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Imagine candidates for election and reelection to California judicial posts running television and radio campaigns, attempting to garner votes by openly aligning themselves with political parties—or fringes of political parties. Envision them wooing voters with frank declarations of their views on capital punishment, gay marriage, tort reform, workers’ compensation, and environmental law.

In this month’s issue, California Supreme Court Chief Justice Ronald George expresses a fear that these types of campaigns could become the reality in California. Perhaps, however, democracy demands that we face this fear.

In 2002, the U.S. Supreme Court decided Republican Party of Minnesota v. White and, in doing so, opened the door for more politically charged (and funded) judicial elections. The Court struck down a Minnesota rule that had prohibited judicial candidates from announcing their views on disputed legal or political issues during their campaigns. The law was intended to strengthen due process by protecting, in part, the perceived impartiality of the judiciary. The Court found that the rule was a poorly tailored, content-based restriction on speech.

Judicial elections are the norm in California and have thus far remained free from partisan funding and direct appeals to voters on key issues. In a 2002 national survey by Greenberg Quinlan Rosner Research and American Viewpoint of 2,428 state judges—including 188 state supreme court justices, 527 appellate court judges, and 1,713 lower court judges—24 percent of California state judges say that they are under pressure to raise money during election years. Ninety-four percent of California state judges agree that “judicial candidates should never make promises during elections about how they will rule in future cases that may come before them,” and a majority of California state judges (53 percent) support public financing for judicial elections.

On the other hand, judicial aspirants who have not succeeded in attracting the governor’s attention or who are simply politically unacceptable to the governor may well favor the opportunity to take their candidacies and their viewpoints directly to the people. If we are going to elect and reelect our judges, the White case indicates that the First Amendment rightly prohibits muzzling judicial candidates from voicing their political opinions. The fear is that unfettered political discourse and campaign funding in judicial elections will undermine the impartiality of the judiciary. Do we have less confidence in our judges than we do in our jury pool? We expect a random group of average citizens to set aside their personal loyalties and prejudices to decide cases objectively and impartially. Shouldn’t we be able to assume that experienced lawyers who become elected jurists are capable of doing the same?

To be clear, the First Amendment does not protect an elected judge who hears a case involving a campaign contributor. By contrast, nothing prohibits an elected legislator or executive from promoting laws that benefit a campaign contributor or a key constituent. We either believe in democracy or we don’t. If we do, we must accept that a lawyer who is deemed qualified for the bench by the Commission on Judicial Performance can campaign openly and still fulfill the sacred public trust by rendering justice fairly. The contrary view suggests the fallacy of protecting democracy by curtailing democracy.

Politics already exists in the shadows of gubernatorial appointments to trial and appellate courts and in the personal views of judges who nevertheless endeavor to rule impartially on each case. As Felix Frankfurter observed in The Commerce Clause: “No judge writes on a wholly clean slate.” If we voters are charged with electing our judges, it seems only fair that each judge hold his or her slate up for all to see.

R. J. Comer is a partner at Armbruster & Goldsmith, LLP, where he specializes in land use law and municipal advocacy. He is the chair of the 2005-06 Los Angeles Lawyer Editorial Board.
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LAWYERS CONSTANTLY FACE procedural requirements, deadlines, and the press of other business, and mistakes are guaranteed to occur. However, a lawyer’s response to a mistake can mean the difference between a quick resolution of the problem or the potential for a malpractice lawsuit. There are few items in California law that are jurisdictional, for which neither the opposing party nor the court can grant relief. Statutes of limitations, the fair value determination of real property under Code of Civil Procedure Section 726(b), and a failure to file a timely notice of appeal cannot be cured. However, in most other instances, a phone call to a courteous opposing counsel may be all that is required.

Once a mistake has been made, a lawyer must accept responsibility for the error. Even though a secretary may have miscalendared a date, it is ultimately the attorney’s responsibility to rectify the problem. The three most common ways to deal with a mistake are: 1) agreement of counsel, 2) noticed motion for relief, or 3) relief from mistake, inadvertence, surprise, or excusable neglect under Code of Civil Procedure Section 473(b) or Rule 60(b) of the Federal Rules of Civil Procedure.

Every lawyer admitted to practice in the State of California takes an oath to support the Constitution of the United States and the Constitution of the State of California and to faithfully discharge the duties of an attorney at law. In addition, a lawyer must “maintain the respect due to the courts of justice and judicial officers.” Implicit in this rule of law is the notion of courtesy to opposing counsel. As fellow officers of the court, opposing counsel are to be treated with courtesy and due respect. In fact, Los Angeles County Superior Court Local Rule 7.12(d)(1) dictates that “counsel should at all times be civil and courteous in communicating with adversaries.”

Given the duty of professional courtesy, many mistakes can be rectified without court intervention. Los Angeles Superior Court Rule 7.12(a) regulates continuances and extensions. This local rule dictates that first requests for reasonable extensions should ordinarily be granted as a matter of courtesy, even if opposing counsel had been denied such courtesy in the past. As Kermit Morgan, a gentleman lawyer through seven decades of practice has stated, “If someone asks you for a two-week extension, grant them three weeks, so that when you make a mistake, your courtesy will be remembered.”

Often, an agreement of counsel is not enough to rectify the mistake, and court intervention is required. If all parties have stipulated to the requested relief, the court may view the application for relief more favorably. For example, pleadings may be amended once as a matter of right within a short time. The purpose of this is to facilitate prompt correction of errors. However, any further amendment requires a noticed motion and the court’s exercise of discretion before leave to file an amended pleading will be granted.

Stipulation of all counsel in conjunction with a noticed motion will often guide the court to grant the requested relief. Similarly, if time is of the essence, stipulation to an ex parte application along with a noticed motion can expedite the process. Even without stipulation of counsel, counsel may bring a noticed motion for relief. The court can grant relief from a waiver of objections for failure to timely respond to interrogatories, inspection demands, or requests of admissions. Likewise, a court can extend the time to oppose a motion for summary judgment upon an ex parte motion anytime on or before the date the opposition is due. However, case law indicates that the court may exercise its discretion to continue a motion for summary judgment upon request of the opposing party to conduct further discovery anytime before the court rules on the motion.

In 1872, the California Legislature first enacted what is now Code of Civil Procedure Section 473. In its current form, the section allows a court to relieve a party or his or her lawyer from a judgment, dismissal, order, or other proceeding based on mistake, inadvertence, surprise, or excusable neglect. Rule 60 is the federal equivalent of California’s statutory scheme.

Section 473 and Rule 60 “relieve the innocent client of the burden of the attorney’s fault, to impose the burden on the erring attorney, and to avoid precipitating more litigation in the form of malpractice suits.” Moreover, because the law favors adjudication of disputes on the merits, the courts should liberally construe Section 473 for relief if a party or his or her attorney makes a mistake or otherwise errs as a result of inadvertence, surprise, or excusable neglect.

Section 473’s saving provisions are applicable across a broad legal spectrum. They may be used to obtain relief from a default judgment, for a defendantgeoised by lack of notice from the Workers’ Compensation Appeals Board, to permit a motion for litigation expenses under Code of Civil Procedure Section 1250.410 to be filed late, to set aside a declaration of paternity pursuant to Family Code Section 757(c)(1), or for relief from default in adversary proceedings in probate. The many applications of Section 473 do not negate the time limits written into the statute. As the California Maxims of Jurisprudence dictate, “The law helps the vigilant, before those who sleep on their rights.”

Mistakes will undoubtedly happen in the practice of law. Even if agreement of counsel or other noticed motion procedure fails, the saving provisions of Section 473 and Rule 60, along with the liberality of courts in granting relief from mistake, inadvertence, or excusable neglect, may prevent a malpractice suit.
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BIG IDEAS FOR YOUR SMALL FIRM
Alternatives to Predispute Jury Waivers after Grafton Partners

WITH LIMITED EXCEPTIONS, the California Constitution preserves the right to a civil jury “inviolate.” But like any right, this one also may be waived. A party to an action in a judicial forum may consent to forego a jury and have a judge decide the dispute. Trying a case before a judge rather than a jury ranks high among alternative dispute resolution devices. Waiving a jury keeps the proceeding within the court system but avoids the risk of a “runaway jury.” Unlike disputants who select binding arbitration, litigants who waive a jury trial retain the right of appeal and avoid the cost of paying an arbitrator. And unlike judicial references, in which the parties pay a retired judge or other professional to act as a lone trier of fact, waiving a jury does not incur additional costs (and saves litigants from having to pay jury fees).

Because of these advantages, businesses and institutions have increasingly favored jury waivers over other forms of ADR and have sought to include jury waivers in their contracts. In 1991, the court of appeal in Trizec Properties, Inc. v. Superior Court gave express approval to the use of these waivers. For nearly 15 years after that decision, growing numbers of companies began including predispute jury waivers in their contracts with vendors, business partners, clients, employees, tenants, and customers.

Recently, though, the California Supreme Court put the future of contractual predispute jury trial waivers in doubt with Grafton Partners L.P. v. Superior Court. The ruling placed California in the tiny minority of states that do not recognize the validity of predispute jury waivers. The Grafton decision thus disturbed settled expectations of the parties to contracts containing these provisions. The ruling also likely raised concerns among corporate counsel and their outside lawyers, who—particularly in light of the court’s refusal to apply its ruling only prospectively—confronted the prospect of having to face juries in future litigation and were left searching for alternatives to jury waivers for future contracts.

But parties can resettle those disturbed expectations. There are strategies to get around Grafton in enforcing existing jury waivers, in structuring future contracts that still contain jury waiver provisions, and, lastly, in using alternative ADR provisions that have judicial approval and achieve the goal of waiving jury trials.

Jury Waivers

Use of predispute jury waivers is particularly common among institutional parties—such as banks, landlords, and even some employers—who frequently contract with individuals. Waivers also appear in contracts between commercial entities. The preference for a bench trial, in which the judge is the trier of fact, over a jury trial springs from several considerations.

- Bench trials avoid the delay, inconvenience, and expense typically associated with jury trials, from choosing the jury (voir dire and jury consultants) to educating it and providing it with necessary tools to render a verdict (preparing, submitting, and litigating jury instructions and special verdict forms).
- Jury trials are more susceptible to error, and thus reversal, in connection with voir dire, conduct of counsel or jury members, the reception of evidence, the giving of instructions, and the rendering of excessive damages.
- Rightly or wrongly, judges are perceived to be more grounded in the law and less swayed by sympathies and prejudices in favor of individual plaintiffs over corporate “bad guy” defendants.

Waiving a jury trial before a dispute arises, rather than after, also has its own advantages—or at least it used to. Chief among them is the settling of expectations, since such agreements provide “advance assurance that any disputes that may arise will be subject to expeditious resolution in a court trial.” But there are countervailing factors. Although parties typically begin moving more quickly in a bench trial than in a jury trial, preparing and submitting proposed findings of fact and conclusions of law, and waiting for the court’s final determination often means that cases do not conclude more quickly. Even more seriously, some express doubts as to whether predispute waivers can be either knowing or voluntary, which are the requirements of any waiver.

Nevertheless, nearly every state court to consider the issue, and every federal court, has adopted the rule that the right to jury trial in a civil case can, at least in some circumstances, be waived by contract prior to and independent of any pending litigation. These courts impose varying degrees of scrutiny when asked to enforce such agree...
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mements, which are subject to the same contractual defenses of unenforceability that arise in the arbitration context.15

California’s Response

For many years, California was among the majority of courts upholding the validity of predispute jury waiver agreements. But in 1991, the Trizec court was the only California appellate court until Grafton to have addressed the issue in a reported decision.

The facts of Grafton are straightforward. Grafton Partners, the plaintiff at trial, engaged the defendant, PricewaterhouseCoopers, as its outside auditor in March 1999. The engagement letter, prepared by PwC, contained a waiver in which both parties “agree[d] not to demand a trial by jury in any action, proceeding or counterclaim arising out of or relating to [PwC’s] services and fees for this engagement.” In the subsequent dispute, the plaintiff demanded a jury trial, and PwC moved to strike the demand pursuant to the waiver agreement. When the trial court, relying on Trizec, granted the motion and struck the jury demand, Grafton sought review. The court of appeal granted writ relief, directing the plaintiff to demand a jury trial and enter a different order denying the motion. The California Supreme Court granted review.

While the policy factors and perceived benefits favoring predispute jury waivers generally are not seriously questioned,17 the Grafton court viewed the case as “principally a question of statutory interpretation,”18 not an act of balancing such policy factors. The court’s opinion was therefore analytically clear-cut.

The court began with the constitution, since the election of a judicial forum to resolve civil disputes automatically vests parties with the right to trial by jury.19 Under Article I, Section 16, that right is “fundamental” unless it is waived “as provided by statute.”20 Quoting extensively from the court of appeal decision, the court concluded that “California constitutional history reflects an unwaivering commitment to the principle that the right to a civil jury trial may be waived only as the Legislature prescribes, even in the face of concerns that the interests of the parties and the courts would benefit from a relaxation of this requirement.”21 The court rejected Trizec’s analysis, which had concluded, by analogy to arbitration agreements, that predispute jury waivers were permissible without statutory authorization. But rather, according to the Grafton court, the analogy failed because arbitration agreements are specifically authorized by statute22 and because they “represent an agreement to avoid the judicial forum altogether.”23

The court next turned to Code of Civil Procedure Section 631, the statutory provision implementing Article I, Section 16. Section 631, “the sole statute governing waiver of a jury in a civil judicial proceeding,”24 provides that a jury in civil cases may be waived “only” in six ways corresponding to the statute’s subsections: 1) by failing to appear at trial, 2) by written consent filed with the clerk or judge, 3) by oral consent, in open court, entered in the minutes, 4) by failing to announce that a jury is required within a certain amount of time of trial setting, 5) by failing to file advance jury fees, and 6) by failing to file jury fees and mileage at the beginning of the second and each successive day’s session, according to Code of Civil Procedure Section 631(c).25 By referencing a prior ruling,26 the plain meaning of the statute,27 principles of statutory interpretation,28 and legislative intent,29 the court easily dispensed with PwC’s argument that Subsection 2 permits predispose jury waivers. In sum, the “lack of legislative direction in section 631 on the enforceability of predispose jury waivers” was not sufficient to constitute the legislative “prescription” that Article I, Section 16 requires. Since any ambiguity had to be resolved in favor of preserving the right to jury trial, the court decided that Code of Civil Procedure Section 631 does not authorize predispose jury waivers of the right to jury trial.30

Implications

The Grafton decision has far-reaching and immediate consequences for those who rely on predispose jury waivers in California. The ruling abrogated outright the use of such agreements in California state courts and vitiated any reliance that has been placed on them as an ADR tool. And it invalidated countless existing contractual jury waiver agreements, since the court refused to apply its ruling prospectively.31

The opinion raises questions about its reach and effect. Does the ruling apply to jury waivers in existing contracts that specify the law of another state as governing? Conversely, does it invalidate jury waivers in contracts governed by California law when the lawsuit proceeds in another forum? Will federal courts applying state law in diversity cases spurn federal law approving predispose jury waivers in favor of state law disapproving them?

