

Prior to RUPA, California followed the aggregate theory of partnerships, under which a partnership was viewed as essentially the combination of its partners. If that combination changed because a partner left or was kicked out, the partnership was always "dissolved," in the absence of a written partnership agreement providing otherwise. For the remaining partners to continue carrying on the partnership's business without the departed partner, they were required to form a new partnership.

RUPA introduced a more flexible framework based on an entity theory of partnership, under which the partnership is a separate entity that exists apart from the sum of its partners. Under RUPA, a partnership can (and usually should) survive the departure of a partner. RUPA accom-

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plishes this result by introducing the concept of "dissociation," which is the term used to describe a partner leaving or getting kicked out of a partnership that continues. Although good business lawyers had been incorporating similar concepts into written partnership agreements prior to RUPA, RUPA made them the default rules.

RUPA retained the concept of dissolution of a partnership, but in most cases a partnership will not dissolve when a single partner leaves. Under RUPA, dissolution only occurs under certain enumerated situations (§ 16801) and has drastic consequences for the partners, including a forced sale of the partnership assets. As a result, the threat of forced dissolution can be used to gain leverage in a dispute, as discussed below.

RUPA sets forth different methods for valuing a partner's share if the partners dissociate or if the partnership is dissolved. When a partner dissociates, the partnership must buy his interest out. § 16701(a). The buyout price is calculated by determining the price a willing buyer would pay a willing seller for the entire partnership, then deducting the partnership's liabilities, and then dividing this net partnership value according to the departing partner's share in the partnership. § 16701(b). Finally, any amounts the dissociating partner owes to the partnership are deducted from his share, including damages for "wrongful" dissociation, which is discussed in more detail below. § 16701(c).

Matthew J. Gluck

If a partnership is dissolved, the assets of the partnership are sold, its debts are paid and any surplus is distributed among the partners. § 16807. RUPA requires an actual sale of all partnership assets because it requires that distributions to partners be made in cash. In-kind distributions are not allowed. *Id.* The forced "fire sale" of the partnership assets means that the partnership may have to accept discounted, distress values for some assets. Moreover, because the assets are actually sold, dissolution will frequently impose significant and unfavorable tax consequences for all of the partners. And, of course, dissolution means the end of the partnership and the partnership business.

The timing of dissociation or dissolution will often be a significant factor in how much a departing partner will receive for her share. The court has the discretion to find that a partner is dissociated or that the partnership is dissolved as of the date of judgment or as of virtually any other date, depending on the facts and circumstances of the case. *See, e.g., Vangel v. Vangel*, 116 Cal. App. 2d 615, 619 (1953) (pre-RUPA case, but its logic should still apply under RUPA). Thus, much of RUPA litigation focuses on disputes over when a dissociation or dissolution should be found to have occurred.

Generally speaking, in a partnership like G.O.P. that has been more profitable each year, you will want your client's share to be valued as of the latest date possible so that she can share in the most profits, while you will seek to have the other partners' shares valued as of the earliest date possible.

Back to your new client Colin. Should Colin seek to dissociate himself or to force a dissolution? Does he have any other options? To advise Colin wisely, you need more facts.

When you press for more facts, Colin tells you that George caused G.O.P. to enter a deal with a company called Hattimutton to manage G.O.P.'s overseas oil and real estate operations. At the time George engaged Hattimutton, it had a record of shoddy work and was more expensive than the other bidders. George performed no due diligence on Hattimutton and did not even consider anyone else for the job. (Colin suspects it might have been a sweetheart deal.) Hattimutton ended up being totally undermanned and under-qualified and lost G.O.P. $10 million.

When Colin confronted George over the incident, George told Colin that George could do whatever he wanted, and cited to a provision of the partnership agreement giving George, as the managing partner, the discretion to act "arbitrarily" and with "absolute discretion."

Colin convened a vote to try to remove George, but, as Dick was quick to note, the partnership agreement gave George two votes, while each of the other partners only received one. Condie and Colin voted to remove George, but Dick (who was fiercely loyal to George, and whom Colin thought was behind some of George's worst decisions), voted to retain him. With his extra vote, George was able to retain his position as managing partner.

Colin wants to know if the provisions of the partnership agreement are valid. Can the partnership agreement give George two votes? Can George really have "absolute discretion," even to act "arbitrarily"? How does all of this affect Colin's choices regarding dissolution and dissociation?

Although RUPA gives each partner an equal voice in the management of the partnership as a default, RUPA also gives the partners the power to vary almost all of its provisions. §§ 16401(f), 16103. The only exceptions to this broad discretion are that the partnership agreement cannot:

• vary the government filing requirements for partnerships;
• "unreasonably restrict" partners' right of access to books and records;
• eliminate the duty of loyalty;
• "unreasonably reduce" the duty of care;
• eliminate the obligation of good faith and fair dealing;
• vary the power of partners to voluntarily dissociate;
• vary the right of the court to expel a partner.

