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his month’s edition of Los Angeles Lawyer magazine presents articles touching upon a broad array of legal topics that include an exposition of the basics of bankruptcy by Uzzi O. Raanan and Zev Shechtman, Thomas E. McCurnin’s article on shareholder derivative lawsuits, Keith Rozanski’s investigation of compliance issues under the Americans with Disabilities Act, and Dan Fligsten’s explanation of the immunities from antitrust liability afforded by the Noerr-Pennington doctrine. What’s more, Ira M. Friedman and David Friedman address judgment renewals under the Family Code. At first glance, thematic unity would appear to be difficult to discern in the face of such a diverse assortment of legal issues, but each of these articles, like most that appear in our magazine, deals with subject matter that presumes, as a necessary precondition, the existence of a free and fair court system, providing equal access to justice for the redress of grievances and the protection of individual rights.

History shows that organized societies invariably establish public judicial institutions. Whether the institutions bestow justice upon the citizenry depends on whether they impartially follow the rule of law, which in turn depends on whether these court systems remain free from undue political and financial pressures.

We all know about the financial crisis that has engulfed our state and federal court systems. The difficulties presented by deep funding cuts have brought into sharp focus the minimum standards to which our court systems should adhere as they endeavor to dispense equal justice for all. Last year, the California Commission on Access to Justice (on which I serve as a commissioner) issued a policy statement calling for minimum standards for access to justice. With this statement, the commission sought to publicize procedures and rules designed to assure that courts will continue to meet their constitutional mandate of due process, including the requirement that no identifiable segment of the population will be discriminated against or disadvantaged in using the public court system. To meet these goals, and to ensure the most efficient use of available resources to provide equal access to justice for all litigants in all jurisdictions, the commission defined the following principles of access to justice:

- Access to the courts shall be affordable.
- Courts shall be accessible to all court users.
- An official record shall be made to preserve court proceedings and to preserve the right to a meaningful appeal.
- Access to the courts shall be affordable.
- Jurisdictions shall have adequate numbers of judicial officers, staff, and other nonjudicial resources to meet caseloads.
- Courts shall provide services to meet community needs.
- The identified components of these access standards shall be tracked.

These standards go hand-in-hand with Chief Justice Tani Cantil-Sakauye’s Access 3D Initiative for restoring access to justice for all Californians. Her initiative focuses on improving physical access, remote access, and equal access to justice for all Californians. Just as the regulations that Keith Rozanski discusses in his ADA compliance piece exist to help disabled persons gain better access to the physical attributes of our society, so too the standards promulgated by the Access Commission and promoted by our Chief Justice’s Access 3D Initiative provide the necessary underpinnings to a justice system that aspires to provide equal access for all.
Using Proactive Techniques for Successful Client Development

CLIENT DEVELOPMENT should be part of goal-setting for every lawyer, especially young lawyers. However, the reality is that generating business is challenging. Young lawyers lament that asking for business feels uncomfortable, premature, or better suited for more gregarious personalities. However, such thinking creates artificial barriers to entry. A more constructive approach encourages young lawyers to embrace the idea of developing business in a more enduring and comprehensive manner. Client development requires lawyers to be active agents who seek opportunities and deliver quality results. Here’s how to go about it.

Be visible. Even the best brief writers or oral advocates should not expect a potential client to find them sitting behind the desk of their office suite. As Cordell M. Parvin, a retired practitioner and current client development consultant, explains in his article “Client Development in a Nutshell,” to become a “go-to lawyer” in the eyes of current or future clients, one must become visible. It is a mistake to think that being a member in a local bar association alone is enough. Rather, visibility demands active and sustained participation within local bar groups or professional associations. Consider joining a committee, organizing an event, and attending association meetings to engage in meaningful contact. This involvement will not only aid professional development but also potentially lay the foundation to establish the types of relationships that yield clients. Moreover, when attending conferences, make a practice of identifying topics of interest that could be beneficial to present at future conferences. Approach conference organizers and offer to present at future meetings. In that same vein, identify trade publications, bar association newsletters, or similar outlets from which to publish. Some attorneys spend years or even decades learning the nuances of a particular subfield but fail to alert others about what they know. Make a habit of becoming visible within your community so that prospective clients are aware of all the services that you offer and do not have to undertake an odyssey to find you.

Network with a purpose. Attendance alone does not constitute networking. Identify a small number of professionals whom you want to meet prior to attending the next networking mixer or conference. Scheduling time to introduce yourself and, following the initial meeting, begin the process of developing a relationship. The next step can range from sending an e-mail enclosing a relevant article or informing the contact of a recent change or update in the law. Social media also provide myriad outlets to disseminate of a bulletin, newsletter, or e-mail summary may increase current clients of legal developments related to their business through further to one’s particular area of expertise. Informing prospective or current clients of legal developments related to their business through dissemination of a bulletin, newsletter, or e-mail summary may increase your visibility and result in your association as the lawyer to seek out for that particular contact.