These questions are readily answered. Grafton will apply to all cases proceeding in California state courts since, under long-standing principles of conflict of laws, the “law of the forum determines whether an issue of fact shall be tried by the court or by a jury.”32 Likewise, federal courts will continue to determine waiver under federal law, even in diversity cases.33 These principles and others34 suggest that California state courts will apply the Grafton rule even if the contract contains a clause specifying that the law of another state governs.35 Similarly, courts in other states will apply their own local laws—which overwhelmingly favor predispose jury waivers—even if the contract specifies California as the governing law.

These answers suggest that not all is lost with respect to existing jury waiver agreements. If both parties continue to agree, they may reaffirm their desire to proceed without a jury by filing “written consent” to waive with the court after proceedings commence.36 But if the willingness of an opponent to waive the right to a jury is in doubt, and the contract does not contain a forum-selection clause that compels proceeding in California state court, litigants can take steps to land in a different forum. As a plaintiff, one can file in federal court, or in another state court, if jurisdictional requirements exist. As a defendant, one can remove to federal court, if permissible, or force the plaintiff into another forum by requesting dismissal on personal jurisdiction or forum non conveniens grounds, if appropriate. Assuming these strategies are legally and factually supportable, contractually available, and tactically sensible, they will advance the goal of salvaging existing jury waivers in many cases.

Some institutions, particularly those with little or no California presence, may wish to continue using jury waivers in their contracts, including those with California residents. To avoid litigating in California (and thus having the jury waivers invalidated), these institutions must include forum-selection and choice-of-law clauses in such contracts. Yet this may not be enough. Whether those contractual provisions will be upheld in particular cases depends on several factors, most of them heavily dependent on the facts of the transaction, the parties, and their relation to the chosen forum. The validity and enforceability of particular forum-selection and governing-law clauses is a matter for another analysis, but their use is an option to explore with the advice of counsel.

Future agreements may also stipulate to alternative forms of ADR that already have a legislative imprimatur. Arbitration is the most well known. Again, the Grafton court noted that predispose arbitration agreements did not raise the same constitutional or statutory issues as predispose jury waivers for two reasons: 1) arbitration agreements are specifically authorized by statute,37 and 2) they “represent an agreement to avoid the judicial forum altogether.”38 The court also observed that California law expresses a “strong state policy favoring arbitration”; there is not just an absence of a similar policy favoring bench trials but rather a longstanding “public policy in favor of trial by jury.”39

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THAT’S ALL.
But arbitration too has its disadvantages. While it may hasten resolution of the dispute and avoid the uncertainties of a jury trial, arbitration entails the added expense of paying for an arbitrator or panel of arbitrators. Although defendants avoid runaway jury awards, there is no guarantee that the arbitrator’s ruling will be legally or factually correct, and the law limits the grounds for review of an arbitrator’s decision and permits no appeal. Finally, if discovery is more curtailed in an arbitration than it is in a judicial forum, as it often is, the parties may trade the resulting cost savings for an increased chance of an erroneous final decision.

Judicial Reference

Less familiar to litigants is the form of ADR known as judicial reference. Much of the post-Grafton commentary has focused on arbitration while disregarding this alternative, which the Grafton court discussed favorably. Judicial reference is statutorily authorized by Code of Civil Procedure Section 638, which expressly sanctions reference agreements made before any dispute arises. Section 638 states:

A referee may be appointed upon the agreement of the parties filed with the clerk, or judge, or entered in the minutes, or upon the motion of a party to a written contract or lease that provides that any controversy arising therefrom shall be heard by a referee if the court finds a reference agreement exists between the parties:
(a) To hear and determine any or all of the issues in an action or proceeding, whether of fact or of law, and to report a statement of decisions.
(b) To ascertain a fact necessary to enable the court to determine an action or proceeding.41

As with arbitration, the enforceability of a predispute agreement for the appointment of a referee “is determined under standard rules of contract interpretation,”42 but courts lack authority to refuse to enforce an otherwise valid reference agreement.43 People are generally familiar with arbitration but not with judicial reference. Essentially, it is a hybrid of arbitration and a bench trial. The case proceeds in a judicial forum, but the court appoints a referee (usually a retired judge) to hear the dispute, make findings of fact and conclusions of law, and issue a report and determination. A decision of the referee “upon the whole issue” becomes the judgment of the court, which is required to enter judgment on the referee’s decision upon the request of the prevailing party.44 Like arbitration, the parties may choose the referee45 and are responsible for paying his or her fees.46

But unlike arbitration, the trial court may, upon a motion for a new trial,47 set aside or modify the referee’s decision, reopen proceedings for further evidence, or modify the judgment in whole or in part.48 Also, the referee’s decision is subject to review from the judgment in the same manner as if the court had made it.49

In short, a judicial reference is a bench trial, except that the parties have agreed to litigate “outside the courthouse”50 before a private judge. Proceedings before the referee take place in the same manner as if before a court in a nonjury trial and under the rules of evidence applicable to judicial proceedings.51 Likewise, reference proceedings are presumptively open to the public.52

A drawback of judicial reference is the added cost of the referee. Since discovery proceeds as if the case were in court (unlike arbitration, in which discovery may be curtailed) the parties may not be able to offset the added cost of a referee by limiting discovery. But, like arbitration cases and in stark contrast to cases in the court system, referred cases can be resolved quickly, saving the parties the time and expense associated with drawn-out judicial proceedings.

Despite these advantages, judicial reference is a drastically underutilized ADR device: In 2004, a study by the Judicial Council of California concluded that referees had been appointed in only a tiny fraction of civil cases in the preceding two years.53 Of the references known to be made under Section 638, only 20 percent (24 cases) involved a general reference in which the referee’s authority could have extended to “all of the issues.”54

Perhaps the most famous recent example of the use of judicial reference was in the dispute between Jeffrey Katzenberg and the Walt Disney Company. In that case, the litigants used Justice Campbell M. Lucas, retired from the Second Appellate District, as their discovery referee55 and Judge Paul G. Breckenridge Jr., retired from the Los Angeles Superior Court, as their trial referee for the damages phase of the proceeding. That began in April 1999 and lasted more than two months, alternating weekly between the “mock trial” courtrooms in the offices of counsel representing the parties. After Katzenberg presented his affirmative case, and before Disney presented its defense, the parties entered into a confidential settlement.

To avoid unintended legal consequences, parties should obtain legal advice before including any ADR provision in any contract. Even so, despite the distinct advantages that judicial reference has over arbitration,56 judicial reference has been given short shrift as a contractual ADR tool. In the wake of the Grafton decision that has invalidated predispute jury waivers, parties...
may be well advised to turn to judicial references as the next best thing.

1 CAL. CONST. art. I, §16.
2 Id.
4 Grafton, 36 Cal. 4th 944.
7 See, e.g., Zitter, supra note 5, at §2.
8 But see Leighton Bledsoe, Jury or Nonjury Trial—A Defense Viewpoint, 5 AM. J. TRIALS 123 §1 (1966) (concluding that, from the defense standpoint, trial by jury is preferable to court trial).
9 Id. at §7. Bledsoe views the greater possibility of reversible error as favoring the defendant, since the chances on appeal from an adverse verdict is lessened when the court serves as trier of fact.
10 Zitter, supra note 5, at §2.
12 Hancock v. Superior Court, No. B170831, 2004 WL 1376400, at *11-12 (Cal. Ct. App. June 21, 2004) (Johnson, J., concurring) (“Too often these waivers would not be voluntary, in any true sense of the word. Instead the surrender of this essential right of American citizenship would be the price extracted from Californians if they wanted to get a job, open a bank account, take out a loan, rent an apartment...or acquire many of the other essentials of modern life.”). The same is often true of most other contractual ADR provisions.
14 Grafton, 36 Cal. 4th at 965-66 & n.12 (Jurisdictions permitting predispute jury waivers do not do so uncritically and, because of the constitutional dimension, impose safeguards “not typical of commercial law,” presumptions against finding of voluntariness, and other burdens and inquiries to protect the right to a jury.).
15 Grafton Partners L.P. v. Superior Court, 9 Cal. Rptr. 3d 511, 521 (Ct. App. 2004), review granted and opinion superceded by 12 Cal. Rptr. 3d 287 (Cal. 2004), judgment aff’d by 36 Cal. 4th 944 (2005).
16 E.g., id. at 9 Cal. Rptr. 3d at 516 (“We have no quarrel with the policy behind Trizec’s rule permitting parties to a commercial contract to knowingly and voluntarily enter into a contractual predispute jury waiver.”); id. at 518 n.10; see also id. at 36 Cal. 4th at 968-69 (Chin, J., concurring).
17 Id. at 951.
18 See id.
19 Id. at 955 (internal quotation marks omitted).
20 CODE CIV. PROC. §1281 (“A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract.”).
21 CODE CIV. PROC. §631(a), (d).
22 CODE CIV. PROC. §631(a), (d).
23 CODE CIV. PROC. §631(a), (d).
24 Id. at 956.
25 Id. at 956.
troversy to a court of law.” (quoting Madden v. Kaiser Found. Hosps., 17 Cal. 3d 699, 713 (1976))).

27 Id. at 959-60. The court noted: 1) the term “party” at the beginning of Section 631(d) could refer only to a party to an ongoing lawsuit in five of the six subsections to which it was the subject, and thus must carry the same meaning in all of the subsections, 2) for five of the six subsections, the act or omission resulting in waiver must occur following commencement of the lawsuit, 3) subdivision d is in the present tense, meaning that a person must be a party when it waives the right to jury trial, and 4) in five of the six subsections, waiver results from a party’s own act or failure to act, while PwC’s theory would permit waiver based on an opposing party’s unilateral action.

28 Id. at 960 (Under the principle known as noscitur a sociis, Subsection 2 should take its meaning from the other subsections, which apply only in existing litigation).

29 Id. at 960-61 (noting that the legislature has expressly authorized predispute waivers in other instances, notably arbitration under Section 1281 and judicial references under Code of Civil Procedure Section 638).

30 Id. at 961.

31 Id. at 970.

32 Restatement (First) of Conflict of Laws §594 (1934); see also Cobb v. Lawrence, 54 Cal. App. 2d 630, 633 (1942).

33 Simler v. Conner, 372 U.S. 221, 222 (1963) (“[T]he right to a jury trial in the federal courts is to be determined as a matter of federal law in diversity as well as other actions.”); Allyn v. Western United Life Assurance Co., 347 F. Supp. 2d 1246, 1251 (M.D. Fla. 2004) (“[T]he right to a jury trial in federal courts is to be determined by federal law in diversity actions.”).

34 World Wide Imps., Inc. v. Bartel, 145 Cal. App. 3d 1006, 1012 (1983) (The waiver of the right to jury trial was “clearly a procedural matter which is determined by the local rules” of the forum.); Bohme v. Southern Pac. Co., 8 Cal. App. 3d 291, 297-98 (1970) (The law of the forum state governs “matters of practice and procedure,” which include the “manner of procedure by which a legal right is enforced.”); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS §122 (1971) (“A court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues of the case.”); id. at cmnt. a (The “mode of trial” was one such matter governed by local law.).

35 Notably, the court of appeal’s superseded opinion in Grafton expressly declined to consider issues arising from the confluence of the right to a civil jury trial, contractual selection of a foreign forum or foreign set of laws, and Article I, §16. Grafton, 9 Cal. Rptr. 2d at 520 n.13. But, given the authorities cited above, it would be imprudent to rely on a governing law provision to save a contractual jury waiver in California state court.

36 CODE CIV. PROC. §631(d)(2).

37 Grafton, 36 Cal. 4th at 955 (citing CODE CIV. PROC. §1281).

38 Id. (An arbitration agreement’s principal feature is that parties agreed they will “not submit[] their controversy to a court of law in the first instance” (quoting Madden, 17 Cal. 3d at 713)).

39 Id. at 964 (citing Moncharsh v. Heily & Blase, 3 Cal. 4th 1, 9 (1992)) (internal quotation marks omitted).

40 Id. at 960-61.

41 CODE CIV. PROC. §638; see also CAL. R. CT. 244.1.


43 Id. at 348. But see L.A. SUPERIOR CT. L.R. 12.31.

44 CODE CIV. PROC. §644; Aetna Life Ins. Co. v. Superior Court, 182 Cal. App. 3d 431, 436 (1986); L.A. SUPERIOR CT. L.R. 9.3(b) (requiring noticed motion).

45 CODE CIV. PROC. §640. Code of Civil Procedure §641 also affords parties the opportunity to lodge objections, on certain grounds, to any proposed referee.

46 CODE CIV. PROC. §645.1(a).

47 CODE CIV. PROC. §655 (A “new trial” is a re-examination of an issue of fact in the same court “after a trial and decision by a jury, court, or referee.”).

48 CODE CIV. PROC. §§657, 662.

49 CODE CIV. PROC. §645.

50 CAL. R. CT. 244.1(e).

51 EVID. CODE §300; Rice v. Brown, 104 Cal. App. 2d 100, 103 (1951).

52 CAL. R. CT. 244.1(e)-(g), L.A. SUPERIOR CT. L.R. 12.18.

53 USE AND COST OF REFERENCES IN GENERAL CIVIL CASES, JUDICIAL COUNCIL OF CALIFORNIA, ADMINISTRATIVE OFFICE OF THE COURTS, OFFICE OF GENERAL COUNSEL, at 1 (2004). Roughly half of those references were made under Section 639 rather than under Section 638.

54 Id. at 10-11.

55 The appointment of a discovery referee is increasingly common as judges and parties recognize that the court’s limited resources often cannot handle document- and discovery-intensive cases; cases with complex discovery issues, such as confidential and sensitive business information, and cases with highly contentious discovery disputes. In these situations, courts invoke Code of Civil Procedure §638(a) or 639(a)(5) to oustsource only the discovery phase of litigation to a referee.

56 Trend Homes, Inc. v. Superior Court, 131 Cal. App. 4th 930, 964 (2005) (holding that when parties agree to judicial reference, “[t]he right only [they] agree to give up is the right to a jury trial.”).
AN INCREASING NUMBER of Internet domain name registration services now offer “private” (or “proxy”) registrations. Domain name registration requires an entry of contact information into the Whois database, which is available to the public via the Internet. Before the option of private registration was available, the required contact information always contained the registrant’s name and postal address, and the phone number and e-mail address of an administrative and a technical contact.1 Public exposure of their contact information makes domain name registrants easy targets for unsolicited sales activity—such as e-mail and postal spam or telemarketing—and may even support criminal activity, including identity theft.2 Today, by opting for private registrations, registrants can conceal their contact information from the public.

