the abtl REPORT

The Judicial Panel on Multidistrict Litigation (JPML): What It Is and What It Does

By Hon. Roger Benitez

The Judicial Panel on Multidistrict Litigation (JPML) is a little-known but significant body within the federal judiciary. Though it operates mostly behind the scenes, its decisions often determine the course of some of the most complex and high-stakes litigation in the United States—ranging from antitrust disputes and trademark infringement cases to nationwide product liability suits. With limited time and space, this article explains what the JPML is, why it exists, and what it does in practice.

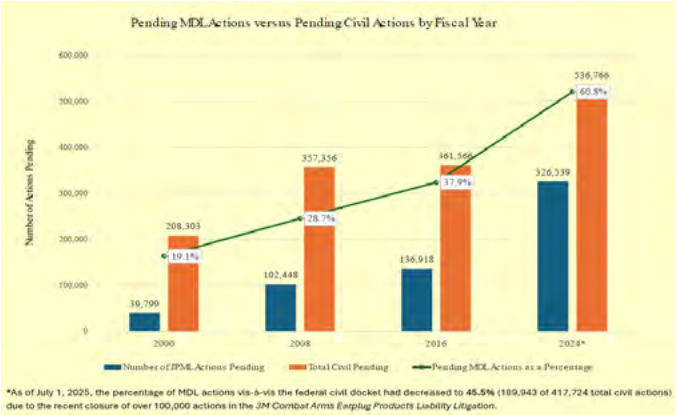
1. Origins and Purpose of the JPML

In 1968, Congress enacted 28 U.S.C. § 1407, thereby creating the JPML. In the years prior, the federal judiciary faced an unprecedented wave of litigation, particularly in antitrust cases against major industries like electrical equipment manufacturers. Dozens of nearly identical lawsuits were filed in federal courts around the country, which created the risk of inconsistent rulings and duplicative discovery. Voluntary coordination among the judges assigned to the cases across the country worked for the electrical antitrust cases, but the shortcomings of collective, voluntary efforts quickly became apparent. To address the problem of duplicative litigation in a formal way, Congress empowered a special judicial panel to decide whether related cases should be centralized in a single court for coordinated or consolidated pretrial proceedings.

2. Impact of the JPML

As demonstrated in the graph below, which reflects the recent trend of JPML cases within the federal civil case inventory, Multi-District Litigation ("MDL") cases play a prominent role in our federal system.

In particular, the JPML plays a key role in shaping modern mass tort and complex litigation. Its decisions can:



Continued on page 4

Inside

BACK to Inside this issue

PRESIDENT'S LETTER:

ABTL San Diego, 2025

By Jenny L. Dixon

As summer winds to a close, it is hard to believe that just three months of 2025 remain. We have had three excellent dinner programs. Feedback on our most recent dinner program, Cindy Tobisman's "Migraines to Mindfulness: How to Chill Out and Bring it in Court" was impressive, with some attendees hailing it as one of the most important programs we have done. I have adopted some of Ms. Tobisman's excellent centering techniques myself, as I recently found myself drawing circles as I prepared to speak in an important meeting.

The "Taco Thursday" Judicial Mixer on September 11 was another resounding success. The combination of judges and tacos proved yet again to be a powerful draw! I am grateful to the Hon. Cynthia Bashant, Chief Judge for hosting us at the James M. Carter and Judith N. Keep Courthouse and kicking off the fun evening.

Our Annual Charity event is on November 12 and will be filled with music, food, raffle prizes, and, most importantly, the awards for our Annual Mock Trial Program winners. Your donations help to fund the prize monies, so come celebrate the future of our legal community. Please sign up as a volunteer scoring judge for the mock trial program – you will have a front row seat for the best and brightest future litigators. Mock trials will commence on November 7, 8, and 10. Click **HERE** to volunteer.

While our chapter has grown, we are still looking to secure additional firms to serve on our board of governors. Please consider encouraging your colleagues and firms to explore membership. If your firm is already on the board of governors, please make sure that you have a delegate to the leadership development committee (LDC). I began my own ABTL journey on the LDC, after a last-minute offer to take over a colleague's registration for the 2013 Annual Seminar. My participation that year changed the course of my career. My 12+ years in ABTL have generated business, friendships, and expertise that I might not otherwise have found.

Our Committee Chairs are hard at work to develop programming for 2026, so please reach out if you have any ideas or brilliant contacts.

My heartfelt thanks to our sponsors for their ongoing support that makes our wonderful activities possible. Many thanks to JAMS, Judicate West, and Signature Resolution (Platinum); ADR Services, Inc., Esquire Deposition Solutions, and Steno (Gold); Ankura, Consilio, and Bill VanDeWeghe, Esq. (Silver).

Finally, I look forward to seeing many of you at the ABTL Annual Seminar at the Wailea Beach Resort on beautiful Maui.

Sincerely,

Jenny L. Dixon

Jenny L. Dixon is a partner at Hahn Loeser & Parks.