Make a practice of routinely doing something in furtherance of client development. Chart your progress. Serve others. Too often lawyers limit their professional network to other lawyers. While other lawyers can and do serve as excellent sources of referral, a worthwhile practice involves expanding one’s network outside of the field of law. Seek out sustained volunteer opportunities with a nonprofit association or agency that has a mission you support. Supporting the mission may motivate a genuine and more significant level of commitment that will allow for development of the types of relationships with agency executives and fellow volunteers that can blossom into clientele in the future. For this reason, but also because professionalism dictates, satisfy fully all volunteer obligations.

Focus and engage. A high level of proficiency is expected of a professional of any kind, but it is also important to develop a niche within a particular practice area. Others within your firm will take note of your expertise and come to you for help with related issues. Furthermore, developing expertise in a subfield helps to frame who you are to prospective clients. Kathleen Brady, a principal at a professional development training company, advises in her article “Marketing and Client Development Activities” that “[c]lient development also requires being on the alert for new business opportunities by staying abreast of legal, business and economic trends.” Brady’s advice can be narrowed further to one’s particular area of expertise. Informing prospective or current clients of legal developments related to their business through dissemination of a bulletin, newsletter, or e-mail summary may increase your visibility and result in your association as the lawyer to seek out for that particular contact.

Plan, execute, evaluate, and repeat. Client development should be approached in a methodical manner. Develop a detailed action plan that includes specific actionable items as outlined above with deadlines. Accountability is the key. Make a practice of routinely doing something in furtherance of client development. Chart your progress and keep a list of contacts. Developing contacts can prove especially beneficial to young lawyers who can cultivate a relationship with a potential client well in advance of expectations to actually carry a book of business.

Client development demands active agency. Scheduling time to engage others and taking small measured steps to increase visibility will yield fruitful results. For those who expect to practice law for any meaningful period of time, identifying and implementing a thoughtful plan is certainly worth the effort.

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SOONER OR LATER EVERY LAWYER will encounter bankruptcy issues that could impact a client’s interests. It is therefore important for the nonbankruptcy practitioner to understand how bankruptcy law works and ways to protect clients from the effects of their own or a third party’s insolvency.

To understand the powers and limits of bankruptcy law, one must understand the impetus for this national set of laws. According to the U.S. Constitution, “Congress shall have Power…To establish…uniform Laws on the subject of Bankruptcies throughout the United States.” The first enduring set of federal bankruptcy laws was not enacted until 1898. Prior to that, insolvency issues were resolved by state courts applying state laws, with a few short-lived experiments with federal bankruptcy laws. Since 1898, federal bankruptcy law has gone through a number of revisions, most notably in 1978, when Congress replaced the Bankruptcy Act of 1898 with the current Bankruptcy Code, with subsequent revisions reflecting shifting political winds. Most recently, Congress codified the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).

Contrary to the apparent vision of the framers of the U.S. Constitution, many aspects of the Bankruptcy Code are governed by the laws of the states in which the respective debtors live, resulting in a less-than-uniform application of this federal law. For example, the laws of each state generally govern the exemptions utilized by debtors, property rights, certain statutes of limitation, and even much of the substantive laws applied by bankruptcy judges. Thus, though the Bankruptcy Code applies in all states, bankruptcy practice differs in certain respects from state to state. Moreover, as federal bankruptcy laws represent limited federal jurisdiction over a discrete area of law, their breadth and application have been the subject of controversy for decades. Consequently, a practitioner must understand that the Bankruptcy Code creates limited jurisdiction in the bankruptcy courts, with the exact demarcation lines sometimes open to interpretation and, perhaps, challenge.

The Bankruptcy Code is divided into various chapters, each designed to address a different set of policy goals or debtors. To understand the advantages and limitations of filing for or pursuing a debtor in bankruptcy, a nonbankruptcy practitioner is well advised to examine the basic concepts underlying chapters 7, 11, and 13, which most individuals or business entities are likely to encounter. Each of these chapters has unique characteristics distinguishing it from the others.

Chapter 7: Liquidation

A chapter 7 liquidation is what most people imagine when they think of bankruptcy. It is available to individuals and most business entities. Filing a petition under chapter 7 (as with chapters 11 and 13) commences a bankruptcy case and creates a bankruptcy estate that is subject to administration under the supervision of the bankruptcy court. The chapter 7 estate comprises essentially all property owned by the debtor when the bankruptcy petition is filed. Assets in which the estate has meaningful equity are sold, and the proceeds are distributed proportionately to the debtor’s creditors. However, certain types of property are exempt from the bankruptcy estate and therefore remain the debtor’s property despite the bankruptcy. Subject to certain exceptions, an individual chapter 7 debtor who complies with the requirements of the Code, particularly by acting in good faith and being honest and forthcoming, is entitled to a discharge of debts. The appeal is obvious to debtors and to a U.S. economy that relies heavily on risk-taking entrepreneurs.