§ 16103(b)(1)-(7). RUPA does not prohibit partners from varying the number of votes they receive, so Colin and his partners were free to agree to give George two votes.

However, the provisions in the G.O.P. partnership agree-

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ment giving George the right to manage the partnership "arbitrarily" and with "absolute discretion" are probably invalid under RUPA. As set forth above, RUPA prohibits the partnership agreement from "unreasonably reducing" the duty of care. § 16103(b)(4). RUPA defines a partner's duty of care as the duty to refrain from "engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of the law." § 16404(d). You could make a strong case on Colin's behalf that acting arbitrarily constitutes recklessness or at least gross negligence in most circumstances, especially given the damages that resulted. Accordingly, the court might limit the application of the "absolute discretion" clause, if not strike it entirely.

The most significant point that arises from the new facts that Colin has shared with you is that he should consider filing suit seeking to dissociate George as of the date of the Hattimutton deal, rather than voluntarily dissociating himself from G.O.P.

To judicially dissociate George, Colin would have to prove one of the following: (i) George "engaged in wrongful conduct that adversely and materially affected the partnership business," (ii) George "willfully or persistently committed a material breach of the partnership agreement or of a duty to the partnership or other partners," or (iii) George "engaged in conduct relating to the partnership business that makes it not reasonably practicable to carry on the business in partnership with the partner." § 16601(5)(i)-(iii). Colin has a strong case that George's behavior meets all of these tests, especially given the $10 million in partnership damages. Note, however, that courts will be much more likely to dissociate a partner for repeated misconduct, so you should press Colin for more facts.

If Colin were successful in judicially dissociating George, the dissociation would be "wrongful." Under RUPA, a dissociation is wrongful if (1) the departing partner is judicially expelled, (2) the dissociation is a breach of the partnership agreement, (3) the dissociation is caused by the partner's bankruptcy, or (4) if voluntary, and if it takes place before the expiration of the term of a term partnership. § 16602(b).

If the dissociation is found to be wrongful, then the partnership may reduce the valuation of the dissociated partner's interest by the damages caused by his wrongful conduct. §§ 16602(c), 16701(c). If the partnership is a term partnership, it has the option of waiting until the expiration of the term to pay the wrongfully dissociated partner his share. § 16701(h).

If Colin succeeds in dissociating George, the partnership would have to buy George out as of the date on which the court finds he was dissociated, but it could deduct any damages he caused by hiring Hattimutton. Most importantly, from that date forward, Colin would split the partnership profits (which have increased every year) with one less partner. And George would be out of Colin's hair, at least in theory.

You tell Colin that he may have a cause of action against George for dissociation based on the Hattimutton deal. He is interested in the idea, but tells you there is more.

Soon after the failed vote to remove George, George and Dick voted to exclude Colin from the partnership business and meetings. (The partnership agreement is silent on expelling a partner.) Colin and Condie opposed, but again to no avail because of George's extra vote.

George and Dick changed the locks on the doors and removed Colin's name from partnership stationery and letterhead. They refused to pay him a share in the profits of the partnership going forward, claiming that they had kicked him out of the partnership.

Colin wants to know if George and Dick could legally exclude him from G.O.P., and, if not, the consequences of their conduct.

A partner can only be dissociated by virtue of certain enumerated events, including voluntarily dissociating by giving notice, by operation of the partnership agreement, by death, by declaring bankruptcy or by a judicial determination that one of the three standards set forth in the section above have been met. *See* § 16601(1), (2), (3), (5), (6) *and* (7). Unless the partnership agreement says otherwise, not even the unanimous vote of the partners would be enough to dissociate a partner, except in limited circumstances that are not present here. *See* § 16601(4). Since the G.O.P. partnership agreement is silent on expelling a partner, George and Dick did not have the power to kick Colin out by a majority vote, and Colin is still a partner.

Colin should be able to establish that George and Dick's exclusion of Colin from partnership affairs qualifies as "conduct which makes it not reasonably practicable to carry on the business in partnership with" them. Thus, under Section 16601(5)(iii), Colin could seek to have George and Dick judicially dissociated as of the date they excluded him (assuming Colin is not successful in having George dissociated even earlier based on the Hattimutton issue).

Furthermore, in one of the more interesting twists under RUPA, a court may compel *dissolution* of a partnership based on the same standard set forth in Section 16601(5)(iii) as a ground for dissociation: "[I]f another partner engages in conduct…which makes it not reasonably practicable to carry on the business in partnership with that partner." § 16801(5)(ii).

Thus, Colin can state a cause of action not only to dissociate George and Dick, but also to dissolve G.O.P. as of the date George and Dick excluded him. Since G.O.P.'s assets include real estate with millions of dollars in unrealized appreciation, and because George and Dick hate paying taxes, the prospect of a forced sale makes Colin's cross-claim for dissolution a powerful tool. Of course, Colin will also face a hefty tax bill upon a dissolution, but he says he is willing to live with this consequence if it comes to that.