However, some private registrants are also attempting to hide acts of wrongdoing. Those who need the contact information to pursue legal claims must devise strategies to uncover it.

One of the forerunners of private registration services, and the most popular, is Domains by Proxy, Inc., which has been available to domain name registrants since 2003.3 Affiliated with GoDaddy.com4 (a registrar of domain names that is known for its controversial Super Bowl 2005 commercial1), Domains by Proxy offers private registration by substituting its own contact information for that of the registrants.6 Thus, aspiring domain name owners may register a name with Domains by Proxy, which will publicly provide its own company contact information in the Whois database for the new registration while recording the identity of the true registrant only in the company’s internal records.

Other registrars have followed suit and are offering a similar service, sometimes doing so by advertising it as a “secure” or “hidden” Whois.7 Even Network Solutions, a well-known registrar of several top-level domains,8 is now offering private registration.9

Unfortunately, private domain name registrations have also become a haven for cybersquatters and other trademark infringers. Indeed, the Web site of the World Intellectual Property Organization (WIPO) Arbitration and Mediation Center already lists 37 domain name decisions involving Domains by Proxy.10 The National Arbitration Forum (NAF) lists at least five.11 At least one other decision involving Domains by Proxy was published by the International Institute for Conflict Prevention and Resolution.12

No doubt there are many more of these cases, particularly because of the practice by some arbitrators of effectively “bouncing” complaints against private registration services13—that is, an arbitrator will require the complainant to amend the complaint when the named respondent does not match the domain name entry in the Whois database. In fact, enough concerns have been raised about private registration services that the Department of Commerce’s National Information and Telecommunications Administration (NITA) has shut down those services for .us domains, for which NITA is responsible.14

Cases filed in court involving private registrations are likely to fly under the radar because the true identity of an infringer generally will be ascertained at some point during discovery, and the pertinent complaint will be amended accordingly. Still, Domains by Proxy has already been named at least once as a defendant in a federal court case.15

Officially, “Domains by Proxy will not do business with nor protect [the] identity” of anyone who 1) transmits spam e-mail, viruses, or other harmful computer software, 2) violates the law, including trademark or copyright infringement, or 3) “[e]ngage[s] in morally objectionable activities.”16 However, rather than prophylactically inspecting the Web sites of each of its customers for infringement, Domains by Proxy suggests to civil complainants that they serve Domains by Proxy with a subpoena: “Upon the receipt of a valid civil subpoena, Domains by Proxy will promptly notify the customer...

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BY MICHAEL S. GUNTERSDORFER
whose information is sought via e-mail or U.S.
mail.” Nevertheless, “[i]f the circumstances
do not amount to an emergency, Domains by
Proxy will not immediately produce the cus-
tomer information sought by the subpoena
and will provide the customer an opportunity
to move to quash the subpoena in court.”17
This policy clearly allows infringers to dis-
continue using one domain while registering
or using another to continue the infringe-
ment—and complainants may find them-
selves chasing a phantom.

Piercing the Veil
A civil complainant needs a method for reach-
ing an infringer other than the subpoena
process, which gives the infringer a heads-up
notice and time to move its activities to
another location on the Internet. Fortunately
for complainants, there is a way to ensure
almost immediate disclosure of a domain
owner’s true identity. This method is derived
from a policy that appears common to private
registration services: Once a legal process
is initiated against a service, it will substitute
its customer’s contact information into the Whois
database in place of its own to protect itself
from liability.

For example, in its “Domain Name Proxy
Agreement,” Domains by Proxy states that
“in its sole discretion and without any liability
to [the customer],” Domains by Proxy may
“reveal [the customer’s] name and personal
information” not only in cases involving
claims of spamming, infringement, or morally
objectionable activity, but also “[t]o avoid any
financial loss or legal liability (civil or crimi-
nal) on the part of [Domains by Proxy].”18

Similarly, Network Solutions’ Service
Agreement provides that “if any third party
claims that the domain name violates or infringes a third party’s trademark, trade
name or other legal rights, whether or not
such claim is valid” or “if any third party
threatens legal action against Network
Solutions that is related in any way, directly
or indirectly, to the domain name, or claims
that [the customer is] using the domain name
registration in a manner that violates any
law, rule or regulation, or is otherwise illegal
or violative of a third party’s legal rights,...
Network Solutions has the absolute right
and power, as it deems necessary in its sole dis-
cretion, without providing notice and with-
out any liability to [the customer] whatsoever,
to (a) reveal to third parties the contact infor-
mation provided by [the customer] to
Network Solutions in connection with the
account for the applicable domain name, [and]
(b) populate the public WHOIS data-
base with the registrant’s name, primary postal
address, e-mail address and/or telephone
number as provided by [the customer] to
Network Solutions....”19

One can infer that private registration
services appear to have no interest in becom-
ing entangled in legal proceedings because of
the conduct of their customers. To avoid the
risk of liability, a service therefore will gen-
nerally opt to disclose the heretofore private
contact information of their customers as
soon as a third party initiates legal steps
against the service. In practice, this means that
once a lawsuit or other proceeding—such as
an arbitration proceeding under the Uniform
Dispute Resolution Policy (UDRP) of the
Internet Corporation for Assigned Names and
Numbers (ICANN)20—is initiated against
a private registration service, the service will
generally drop the customer like a hot potato
and “populate” the Whois database with the
true registrant’s information. A service gen-
erally will react in the same way to a cease-
and-desist letter directed at it. Hence, an
infringer’s attempt to hide behind a private
registration will be short-lived as long as the
infringer’s conduct provides a good faith
basis for a claim against—or a cease-and-
desist letter directed toward—the private reg-
istration service used by the infringer.

Legal Ethics
Generally, as long as there is a good faith basis
for a claim against the hiding infringer—
based, for example, on infringing content or
activity at an IP (Internet Protocol) address
corresponding to the registered domain
name—there is also a good faith basis for a
claim against the service provider, which
appears in the Whois database as the “Regis-
tered Name Holder” of the suspect site.21

Indeed, the purpose of the Whois database is
to publicly provide accurate contact infor-
mation for registered domain name holders.22

In fact, UDRP dispute resolution service
providers23 often require that the respon-
dent’s contact information listed in a com-
plaint match the Whois database entry for
the domain name in dispute. For example, when
a UDRP complaint is filed with the NAF, the
NAF normally will reject it if the listed con-
tact information of the respondent does not
match the Whois database entry of the dis-
puted domain name. However, private reg-
istration services often move very quickly to
substitute the contact information of the reg-
istrant into the Whois database upon receipt
of a complaint. Thus the Whois database
entry already may be updated by the time
the case coordinator of the dispute resolution
provider attempts to verify that the contact
information provided in the complaint
matches the Whois entry of the disputed
domain. The updated information results in
the complaint being bounced, and the com-
plainant generally is required to file an
amended complaint using the substituted
information.24

Some arbitrators have condemned the
postcomplaint substitution of Whois data by
private registration services as “cyberflying”
and have held services liable.25 Also, in an
apparent effort to combat cyberflying, the
NAF has revised its supplemental rules, effec-
tive January 1, 2006, to define the holder of
a domain name registration as “the single
person or entity listed in the Whois database
registration information at the time of filing
of the Complaint.”26 Notwithstanding this
effort and other similar actions that may be
taken by arbitrators, it appears for now that
private registration services will proceed with
their practice of switching information when
they are named and potentially liable, and in
doing so they will reveal hidden infringers.

Targeting the private registration service
rather than seeking the identity of the hidden
registrant by subpoena is an appealing strat-
ey because of the issue of timing. A subpoena
will delay disclosure of the registrant’s con-
tact information while giving the hiding reg-
istrant a head start on choosing other means
to conduct the disputed activities. Moreover,
a complaint or letter directed at the service
requires no notice to the hidden registrant. It
is, after all, the service that is the listed holder
of the allegedly infringing Internet domain in
the Whois database. The private registration
service may or may not inform its customer
but has usually already revealed the cus-
tomer’s identity before the customer can hide
again.

Targeting the private registration service
is completely ethical. A WIPO Arbitration
and Mediation Center panel stated: “The [pri-
vate registration service] cannot distance itself
from the mala fides of the [hidden registrant].
If it chooses to act as a ‘front’ in these situa-
tions, it has to bear responsibility for what
goes on behind it.”27

To quickly discover the identity of hidden
domain name registrants, complainants
should initiate a legal process against the pri-
ivate registration service rather than seek the
hidden registrant’s identity by subpoena.
Filing a court complaint or simply sending a
cease-and-desist letter will generally accom-
plish this task. However, the often more costly
UDRP complaint process seems to be the
best way to discover the infringer’s contact
information within a few days, because the
registration service will normally try to swiftly
modify the Whois entry before the proceed-
ing officially commences and a case coordi-
nator has verified the Whois data of the dis-
puted domain.

Filing costs vary among dispute resolution
providers. WIPO’s Arbitration and Mediation
Center charges $1,500 for the filing of a com-
plaint, involving up to five domains, that will
be heard by one arbitrator.28 The National
Arbitration Forum charges $1,300 for a com-
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plaint involving one to two domains that will be handled by an arbitrator.

The Asian Domain Name Dispute Resolution Centre charges U.S.$1,000 for an arbitral proceeding involving one arbitrator and one to two domains. The International Institute for Conflict Prevention and Resolution requires the payment of a membership fee, which starts at U.S.$3,000 annually for law firms of 150 lawyers or less.

1 See Internet Corporation for Assigned Names and Numbers (ICANN), Registrar Accreditation Agreement §3.3 (2003), available at http://www.icann.org/registrars/ra-agreement-17may01.htm.
2 See, e.g., http://www.internetprivacyadvocate.org/.
3 See http://www.domainsbyproxy.com/.
9 See http://www.networksolutions.com/domain -name-registration/private.html; see also http://www .internetprivacyadvocate.org/.
13 See, e.g., Guru Denim, Inc. v. Partovi, Case No. FA 445327 (National Arbitration Forum, May 6, 2005) (involving a domain name that had been registered using the Domains by Proxy private registration service, but the decision makes no mention of Domains by Proxy because the complaint was later amended to name the true registrant as the respondent).
16 See http://www.domainsbyproxy.com/LegalAgreement.aspx.
21 See ICANN, Registrar Accreditation Agreement §3.3.1.6.
24 See, e.g., InfoSpace, Inc. v. Brock, Case No. FA 250831 (National Arbitration Forum, June 7, 2004) (finding that “[a]l the time the [c]omplaint was filed, the WHOIS information for the disputed domain name <dogpile.com> listed the registrant as being ‘Domains by Proxy, Inc.’ After the registrar, Go Daddy Software, Inc., was notified of the Complaint, the WHOIS information was changed…to list the registrant as [r]espondent in this case.”).

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A Decade as Chief

Ronald M. George reflects on his 10 years as chief justice of California in an exclusive interview with Los Angeles Lawyer

On April 4, 2006, the Los Angeles legal community will join with the Honorable Ronald M. George in celebration of his 10th anniversary as chief justice of California. Chief Justice George is a graduate of Princeton University and Stanford Law School. Upon graduation he joined the California Department of Justice as a deputy attorney general. In 1972 he was appointed by Governor Reagan to the Los Angeles Municipal Court. Successive governors of both parties appointed him to the Los Angeles Superior Court, the California Court of Appeal, and, in 1991, to the California Supreme Court. On March 28, 1996, Governor Wilson appointed Justice George as the 27th Chief Justice of the California Supreme Court, and his appointment was confirmed by the Commission on Judicial Appointments on May 1, 1996. He was sworn in on the same day. On February 7, 2006, Chief Justice George graciously set aside time in his chambers for Samuel Lipsman, publisher and editor of Los Angeles Lawyer, and Richard H. Nakamura Jr., a partner at Morris Polich & Purdy and former chair of the Los Angeles Lawyer Editorial Board, to conduct an extensive and wide-ranging interview. Highlights from that interview are printed below.

LAL: Mr. Chief Justice, do you feel a special affinity with any of your predecessors?
George: First, I would say Chief Justice Gibson. Chief Justice Gibson made valiant efforts to establish the California courts as a true coequal branch, just as Chief Justice Taft tried to create a true federal judicial branch (as opposed to a number of separate fiefdoms, which is how Taft actually described it). Similarly, at one point, I believe as late as the 1930s, California had about eight levels of trial courts, and Gibson was successful in consolidating some of that. I view myself as taking on and continuing that battle to its logical culmination. So I have a certain desire to achieve some of the goals that Chief Justice Gibson went a long way toward achieving.

LAL: When did you first think, “I’d like to be a judge”?
George: When I assumed more administrative duties in the attorney general’s office. It had a rotating administrative position for the Los Angeles office, where there were more than 110 attorneys. I had a stint
I have at least 30 or 40 individual, one-on-one meetings with the legislators, sometimes in my chambers here, sometimes in Sacramento. Of time meeting with the governor and his advisers, meeting with legislatures, sometimes think that how the language is used can be as significant influenced by political considerations. And yet by the same token, I never feel that a result achieved by this court or any court should be dictated by the legislature?

**LAL:** Within a month after you were appointed as an associate justice on the California Supreme Court in 1991, your predecessor, Chief Justice Malcolm Lucas, wrote an opinion that upheld a voter initiative that enacted term limits in California and that significantly reduced the legislature’s budget. The legislature responded by suggesting that the court’s budget ought to be similarly reduced and by proposing a constitutional amendment that would significantly curtail the court’s jurisdiction in certain matters. How did those events affect your perception of the relationship between the courts and the legislature?

**George:** I joined in the majority opinion, and certainly I would never feel that a result achieved by this court or any court should be influenced by political considerations. And yet by the same token, I sometimes think that how the language is used can be as significant as the end result or, at least, of the courts’ ruling being accepted. And I did realize even before I became chief justice that it was very important to maximize the good working relationship among the three branches of government. So with that in mind, I spend a great deal of time meeting with the governor and his advisers, meeting with legislators, sometimes in my chambers here, sometimes in Sacramento. I have at least 30 or 40 individual, one-on-one meetings with the legislature each year.

**The Administration of Justice**

**LAL:** One of your achievements has been to secure state funding of the courts. Have there been any unforeseen effects since that shift took place?

**George:** I wouldn’t say anything was unforeseen. I think that the shift of state funding has been very successful. Perhaps in the minds of some there was an expectation that it would solve all the problems of funding the judiciary overnight. And the reason it has not is that we are still coping with the aftereffects of years and years of chronic underfunding, when the courts were dependent upon county funding. But having said that, the switch to state funding has achieved the goals of providing much more uniformity and access to justice around our state.