JPML... | *Continued from cover*

- **Channel the cases to one court**—A single judge may suddenly oversee thousands of lawsuits affecting billions of dollars in potential damages.
- **Influence settlement dynamics**—Centralization often fosters global settlement negotiations, as parties can resolve disputes in one forum rather than litigating across the country.
- **Shape nationwide commercial conduct**—While transferee judges apply the substantive law of the cases' original jurisdictions, their rulings often substantially impact the marketing and sale of products nationwide.
- **Manage judicial resources**—Centralization frees district courts from duplicating efforts and helps maintain consistency in rulings.

3. Structure of the JPML

The Panel is composed of seven sitting federal judges, appointed by the Chief Justice of the United States. They come from different circuits and districts to ensure geographic and institutional diversity. No two judges on the Panel may come from the same circuit. Although there is no specified term, by tradition the judges sit for seven years, unless extended. Currently, the Panel is chaired by the Hon. Karen C. Caldwell. Other judges on the panel currently are: Hon. Nathaniel Gorton, Hon. Mathew Kennelly, Hon. David Norton, Hon. Roger Benitez, Hon. Dale Kimball, and Hon. Madeline Cox Arleo. The Panel is supported by its Executive Officer, Josh Bullock, staff attorneys, its Clerk of the Panel, and a small staff. It maintains its offices in Washington, D.C.

Every two months the Panel meets and holds hearings. The Panel does not sit in one permanent location but holds hearings in different districts through the country. This traveling schedule underscores the national scope of its work and ensures access for attorneys from different regions. The Panel also has its own Panel Rules of Procedure which may be found at https://www.jpml.uscourts.gov/.

4. What the JPML Does

The JPML's primary responsibility is to decide whether civil cases pending in multiple federal courts should be centralized. Centralized cases are generally known as Multi-District Litigation dockets or MDLs.

Key functions of the Panel include:

- **Centralization decisions** – Determining whether cases involving one or more common questions of fact should be centralized under 28 U.S.C. § 1407.
- **Selecting the transferee district** – Choosing which federal district court and judge will be selected to preside over pretrial proceedings.
- **Monitoring**- Periodically verifying that an MDL is progressing consistent with the demands of the cases.
- **Managing remands** – Sending cases back to their original courts once pretrial proceedings are complete.

5. The Process of MDL Centralization

The Panel's primary task is to decide whether there are one or more common questions of fact that relate the cases. Depending on the complexity of the cases, the Panel then considers whether centralizing the cases (creating an MDL) would "serve the convenience of the parties and witnesses" and whether centralization would "promote the just and efficient conduct of such actions."

In deciding whether to centralize, the Panel considers:

- The number of pending actions. As few as two actions may be sufficient if the issue or issues are sufficiently complex and the likelihood of inconsistent rulings is great.
- The nature and complexity of the common question or questions.
- Judicial efficiency. In particular, centralization may be appropriate if actions are likely to involve overlapping discovery and motion practice.
- Fairness to the parties.

The process begins when a party files a motion asking the Panel to centralize related cases. The Panel then schedules the matter for a hearing. After considering the written briefs, staff recommendations, and oral arguments, the Panel meets in conference and, usually within a week or two, issues a transfer order or denies centralization. If centralization is ordered, all related cases are transferred to the chosen transferee district for coordinated pretrial management. Cases not part of the motion but which involve the same factual questions may later be brought into the MDL by subsequent motion or by the Panel ***sua sponte*** through its conditional transfer order process, which conditionally transfers cases filed in other districts unless a party objects to such transfer (in which case, those objections will be heard at the next hearing session).

Continued on page 5

BACK *to Inside this issue*

JPML... | *Continued from page 4*

6. Selecting the Transferee Court

Once centralization is decided, the Panel must then choose the district to which the MDL will be transferred (the transferee court) and to which judge (the transferee judge.) In reaching its decision the Panel generally will consider:

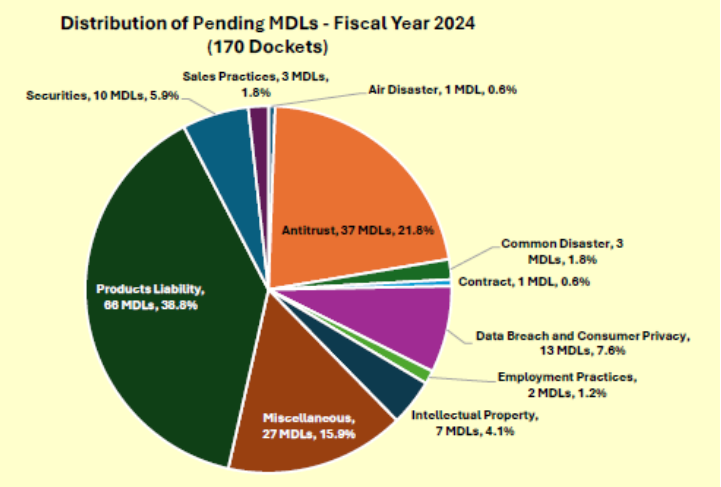
- Location of Evidence.
- Progress of related cases.
- Convenience of the parties and witnesses.
- Whether a given judge is assigned a related case, as well as that judge's experience and expertise.
- The transferee district's caseload as well as the transferee judge's individual caseload.
- Other factors that may make centralization in a district or before a given judge more likely to result in the "just and efficient" conduct of the case.