You advise Colin that he should file suit seeking to dissociate George and Dick, and, in the alternative, to dissolve G.O.P. He can also seek to be voluntarily dissociated as of the date of judgment in the alternative, so that he can still be bought out in the event the court

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rejects his other claims The goal, however, would be to retroactively kick George and Dick out of the G.O.P. as of the date they excluded Colin (maybe earlier for George) and to have their partnership shares valued as of that past date, thus cutting them off from any profits the partnership made going forward. In the end, the threat of this possibility and the possibility of dissolution could pressure George and Dick into favorable settlement offers for a buyout of Colin's share.

If, in your representation of Colin or in any other case, you seek to learn more about RUPA, we highly recommend *The Revised Uniform Partnership Act*, Hillman, Vestal & Weidner, 2006 edition. The Hillman treatise is the most thorough secondary source on RUPA that we have encountered and is the treatise most often cited in the case law.

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"Notice of Motion" that frames for the court the exact issue which is to be decided.

Because arbitration is more informal, it can become confusing as to what is at stake in the arbitration. The petition often does not state exactly what is sought.

This problem is more pronounced in arbitration motion practice. Often a motion is brought for an arbitrator to decide a very broad issue such as "the insurer's duties under the insurance policy." If that same motion were brought in court, the Notice of Motion would say instead "Motion to Grant Summary Adjudication on the Insured's Duty to Defend." This lack of precision in the informal arbitration process results in moving papers, opposition briefs and oral argument being presented before anyone considers with specificity the nature of the relief being sought. Everyone involved then realizes that no one is clear as to what exactly is supposed to happen.

Some people believe that informality is one of arbitration's strengths. That may be, but informality can result in unnecessary mistakes because issues are not carefully thought out.

• Admissibility of evidence is often a concern. Many people believe that anything can come into evidence in arbitration. That is correct, but the weight and reliability given to a piece of evidence often are directly tied to its actual admissibility in court. The Evidence Code exists for a reason: it requires only reliable testimony to be admitted into evidence. If an arbitrator is weighing the reliability of double hearsay versus the reliability of evidence that would actually be admitted in a trial, the double hearsay will most often be ignored.

Therefore, it is probably unwise in arbitration to rely heavily on evidence that would otherwise be inadmissible. The arbitrator may indeed admit it as evidence in the arbitration and then later simply ignore it as unreliable. When inadmissible evidence is submitted against you, it also cannot hurt to object to its admissibility in order to highlight its unreliability. Of course, many arbitration clauses state that the arbitrator is to use the Federal Rules of Evidence or something similar which would provide a check on this problem, especially if an experienced arbitrator is presiding.

However, if an arbitrator makes a decision based on unreliable evidence, there is nothing that can be done about it. That is also true in a jury or court trial, but the problem highlights why one should be careful in arbitrator selection. (However, there may be times when one wants such an arbitrator.)

• Consider having the arbitrator issue a tentative arbitration award that can be challenged or discussed in post-arbitration motions. One of the biggest complaints against arbitration is that the losing party does not have any recourse for an incorrect ruling. (Arbitration is the only procedure in civil litigation that is over after the ruling. If you are in court, due process provides for motions for reconsideration, new trial, appeal, etc.) The lack of post-arbitration remedies can prove extremely frustrating. The finality of arbitration, while initially appealing, is not quite so attractive to clients when they lose and have no recourse.

If the arbitrator issues a tentative ruling, it affords the parties with one last chance to correct what they believe to be a mistaken ruling and it gives the arbitrator an opportunity to correct any mistakes. It is everyone's nightmare to discover a vital mistake (*e.g.*, overlooking the significance of an important document) after a final ruling is issued and the arbitrator has lost jurisdiction. A tentative ruling extends the time for the actual arbitration hearing, but in the right case, doing so can be very helpful to everyone.

• Consider "baseball arbitration." Baseball arbitration works well when there are discrete money issues to be resolved, such as when deciding the amount of attorneys' fees to be awarded or resolving certain employment disputes. Each side chooses a figure and the arbitrator is asked to pick one or the other. The parties can change their figures at any time until the decision is rendered. This procedure allows each side to change offers and demands and encourages each side to become more reasonable in response to the other side's positions. Eventually, the parties' positions coalesce and the actual ruling is perceived by everyone to be fair.

Hopefully, these suggestions will help make commercial arbitrations as they were intended 15 to 20 years ago. Arbitration can be a quicker and less expensive way to resolve commercial disputes. Arbitration is not perfect, but then again, neither are other dispute resolution systems. In arbitration, the clients have control to create a process that works best for them.

Hon. William Cahill (Ret.) was a judge on the Superior Court for the City and County of San Francisco; he now serves as a mediator and arbitrator at JAMS Endispute in San Francisco.