One of the great benefits of the switch to state funding has been achieved just in the last couple years, when we got the legislature and the governor to agree to tie the trial courts’ operating budget to something called the State Appropriations Limit, or SAL, which is a formula that the legislature applies to its own budget and that ensures that with respect to continuing operations (as opposed to new programs) there is no need to justify from scratch the operating budget and to prove that case each year anew. The presumption is that the judicial branch, the trial courts, get what they got the year before adjusted upward for any increase in costs. That has resulted in the last two fiscal years in courts getting more than $100 million extra just automatically by reason of being part of this.

**LAL:** You seem to give a broad meaning to “access to justice.” What do you mean by that term?

**George:** Access to justice in my view entails many, many different aspects and facets. It certainly includes access to our facilities for people with disabilities, and our facilities, often being constructed in an earlier era, are not adequate for that purpose. It involves access that is safe so that people don’t have shootings or knifings in a courthouse, such as we’ve had in Los Angeles County and other parts of the state.

It involves access to our increasingly multiethnic and multicultural population. Our court system in California in any given year translates more than 100 languages, running the gamut literally from “a” to “z”—Albanian to Zapotec.

It also involves access to the business community. Its members are entitled, as is the mass torts community, to have complex litigation heard in an expeditious, efficient, and informed way, instead of feeling, “Well, perhaps we’re really not stakeholders in the public justice system any more. Let’s take our business to ADR.” I have no quarrel with ADR, but it should be a viable alternative and not an alternative that one goes to because of inadequacies in the public justice system.

**LAL:** With the unification of the courts, we now have essentially a unified pay scale. Do you think the salaries that state court judges are paid is adequate to attract and retain the best?

**George:** I do not feel that the salaries paid to judges are adequate, nor are the retirement benefits, and I say that with reference to the post-1994 judges who are under JRS-2, the second tier. I don’t think that it’s appropriate to compare the salary of judges to the private sphere because they will never be equal. There are various benefits that arise from public service, both psychic and in the monetary benefits of the retirement system. However, I think there is a problem when judges’ salaries fall too far behind the private sector, even though they cannot ever really catch up. But what I found the most troubling, and I think impossible to justify, is that we have many areas in our state where public defender-IVs, deputy D.A.-IVs, deputy county counsel, or city counsel-IVs make more then the superior court judges before whom they’re appearing.

It illustrates the fact that judicial salaries have fallen. We are tied under Section 68203 of the Government Code to increases in compensation received by the average of state employees. And that has been beneficial. I’m glad we have that. But it’s not adequate. And I did convince Governor Gray Davis that the judiciary was entitled to a separate additional adjustment of 17 percent. He agreed to do that in two segments, and we achieved the first 8½ percent increase, and then the economy tanked and the second was put off. Of course, the governor’s successor doesn’t feel bound by any commitment made by his predecessor, but nonetheless, he has expressed general sympathy for that...
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George: 

There’s a perception that the Los Angeles Superior Court is sometimes difficult to bring in line with statewide priorities. Have you found that to be the case today? If so, how do you deal with it?

George: 

Los Angeles has had some greater problems to overcome in some of these institutional reforms, largely because of its size. Los Angeles is unique in the millions of filings and the number of facilities and the number of bench officers. It basically is a good one-third of the state’s judiciary. So unification, when you have 24 municipal courts and one superior court, is a far greater effort, understandably, than it is in many counties that just have two judges who can go out and have a beer and decide, “Let’s unify.”

Another example is the switch to one-day-or-one-trial jury service. That form of jury selection is much more difficult to achieve in Los Angeles because you have the Central District, for instance, where you have a great caseload but not as many eligible jurors. People said it couldn’t be done; they could never manage to do one-day-one-trial in the Central District, but they did. So it’s very much to their credit.

We’ve had other difficulties that we’ve worked out with regard to the formulation of jury instructions written in plain language. That was thought to be a major stumbling block. But we’ve worked those things out. So it’s completely understandable to me as a former judge of the Los Angeles Municipal and Los Angeles Superior Courts that things would be on a grander scale and more difficult to change. I’ve made a point of appointing Los Angeles Superior Court judges to the Judicial Council to have the benefit of their input in the statewide process.

LAL: Do you believe that the effort to eliminate local rules in favor of standardizing rules statewide has been successful? Is there still work to be done?

George: 

Basic rules of practice shouldn’t interfere with the practitioner’s ability to go from one jurisdiction to the other. We’ve achieved great uniformity in areas where there should be uniformity, while still allowing for local implementation and local experimentation where variety is appropriate. There are still, though, judges who attempt, I think, to impose what are called “local local” rules. And from my conversations with the leadership of the Los Angeles Superior Court, the presiding judges and assistant presiding judges in recent years have said, “We want to know about those practices because we don’t favor them either. We don’t want to have a judge post his or her own rules on the front door.” So I think this problem, as with so many others, involves changing the judicial culture.

LAL: 

There’s a frequent complaint on the part of practicing attorneys in Los Angeles County that some judges, frankly, are less than fully competent. Is there any way short of the electoral process to address that problem?

George: 

I would be very hesitant to see the Commission on Judicial Performance evaluating a judge’s judicial or legal abilities. I think that we resort, of course, to the appellate process for that kind of redress. And I realize it’s not a perfect solution because it involves delay and added expense to the litigants. But unless there is a pattern of willful disinclination to follow the law, I don’t think that that’s something that should be a matter of discipline. We have to rely on appellate review and we have to rely upon the electorate. And that’s not a perfect solution, and I recognize that.

LAL: 

The U.S. Supreme Court recently declined to review a Minnesota law that the federal courts struck down as improperly restricting the type of campaigning that judges could do for election.

George: In the Dimick case?

LAL: Yes. Do you think that that’s going to have an effect on California?

George: 

I’m troubled by some developments out of state. And that includes the U.S. Supreme Court’s decision in the Republican Party of Minnesota v. White and the remanded decision in the Dimick case, on which the Supreme Court recently denied cert. I believe that [the Supreme Court’s] expansive application of First Amendment principles to the legitimate interest of the state in regulating the conduct of those holding judicial office or aspiring to judicial office will have a detrimental affect upon the nature of judicial elections and possibly the nature of the persons who occupy judicial office.

I’m afraid that the principles laid down in those two decisions might very well be applied and extended in California. I don’t welcome the prospects of partisan judicial elections that characterize the elections in some of the other states, and I’ve become well aware of what those are in other states through my recent term as president of the Conference of the Chief Justices. For instance, in Ohio individuals run on political party tickets for the supreme court, and millions of dollars are spent on those races.

LAL: Do you have any hope that it’s not going to come very quickly to California?

George: 

I have great concerns that this could come to California. We had a very disturbing development in the state of South Dakota, which involves the so-called jail-for-judges initiative, which is qualified for the November 2006 ballot. The Web site describes it as “black-collar crime”—three strikes and you are rendered ineligible for judicial service in South Dakota for your lifetime. There’d be a special grand jury that would have the authority to investigate abuses of judicial discretion. Judges would lose their immunity from civil suit or actions.

This initiative was started by a California group that has admitted in some interviews recently that they deliberately chose a small state where 30,000 signatures are needed to qualify for the ballot. If it’s successful there, then they will go to Nevada, and then try to come back to California. So these are things on the horizon that to me are very troubling and that threaten judicial independence.

Judicial Decision-Making

LAL: How would you describe your judicial philosophy?

George: 

Well, I think it has become almost a cliché to say this, but obviously a judge’s function is to apply the law and not to make the law, and yet as a practical matter, there’s always the need to interpret statutes, to fathom what the legislature intended, to develop common law. So to a certain extent, a judge will engage in rulings that by their very nature are going to be controversial because they are plowing new ground, even if it’s just applying established principles in a new context. But I think it’s very important for judges to make the reasons for their decisions plain and known.

LAL: To what extent do you think that appellate judges decide their cases on the basis of a results-driven process?

George: 

I do not believe that appellate judges do so. And I think, of course, that’s often the perception of the aggrieved party and sometimes the losing attorney. Now, in cases where the appeal was not frivolous but was, at least, a long shot because the law is very much against the appealing party, the result could be anticipated. But if the suggestion is that apart from precedent or controlling principles the justices want to achieve a certain result, I think that’s a shallow view of the process.

LAL: The subject of citing unpublished opinions remains a controversial one. Last year the court’s Advisory Committee on Rules for Publication released the results of a survey in which 58 percent of the responding court of appeal justices reported that they had relied on unpublished opinions in their work, either to consider a rationale or to main-
tain consistency with their prior decisions. Should justices on the court of appeals consult unpublished opinions?

**George:** Well, one should always be aware of one’s own work product, hopefully, and try to be consistent, and I think that the burden on a justice who does that is to make an independent justification for the principles that are set forth. We don’t want to have, for reasons obvious to me, every decision published. And if you allow citation of unpublished opinions, you’re going to have inequities in terms of people’s access to these unpublished opinions, and lawyers deemed incompetent if they didn’t search for the needle in the haystack.

And I think it’s no secret that if judges deem a decision publishable or worthy of publication, they’re going to spend a lot more time fine tuning. It would slow down the appellate process if everything has to be of publication standard. So I think that there are many reasons why it’s not wise to publish everything, but it is wise to examine the process and see if we can improve it in some way.

**LAL:** Might there be room in the process, though, to allow parties to cite unpublished opinions in petitions for review or answers to petitions for review in their attempt to show that there is a conflict in the courts of appeal?

**George:** Well, that’s something certainly that the commission that I have appointed will look at, I’m sure. And I don’t have many set ideas in this whole area, except probably one, and that is, we should not just say everything should be published.

**LAL:** The other side of the publication question is, of course, depublication. There was a time during the 1980s and 90s when the California Supreme Court was regularly depublishing at least 100 cases annually. Recently that number has dropped to fewer than 25 depublished cases per year. Does that signal a change in the court’s attitude toward depublication?

**George:** I believe it does. When I came on the court in 1991, there were times when the court would depublish more court of appeal opinions than it would take up. I think it was up there, above 140. And very frankly—and I want to speak more of my own personal view than to try to ascribe these to my colleagues—my own thought was that the depublication authority was being misused by this court to the extent that it was being used to resolve questions of law and often to resolve conflicts, and that was not a proper use of the depublication authority.

On the other hand, let’s say that the law in a given area has been well established and that there is an aberrant decision that’s just inconsistent with the body of law or that contains some troubling dictum that might mislead the trial bar or the trial bench. Does it make sense when you have the capacity to issue only 110 or 120 opinions a year—which, by the way, is a lot more than the U.S. Supreme

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**The Top 12**

Chief Justice Ronald M. George has identified the following 12 opinions (listed in reverse chronological order) as the most important that he has authored during his tenure on the California Supreme Court.

- **Miller v. Department of Corrections,** 36 Cal. 4th 446 (2005) (holding that pervasive favoritism toward a female employee engaged in sexual affairs with a male supervisor created a hostile work environment and violated F.E.H.A.’s prohibition against sexual harassment).
- **Marine Forests Society v. California Coastal Commission,** 36 Cal. 4th 1 (2005) (holding that legislature’s appointment of some of the members of this executive agency does not violate state constitution’s separation-of-powers clause).
- **Lockyer v. City and County of San Francisco,** 33 Cal. 4th 1055 (2004) (holding that local officials acted outside their authority in issuing marriage licenses to single-sex couples in violation of state statutes).
- **In re Rosenkrantz,** 29 Cal. 4th 616 (2002) (setting forth the standard for judicial review of governor’s reversal of parole board decisions).
- **Manduley v. Superior Court,** 27 Cal. 4th 537 (2002) (upholding constitutionality of Proposition 21, the Gang Violence and Juvenile Crime Prevention Initiative, which confers upon the prosecutor the discretion to file specified charges against certain minors directly in criminal rather than juvenile court).
- **People v. Williams,** 25 Cal. 4th 441 (2001) (holding that there is no right of jury nullification).
- **Aguilar v. Avis Rent A Car System, Inc.,** 21 Cal. 4th 121 (1999) (holding that a remedial injunction prohibiting the continued use of racial epithets in the workplace does not violate the right of freedom of speech if there has been a judicial determination that the use of such epithets will contribute to the continuation of a hostile work environment).
- **NBC Subsidiary (KNBC-TV) Inc. v. Superior Court,** 20 Cal. 4th 1178 (1999) (holding that the right of the media and the public to attend court proceedings extends to civil as well as criminal proceedings).
- **In re Attorney Discipline System,** 19 Cal. 4th 582 (1998) (imposing a special regulatory assessment on attorneys actively engaged in the practice of law, to be used exclusively for attorney disciplinary purposes, in the absence of such provision by the executive and legislative branches).
- **American Academy of Pediatrics v. Lungren,** 16 Cal. 4th 307 (1997) (holding that a statute requiring a pregnant minor to obtain parental consent or judicial authorization before she may secure a medically safe abortion violates the minor’s right to privacy guaranteed by the California Constitution).
- **Warfield v. Peninsula Golf and Country Club,** 10 Cal. 4th 594 (1995) (holding that private country clubs that engage in numerous regular business transactions with nonmembers violate the Unruh Civil Rights Act by excluding women from proprietary membership).
- **Knight v. Jewett,** 3 Cal. 4th 296 (1992) (holding that the doctrine of implied assumption of risk bars a lawsuit by a participant in a sport activity against a coparticipant for injuries suffered as the result of negligent conduct).
LAL: For the attorney who has petitioned the court for review, and instead gets the adverse court of appeal opinion depublished, what can that attorney say to his or her client? “The court of appeal opinion is depublished but it has no effect on you.”

George: Well, it’s a difficult matter for an attorney to deal with. This probably is not very much consolation, but it serves as a mini-civics lesson. What is the function of the California Supreme Court? We deny review in dozens and dozens of cases that we think the court of appeal decided wrong. We cannot, with 2,000+ bench officers in the state and 7 of us, take up every case that’s wrongly decided. We have an intermediate court of appeal in this state that is entrusted with the responsibility of getting it right. And if they don’t get it right in a particular case, we cannot and will not take up that case just because it was wrongly decided.

Now, this is something that was—even though I knew it—shocking to me when I came onto the court as a new justice in 1991, because as a municipal court, superior court judge, as a court of appeal justice it was ingrained in me when you have a wrong and there’s a legal remedy, you right it and correct the error.

LAL: There are many instances in which the court dodges what everyone sees as the key issue in a case because the court decides it on the narrowest possible grounds. For example, a couple of years ago in Aguilar v. Lerner, the question was whether a private fee arbitration agreement between an attorney and a client trumped California’s Mandatory Fee Arbitration Act. The court did not resolve that issue, saying that the client had waived it by filing a malpractice suit. Why not decide the issue once and for all?

George: I won’t comment, of course, on that case or on any particular case, but there are many reasons why sometimes the court will not address the broader question that the party anticipated or desired to be resolved. Sometimes it turns out that the record has an aberrant factual scenario that wouldn’t lend itself to the enunciation of a broad guiding principle. Sometimes a required objection or a request for jury instruction did not occur.