7. Impact of Centralization

Once an MDL has been centralized, the transferee judge handles all pretrial matters, such as discovery, pretrial motions including motions to dismiss, claim construction, Daubert rulings, and motions for summary judgment. In some instances, the transferee judge may schedule bellwether trials. The transferee judge may also take steps to promote settlement negotiations. Cases not resolved return to their original districts for trial—though in practice most MDL cases settle.

While its origins lie in electrical equipment antitrust cases scattered across the country, throughout its history, the Panel has centralized cases involving many areas of the law including securities, data breach, product liability, employment, patent, and intellectual property.

The graph below shows the current distribution of types of cases within the Panel's case inventory.



8. Conclusion

The Judicial Panel on Multidistrict Litigation itself does not decide the substantive merits of cases, but as the "traffic cop" of the federal civil justice system, it profoundly influences how those cases are litigated and oftentimes settled. By determining whether and where complex federal litigation is centralized, the JPML ensures efficiency and consistency in the handling of disputes that span the country. For both young and experienced lawyers alike, understanding the JPML's role is essential for effective advocacy.

Hon. Roger T. Benitez is a federal judge on senior status with the United States District Court for the Southern District of California.

BACK to Inside this issue

89 marbles down, 164 to go.

By Christian Andreu-von Euw

My family started a simple ritual with two jars—one has a marble for every month since my eldest was born, and the other has a marble for every month until my youngest will graduate high school. Each month, we move a marble from one jar to the other. It's a simple gesture—but a meaningful one. As we move the marble, we reflect on the life we just lived and remind ourselves to spend the next month with purpose.

This practice grounds me in my parenting and helps me bring intentionality to my whole life. And lately, I've been thinking about how it applies to my work as a lawyer.

Litigation is also a countdown—and there's no way to reclaim wasted time. A case begins on the day the client walks in the door and ends on the day a verdict (or settlement) arrives. It may take years, but that time is still limited, and each decision shapes the outcome.

Good litigation strategy starts at the end: we work backward from trial, assigning marbles to each phase—pleadings, discovery, expert reports, motion practice, and so on. Every stage matters. Experts need space to think and defend. Discovery requires planning, coordination, and often a little diplomacy. The to-do list is long, and the time moves fast. To spend that time wisely, we need to develop trial themes early, identify the evidence that matters most and the evidence we still need, and—most importantly—keep a laser focus on the key issues that will actually decide the case.

The real challenge, though, is staying intentional through it all.

There's always so much to do. Plans are constantly being tested—by what the evidence reveals and by what the other side throws our way. And it's easy to fall into autopilot or let frustration (or ego) dictate choices. But that's a disservice—to the case, to the client, and to ourselves.

That's where the marble mindset helps.

We have to remember to spend each marble wisely. Every decision should serve the bigger picture. Are we doing this because it brings us closer to a successful verdict? Or are we just repeating patterns? Are we pursuing this motion because it truly matters—or because opposing counsel got under our skin? The time we spend stewing over a mischaracterization is almost always better spent preparing for the issues that actually matter or advancing another case.

Like life, a case feels long—until suddenly it's not. Trial arrives. And if we haven't been intentional along the way, we'll wish we had been.

So I'm renewing my commitment to bring the same clarity and purpose to my practice as I'm striving to bring to my life.

Because everything should serve a purpose.

And the marbles move either way.

Christian Andreu-von Euw is an experienced and exceedingly effective litigator and trial lawyer with The Business Litigation Group, P.C., Christian is also an electrical engineer.

BACK to Inside this issue

The Mindful Advocate: Insights from Cynthia E. Tobisman

By Evan Critchlow

On August 20, 2025, ABTL San Diego hosted its quarterly dinner program, featuring an engaging and thought-provoking encore presentation by renowned appellate attorney and novelist, Cindy Tobisman.

The event was held at the Westin San Diego Gaslamp Quarter and began with a lively outdoor networking happy hour where attorneys and judges from across the legal community reconnected. Attendees then moved to the main ballroom to enjoy dinner, dessert, and an inspiring talk that was both memorable and genuinely unique.

Ms. Tobisman's presentation, titled "Migraines to Mindfulness: How to Chill Out and Bring It in Court," offered a refreshing and introspective look at the emotional challenges of a litigation practice and how attorneys can better manage the stress and anxiety that often accompany the job. Using compelling metaphors and eye-catching slides, sheencouraged the audience to explore what it means to calm the animal inside us and retrain our mental operating systems to stay grounded under pressure.