TRENT NORRIS

On ENVIRONMENTAL LAW

With the Al Gore biopic *An Inconvenient Truth* receiving an Academy Award, it is clear that the world's most far-reaching environmental issue — global climate change — has finally found a broad audience. And so have revolutionary proposals to change environmental law.

As a political issue, global warming has been around for decades. In the mid-1980s, Senators Al Gore and Tim Wirth proposed relatively modest approaches to reducing emissions of substances that cause global warming, such as carbon dioxide, a greenhouse gas. In 1989, the Montreal Protocol on Substances that Deplete the Ozone Layer entered into force. And for years, Earth Day speeches and sermons have sounded the tocsin.

Now, among scientists, the climate change debate is no longer over *whether* human activity is warming the planet or *how* it is doing so, but over how much, how quickly, and how to stop it. That fundamental consensus, embodied in the recent report of the Intergovernmental Panel on Climate Change, has brought developments in environmental law that are directly related to climate change. They will have a significant effect on American individuals and businesses, and California is out front.

Just as the environmental challenges of the prior generation brought such novel legal concepts as citizen suits and unlimited, joint and several, retroactive liability, the challenges of global climate change are spawning creative legal and policy approaches addressing this most collective of problems. Four bear mention.

Massachusetts v. Environmental Protection Agency. In what some are calling its most important environmental case ever, the U.S. Supreme Court on November 29 heard oral argument presenting the question of whether the Clean Air Act provides EPA with authority to regulate greenhouse gas emissions and, if so, whether EPA must exercise that authority or may decline to do so based on unenumerated policy considerations. EPA in 2003 denied a petition asking it to regulate greenhouse gases from motor vehicles based on the theory that such gases are "air pollutants" that endanger public health and welfare. EPA argues that greenhouse gases are not "air pollutants" and that it has discretion to decline to regulate them "[u]ntil more is understood about the causes, extent and significance of climate change and the potential options for addressing it." Ten states have sided with EPA; 12 others have challenged it. A ruling is expected this spring.

California AB 32. Prompted in part by the lack of federal action, the California legislature late last year enacted the Global Warming Solutions Act, which requires statewide greenhouse gas emissions in 2020 to equal those in 1990. How the law will meet this goal of reducing emissions by approximately 35 percent is yet to be worked out among such agencies as the Air Resources Board, the Public Utilities Commission, the Energy Commission, and various local authorities. Under intense consideration are market mechanisms such as "cap and trade" systems that set an overall limit, allocate credits based on a baseline emission amount for various sectors or individual companies, and then allow such credits to be bought and sold as each credit gradually entitles the owner to lower emissions.

The Regional Greenhouse Gas Initiative. On the opposite coast, likewise attempting to fill the federal vacuum, several U.S. states and Canadian provinces are considering how to implement a proposed regional cap-and-trade program. Led by seven northeastern states, the program aims to allocate emissions credits to each state, which will further allocate them to individual facilities under state laws and regulations based on a "model rule" that is being drafted. Legal challenges are inevitable.

People v. General Motors. In 2006, Attorney General Bill Lockyer filed suit against the nation's six largest automakers alleging that their products' emissions of greenhouse gases have created a public nuisance for which the state deserves to be compensated. His successor, Jerry Brown, has continued the suit, which is premised on a theory that is universally acknowledged as novel. Even moderate success would breed similar suits across the country against the automobile and other industries.

Trent Norris

These are but the start of a growing wave of creative ways of addressing global warming that — given the economic and environmental stakes — are likely to result in litigation for the next generation of environmental lawyers. Any "cap and trade" regime requires extensive legal work to establish its "market" of tradable credits. The regulatory process alone will undoubtedly spawn wide-ranging disputes among vested interests over questions with significant short-term economic impacts that may or may not result in longer-term benefits for the wider population.

Less directly, but with perhaps greater urgency and practical application, the challenges of global climate change will prompt major activity in land use and local government law. Communities will struggle to address the effects of climate change, from increasing needs for weather-related disaster assistance to the rising sea level and its effect on property values, coastal habitat, recreation, and such key infrastructure as bridges, roads, and sewage treatment facilities.

Defying Mark Twain's quip that "Everyone complains about the weather, but no one ever does anything about it," environmental lawyers are at the forefront of creative approaches to climate change. And, long after Hollywood has moved on to another issue, the changes in environmental law being wrought today will continue to affect us all.

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same procedures as one with an arbitration clause.

The language in Section 1280(a) was added in 1961 in response to a recommendation by the Law Revision Commission that the "statute be amended to…expressly extend[] the coverage of the statute to appraisals and valuation proceedings." *Coopers & Lybrand v. Superior Court*, 212 Cal. App. 3d 524, 533-34 (1989) (citation omitted); *see also Helzel v. Superior Court*, 123 Cal. App. 3d 652, 659 n.4 (1981). The fit, however, is fairly awkward. Parties typically use arbitration clauses as a form of comprehensive alternative dispute resolution — as a substitute for a court or jury trial to resolve all disputes. Appraisal clauses are more typically used in a limited fashion to establish valuation under specified circumstances. For instance, a partnership agreement may include an appraisal clause that comes into play when the partnership has a right to purchase the interest of one of the partners. A lease agreement may provide for valuing the property, the fixtures, or the fair market rental value on a renewal. Or an insurance agreement may contain (indeed, in some instances is mandated by law to contain, *see* Ins. Code § 2071) a loss appraisal clause that comes into play once coverage is determined.