Sometimes, frankly, the court is very much divided and would not provide the guidance that we give in a case in which we have a majority of the court on one opinion. Now, if you look to the U.S. Supreme Court, they set an example that we try to avoid in very fractured holdings. And you can literally look at the syllabus or the head notes of a U.S. Supreme Court decision and very, very frequently find Justice A concurs in parts 2-A and 4-F of Justice B’s opinion. I saw one where somebody concurred except for footnote 24. Now, sometimes you have to add up all these separate opinions and you don’t know what the case held. It hasn’t performed its function of providing guidance to the public, to the trial bar, or the trial bench, and it’s just confusion. We often go a couple of years or more without having a single case in which there isn’t at least four or more justices in on one opinion. I think it’s very important that we try to get together and provide guidance. And sometimes if we can’t provide guidance, rather than muddy up the waters with plurality opinions, we settle upon the common ground that we can find. And by definition, if the issue is important, it will reoccur and it will be there to take up in another case on a future day.

LAL: What do you think of the practice of courts of appeal issuing tentative opinions?

George: That’s really something we truly left up to the individual court of appeal. I know that it would not work in our court because I think by the nature of the cases that reach us, our questions involve more ambiguity.

LAL: How much of a difference does oral argument make?

George: We are a so-called hot court in the sense that we spend a lot of time working up the case, examining the record, researching the law, in advance of scheduling the case for oral argument—as opposed to the U.S. Supreme Court, which does most of its work after oral argument. So, you can say, “Well, look. That court is more open-minded.” But they’re not in a position to have as much benefit from oral argument as perhaps a court such as ours is, because we’re really steeped in the case beforehand. But reasonable minds can differ on that. We have cases, notwithstanding the fact that we do this advance or front-loading, in which while we’re still in the elevator coming up to the table in my chambers here to vote on the case, and justices say, “Well, that really made a difference, didn’t it?” And the case has been flipped around 180 degrees as a result of the oral argument.

The George Court

LAL: During the 1960s and 70s, in particular, the California Supreme Court enjoyed a commanding presence on the national legal stage. Do you think that it still does?

George: I believe that—not only with regard to court reform and structural matters that we’ve already discussed but also in terms of the cutting edge issues that come up here. We look at some of the cases involving civil rights of gay individuals and the adoption cases that we have heard. I couldn’t have imagined issues like that when I was in law school. We have a society evolving to the point where these issues are real and have reached the highest court of the state. And I’m just picking out one issue. We have others involving technology.

LAL: Can we attach any significance when a court opinion is signed “George CJ?”

George: Well, only that I assigned the case to myself. I make an effort in our process to try to accommodate the views of my colleagues to the maximum extent, maybe because I have a particular institutional focus as chief or maybe just because of my predisposition. If I get the fourth vote, I don’t stop counting. I feel that the court’s function is enhanced if it can speak with one voice or as few voices as possible.

Now, I have written dissents myself. There are times when you just don’t go along to have a unanimous opinion. But a lot of separate little concurring opinions just clutter up case reports and add confusion to the jurisprudence of our state.

LAL: So how is the author chosen?

George: What happens is within a day or two after review is granted I assign the case to either one of my colleagues or to myself, but assignments are made, under the court’s policies, only to a justice who voted to grant review in the case.

Now, nobody to my knowledge has ever written on this, but it would be interesting to focus on those cases where the author was not somebody who voted to grant review. What does that mean? It means that the author initially was a dissenter and maybe got a second vote, a third vote, and here’s the fourth vote. And suddenly that person has the majority. The tentative author has decided not to change his or her view to accommodate the majority, so the case is reassigned.

That sometimes happens even after oral argument, but normally it happens before, because when review is granted the case is briefed anew and the assigned justice and one or more of his or her research attorneys research the legal issue proposed in the disposition and circulate a draft, which is called a calendar memorandum, to the remaining justices of the court. Within 15 days, the other justices are supposed to send in, they’re called “PRs” or “preliminary responses,” and that could be anything from checking off the “I concur” box to pages of suggestions or disagreements or a separate treatment alto-
thought that it was a good case to take up. Herself on the merits in the end, even though the justice may not have try generally in the assignment process to keep the workload even. And I think nobody wants to become the expert on water law or tax law. Those cases hopefully are distributed evenly, civil and criminal cases. (By the way, the death penalty cases are not assigned by me. They are done automatically. The records come in on a rotational basis by the clerk’s office.) I will say that I have a particular interest in the area of relationships among the branches of government. So at some times, if I have been among those who voted to grant review, I would assign that case to myself.

LAL: Are you implying that if somebody votes to accept a case that there’s an implication that he or she wants to overturn it?
George: No.

LAL: Why would it be so unusual for someone who voted not to accept a case to wind up being on the majority side?
George: There may be a conflict among the appellate courts, and we may take up a case and say, “The court was absolutely correct on this. But another court decided another way last year, and there wasn’t a conflict then, so we didn’t take it up.” Or, we might say, “The issue appears much more substantial now.” And this brings in the matter of amicus briefs, which are often very helpful, and which we are very happy to receive both on the petition for review stage and on the merits. We may realize that there’s much more in the way of ramifications for that issue. So the fact that the court of appeal decided in a certain way does not imply that we, that the majority, decided differently. [In voting to deny review] a justice may just think, “You know, the case wasn’t all that important” or, “You know, this is not a good case. It’s not a good factual situation. I’d rather wait for another case to decide it.” But the majority felt, “No. Let’s take it up anyway.” Well, that person is in just as good a position to express himself or herself on the merits in the end, even though the justice may not have thought that it was a good case to take up.

Capital Cases
LAL: As you know, the process of judicial review in capital cases is cumbersome. It’s prolonged. It’s reported that the court spends nearly 20 percent of its time on capital cases. Is this an intractable problem?
George: I believe that the court has come close to maximizing what efforts it can make to expedite the process. And when I say “expedite,” we don’t want the kind of speedy capital justice that exists in some of our Southern states. But it does boil down in large part to the resources that are available to the court in the process to handle these cases appropriately. And my view is that if California wants to have a death penalty, it should devote sufficient resources to enable that process to be carried out in an appropriately efficient way.

I don’t favor rigid timelines, that one should be able to resolve within a period of five years whether a judgment of death would be affirmed or reversed or set aside on habeas. But the fact that this process goes on frequently for 20 or more years puts in a bad light the whole judicial process, certainly in the public’s eye, and frankly in my eye as well. I think it is, to a large extent, a dysfunctional system.

“We deny review in dozens and dozens of cases that we think the court of appeal has wrongly decided. We cannot, with 2,000+ bench officers and 7 of us, take up every case that’s wrongly decided.”

What it really boils down to is a rather paradoxical way is that the virtue of our system in California for having death penalty cases is also its vice, because we try to build in enough due process in terms of quality of legal representation that we can’t turn them out lickety split the way they do in the South. But if we want to have a death penalty—and I tried to make this point in the meeting with the governor and legislature—we have to devote sufficient resources. Personally, I don’t get into whether on a cost-benefit basis there should or should not be a death penalty. That is something for the people of the state of California to decide directly through the elective process and through the representatives that they send to the legislature. But my point is, that if you want to have a death penalty, it should be adequately funded so that the system can handle these cases within a reasonable amount of time.

LAL: Do you think California should, like Oklahoma and Texas, have a separate court system to handle criminal appeals?
George: I do not. And most people who have examined that system and some who have worked in it do not feel that the model of those two states is something that should be emulated.

LAL: I’d like to ask you a question about clemency. It’s been a long time since clemency has been granted in California. Today if we had a governor who granted clemency, our constitution would require the concurrence of four justices on the California Supreme Court.9 Where would the court turn to for standards or guidance in looking at a governor’s request for clemency?
George: Clemency is basically a successor to the ancient royal prerogative of mercy, generally not based on questions of guilt or innocence or legal end. The concurrence of the court presumably would involve the same nonjudicial considerations as the governor is faced with because it’s really an extrajudicial, outside-the-legal-process type of determination. And this court, I’m sure, in a hypothetical situation, could be faced with something that would be very difficult for the court to resolve in terms of whether an individual should have the concurrence of this court and therefore enable the governor to exercise his function. It’s one of those situations that does not fit neatly into our preconceived ideas of separation of powers.

The Legacy
LAL: Is there a particular opinion or series of opinions that you
George: I sort of cringe a little bit when I hear the “George Court.” The term is used for any chief justice, and I understand that. But I tend to look at things on a case-by-case basis. To get back to the question: A decision that I wrote some time ago on membership in a golf club, *Warfield v. Peninsula Golf & Country Club* 9 in which a woman, who is an ace golfer, divorced her husband and was awarded the club membership. But because she was a woman, the club would not allow her to have it. I wrote an opinion for the court applying the Civil Rights Act in that situation. And I think that that was one of the first cases where I had occasion to really get into that area in depth.

In subsequent decisions, [the court has] gone into that whole area of adoptive parents and gay couples.10 So that’s an area where the court has been in the forefront. Of course, I don’t want to say anything about what may come ahead, but I think it’s obvious that many other important issues will be reaching us in that general area.

We’ve also done a lot in the area of arbitration, what its limits are: *Aguilar*11 and *Armendariz*12 and other matters where consumer rights are involved that may border on contracts of adhesion.

*LAL*: Your court seems to have avoided the polarization that has marked the American body politic during the past decade. To what do you attribute that?

George: Well, I think that it’s a great credit to the governors who, despite their different political philosophies, have made a concerted effort to follow a merit-based selection process. Now, that isn’t to say that political considerations are never a part of the process, but the current administration is more bipartisan in its judicial appointments than any we’ve had in my professional lifetime.

Moreover, we haven’t had, frankly, the legislature involved in the confirmation process. We have a system that I find far preferable. I would rather have a supreme court justice face the electorate every 12 years after facing the Commission on Judicial Appointments than have the equivalent to what goes on at the federal level. Our system isn’t perfect, but I find it preferable. I think it maximizes the chances of getting individuals who are well-qualified professionally and morally and temperamentally to serve on a bench. It’s not infallible, but I think it’s basically a good system and people have been willing to adhere to it.

*LAL*: Are there any decisions that you’ve made that you regret?
George: There’s nothing that I can think of as an appellate justice. There are some decisions that I wish I didn’t have to write because I wish that the parties would have resolved things differently or maybe that the governmental institutions would have acted differently than they did. And that put the court in a very difficult position of having to decide something, which, in the court of public opinion, was a no-win situation. But that’s not a regret in deciding cases a certain way; it’s a regret that the case even had to be resolved by the court.

LAL: What’s been your biggest disappointment as chief justice?

George: It’s been both a source of great satisfaction and a frustration dealing with funding issues, because there are so many things that I would ideally like to accomplish and that I think are within the realm of possibility if resources were available to the courts commensurate with their importance as a third branch of the government, and more importantly, given the importance of what we provide to the public. It’s not about judges. It’s about access to justice.

I realize that the judiciary is competing with education and welfare and transportation and healthcare, and we can’t have a myopic vision thinking that we should be first on everybody’s list. And yet, I don’t think that the public and the legislature have a full appreciation of how significant the services are that are afforded by the judiciary to the public.

When I look back it’s easy to say how much more we need to do, but we’ve really made enormous progress, and that is a source of great satisfaction. I’m very grateful to those in the other two branches of government who have seen fit to assist us and are partners, other groups who have helped us—and the bar has been wonderful in that regard. But notwithstanding how far we’ve come, I suppose I am impatient sometimes at the fact that we could do so much more if we were funded at a level that I think is commensurate with the importance of what we do for the public.

I have to spend a great portion of my time just trying to obtain adequate resources, whereas I would wish that were a given. But I insist on doing my one-seventh share of the opinions. As part of the job, I like that. I enjoy the contact with the other branches and still getting around the state. But to have to press for adequate funding continuously is sometimes frustrating.

LAL: Would the proposals currently being considered to amend the judicial article of our constitution, Article 6, address any of these concerns?
George: Well, I think it would in the sense that many of the things that we’ve achieved are the creature of statute. The amendments would put them into the constitution, where they would be protected from a future legislature that might see its priorities differently or that might take umbrage at some particular future decision of this court.

LAL: Your tireless devotion to improving the administration of justice and access to justice is well known. Would you be pleased if that were your legacy, as opposed to your jurisprudence?

George: No. I really try to focus on both entities. And they both give me a great sense of satisfaction. But I would feel quite remiss if it were only one or the other that was the dominant focus of my efforts. I love the mix. And maybe some of that comes from having been a political science major. I enjoy government, and I enjoy working with people for solutions. But I love working and crafting opinions. So to me it’s a perfect blend, a perfect mix, and I wouldn’t trade it for anything. I can’t imagine a more enjoyable or satisfying position to be entrusted with, and I feel very, very fortunate to have the opportunity of public service.

1 Justice Phil S. Gibson, California’s longest-serving chief justice, served in that position from June 1940 to August 1964.
2 Justice Roger Traynor succeeded Phil Gibson as chief justice. Chief Justice Traynor served for nearly six years, from September 1964 to February 1970.
4 The Judges’ Retirement System II (JRS II) was established in 1994 as a retirement plan for California’s judges and justices appointed or elected on or after November 19, 1994. See www.calpers.ca.gov. According to an April 2005 survey of judicial salaries conducted by the National Center for State Courts, trial judges in California earn $149,160, the fourth-highest salary for trial judges in the country. When adjusted for the cost of living, the salary rank drops to 33rd. See http://www.ncsconline.org/.
5 Dimick v. Republican Party of Minn., 416 F. 3d 738 (8th Cir. 2005), cert. denied ___ U.S. ___ (Jan 23, 2006) (No. 05-566).
8 CAL. CONST. art. V, §8(a) states: “The Governor may not grant a pardon or commutation to a person twice convicted of a felony except on recommendation of the Supreme Court, 4 judges concurring.” See also PENAL CODE §4852.16 (“[P]ursuant to Section 8 of Article V of the Constitution, the Governor shall not grant a pardon to any person twice convicted of felony, except upon the written recommendation of a majority of the judges of the Supreme Court.”).
11 Aguilar, 32 Cal. 4th 974.
PROFESSIONAL ETHICS made headlines last year. While lawmakers debated shifting legal definitions of torture, it was revealed that lawyers working for the Bush Administration had approved, in classified opinions, an executive order authorizing warrantless spying within the United States. The lawyers did so despite the U.S. Supreme Court’s rejection, 30 years earlier, of similar presidential claims on national security grounds.1 While still a Supreme Court nominee, Samuel A. Alito Jr. explained his failure to recuse himself from cases involving the Vanguard Group and Smith Barney by saying that his pledge during his 1990 confirmation hearings to the court of appeals to avoid conflicts of interest involving the two financial entities had been “unduly restrictive.”2 The American Bar Association, after encouraging lawyer whistleblowing on corporate malfeasance in 2003, backtracked in 2005 by opposing the government’s routine practice of seeking waivers of the attorney-client privilege and work product doctrine.3

In California, a federal judge in Fresno sanctioned an entire law firm for violating its ethical duties to the court. This decision arose from the unsuccessful defense by the lawyers of a school district sued by parents seeking special educational services for their disabled son. In a blistering 83-page opinion detailing the firm’s intentional misstatements of law and facts, obstructive conduct, and bad faith, the court asked rhetorically whether “a culture of misrepresentation and deception exists at Lozano Smith,” and ordered all 80 lawyers in seven offices of the firm to attend ethics training.4 After a Los Angeles grand jury indicted a retired lawyer for alleging taking more than $2 million in illegal kickbacks to act as a named plaintiff in dozens of securities class actions brought by Milberg Weiss Bershad Hynes & Lerach, prosecutors said that the lawyer attempted to launder the pay-
ments by asking his firm not to deposit the monies in its client trust account and to pay his personal expenses, such as car payments and charitable contributions.