Ms. Tobisman reframed courtroom nerves as excitement rather than fear and emphasized the importance of staying present, encouraging attendees to enjoy both the process and the present moment. Drawing parallels from high performers across different disciplines, she invited lawyers to pause, reflect, and approach each decision with clarity, confidence, and intentionality.

Thank you to ABTL's registration volunteers, Michelle Brookfield an associate at Buchalter and Haley Wayland an associate at Allen Matkins.

Additional takeaways included:

Tips and techniques for quieting fear-based responses.

Insight into how attorneys are often wired for stress and how awareness of that wiring can be the first step toward managing it.

The importance of community and the shared nature of the legal journey.

The evening closed with a renewed sense of purpose, reminding all in attendance that even the most elite advocates, including those who practice before the highest courts, benefit from intentional mindfulness and grounded perspective. In addition to the coveted 1 hour of MCLE Wellness Competence Credit, attendees left the event with actionable tips and tricks for staying calm, present, and effective in high-stakes legal work.

Many thanks to our sponsors for making this impactful evening possible. We look forward to welcoming you to the next ABTL San Diego event.

For information on upcoming events, please visit https://abtl.org/sandiego/events.

Evan Critchlow is a litigation associate at Wilson Turner Kosmo LLP and an ABTL Leadership Development Committee member

BACK to Inside this issue

(L to R) Dan Gunning, Secretary | Jenny Dixon, President | Jon Brick, Vice President
Anne Wilson, Dinner Committee Chair | Cynthia Tobisman, Speaker.

Event photos by Dobbins Photography | Carrie Dobbins: c.dobbs487@gmail.com

BACK to Inside this issue

Dear Ms. Tobisman,

I wanted to thank you for your presentation at the ABTL dinner this week. I found your presentation delightfully insightful, caring, and informative. The hour flew by, and I would have enjoyed more time without any notice of a clock. That is a rarity and testament to how terrific you were.

We all have baggage woven into our fiber, that predates our cerebral ability to reason. As we develop, more is dumped upon us, and I suppose we find a way, until perhaps we don't. I was raised in the don't complain, rub some dirt in it while learning to duck and cover. Intelligence and success does nothing to address one's inner issues; rather, it enables some to hide it better than others as we channel the angst into success. Of course, success is an odd concept because it depends upon how we measure the same.

You touched on so many elements, shared useful information and came from a sincerely open and honest place. It was very well received by all with whom I spoke, and on a personal level was worth many more hours than we spent, so I thank you!

Also, on an unrelated note, but one that shows how we all are only so many connections away from knowing others, I shall briefly digress. Many years ago, well before law school, as I was on the winding road to where I am today, I worked in a store in Sherman Oaks. The store specialized in high end stereo equipment. One client had experienced a bit of a problematic installation with a less-than-stellar technician's installation work. I ended up stepping in after-the-fact to see what could be done to right the ship. The rightfully frustrated consumers were a Mr. & Ms. Richland. From my perspective, the Richlands were great to work with. Kent was fair minded and totally reasonable. For whatever reason, perhaps because I am curious, I shared a bit of a lengthy conversation with Kent about the law, and so forth. On my drive home from the Richlands, I first thought about going to law school. My discussion with Kent resonated, and I ultimately found myself doing so a few years later.

Anyway, I just wanted to share a quick thank you, and if you happen to be speaking with Kent (who may not recall me although I doubt he will soon forget the knucklehead installer that was on his roof with a power drill), please do say hello from me, letting him know that two folks in your firm have left a lasting impression on me that is sincerely appreciated!

Sincerely,

Robert Sunderland

Signature Resolution

BACK to Inside this issue

Destructive Conflict in the Boardroom: Problems Attorneys Can Help Directors Avoid

By Bill VanDeWeghe

We see it every day. Conflict among board members, or between boards and the executives they appoint, causes stock prices to drop, sullies reputations, and damages companies. OpenAI, WeWork, Uber, Ben and Jerry's, … the list goes on and on.

While some disagreements are healthy, negative disagreements that devolve into dysfunction are unhealthy and can be costly. The warning signs are predictable, from ignoring festering tensions to tolerating misconduct to lacking tools to deal with problems when they arise. However, attorneys advising public and private companies are uniquely positioned to help directors recognize dysfunction early, design governance documents that allow for flexibility, and implement mechanisms for the constructive resolution of conflicts.

This article addresses the challenge of conflict in the boardroom, examining its importance, identifying warning signs, and outlining how to transform problems into opportunities.

Boardroom Conflict is Costly

Boardroom dysfunction is rarely a single flashpoint. It usually reflects a failure of systems, processes, and oversight. The wide-ranging and, often, hidden fallout of boardroom conflict includes:

- **Financial erosion:** Misaligned priorities, distracted leadership, and unnecessary legal costs drain resources.
- **Brand and reputational damage:** Investors, customers, and acquisition targets lose confidence.
- **Talent loss and trouble attracting talent:** The reputation of dysfunction spreads, driving away top performers, undermining culture, and impeding institutional knowledge.
- **Strategic paralysis:** Internal politics begin to overshadow execution, allowing competitors to seize advantages.