Nevertheless, the handful of California cases to discuss the issue outside the insurance context generally treat appraisals as equivalent to arbitration. *See, e.g., Coopers & Lybrand*, 212 Cal. App. 3d at 534; *Helzel*, 123 Cal. App. 3d at 659-60. This treatment leaves unanswered a number of practical questions that confront a litigator dealing with a complex agreement containing an appraisal clause. For instance, who decides preliminary questions, such as whether the facts giving rise to an appraisal right have occurred? Assuming a matter is going to appraisal, what procedures apply and who determines legal questions that may arise in connection with the arbitration? Finally, given the special treatment for appraisals under California law, does it make a difference if interstate commerce is implicated and the Federal Arbitration Act applies?

Who Decides Preliminary Questions?

The California Arbitration Act provides a facially simple procedure for determining whether to order parties to arbitration. The court must order the parties to arbitration "if it determines that an agreement to arbitrate the controversy exists," unless one of three statutory exceptions applies: waiver, revocation, or the existence of a pending action involving third parties arising out of the same transaction. Code Civ. Proc. § 1281.2(a)-(c). Section 1281.2 also authorizes the court to delay arbitration if "there are other issues between the petitioner and the respondent which are not subject to arbitration…and…a determination of such issues may make the arbitration unnecessary." *Id*. §1281.2 (sixth paragraph). The petition to compel arbitration is resolved by a summary hearing, scheduled no later than any other matter in the case. *Id*. §§ 1290.2, 1291.2; *see Rosenthal v. Great Western Fin. Sec. Corp*., 14 Cal. 4th 394, 413 (1996).

Certain preliminary questions, such as waiver, thus fit easily into the statutory framework and present clear questions for the court, *albeit* ones resolved in a summary fashion, without a right to a jury trial and usually without an evidentiary hearing. *Id*. at 413-18. Arbitrability — construction of the agreement to determine if the arbitration clause covers the instant dispute — is also generally a question for the court, unless the contract manifests a clear intent to submit the issue to the arbitrator. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Parker v. Twentieth Century-Fox Film Corp*., 118 Cal. App. 3d 895, 901 (1981). But other preliminary questions are often for the arbitrator. For instance, under California law, claims of fraudulent inducement that go to the entire agreement (as opposed to merely the arbitration clause) are for the arbitrator and not the court to decide, at least assuming a relatively broad arbitration clause. *See Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street*, 35 Cal. 3d 312, 323 (1983). Likewise, a claim of partial illegality of the contract is generally for the arbitrator. *See Moncharsh v. Heily & Blase*, 3 Cal. 4th 1, 30 (1992).

In the appraisal context, the parties generally will have intended the appraisal clause not as an all-encompassing dispute resolution mechanism, but rather as a device that comes into play only in specified circumstances, *e.g*., when a partnership has the right to purchase the interest of a partner. *See Parker*, 118 Cal. App. 3d at 901. Under these circumstances, preliminary questions should not be for the appraiser to decide. The party attempting to enforce the appraisal clause will nonetheless have procedural advantages, including the ability to bring the issue before the court in an expedited fashion and perhaps to speed through the resolution of those preliminary issues. The only channel open to the court to avoid determination of those preliminary issues in a summary proceeding appears to be the unlettered sixth paragraph of Section 1281.2, permitting the court to defer the appraisal until the resolution of other issues through litigation. *Id.; cf. Helzel*, 123 Cal. App. 3d at 661 (declining to apply provision).

What Procedures Govern the Appraisal?

The California Arbitration Act provides default rules for the conduct of arbitrations, although parties are free to contract for alternative procedures. The default rules include pre-hearing disclosure of witnesses and documents a party intends to introduce, a live hearing at which parties may present evidence and cross-examine witnesses, testimony under oath, representation by counsel, and a written award. *See* Code Civ. Proc. §§ 1282.2(a),(d), 1282.4, 1283.4. If the arbitrator intends to base an award on information not obtained at the hearing, he or she must disclose the information to the parties and give them an opportunity to respond. *Id*. § 1282.2(g).

These procedures do not bear much resemblance to a traditional appraisal, which is not typically viewed as adversarial. For instance, in a real estate valuation, an

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KATE WHEBLE

On TRADEMARK & COPYRIGHT

A trademark conveys information about the source of goods or services: APPLE computers; JET BLUE airlines. Thus, a trademark does not exist in a vacuum: to have meaning, and any legal protection, it must be used in commerce in connection with goods or services. What's more, the use must be "lawful." Trademark owners, especially those in government-regulated industries like alcoholic beverages, food and pharmaceuticals, must be vigilant about the accuracy of the information they provide in connection with their branded products, or they jeopardize their rights.