On another front, the State Board of Bar Examiners voted to raise the passing score on the Multistate Professional Responsibility Examination. In 2008, when this decision goes into effect, California will share with Utah the distinction of requiring the highest passing score in the nation.

Finally, the Commission on the Revision of the Rules of Professional Conduct continued its work throughout 2005. In 2006, the commission is expected to release its first proposed new rules for formal public comment.

Conflicts of Interest

During 2005 several California courts published opinions concerning conflicts of interest. The fundamental principles are fairly straightforward. Every lawyer admitted to practice in California has a duty “to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” This reflects two related but independent duties—one of undivided loyalty to a client and another to keep client secrets in confidence. The California Rules of Professional Conduct describe a lawyer’s ethical obligation to avoid, absent appropriate written notice or consents, entering into a business transaction adverse to a client, representing clients with adverse interests, and representing a client in a matter in which the lawyer has a particularly close relationship with the other party’s lawyer.

In Goldberg v. Warner/Chappell Music, Inc., a lawyer applying for an in-house legal position with a company talked briefly and informally with a partner of an outside law firm concerning her proposed employment agreement. Notwithstanding these talks, the lawyer handled her negotiations with her prospective employer on her own. The partner did not open a file on the matter and did not bill the lawyer for his time. The lawyer began her in-house employment and proceeded to develop close personal and professional relationships with various lawyers in the partner’s outside law firm, which she retained to represent her company on multiple matters. The partner later resigned from the law firm to work at another firm, but his former firm continued to handle matters for the in-house lawyer’s company. Six years after she was hired, the in-house lawyer was fired, and she sued the company for wrongful termination. The company retained the partner’s former outside law firm to represent it against her claims.

The trial court concluded that the law firm should not be disqualified, and the court of appeal agreed. The appellate court reasoned that the in-house lawyer and partner (and the partner’s firm) had formed an attorney-client relationship, notwithstanding the informality of their brief discussions. That relationship ended at the latest when the partner left the law firm, if not earlier when the in-house lawyer accepted her job offer. Thus, the court applied the substantial relationship test, because the law firm represented adverse clients in successive, rather than concurrent, engagements.

When a substantial relationship has been shown to exist between a lawyer’s former and current engagements, and when it appears by the nature of the former representation that confidential information material to the current dispute would normally have been imparted to the lawyer, the lawyer’s knowledge of confidential information is presumed, and the lawyer and his or her law firm should be disqualified from the current engagement, absent appropriate consents. Under the circumstances, however, the Goldberg court was not prepared to disqualify the law firm by imputing to it knowledge of confidential information concerning the representation of the in-house lawyer gained by the former partner. The court noted that because the partner had left the firm and the firm submitted evidence that others in the firm possessed none of the confidential information acquired by the partner, there was no opportunity for confidential information to be divulged. At some point, the court concluded, it ceases to make sense to apply a presumption of imparted knowledge when a lawyer moves from firm to firm.

In another successive representation case, Pound v. DeMera, the Fifth District Court of Appeal, analyzing an issue of first impression in California, concluded that two lawyers who were neither partners nor employees of the same firm but served as cocounsel for clients in a corporate divorce had to be disqualified. This was necessary because of a conflict arising from one lawyer’s one-hour consultation three years earlier with a lawyer for two adverse parties. The court concluded that the two engagements were substantially related and, in the absence of appropriate client consents, mandated the disqualification of the first lawyer. The court also disqualified his cocounsel because, under the circumstances, there was no possibility for erecting an ethical wall precluding the dissemination of confidential information, even assuming that this type of screening is deemed effective in California. The very purpose for engaging the second lawyer as cocounsel in the case was to acquire the cocounsel’s assistance at trial against the cocounsel’s former
The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education legal ethics credit by the State Bar of California in the amount of 1 hour.

1. Every lawyer admitted to practice in California has a duty to preserve the secrets of his or her clients at every peril to himself or herself.
   True
   False

2. According to the Rules of Professional Conduct, a lawyer may represent a client in a matter in which the lawyer has a particularly close relationship with the other party’s lawyer—as long as the lawyer informs the client in writing.
   True
   False

3. The substantial relationship test applies when a lawyer may have learned confidential client information in successive engagements.
   True
   False

4. If one of two lawyers acting as cocounsel has access to confidential client information that gives rise to a conflict of interest, both lawyers may be disqualified.
   True
   False

5. In simultaneous or dual representation cases, “the primary value at stake,” according to the California Supreme Court, is the attorney’s duty of confidentiality.
   True
   False

6. Absent client consent, a lawyer cannot represent an adversary to his or her client, even in a matter wholly unrelated to the engagement.
   True
   False

7. A lawyer cannot act as cocounsel in a class action and serve as a class representative in the same action.
   True
   False

8. The American Bar Association’s Model Rules of Professional Conduct apply to California lawyers if they are appearing in a federal proceeding in California.
   True
   False

9. A client may be deemed to have waived the right to confidentiality if he or she agrees to testify as an expert in a matter in which the client’s former lawyer represents the adverse party.
   True
   False

10. Prior to the formation of the attorney-client relationship, the duty of confidentiality does not apply to information communicated to a lawyer by a prospective client.
    True
    False

11. The lawyer can prevent the attorney-client privilege from attaching to communications by a prospective client by stating that he or she will not represent the client.
    True
    False

12. To prevent prospective clients from providing unsolicited confidential information to a lawyer’s Web site, the lawyer should place a disclaimer on the Web site stating, in plain language, that submissions to the site will not be confidential.
    True
    False

13. Unsupported accusations by lawyers of judicial misconduct are to be expected in the heat of litigation and are not subject to sanctions.
    True
    False

14. A client may sue his or her lawyer for giving the client bad advice that leads the client to violate a criminal statute.
    True
    False

15. Normally, a lawyer sued by his or her client for malpractice may not sue a successive lawyer for indemnity, lest the indemnity claim create a conflict of interest between the lawyers and the client or lead to the disclosure of confidential client information.
    True
    False

16. The rule against fee-splitting in the Rules of Professional Conduct does not apply to arrangements between partners.
    True
    False

17. The Rules of Professional Conduct govern the conduct of California lawyers when they are practicing in another state.
    True
    False

18. The client’s right to compel arbitration under the Mandatory Fee Arbitration Act can be waived by delay and the resulting prejudice to the lawyer.
    True
    False

19. Inadvertent contact with a judge through a Listserv constitutes an unethical ex parte contact.
    True
    False

20. California’s ethical standards for arbitrators in contractual arbitrations are preempted in securities arbitrations administered by the National Association of Securities Dealers (NASD).
    True
    False
client. Thus the potential for disclosure of confidential information was significant.17

The ruling in *Cal West Nurseries, Inc. v. Superior Court*18 illustrates that the substantial relationship test does not apply in cases of concurrent representation of adverse parties. As the California Supreme Court noted in *Flatt v. Superior Court* in 1994, “The primary value at stake in cases of simultaneous or dual representation is the attorney’s duty—and the client’s legitimate expectation—of loyalty, rather than confidentiality.”19 Thus, in *Cal West Nurseries*, the court issued a writ instructing the trial court to disqualify a law firm that represented as cocounsel two clients pursuing a cross-complaint for indemnity and apportionment against Cal West, which the law firm was currently representing in an unrelated litigation matter.

When Cal West objected to receiving deposition notices from its own law firm, the law firm filed a disassociation of counsel, stating that it would no longer represent its two clients regarding the claims asserted between them and Cal West. The court held that this action did not remedy the conflict, for the law firm’s clients were still adverse.20 Quoting *Flatt*, the court of appeal noted that “[a] client who learns that his or her lawyer is also representing a litigation adversary, even with respect to a matter wholly unrelated to the one for which counsel was retained, cannot long be expected to sustain the level of confidence and trust in counsel that is one of the foundations of the professional relationship.”21 To resolve the conflict, the law firm needed appropriate consents from its three clients.

The duty of loyalty likewise prevents a lawyer from serving as a class representative in a class action brought by his or her firm. The court in *Apple Computer, Inc. v. Superior Court*,22 relying on several federal class action cases and treatises on California and federal class action litigation, issued a writ instructing the trial court to disqualify both the law firm in which the named plaintiff worked and cocounsel for the putative class. By purporting to serve as a class representative, a lawyer and his or her law firm “have placed themselves in a position of divided loyalties—their own financial interest in recovering attorney fees versus their obligation to the putative class to maximize the recovery of monetary and other relief.”23 Even though the plaintiff lawyer did not work for cocounsel’s firm, the court disqualified class cocounsel because of the close business connection between the plaintiff lawyer, his firm, and cocounsel. The two firms were serving or had served as cocounsel in 13 other matters—six of which were active at the time of the disqualification motion. This close business relationship created a conflict for cocounsel.24

In *Abbott v. United States Internal Revenue Service*, the Ninth Circuit reached a different result, concluding that a lawyer who concurrently represented a taxpayer in litigation with the IRS and served the IRS as an expert witness in unrelated matters did not have a conflict of interest.25 In analyzing the conflict-of-interest issue, the Ninth Circuit first considered Model Rule 1.7 of the American Bar Association’s Model Rules of Professional Conduct.26 This was a mistake. The Model Rules do not apply simply because a California lawyer happens to be practicing in a federal proceeding. The Ninth Circuit should have applied the California Rules of Professional Conduct—specifically Rule 3-310—and California Business and Professions Code Section 6068(e)(1). The Ninth Circuit declined to do so because the client first raised Rule 3-310 in her reply brief.27 The Ninth Circuit also noted that it was disinclined to adopt a rule that would effectively impede the IRS from obtaining the expert aid of practicing members of the tax bar.28 One may question whether the duty of loyalty should have precluded the lawyer from simultaneously representing the taxpayer and serving as an expert for the IRS without an appropriate disclosure and opportunity by the taxpayer to seek new counsel.

**Cross-Examination of Former Client**

In Formal Opinion 513,29 the Los Angeles County Bar Association’s Professional Responsibility and Ethics Committee considered whether a lawyer who learns that an opposing party has designated the lawyer’s former client to testify as an expert needs to take any steps before continuing with the lawyer’s current representation. The committee concluded that there is no ethical impropriety for the lawyer to continue with the representation in the current matter, even in the absence of consent from the former client/expert, so long as the lawyer does not possess confidential information from the former client/expert that would be material to the employment in the current matter. If, however, the lawyer possesses such confidential information, the lawyer may not accept a new engagement without the informed, written consent from both the former client/expert and the new client.30

A lawyer who learns that an adverse party intends to designate the lawyer’s former client as an expert during the course of an ongoing matter faces a somewhat different situation. If the lawyer possesses material confidential information that could be used against the former client/expert and the former client/expert refuses to consent to the lawyer’s continued representation of the adverse party, the committee suggests that the lawyer seek judicial determination as to whether the former client/expert has waived the right to confidentiality and the right to assert the conflict by having agreed to testify in the new matter.

**Confidential Communications to a Web Site**

Trolling for members of a class action it planned to bring against pharmaceutical company SmithKline Beecham, a law firm invited potential plaintiffs to fill out a questionnaire on its Web site asking for extensive information about their use of the drug Paxil. After suit was filed, SmithKline Beecham sought discovery of the questionnaires over the plaintiffs’ objection based on the attorney-client privilege. The defendant noted that a person filling out the form was required to acknowledge in writing that the questionnaire did not constitute a request for legal advice and that no attorney-client relationship was formed by submitting the information. Nevertheless, in *Barton v. United States District Court*,31 the Ninth Circuit granted mandamus to prevent disclosure of the completed Internet questionnaires.

The court noted that, in California, communications by prospective clients with the aim of obtaining legal services are covered by the attorney-client privilege, regardless of whether the prospective clients ever actually retain the lawyer. Without the privilege, people seeking assistance with their problems could not safely confide in lawyers. The privilege does not apply when a lawyer specifically states that he or she will not represent the person communicating with the lawyer, but the court of appeals found in *Barton* that the law firm’s Web site did not do this because it merely indicated that “[the firm] did not represent the submitter yet.”32 The court further explained that what the clients thought was more important than what the law firm intended, and if the Web site questionnaire was ambiguous, the clients should not be penalized for the law firm’s ambiguity.33

The reasonable beliefs of visitors to a lawyer’s Web site also were the focus of an ethics opinion by the State Bar’s Committee on Professional Responsibility and Conduct (COPRAC). In Formal Opinion No. 2005-168, COPRAC considered whether a lawyer owed a duty of confidentiality to people who submitted legal questions to his Web site but whom the lawyer elected not to accept as clients. The issue is critical since the existence of a duty of confidentiality to non-clients could disqualify the lawyer from other representations. The opinion concludes that even if a visitor agreed that no confidential relationship was formed, this would not necessarily defeat the person’s reasonable belief that he or she was submitting questions to the Web site for the purpose of retaining the
lawyer and that the lawyer would keep the information confidential. To protect both parties, COPRAC recommended that a Web site disclaimer plainly state that a person’s submission to the site would not be confidential. Alternatively, a lawyer’s Web site could make an initial request of inquiring visitors to provide only the information that would be necessary to perform a conflicts check.