Attorneys should help boards understand that, once damage is visible externally, it is difficult to go back in time and avoid lasting harm.

Red Flags:Early Warning Signs of Dysfunction

Conflicts rarely develop overnight. Instead, they simmer beneath the surface, revealing themselves through subtle yet telling behaviors. Attorneys should encourage directors to monitor for these types of red flags:

1. Communication breakdowns

- Contentious, defensive, or passive-aggressive emails written to score points or "make a record."
- Board members who avoid asking questions or pretend to have all the answers.
- Exclusionary communications that leave key players out of the loop and off important threads.
- Members who are slow to acknowledge successes but quick to point out problems often signal deeper disengagement.
- Bullying, intimidation, or subtle silencing of dissent corrodes board effectiveness. When one or two members dominate discussions, it creates a chilling effect on the conversation. Attorneys should flag these patterns early; they are often precursors to larger governance problems.

2. Behavioral issues

- Temper flare-ups, impatience, and a lack of willingness to listen to others by board members or senior executives. Superficial harmony on meeting days, contrasted with hostility in one-on-one exchanges.
- Drama or defensiveness among executives and directors erodes trust and constructive dialogue.
- Narcissistic or "Prima Donna" syndrome behavior—directors or executives ignoring rules or asserting that they are entitled to special treatment.
- A noticeable increase in complaints reported to the company by employers, customers, and others (harassment, poor management, "whistle-blowing") requiring investigation.
- Superficial harmony on meeting days, contrasted with hostility in one-on-one exchanges.

3. Ignoring Existential Threats

Companies stumble when boards delay responding to reputation risks or market challenges. Examples include **Pizza Hut (PR), Kodak (Technology), Blackfish (PR and changing social norms), BP (Corporate mistakes), and WeWork (Disputes with executives)**. In each case, visible threats were met with hesitation or denial. Boards that delay crisis communications, ignore subject matter experts, or fail to rethink strategy compound the damage.

Continued on p. 14

Destructive Conflict in the Boardroom... | *Continued from p. 13*

4. Weak Board Composition: Having the wrong people in the boardroom

- Allowing echo chambers of bad guidance, often caused by a lack of diversity in experience or perspective. Problems are not recognized or addressed.
- Failing to understand fiduciary duties or having weak processes in place can lead to basic mistakes in many areas, including HR (compensation and executive terminations), mergers and acquisitions, safety, and investigations.
- Missing critical skills/expertise (e.g., Finance, marketing, HR, Engineering, or Science) prevents the board from addressing complex challenges effectively. A board does not need to have expertise in all areas, but it needs to know when to turn to outside resources.

The red flags listed above are symptoms of deeper cultural or governance issues. Boards need to move quickly to address the problems and avoid a conflict that is played out in the Wall Street Journal.

Transforming Problems into Opportunities

1. Create a Strong Process to Vet and Monitor Directors

Boards can underestimate the importance of rigorous pre-appointment vetting. Beyond reviewing résumés and references, consider using a proven search firm to assist with the process. Attorneys should advise boards to:

Investigate prior disputes, lawsuits, or regulatory issues.

Check references "adjacent" to those provided for candid perspectives.

Consider compensation structures that align rewards with the company's performance.

Consider the alignment between the potential board member and the board's needs.

2. Don't Ignore or Excuse Disruptive or Bad Behavior

Whether the board member is a founder, brand ambassador, or key relationship holder, attorneys should encourage boards to ask:

- What mechanisms do we have in place for dealing with bad behavior?
- What resources does the board have for working with the challenging individual to realign their behavior with the board's needs?
- If support and transparency with the board member do not address the problem, explore the difficult questions:
  - Does the company truly need this individual?
  - Can the board afford to tolerate the member's behavior if it undermines culture or governance?
  - Are mechanisms in place to separate the person gracefully if necessary?
- What review mechanisms should be put in place?**:** Regular 360-degree feedback, committee evaluations, and structured performance reviews can identify dysfunction early.

3. Act Quickly

By the time disputes become obvious, positions can become entrenched, and relationships may have been damaged. Boards that hesitate and wait too long risk impairing their culture, incurring reputational harm, and decreasing value. Attorneys can help by advocating for confidential interventions early—whether through mediation, coaching, or independent review/investigation.

4. Call in the Experts!

- No board has all the answers. Just as directors seek outside expertise in areas such as crisis communications, government relations, banking, acquisitions, litigation, and investor relations, they should call in the experts when facing burgeoning conflict. Third-party neutrals are equipped to navigate the conflict so the board members can get back to work. Attorneys should normalize this practice, reminding boards that timely expertise can mean the difference between a setback and a catastrophe.
- Maintain a resource list of executive coaches, advisors, and mediators who are trained to help parties depersonalize conflicts and take a perspective.

5. Strengthen governance documents: Build flexibility into bylaws and agreements for board changes by ensuring that agreements contain provisions for dispute resolution (mediation and arbitration requirements), termination procedures, and possibly tenure limits.