The consequences of flouting this rule are shown in *CreAgri, Inc. v. USANA Health Services, Inc.*, CV-03-3216-MMC (9th Cir. 2007). Plaintiff CreAgri sold OLIVENOL, a dietary supplement containing an antioxidant called hydroxytyrosol ("HDTS"). When CreAgri began to sell OLIVENOL in spring 2001, the label indicated that each tablet contained 25 mg. of HDTS. There was no standardized way to measure HDTS content. CreAgri could have applied to the FDA for an exemption from labeling requirements, but it did not.

By spring 2002, CreAgri had determined that each OLIVENOL tablet contained only 5 mg. of HDTS. CreAgri changed the label but again did not seek an exemption from labeling requirements. Later, during the lawsuit, CreAgri further revised its estimated HDTS content to 3 mg. per tablet.

CreAgri applied to register the trademark OLIVENOL with the U.S. Patent and Trademark Office ("PTO") on October 9, 2002. In June, just a few months earlier, USANA Health Services ("USANA") applied to register the trademark OLIVOL and began selling its product in August 2002. The OLIVOL mark registered, blocking registration of CreAgri's mark.

CreAgri sued for trademark infringement and related claims, asserting that the mark OLIVOL infringed its rights in OLIVENOL and claiming prior use of its mark. USANA counterclaimed, seeking, among other things, cancellation of the OLIVENOL registration on the ground that the OLIVENOL mark had not been lawfully used in commerce because of the erroneous claims regarding the amount of HDTS in the product.

The district court granted USANA's motion for summary judgment, holding that the OLIVENOL mark had not been lawfully used in commerce before USANA's application and use dates. The court also cancelled the OLIVENOL registration because the registration was not supported by lawful use in commerce before USANA's June 2002 application filing date because the OLIVENOL labels did not comply with federal labeling requirements.

CreAgri had three defenses, which the court rejected. First, CreAgri asserted that the nexus between its labeling violation and the OLIVENOL trademark was too attenuated to deprive CreAgri of trademark rights. The *CreAgri* court agreed that some violations could fall into this category, but refused to give CreAgri benefit of the rule, stating that "the nexus between a misbranded product to the product's name is sufficiently close" to justify withholding trademark protection.

Second, CreAgri argued that it was technically infeasible to accurately measure the HDTS levels because there was no accepted testing method, and thus the sale of OLIVENOL was not actually unlawful. The court dismissed this argument by pointing out that the company could have applied for an exemption from the labeling requirements.

Third, CreAgri argued that the unlawful sales were not material, but rather harmless or *de minimis*. The court disagreed. It compared the facts to those in *General Mills v. Health Valley Foods*, 24 U.S.P.Q.2d 1270 (T.T.A.B.). In the *General Mills* case, General Mills sold 18 mislabeled boxes of FIBER ONE cereal before noticing the error, correcting it, and selling over 600,000 boxes of correctly labeled cereal, all before plaintiff claimed use of its trademark FIBER 7. The *CreAgri* court distinguished this case because the error had been corrected and lawful use had commenced before the other party used its trademark. Here, by contrast, no OLIVENOL bearing accurate labels was sold prior to the first use of USANA's OLIVOL product.

Kate Wheble

The *CreAgri* decision is consistent with PTO policy, which requires that before a trademark registration issues, the applicant must demonstrate lawful use in commerce of its mark in connection with the goods and services set forth in the trademark application.

The burden is generally on third parties to bring up questions of "unlawful use" such as mislabeling or lack of proper agency approval. The PTO will not inquire without evidence of a clear legal violation, namely a court or regulatory agency decision or evidence of a *per se* violation. Trademark Manual of Examining Procedure § 907. Minor technical irregularities such as incomplete labeling information generally will not trigger an inquiry. *Id*.

The *CreAgri* ruling could affect marketers whose products are regulated by Federal statutes as diverse as the Food, Drug and Cosmetic Act, the Fair Packaging and Labeling Act, the Meat Inspection Act, the Environmental Protection Act, the Clean Air Act, and the Insecticide, Fungicide and Rodenticide Act. This requirement could provide an effective weapon for those seeking either defensive or offensive claims in a trademark infringement suit. Companies in numerous industries, especially sellers of heavily regulated products like alcoholic beverages, nutritional supplements, food, cosmetics and pharmaceuticals, should look closely at the accuracy of labeling, promotion, packaging and advertising of their products.

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appraiser ordinarily might be expected to visit the property, gather information about comparable sales, and engage in *ex parte* discussions to learn any information bearing on the valuation. In a business valuation, the appraiser would review financial materials concerning the business and engage in discussions with management. *See generally* Uniform Standards of Appraisal Practice (2006), *available* at http://www.appraisalfoundation.org. To the extent valuation might turn on disputed issues of fact or legal questions (for instance, a disputed zoning issue or a partner's right to compel liquidation), the appraiser may be required to state his or her assumptions without purporting to resolve the disputed issues. *See id*. (definition of extraordinary assumption).