**Bad Acts by Attorneys**

Lozano Smith, a law firm, boasts in its advertising that it is a premier firm in the field of education law. The firm represents hundreds of California school districts, often in lawsuits brought by parents seeking services for their disabled children under the Individuals with Disabilities Education Act and related laws. In Moser v. Bret Harte Union High School District,34 U.S. District Judge Oliver Wanger held that the firm’s lawyers had engaged in a concerted effort over four years “to distort, if not deceive, the court when shaping the court’s view of both the record and applicable law in the case.”35 Moreover, the court detailed numerous examples in which the lawyers for the school district impeded the proceedings by making frivolous, vexatious, and obstructive objections; blatantly and repeatedly distorted the record despite warnings that their statements were inaccurate; and intentionally misrepresented the law. The court rejected the principal lawyer’s excuses as “untenable,” “not credible,” and “simply not true”—but when Lozano Smith tried to exonerate itself by blaming the principal lawyer alone for the misconduct, the judge tartly named as culprits the firm’s senior lawyers who had actively worked on the case and signed papers filed with the court. Holding that the distorted and incorrect legal arguments were written by one of the law firm’s leaders in violation of Rule 11 of the Federal Rules of Civil Procedure, the court concluded: “This raises [the] question whether a culture of misrepresentation and deception exists at Lozano Smith….”36 Sanctioning the lawyers under Business and Professions Code Section 6068(d) and Rule 5-200 of the Rules of Professional Conduct which, among other authorities, prohibit false and misleading statements to a court, the judge publicly reproved the principal lawyer and ordered all Lozano Smith shareholders and associates to attend ethics training by the end of the year.37

An irritated panel of the Second District Court of Appeal found a lawyer guilty of criminal contempt because she had made unsupported accusations of judicial misconduct by the appellate court and had engaged in a pattern of abuse by repeatedly impugning the integrity of a trial judge, opposing counsel, and counsel’s expert witnesses. In *In re Debra L. Koven*,38 the court cited two intertemporal petitions for rehearing in which the lawyer flung charges that the court of appeal had concealed conflicts of interest with the opposing parties and their counsel, conspired to fix the case against her client, manipulated the result, concocted a trumped-up review, and misrepresented the evidence. The court of appeal found that these accusations were false and patently outrageous. It accepted Koven’s subsequent apology but declined to purge the contempt citations because the lawyer had not acted in good faith given the lack of support for the charges; her statements were spiteful and malicious, and not inadvertent; and she was a repeat offender. “The Court of Appeal will not quietly suffer an attack upon its integrity,” it sternly wrote, fining Koven $2,000 and directing the clerk to report her to the State Bar for investigation and possible discipline.39

**Lawsuits against Lawyers**

In two cases decided by the Fourth District Court of Appeal, lawyers were sued with different results. In *Chapman v. Superior Court*,40 a former member of the board of the San Diego Unified Port District was convicted of having a personal financial interest in contracts made by the Port District, in willful violation of Government Code Section 1090. In a case of first impression, the former board member sued the Port District’s lawyer for legal malpractice, claiming that he had relied on the lawyer’s negligent advice regarding compliance with the law. The former board member sought damages resulting from his criminal prosecution, including lost business opportunities, attorney’s fees, and emotional distress. The lawyer argued he had no attorney-client relationship with the former board member. The trial court denied the lawyer’s motion for summary judgment, and the lawyer petitioned for a writ of mandate. The court of appeal granted the writ but sidestepped the issue of the attorney-client relationship. Instead, the court held that public policy bars recovery for injuries arising from a knowing and willful crime—notwithstanding what it characterized as the lawyer’s “inexplicable” advice to the former board member—and it directed the superior court to enter summary judgment in favor of the lawyer.41

A different public policy argument was brushed aside, and a lawsuit against a law firm was allowed to proceed, in *Forensis Group, Inc. v. Frantz, Townsend & Foldenauer*.42 The case arose out of a wrongful death action by the Hernandez family for the death of the family’s father in a workplace accident involving a forklift. The law firm Frantz, Townsend & Foldenauer sued the
forklift manufacturer on behalf of the family and retained an expert mechanical engineer through Forensis Group. At his deposition, the expert did not identify any applicable safety standards, but when the manufacturer later moved for summary judgment, the expert stated in a declaration that the vehicle failed several safety standards. The court granted summary judgment, noting that the expert had contradicted himself. The Frantz firm referred the Hernandez family to another law firm, which filed a malpractice suit against the Forensis expert. The expert cross-claimed against the Frantz law firm for equitable indemnity, alleging that because he was retained by the law firm, the lawyers should share the loss attributable to the expert’s unsuccessful opposition to the motion for summary judgment. The expert charged that the lawyers had not provided him with adequate information, had failed to rehabilitate him at his deposition, and had failed to brief the court on the law regarding the admissibility of evidence regarding industry standards.

The law firm moved for summary judgment, arguing that the expert’s indemnity claims were barred by the public policy interest in ensuring the lawyers’ undiluted loyalty to their clients, and the trial court granted the motion. On appeal, the Fourth District noted that the normal rule permitting equitable indemnity among joint tortfeasors has an “attorney exception” that normally bars indemnity claims against successive lawyers lest the claims create a conflict of interest between attorney and client or compromise the lawyer’s duty of confidentiality to the client. However, citing the state supreme court’s decision in Musser v. Provencher, the court of appeal noted that the exception does not apply in every case, and reversed the summary judgment, holding that the expert’s cross-claim against the law firm could proceed.

The court compared the role of expert witnesses to concurrent legal counsel. Like the concurrent counsel in Musser, the Forensis expert could not independently communicate with the trial court and had to act through the Frantz firm. He was not involved in legal strategy and relied on the legal standards supplied by the law firm. Furthermore, the court held that since the Hernandez family had settled its claims against the expert, leaving only the expert’s cross-claim for equitable indemnity against the law firm, there was little danger that the lawyers would breach their duty of loyalty or their duty of confidentiality to defend the claim.

Departing Partner

In Anderson, McPharlin & Conners v. Lee, a law firm sued to enforce its partnership agreement against a lawyer who took more than two dozen clients with him when he
left the firm. The partnership agreement stated that the firm had invested substantial money in generating business and would lose money if a partner left with clients. The lawyer agreed that if he left with open files, he would make payments to the firm based on a formula equal to 25 percent of the revenues for all legal services rendered for 24 months after his departure. During the 24 months after the lawyer left the law firm, the clients he took with him paid him $526,000, 25 percent of which was $131,000. The lawyer refused to pay the 25 percent amount to the law firm, arguing that the contract was an unenforceable fee-splitting agreement under Rule 2-200 of the Rules of Professional Conduct.46

The Second District Court of Appeal rejected his argument. The court noted that Rule 2-200(A), by its express language, excludes arrangements between partners in its limits on fee splitting. Moreover, the court said, the provision was a “termination payment,” enforceable when a partner left the firm with clients, and was not a fee-splitting agreement at all.47

Unauthorized Practice of Law

Ever since the California Supreme Court in Birbrower, Montalbano, Condron & Frank, P.C. v. Superior Court48 strictly applied Business and Professions Code Section 6125's prohibition on the unlicensed practice of law in California, some practitioners have been surprised regarding findings of UPL. In The Matter of Stephene M. Wells,49 the State Bar Court found that the respondent, a member of the State Bar of California, was guilty of UPL and violated Rule 1-300(B) of the Rules of Professional Conduct because she had practiced law in South Carolina even though she was not licensed there. Rule 1-300(B) states: “A member shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.” This is consistent with the extraterritorial reach of the Rules of Professional Conduct, which is defined in Rule 1-100(D)(1): “As to members: These rules shall govern the activities of members in and outside the state, except as members lawfully practicing outside this state may be specifically required by a jurisdiction in which they are practicing to follow rules of professional conduct different from these rules.”

Wells was admitted to the California bar in 1984. She moved to South Carolina in 1996 and practiced law there until 2001, focusing on employment discrimination claims under Title VII of the Civil Rights Act of 1964. She was not a member of the South Carolina bar and, as a resident of the state, was ineligible for admission pro hac vice. She moved back to California, and the State Bar filed disciplinary charges against her, alleging, among other things, that Wells engaged in UPL in another jurisdiction. In her defense, Wells argued that since her practice was limited to federal civil rights claims before the Equal Employment Opportunity Commission, federal law preempted state regulation and she could not be liable for UPL. She cited Sperry v. Florida for this contention.50 The State Bar Court rejected this argument because her practice was not limited to the EEOC or federal court. Furthermore, the lawyer held herself out as entitled to practice in South Carolina without limitation. The court, citing two California Supreme Court opinions, noted that the mere practice of holding oneself out as a practitioner constitutes UPL.51

The federal preemption argument was embraced by the U.S. Court of Appeals for the Federal Circuit in Augustine v. Department of Veterans Affairs.52 Petitioner Augustine prevailed in her appeal to the federal Merit Systems Protection Board, which held that the Department of Veterans Affairs had violated her right to a veteran’s preference by not selecting her for a civil service job. The board, however, held that she was not entitled to recover her attorney’s fees because her lawyer, who was licensed in Massachusetts and New York, was not admitted to practice law in California, where he had represented the petitioner before the board. The Federal Circuit vacated and remanded this ruling.

The court of appeals admitted it was unclear whether Business and Professions Code Section 6125 was intended to regulate practice before federal administrative proceedings, though it cited a pre-Birbrower memorandum from the California State Bar stating that a nonmember is not engaged in UPL when practicing before federal courts or agencies in California.53 However, the court held, any state law purporting to regulate practice before a federal administrative agency would be invalid because state or local law that attempts to impede or control the federal government or its instrumentalities is deemed presumptively invalid under the supremacy clause. The Federal Circuit cited a number of cases for this proposition—including the U.S. Supreme Court’s 1819 decision in McCulloch v. Maryland—that none of them dealt with the state regulation of lawyers.

The court of appeals compared the sui generis ruling in Sperry, which recognized the Patent Office’s right to permit nonlawyers to prosecute patents, with the present case: “Just as the states cannot regulate practice before the PTO, they cannot regulate practice before the Merit Systems Protection Board….California has no authority to require that attorneys practicing before the Board obtain a state license or to regulate the award of fees for work before federal agen-
cies.” The court concluded that Congress and the board did not intend to incorporate state law standards for practice before the board, though it approvingly cited a board decision that attorneys appearing before it were expected to conform to state ethics rules governing attorney conduct. The Federal Circuit clinched its opinion with the assertion that if state licensing rules were applied, the pool of attorneys available to practice before federal agencies in California “would be severely impaired.”

Attorney Fee Arbitration

In California, the Mandatory Fee Arbitration Act (MFAA) provides a quick and inexpensive method for clients, at their option, to resolve fee disputes with their lawyers through nonbinding arbitration. If the client invokes the right to arbitrate under the MFAA, the lawyer must submit the fee dispute to arbitration. Arbitration under the MFAA is limited to fee disputes and may not include any related issues, such as a claim for legal malpractice or professional misconduct. Prior to or at the time of serving the summons in a lawsuit for fees, a lawyer must give a client written notice that the client has a right to arbitration under the MFAA.

Failure to provide written notice of the right to MFAA arbitration is a ground for dismissal of a lawyer’s lawsuit, but, as the Sixth District Court of Appeal concluded in Law Offices of Dixon R. Howell v. Valley, dismissal on this basis is discretionary, not mandatory. In Howell, the court held that the client waived his right to seek dismissal of his lawyer’s lawsuit—even though the lawyer failed to give the client adequate notice—and prejudiced the lawyer’s law firm by litigating the dispute for 15 months, until six days before trial, without demanding arbitration.

Judicial Misconduct

By a divided vote, the Judicial Council of the Ninth Circuit dismissed a complaint of misconduct against U.S. District Judge Manuel Real, who was accused of improperly withdrawing a case from bankruptcy court and enjoining a state court eviction order to protect a female criminal defendant whose probation he was supervising. In dissent, Judge Alex Kozinski concluded the orders were a raw exercise of judicial power amounting to serious misconduct and bluntly described the district judge’s statement of contrition as “slippery” and “risible.”

In Regan v. Price, the Third District Court of Appeal held that a judicial officer did not have absolute immunity for assaulting and battering a litigant. Price, an attorney, was appointed by the Placer County Superior Court to act as a discovery referee in a case

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involving Regan. During the litigation, Regan’s lawyer Kingslan questioned Price’s ability to contain his emotions and, after a conference call in which the discovery referee falsely accused Kingslan of stealing documents that belonged to his client, Kingslan drafted a letter informing Price that he would be moving for a protective order removing Price from acting as discovery referee. Kingslan and his client Regan delivered the letter to Price at his office. After reading the letter, Price blocked the exit door, and when Kingslan and Regan attempted to step around him, the referee shut the door and blocked it with his body. Kingslan was able to open the door and escape, but Regan, a 63-year-old cancer survivor, was injured when Price slammed the door against him. Regan sued Price for false imprisonment, assault, battery, negligence, and infliction of emotional distress.

The California attorney general represented the discovery referee in the suit. Price argued that he had absolute judicial immunity. The appellate court rejected the defense, holding that judges are insulated from civil liability only for exercising judicial functions, and one “who applies brute force to a litigant is not engaging in any task that can be reasonably associated with his role as a judge....” The court concluded: “A judge’s robe is not a king’s crown....[Judicial immunity] was never intended to protect acts of thuggery against litigants merely because the assailant happens to be a judge.”

Ex Parte Contacts

It has long been the rule that a lawyer representing a client in a litigation matter is prohibited from most ex parte contacts with the judge assigned to the case. With the recent proliferation of electronic communications, a lawyer posting a message to a Listserv, for example, may inadvertently come in contact with a judge assigned to the case of the lawyer’s client if the judge is also a member of the Listserv. In a recent opinion, the Los Angeles County Bar Association’s Professional Responsibility and Ethics Committee warned that although inadvertent contact with a judge through a Listserv likely creates no ethical violation, “[n]ew forms of communication can seductively cause lawyers to forget their ongoing duty to maintain the confidences of their respective clients.” The committee noted that a cavalier approach toward communications via a Listserv—for example, an exchange of messages regarding expert referrals—could create difficulties for lawyers, including the disclosure of confidential information, engaging in prohibited ex parte communications with a judge, and the impairment of a claim of protection under the
attorney’s work product doctrine. Similarly, the committee also cautioned judges to make every effort to avoid situations in which they would be exposed to unintended or inadvertent communications regarding issues in controversy.

Federal Preemption

In 2003, state and federal courts held that California’s Ethics Standards for Neutral Arbitrators in Contractual Arbitration were preempted.66 Last year, the final chapter was written by the California Supreme Court’s affirmance of the Second District Court of Appeal in 

Jevne v. Superior Court.67 The supreme court held that the California Standards’ disclosure requirements and disqualification standards for arbitrators were preempted as a result of the approval by the U.S. Securities and Exchange Commission of the rules for neutral arbitrators promulgated by the National Association of Securities Dealers (NASD). Concluding that the provisions for disclosure and disqualification were not severable from the remaining standards, the state supreme court ruled that the California Standards in their entirety were preempted in securities arbitrations administered by self-regulatory organizations such as the NASD.68

In American Bar Association v. Federal Trade Commission,69 the U.S. Court of Appeals for the District of Columbia Circuit held that the FTC had exceeded its authority with its attempt to extend the privacy and disclosure requirements of the Graham-Leach-Bliley Act to practicing lawyers. The court did this by affirming summary judgment for the ABA, which had sued the FTC for declaratory judgment. The ABA was concerned that the imposition of regulatory duties under the act would interfere with the confidential attorney-client relationship. The court noted that the FTC “had apparently assumed—without reasoning—that it could extend its regulatory authority over lawyers...with no other basis than the observation that the Act did not provide for an exemption.”70 The court rejected this reasoning, observing that the regulation of the practice of law is traditionally the province of the states, and that federal law may not be interpreted to reach into areas of state sovereignty unless the language of federal law compels the intrusion. “[I]t is not reasonable for an agency to decide that Congress has chosen such a course of action in language that is, even charitably viewed, at most ambiguous.”71
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24 Id. at 1274-76.