6. Encourage proactive communication:

Attorneys should encourage and model proactive communication through:

- Engaging chairs, vice-chairs, and counsel in continuous dialogue with directors, not just during formal meetings.
- Instituting an open-door policy and designating a point of contact for raising board tensions.
- Considering a board ombudsman, who can serve the role of a sounding board and resource for elevating board concerns.

Continued on p. 15

BACK to Inside this issue

Destructive Conflict in the Boardroom... | *Continued from p. 14*

8. Balance firmness with diplomacy: Attorneys should help boards avoid "hard positions" that back adversaries into corners, instead encouraging more flexible, negotiated solutions. This can apply to board members speaking with one another or interacting with others.

Conclusion

Conflict in the boardroom is inevitable, but it does not need to devolve into dysfunction and destruction. Attorneys can help boards to remain vigilant and institute proactive paths for conflict resolution, thus minimizing conflict and focusing on the task at hand: leading with integrity, pursuing productive strategies, and prioritizing stability.

Bill VanDeWeghe is a mediator and arbitrator with JAMS. He focuses on complex business disputes. In addition to litigating cases for 15 years, Bill has served as a public and private board member, a managing director at an investment banking firm, co-founder of a SAAS company, and CEO of a lab equipment company that merged with 3 other companies.

Community Outreach

By Hon.Linda Lopez

Lincoln High School students were in for a treat when Joseph (Joe) McGeady took over the bench! Smiling from ear-to-ear while sitting tall and proud in the "judge's" chair located at Lincoln's Mock Trial room, he shared with the students his path to the legal profession as part of the ABTL's Community Outreach program. I shared my story as well, leading to many questions from the intrigued students. Our session was open to all students, not only those interested in the law.

Neither Joe nor I had a traditional path to our respective careers. The students learned how we both began our journeys by attending community college before transferring to our respective four-year universities and ultimately attending law school. Joe dropped out of high school and spent six years in the Navy before attending college, while I worked full-time during my entire education, which limited my ability to participate in many extracurricular activities. We strived to make sure their take-away was that it was all worth it! We shared how passionate we are with the law, underscoring the wonders of the legal profession.

Students learned that many people, like me, can pursue higher education irrespective of financial ability. They were informed about financial aid, scholarships, work-study programs and attending part-time so they can work while in school. Many were surprised to hear about their options! One student shared that he had done some research into the LSAT courses and available loans.

The greatest take-away for them was that whether you have an interest in the legal profession or not, there are many benefits from attending sessions that ABTL members intend to put on throughout the school year as part of the Community Outreach program. Drama students can practice their theatrics, some of the shyer students can practice their public speaking, and those interested in pursuing careers in the legal profession can get better equipped with information coming straight from the source!

William (Bill) Thyne, who is the Mock Trial coach at Lincoln was very enthusiastic. Joe and I walked around the campus with him where he was greeted by many students. It was clear he has the respect of many students who can undoubtedly benefit from participating in our program. Mr. Thyne loved the fact that we intend to invite all students to our informative sessions. He is committed to working with the ABTL in future sessions and to assist us in getting students excited to attend.

For this school year we are planning to set up flyers around campus inviting students to join us for our sessions where they will hear from many of us regarding everything law profession related! We are hoping to create opportunities for them to engage in legal "skits," to review written motions and orders, and to observe court proceedings if transportation can be accommodated. While this program is at its early stages, we are all excited to see how it develops. With the help of ABTL members, it is sure to be a success!

From my end, I hope to get some volunteers from the court to share their respective jobs and roles. For instance, one bilingual student was interested in interpreting and translating which made me think of asking whether anyone from that department would be available to share with the students their path to their profession. This is just one of the many careers these students can learn about. As always, it takes a village and as fellow villagers your ideas, suggestions and time are critical. Let's all put on our thinking caps and provide a robust program for these students!

Hon. Linda Lopez is a judge on the United States District Court for the Southern District of California

ABTL Congratulates Hon. Larry Burns (Ret.)!

On September 12th, at an awards celebration in Balboa Park, Hon. Larry A. Burns, Ret., accepted the Justice Antonin Scalia Award for Excellence on the Bench from the San Diego Lawyers Chapter of the Federalist Society

MAKE LOVE (Or At Least 'NICE') NOT WAR

By Mark Mazzarella

As most of you know, the articles I write for ABTL generally reflect my nearly one-half century of experience as a trial lawyer. I tend to shy away from providing what I recognize is critical "nuts and bolts" analysis of the law. That is because, over the years, I have come to realize the most valuable thing we well-worn lawyers have to offer is the wisdom we have gained from decades of trial and error, with an emphasis on error, since we all learn more from our miscues than from our successes. And, the fact is, it takes a lot more effort and horsepower to research and write an inciteful article on technical areas of the law than to sort through our life experiences for material that might educate or inspire others. Speaking for myself, I leave the heavy lifting to others.