Thus, a court-ordered appraisal under the California Arbitration Act may be a very strange procedure, in which attorneys present evidence to an appraiser and an appraiser is deprived of many of his or her usual tools for addressing valuation. In addition, the appraiser may well be put in the unusual position of having to resolve disputed questions. While any determination by the appraiser is subject to review on a motion to confirm or vacate the award, that review is highly deferential. *See* Code Civ. Proc. §§ 1286.2, 1286.6.

What If Interstate Commerce Is Involved?

The Federal Arbitration Act, 9 U.S.C. §1, *et seq*., provides for enforcement of arbitration provisions in any contract "evidencing a transaction involving commerce." 9 U.S.C. § 2. By this language, Congress fully exercised its Commerce Clause power to cover any transaction affecting commerce. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 277 (1995). Although a petition to compel arbitration in a matter affecting interstate commerce may be brought in state court, the Federal Arbitration Act governs arbitrability and preempts conflicting state law. *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984). Nonetheless, the procedures used to address an arbitration petition in state court are generally derived from state law. *Rosenthal*, 14 Cal. 4th at 409-10.

In contrast to California law, the Federal Arbitration Act does not define arbitrations to include appraisals. *See* 9 U.S.C. § 1. Federal courts have split as to whether an appraisal clause found in an agreement affecting commerce is subject to the Federal Arbitration Act. In *Wasyl, Inc. v. First Boston Corp*., 813 F.2d 1579 (9th Cir. 1987), the Ninth Circuit held that it was appropriate to look to state law to determine whether an appraisal is subject to rules governing arbitrations. Finding that California did so treat appraisals, the court applied the Federal Arbitration Act to an appraisal clause. *Id*. at 1582; *accord Portland Gen. Elec. Co. v. United States Bank Trust, N.A*., 218 F.3d 1085, 1090-92 (9th Cir. 2000) (FAA not applicable to appraisal in Oregon because Oregon law does not treat appraisals as arbitration). In contrast, the Tenth Circuit declined to look to state law for the definition of arbitration in an FAA case. *See Salt Lake Tribune Pub. Co., LLC v. Mgmt. Planning, Inc*., 390 F.3d 684, 688-92 (10th Cir. 2004).

The issue is made more complex by the handful of provisions in the California Arbitration Act, discussed above, that permit a court to delay or refuse arbitration if there is an action arising out of the same transaction involving third parties or if there are other issues between the parties not subject to arbitration. There is no counterpart to these provisions in the Federal Arbitration Act. Nonetheless, if the parties have included a choice of law provision selecting California law, a court is permitted to apply these provisions notwithstanding the preemptive effect of the federal act. *See Cronus Inv., Inc. v. Concierge Services*, 35 Cal. 4th 376, 383 (2005).

The upshot appears to be that under current law in the Ninth Circuit, appraisal clauses will be given the same broad effect whether the action is brought in state or federal court, and whether or not interstate commerce is involved. However, the procedural flexibility provided by Section 1281.2 will not be available in federal court. Nor will it be available in state court if the agreement affects commerce and there is no California choice of law provision. Thus, the possibility exists for surprising results to the extent courts continue to "borrow" the state law definition of arbitration while using the procedures found in the Federal Arbitration Act.

Appraisal clauses in commercial agreements can have significant and unexpected procedural and substantive consequences. The ability to treat an appraisal clause as an arbitration clause offers the opportunity to seize control of a case and redirect it to a different forum. On the other hand, that forum may afford relatively little due process and put non-attorney appraisers in the position of resolving disputed factual and legal questions, with relatively little opportunity for judicial review.

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CHIP RICE

On LITIGATION SKILLS

Speed kills, but it's a double-edged sword. Thinking and acting quickly are crucial for good litigators, but going too rapidly can hurt you and your clients. That is why most young lawyers need to learn how to speed up and then they have to learn how and when to slow down.

Tossing Back Ticking Time Bombs

Let's face it: the pace of litigation can be brutal, and it seems to be getting faster all the time as a result of modern technology. There are always letters, e-mails and voicemail messages to be returned, and any delay can and will be used against us. In particular, a letter for the record from opposing counsel is a ticking time bomb that must be tossed back as quickly as possible, but inexperienced or inattentive counsel often procrastinate and let their opponent create "undisputed" evidence about a discovery or other dispute.

In addition, every case has its own list of deadlines that will change in ways that we can never predict with confidence. And, worst of all, just when we really ramp up for trial, our case will often be settled or postponed — a particularly frustrating form of litigation interruptus.