23 Apple Computer, Inc. v. Superior Court, 126 Cal. App. 4th 1274-76.

22 Id. at 1273 (emphasis in original).

21 Id. at 1272.

20 Id. at 1176.


17 Id. at 77.


14 Anderson, 135 Cal. App. 4th at 133.

13 Id. at 760-61.

12 Id. at 762.


10 Id. at 76.

9 Id. at 1170.

8 See CAL. RULES OF PROF'L CONDUCT R. 3-320.

7 BUS. & PROF. CODE §6068(e)(1).

6 Information about the new rules and the commission’s public meetings can be found at http://www.calbar.ca.org.


3 Id. at 1085-86.

2 Id. at 1086.

1 Id. at 1087.

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Contact Gail.


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LESTHER WINKLER, MD
Encino-Tarzana Regional Medicine Center Pathologist. (consulting emeritus status) 10155 Topeka Drive, Northridge, CA 91324, (818) 349-8568, fax (818) 993-9701, e-mail: jhv.winkler@karslab.com.

Contact Yvonne.

Specialties: surgical and autopsy pathology, clinical pathology. Forty years of experience in reviewing medical records (hospital records, office records) with emphasis on pathology aspects, gross and microscopic, and relationships to general medical and hospital care. Experience with hospital bylaws, rules, and regulations, consent issues, and medical staff privileges. Also experienced in hospital healthcare law, medical, hospital, and “outside” ethical medical issues. Helped establish concepts and chaired hospital ethics committees for more than 10 years. Represented physicians before California Medical Board when requested by attorneys. Degrees/licenses: MD.

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LESTHER WINKLER, MD Encino-Tarzana Regional Medical Center Pathologist, (consulting emeritus status) 10115 Topkea Drive, Northridge, CA 91324, (818) 349-8588, fax (818) 993-9701. Contact Lesther Winkler, MD. Specialties: surgical and autopsy pathology, clinical pathology. Forty years of experience in reviewing medical records (hospital records, office records) with emphasis on pathology aspects, gross and microscopic, and relationships to general medical and hospital care. Experience with hospital bylaws, rules, and regulations, complaints, and medical staff privileges. Also experienced in hospital healthcare law, medical, hospital, and “outside” ethical medical issues. Helped establish concepts and chaired hospital ethics committees for more than 10 years. Represented physicians before California Medical Board when requested by attorneys. Degrees/licenses: MD. See display ad on page 83.

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The Powers of War and Peace

The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11
By John Yoo
The University of Chicago Press, 2005
529, 366 pages

In 1999 in the Balkans, Serbian troops forced ethnic Albanians to leave the Serbian-governed province of Kosovo. In order to put a stop to the killings and forced exodus of thousands, President Bill Clinton ordered U.S. airstrikes against the Federal Republic of Yugoslavia, in concert with other members of the North Atlantic Treaty Organization (NATO). Congress did not declare war or otherwise approve this military action. Was Clinton’s use of military force against the Serbian military without congressional authorization constitutional?

Two years later, President George W. Bush terminated U.S. adherence to the Anti-Ballistic Missile (ABM) Treaty with Russia, thereby permitting the United States to legally proceed with the development of a missile defense program to protect the United States from missile attack by rogue nations and terrorists. Congress never approved of this treaty termination by the Bush administration. Was this act by Bush constitutional?

In The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11, John Yoo seeks to answer these questions. A former deputy assistant attorney general in the George W. Bush administration, Yoo helped formulate many of the administration’s controversial legal policies concerning the war on terror. Currently a professor of law at U.C. Berkeley, Yoo has written a thought provoking book about the constitutional powers of the presidency and Congress in the context of making foreign policy. The author believes that recent scholars have taken an overly legalistic approach in looking at how the competing branches act in foreign affairs, and he argues that a more pragmatic approach is necessary in light of the war on terrorism, globalization, and history.

The author begins with an examination of the historical roots of the Constitution and the foreign affairs power. He traces political, philosophical, and legal influences on the Framers. The British parliamentary system of government had an enormous impact on how the Framers viewed the foreign affairs power. Looking to the British system of government, the Framers understood that the executive branch must be the primary force in making war and dealing with foreign nations. But the Framers were also concerned about the executive having too much power, akin to that of a monarch. They sought to limit this power primarily by giving the legislative branch the power of the purse.

Yoo stresses—perhaps too much—throughout the book that the power to fund or defund presidential initiatives in the military or foreign relations realms is an extraordinarily effective check on the executive branch. Without funding from Congress, the army would not have humvees, Apache helicopters, rifles, MREs, or ammunition to fight enemies overseas, and diplomats would be unable to travel abroad, operate embassies, or dispense foreign aid. The power of the purse is quite a significant power indeed, if put to use.

The question remains, however, whether a president must have congressional approval before going to war. This is perhaps the most interesting part of the book. Many scholars, such as John Hart Ely, Thomas Franck, and Michael Glennon, believe that the declare war clause of the Constitution means that Congress must give the president authorization to initiate military hostilities except in the case of self-defense. For instance, President Woodrow Wilson obtained a formal declaration of war from Congress against the Central Powers in 1917, and President Bush got congressional authorization in the recent wars against Afghanistan and Iraq. But Yoo has a different and more realistic view of the declare war clause by focusing on the historical context.

“Declaring war” during the time of the Framers meant not authorizing war but recognizing and proclaiming that a state of war exists. For instance, Yoo mentions that the Declaration of Independence did not authorize war against Britain; American revolutionaries had already been fighting the British for more than a year before the Declaration. A declaration of war at the time of the American Revolution served a more legalistic purpose—showing that legal relations between the United States and its British enemy had changed; American citizens would then not be considered criminals if captured for attacking British ships or troops.

War without Declaration

Yoo deemphasizes the importance of the declaring war clause and argues that a president does not need a green light from Congress before initiating hostilities. In an age of nuclear weapons and terrorist threats, it is impractical for a president to wait for congressional approval to fight a foreign menace when time is of the essence in defending the nation. Yoo points out that throughout U.S. history, most conflicts involving the United States have been without congressional approval. Examples include the Korean War, the invasion of Grenada, and President Clinton’s use of military force against Yugoslavia. Some scholars would argue that the Kosovo conflict was unconstitutional, while Yoo argues that it was within President Clinton’s inherent power as commander in chief to send U.S. armed forces there. As Yoo notes, Congress has the power to thwart military conflicts by refusing to appropriate funds for war. In the cases of Korea, Grenada, and Kosovo, Congress simply chose not to defund military operations.

A major section of the book covers treaties and the legislative and executive branches. Presidential power is at its greatest in the area of foreign relations, particularly regarding treaties. The president can...
negotiate, sign, interpret, implement, and even terminate international treaties without congressional consent. For example, President Bush ended the ABM Treaty unilaterally, and according to Yoo this was perfectly constitutional. If Congress had disagreed with Bush’s actions and wanted to oppose them, it could have rejected an appropriation of research and development funds for an anti-ballistic missile defensive shield. The legislative branch can thus check presidential initiatives involving treaties through Congress’s power of the purse, in addition to the Senate’s advice-and-consent power.

Congressional-Executive Agreements

Yoo writes an informative chapter about the predominance of congressional-executive agreements and how they have essentially taken the place of treaties in modern diplomacy. The author adheres to the prevailing orthodoxy that congressional-executive statutory agreements are interchangeable with treaties, although technically these agreements bypass the advice-and-consent provision of the Constitution. But such agreements are necessary because submitting every matter for Senate approval would needlessly tie the hands of the president in the conduct of foreign policy. This is particularly true about controversial but important trade initiatives such as the North American Free Trade Agreement, which are likely to fail in the Senate because a supermajority is needed to pass a treaty. The globalization of trade necessitates a more flexible approach utilizing effective congressional-executive agreements. Nonetheless, Yoo observes that there remains a place for treaties in the modern world. Important international agreements involving human rights, arms control, extradition, and the environment still require Senate assent.

Major strengths of the book include the inclusion of historical references and Yoo’s willingness to acknowledge competing arguments—even those that weaken his own. The author could discuss in greater depth the doctrine of preemptive self-defense and the Constitution. But overall, The Powers of War and Peace is a thorough and timely contribution to international law. Woo does an excellent job setting forth a realistic view of the interplay of foreign affairs and the Constitution, a view emphasizing the pre-eminence of the presidency in making war and formulating treaties, the flexibility of concluding accords with foreign countries using congressional-executive agreements, and recognizing the potent check that is available to Congress on presidential misadventure—the power of the purse. It is a refreshing perspective that should gain greater acceptance in legal and academic circles.
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20th Annual Environmental Law Super Symposium
ON THURSDAY, APRIL 6, the Environmental Law Section will present the 20th Annual Environmental Law Super Symposium, which has the theme of “Clean Air and Water with Room to Grow: Meeting the Environmental Challenges to Southern California’s Future Development.” As in the past, the symposium will provide a vital update of the many developments occurring in the field of environmental law. The presentations will cover the significant environmental challenges involved in planning for Southern California’s future development. The keynote speaker is S. David Freeman, president of the Los Angeles Board of Harbor Commissioners. Sessions that follow will feature prominent members of the Los Angeles environmental law community. Sessions will include:
• To Grow or Not to Grow: Is the Sky the Limit for LAX?
• Water, Water, Everywhere, but Is There Enough?
• Using Insurance When Responding to Environmental Administrative Actions and When Developing Brownfields
• The Effect of Bankruptcy upon Environmental Remediation Obligations
• Who’s Using the CHHSL? The Latest Tool in Cal-EPA’s Toolbox?
• Is Liquid Gas a Solid Option?
The symposium will take place at the Los Angeles Marriott Downtown, 333 South Figueroa Street. Valet parking is available for $9. The registration code number is 009285. On-site registration will be available at 8 A.M., with the program continuing from 8:30 A.M. to 4:30 P.M.
$145—CLE+PLUS members
$275—Environmental Law Section members
$325—LACBA members
$400—at-the-door payment for all
7 CLE hours

Practical Persuasion
ON THURSDAY, MAY 11, the Los Angeles County Bar Association will present a program led by Scott Wood on the key principles for writing motions and briefs. In addition to these principles, the workshop includes a brisk review of 10 tips for clarity and concision. The program will take place at the LACBA/LexisNexis Conference Center, 281 South Figueroa Street, Downtown. Reduced parking is available with validation for $9. On-site registration and the meal will begin at 5:30 P.M., with the program continuing from 6 to 9:15. The registration code number is 009161. The prices below include the meal.
$100—CLE+PLUS members
$175—LACBA members
$225—all others
3.25 CLE hours

16th ANNUAL FAMILY LAW WALK-THROUGH PROGRAM
ON THURSDAY, APRIL 20, the Family Law Section and the Los Angeles Superior Court will hold their annual walk-through program, offering a comprehensive introduction to the Family Law Department at Los Angeles Superior Court. Those in attendance will be able to participate in a tour conducted by experienced family law attorneys and knowledgeable court staff. Judicial officers will describe the basics of court procedures and processes. Due to court requirements, no food will be provided for this program, which will take place at the Los Angeles Superior Court, 111 North Hill Street, Downtown. Parking is not provided for this program. There are many parking lots in the area. Be sure, however, to select a parking lot that will be open until 7 P.M. On-site registration will begin at 4 P.M., with the program continuing until 6:45. The registration code number is 009277.
Free—CLE+PLUS members
$25—Family Law Section members
$30—LACBA members
$40—all registrants after April 14
2.25 CLE hours
The Abiding Appeal of the Concept of Legislative Due Process

WHEN LEGISLATURES DELEGATE their lawmaking function to administrative agencies, there are safeguards to ensure the adequacy of agency deliberations and judicial scrutiny of the resulting decisions to ensure rational decision making. Ironically, none of these safeguards apply to the legislative process itself. Should they? Perhaps as a matter of constitutional “legislative” due process?

Legislative due process sets minimum constitutional requirements for the deliberative process in order to protect the right of the people generally to fair deliberation before the enactment of laws that affect life, liberty, or property. As early as 1856, the U.S. Supreme Court suggested that due process is sufficiently broad to encompass legislative procedure:

The Constitution contains no description of those processes which [the due process clause] was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process ‘due process of law,’ by its mere will.

The most prominent current advocate of legislative due process is Justice John Paul Stevens. In Fullilove v. Klutznick, Justice Stevens wrote in dissent:

I see no reason why the character of [the legislature’s] procedures may not be considered relevant to the decision whether the legislative product has caused a deprivation of liberty or property without due process of law.

Justice Stevens found that “establishing essential rules for the political process” is a proper function of judicial review under the Fifth Amendment and even suggested that constitutional scrutiny of legislative process is a conservative method of constitutional review:

A holding that the classification was not adequately preceded by a consideration of less drastic alternatives or adequately explained by a statement of legislative purpose would be far less intrusive than a final determination that the substance of the [legislative] decision is not “narrowly tailored to the achievement of that goal.”

Justice Stevens also concluded that such judicial review would not violate the separation of powers. This makes sense. The authority of the courts to declare a law unconstitutional is established. As a result, there should be no objection to courts engaging in a judicial review limited to the process by which a law is enacted.

Despite the logic of legislative due process, there is strong resistance to judicial due process scrutiny of legislative procedure. For example, the Supreme Court, in United States v. Locke, held:

[A] legislature generally provides constitutionally adequate process simply by enacting the statute, publishing it, and, to the extent the statute regulates private conduct, affording those within the statute’s reach a reasonable opportunity both to familiarize themselves with the general requirements imposed and to comply with those requirements.

And, California prohibits inquiry behind a duly enacted law. In Longval v. Workers’ Compensation Appeals Board, for example, the court observed that “[a]n act of the Legislature, ‘as it is enrolled and authenticated…cannot be impeached by showing defects and irregularities in the proceedings…before the Legislature.’”

There are also questions concerning the effectiveness and even the desirability of imposing due process requirements on legislative deliberation. Would legislative due process improve the quality of lawmaking? Would legislative due process put too much power into the hands of the judiciary? Would any test for legislative due process prove difficult to administer in practice?

Despite these questions and the resistance of the courts, there is an instinctive appeal to the concept of legislative due process. Constitutional scrutiny of the legislative process furthers the public interest in thorough deliberation over proposed laws, without intruding upon the substance of the laws enacted. The question, therefore, should not be whether legislative due process is a good idea, but how best to ensure that legislation receives all the process it is due.
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