I think my evolution as a trial lawyer has followed essentially the same path as most of us gray-hairs have experienced, and the path most of the younger among you will experience if nature takes its course. We start out lacking the confidence to know when to fight and when to yield or compromise. Not wanting to show weakness, we tend to err on the side of fighting. As we reach our stride, our confidence grows, as does our ability to fight and win. We can become more focused on winning every battle than avoiding them, because we enjoy flexing our new-found trial lawyer muscles and the success it brings. We have become good at it! Then, as we become veterans of more battles than we care to remember, we start to recognize how often our victories have been Pyrrhic, unnecessary or counterproductive. We learn to pick our fights carefully, that nuclear weapons are best left in the silos, and conflict seldom accomplishes anything. It is only then that we truly reach our stride as trial lawyers.

Experience, knowledge, skill and common sense are all required to be a great trial lawyer. They are the engines that generate our power as lawyers. But unrestrained power can do a lot of damage. We need to learn to apply restraint. In my experience, adopting the following rules of engagement before your next battle will help you utilize your best lawyerly qualities for maximum benefit.

Play Nice

I recently had to respond to a "meet and confer" request in advance of my opposing counsel filing a demurrer in what was to be a very hotly contested case. Our respective clients detest one another. Clients generally expect their champions to show similar disdain toward the opposition's standard bearers. It is tempting to comply and avoid the risk your clients will think you are soft or not committed to their cause. But that will suck you into the same vortex that probably led to the dispute between your respective clients.

My opposing counsel and I have dramatically different views of the facts and the law. In my past life, I might not have been able to resist unnecessary sarcasm, hyperbole, and attacks on the lawyer, not on their arguments. I knew we would not be able to reach agreement on much, but I was hell-bent on at least starting the relationship on the right foot. Here are my first two e-mails in preparation for discussing the issues over the phone the next morning:

"[Opposing counsel]

I am working on a reply to your meet and confer letter now so we will know one another's views in advance of our call.

While I can be reached on my office line sometimes, I can (almost) always be reached on my cell. I expect we will have reason to talk fairly often over the next several months. Therefore, here is my cell phone number—XXX-XXX-XXXX. I would suggest you try that number first if you need to reach me (including tomorrow). If for some reason I do not pick up, call my office and [my assistant] can usually track me down, or give you some indication when I will be available if I'm in a meeting, deposition or hearing.

I look forward to speaking with you tomorrow and working on this very interesting case with you.

Mark"

That e-mail was followed, after I completed my response to her meet and confer letter, with the following:

"[Opposing counsel]

Here are my responses to the issues you raised in your meet and confer letter. In some respects, I expect we will just have to agree to disagree. In others, I have agreed with you, and hope after reading my comments below and reviewing the complaint, there are at least some areas where you will agree with me. In any event, I look forward to discussing these issues with you tomorrow. Please feel free to call me on my cell any time after 10:00 a.m. tomorrow morning.

Continued on p. 19

Make Nice Not War | *Continued from p. 18*

Mark"

These e-mails not only set the stage for a cooperative and pleasant relationship between counsel—they were what prompted me to write this article. As I sent off the last of these e-mails, along with my responsive analysis which also was thoroughly professional, I reflected on how I might have responded in my relative youth. I might have made comments that suggested my opposing counsel was being "disingenuous," a word I once used often, but have not written for years until now. That is because it is the functional equivalent of calling opposing counsel a "liar," which serves no legitimate purpose, and is bound to raise their hackles. I might have suggested their analysis was "simplistic" or "irrational," or if I was really on a roll, I could have called it "obtuse" or "fatuous." All of these words read the same—"stupid." Nobody likes to be called stupid. All I really needed to say was "I disagree with your analysis," or "I believe you overlooked the following," or "I believe you have misread the Jones v. Smith opinion."

The purpose of my response was to articulate the reasons why I believed certain causes of action in my complaint would withstand demurrer, and to state the extent I was willing to dismiss or amend other causes of action. It was not to establish I was the Alpha in the relationship. Try that and you are likely to set a tone that will be difficult to change.

Extend Courtesies Such as Extensions of Time

Such courtesies as granting extensions of time or agreeing to briefs with a few more pages than called for in the code buy a lot of good will. In almost all cases, similar courtesies will be extended to you when your back is up against the wall. They are also required by the San Diego County Bar Association "Attorney Code of Conduct"("The Code"). The Preamble of the Code states that although it "is not a separate basis for sanctions nor a basis for ancillary litigation, it is intended to reflect acceptable standards of conduct for attorneys in San Diego County." And it reflects what state and federal court judges expect from the lawyers who appear before them. The behavior mandated by the Code includes:

- Lawyers should attempt to resolve, by agreement, their differences relating to procedural and discovery matters.
- Lawyers must remember that conflicts with opposing counsel are professional and not personal; vigorous advocacy is not inconsistent with professional courtesy.
- Lawyers should treat adverse witnesses, litigants and opposing counsel with common courtesy, good manners, fairness, and due consideration.