Crisis Engagement

To make matters worse, most litigators are adrenaline junkies. We enjoy feeling in the flow when we are fully engaged in a crisis, but we tend to get a little bored and lazy when not challenged. As a result, we fall easily into a hunter-gatherer rhythm that peaks with the big kill: a deposition, hearing or trial. Attending to details during the lulls is just not as much fun.

Under the pressure of tight deadlines and competing demands, litigators have to be quick studies who can digest complicated and often conflicting evidence and legal principles. As a result, we learn to focus on what is important and disregard what is not. But if we are not careful, we will be fast but shallow — what I like to call being "too quick to a B+." We have to force ourselves to take the time to think things through.

Getting Feedback from Colleagues

We also need to take the time to ask for help. Litigators tend to fall in love with their own arguments, and their own momentum can keep them from seeing any holes or inconsistencies until it is too late. So it is important to get feedback from colleagues to guard against your own blind spots. Even a short letter will usually benefit from review by someone else, who will often see typographical or even substantive errors that your eyes will pass over.

Speed can be particularly dangerous when trying to understand a complex set of facts by alternating between reading the relevant documents and interviewing your client and other witnesses. We have to suspend our inherent tendency to start drawing conclusions while we absorb as much information as possible, and we should not rush the process. No one can listen quickly, and no one can master a complicated situation without hours of careful reading and cloistered contemplation.

Chip Rice

When litigators are in too much of a hurry, they never really listen to their clients or understand all of the important documents. As a result, they are embarrassed when one of their favorite theories goes up in smoke in a deposition because opposing counsel asks their client a question that should have been thoroughly discussed in private long before. Even worse, going too quickly can lead to mistakes in front of the "decider" — whether it is a judge, jury, arbitrator or mediator.

The ultimate impact of such mistakes will depend on how they are interpreted. Some judges seem to think that mistakes are just part of the game and that it is unsportsmanlike for a lawyer to draw too much attention to opposing counsel's errors. But other judges believe that mistakes by counsel show a lack of respect for the truth, and they start discounting what that counsel says.

Slowing Down

At the risk of sounding self-righteous, I prefer the latter kind of judge. Lawyers do a tremendous disservice to their clients and the legal system when they go too quickly to be careful. Many meritless claims and defenses are asserted because some lawyer had a bright idea that he or she did not bother to take the time or trouble to check out. We litigators have a professional responsibility to slow down enough to get things right, and judges should hold us accountable if we don't.

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Letter from the President

We're off to an exciting 2007! As you likely know by now, four of our six dinner programs this year will be devoted to demonstrations of key trial skills by some of California's leading trial lawyers. Each program draws from the same hypothetical case involving misappropriation of trade secrets. At our first program in February, Nanci Clarence and Mark Geragos picked the jury for the case. You won't want to miss our next program, on April 24, when Allen Ruby and Doug Young will deliver the case's Opening Statements. To complete the trial, on September 18, Dan Johnson and Raoul Kennedy will examine a key witness, and then on December 4, John Keker and Jim Brosnahan will deliver their Closing Arguments. Based on the overwhelming attendance and reaction at our February program, this should be a terrific series of programs.

Ben Riley

To augment these four trial practice programs, our 2007 Program Chairs, Larry Cirelli and Daralyn Durie, will also present two panel programs, on June 5 at the Four Seasons in East Palo Alto, and July 24 back in San Francisco, discussing other topics of interest, including effective use of demonstrative evidence at trial. I also am pleased to report that on May 15, at the Marriot Hotel at 12th Street in Oakland, we will jointly present a lunch program with ABTL's Leadership Development Committee, focusing on the complex case assignment systems in Alameda, Contra Costa and San Francisco counties. Information on all these programs will be emailed to you as they approach.

The other important ABTL event to put on your calendar is October 5-7 — our Annual Seminar Event at the beautiful Silverado resort in Napa. Judges and ABTL members from throughout California will convene for practical, "how-to" demonstrations and panels based on a hypothetical case with privacy and securities issues. Chair Rob Bunzel also has secured Justice Sandra Day O'Connor (Ret.) as our keynote speaker. You won't want to miss this spectacular seminar!

Finally, I want to thank my incredible ABTL Northern California officers, committee chairs, and Board members. We are executing a very ambitious year, and everyone is pitching in. Special thanks go to our Membership Chair, Mary Jo Shartsis, who has led a quick start to our 2007 membership drive, and Tom Mayhew and Howard Ullman for their terrific work publishing our always interesting *ABTL Report*.

We do all this work for you, our members. We are working especially hard this year to bring the very best trial practice programs, panelists, and articles ABTL can offer to our associate and other members who have been in practice 10 years or less. You are the future of our organization, and we welcome your involvement. Please contact me with any suggestions you might have for programming or other services we can offer. In the meantime, I'll look forward to seeing you at our programs and at Silverado in October!

Mr. Riley is a partner with the San Francisco office of Howrey LLP, and is President of the Northern California Chapter of ABTL for 2007. rileyb@howrey.com.

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