Continued on p. 20

Make Nice Not War | *Continued from p. 19*

- Lawyers should not arbitrarily or unreasonably withhold consent to a just and reasonable request for cooperation or accommodation.
- Lawyers should inspire and encourage opposing counsel to conform to the standards in this code and to amicably resolve related disputes promptly, fairly and reasonably, with resort to the court for judicial relief only if necessary.
- Lawyers should conduct themselves so that they may conclude each case with a handshake with the opposing lawyer.

Establish Friendly and Respectful Relationships

The last bullet point above, "Lawyers should conduct themselves so that they may conclude each case with a handshake with the opposing lawyer," is as close to the "Golden Rule" of lawyer behavior as any. If you keep that goal in mind, you will not violate any of the other standards of behavior outlined in the Code. Moreover, you will find, over time, some of your best friends and most consistent referral sources were once your adversaries.

When my brother and law partner, Daral, died three years ago, I received more calls and e-mails than I could count. While they acknowledged Daral's skill as a trial lawyer, what they emphasized was his professionalism and the friendship they had established. The words I heard over and over again were: "He was a gentleman," or "He was a great guy." What those with whom he had cases valued most was the relationship they had established with him. While they were adversaries, they had become friends.

We all spend much of our waking time interacting with other lawyers, many of whom are adversaries. We should seek to capitalize on opportunities to develop life-long valued relationships with opposing counsel. You do not need to sacrifice zealous representation to build great personal relationships with opposing counsel. Since 1984 the "Dan Broderick Award" has been given at the Red Boudreau Dinner to a San Diego trial attorney for civility, integrity and professionalism in the practice of law. Dan was a JD/MD with degrees from Harvard and Cornell, who laid waste to the San Diego medical malpractice defense bar. Everyone who ever had a case against Dan recognized what an effective trial lawyer he was and also had become friends with him.

You Can't Bring a Knife to a Gun Fight

Unfortunately, there will be attorneys who do not play by the same rules you do. Never forget, the two primary duties attorneys have are: (1) to preserve client confidences; and (2) to zealously represent clients. Giving in to bullying tactics or backing down from a fight that is necessary to protect your client's interests is not "zealous" representation--neither is putting your desire to be liked, or to avoid conflict, or not to create enemies, above what is best for your client. If opposing counsel makes unreasonable requests for extensions of time, especially when the extensions may prejudice your client's interests, you have a duty to hold the line. If opposing counsel insists upon providing incomplete responses to discovery, unreasonably delaying depositions or the like, you are duty bound to put your foot down. If it is important that the judge or jury know your opposing counsel lied to you, you need to tell them, firmly but professionally.

However, even when you must put on the armor of a combatant and steel yourself for a fight, you do not need to, and never should, compromise your professionalism. Even the most contentious situation can be approached with grace. There is a difference between being "firm' and giving in to the "dark side." Just because your opponent has chosen to compromise their integrity or ethics is no excuse for you to compromise yours. Rather, it is an opportunity to distinguish yourself from them. That will be appreciated by those who count most.

Remember Who Your Ultimate Audience Is

You may be so caught up in the emotion of the moment that you forget what you say, and how you say it does not make a lot of difference until it is read by a judge when ruling on a motion, or by a judge or jury when it has become evidence. If you think judges or juries are impressed by a sharp tongue, overbearing attitude, or unprofessionalism of any kind, you are simplistic, irrational, obtuse and/or fatuous. Or should I say, "mistaken."

People are drawn to likeable people. Mean people are threatening and unattractive. Lawyers start out with a bias against them as overbearing, dishonest, egotistical, and I could go on for pages. The last thing we should do is play into and confirm those stereotypes. On the contrary, we need to work hard to overcome them. Grace, professionalism, kindness, understanding, patience and the like is the best antidote.

Relationships Are Like Reputations, It Takes Years to Build Them and One Moment of Bad Judgment to Ruin Them

When I was a young lawyer, I was representing a local Savings & Loan in a case against an insurance broker who was represented by one of San Diego's best lawyers, Rob Wright. I was convinced the broker was a crook and Rob was tarred by association. I wrote Rob a demand letter that makes me cringe when I think about it today. When I met with my client's

Continued on p. 21

Make Nice Not War | *Continued from p. 20*

grandfatherly general counsel the next morning he gave me some sage advice. He said: "I think that was one of those letters that is best set aside overnight and picked up in the morning after a good night's sleep and some reflection." As for Rob, always the consummate gentleman, when we met the next day, he smiled and said something witty and disarming. I was lucky, I had a client who understood and appreciated my zeal and was willing to mentor me rather than write me off as a crazy cowboy. And Rob's perfect response with a few words and a smile tactfully let me know I was out of line, while graciously giving me a pass, for which I am grateful to this day.

I could have lost an important client and the friendship of a man I grew to admired greatly. I was lucky I didn't. If you "make nice" with opposing counsel, I can guarantee you will be glad you did in the morning.

Mark Mazzarella is a veteran litigator for Duckor Metzger & Wynne, APLC, and a past president of ABTL.

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