Prior to 2005, chapter 7 was available to individual debtors of all incomes. However, that year Congress enacted BAPCPA, which imposes an income means test that limits the eligibility of individuals with primarily consumer debts to file under chapter 7. A chapter 7 filing by an individual who earns above the median income in his or her respective home state is deemed an abuse of the bankruptcy law unless the income is lower than a specified portion of the debtor’s debts. Individuals with incomes below the median for their state are exempt from the means test.

Immediately upon the filing of a chapter 7 case, a trustee is appointed by the Office of the United States Trustee (UST). The chapter 7 trustee is the sole representative of the estate. The chapter 7 trustee’s primary duty is to “collect and reduce to money the property of the estate,” to distribute funds to unsecured creditors, and then close the estate “expeditiously.” The trustee’s other duties include...
investigation of the debtor’s financial affairs, accountability for the estate’s property, and ensuring that the debtor complies with his or her duties.15 Though generally not authorized to operate the debtor’s business, the chapter 7 trustee may obtain such authority for limited periods when to do so is in the best interest of the estate and “consistent with the orderly liquidation of the estate.”16

Thus, a major feature that distinguishes a chapter 7 case from chapters 11 or 13 is the debtor’s loss of control over assets after filing the petition. While this can be detrimental to a debtor who, for example, loses the ability to control ongoing litigation or claims, it can be a boon to a litigation opponent who can now negotiate with a disinterested trustee who is not emotionally invested in the legal dispute. This lack of control is often a reason for the debtor to file under chapter 11 or 13, either of which permits debtors generally to remain in control of their own assets after they file for bankruptcy.

Shortly after a petition is filed, the chapter 7 debtor is required to attend a meeting of creditors, in which the chapter 7 trustee and any present creditors may examine the debtor under oath.17 The examination is usually short, used to confirm that the debtor read and signed the petition and schedules and the debtor’s identification and to ensure that information provided by the debtor is complete and accurate. However, creditors may also utilize this meeting to briefly question debtors about assets and, when conditions are met, to elect a different trustee than the person appointed by the UST.

If the estate has no assets to distribute to creditors, the chapter 7 trustee will file and serve on creditors a report stating that there are no assets (the No Asset Report) and that no distribution to creditors is expected. The case will generally be closed by the court clerk shortly after the filing of the No Asset Report. If there are assets or potential assets in the estate, including legal claims, the trustee will administer the assets, whether by selling readily available property, filing lawsuits, or settling the estate’s legal rights. Trustees generally retain legal counsel to perform the legal work required to marshal and sell estate property.19

In chapter 7 cases with assets or potential assets, creditors are given notice of a deadline by which they must file their claims, known as the Claims Bar Date.20 Usually after completing the liquidation of assets, the trustee reviews the proofs of claim filed by debtors in order to determine if there are bases to object. The trustee generally seeks to determine whether a claim contains sufficient evidentiary support and whether the claim is entitled to the level of priority alleged by the claimant.21 After payment of administration expenses, allowed claims are paid on a pro rata basis and in order of statutory priority, with no lower priority claim being paid prior to payment in full of all higher priority claims.22

Likely, the most important goal for an individual chapter 7 debtor is the discharge, which releases the debtor from liability from certain debts and operates as an injunction against collection or any other actions to recover money from the debtor on account of claims incurred prior to the petition filing.23 At the expiration of 60 days after the first date set for the section 341(a) meeting of creditors, if no actions were filed to deprive the debtor of a discharge or to dismiss the case, and the deadlines to do so have not been extended, the bankruptcy court is required to grant a discharge forthwith.24

Chapter 13
Chapter 13 allows certain individuals with regular income to reorganize their debts without the need to surrender or liquidate their assets.25 Rather, debtors are required to use future earnings to pay their debts over a period of three to five years, or less if creditors are paid in full.26 Chapter 13 tends to be a fast-paced proceeding, requiring the submission of a payment plan within 14 days after the filing of the bankruptcy petition.27 To qualify for chapter 13, an individual must have regular income,28 less than $383,175 in unsecured debts, and less than $1,149,525 in secured debts.29 If the debtor’s income is under the state median, his or her plan must provide for payments over a period of three years, unless cause is shown to extend the payment period (which cannot exceed five years).30 Unlike a chapter 11 plan, chapter 13 does not allow creditors to vote on the plan. However, creditors may object and, if they do, the plan may not be confirmed unless creditors are paid in full over the term of the plan or all of the debtor’s projected disposable income is committed to the payment of creditors under the plan.31 The plan must provide for payment to creditors of at least what they would have received had the debtor filed for bankruptcy under chapter 7.32 As in many other provisions of the Bankruptcy Code, good faith is a requirement to confirmation of a Chapter 13 plan.33

A debtor may at any time voluntarily convert a chapter 13 to chapter 7 or may request that the chapter 13 case be dismissed.34 The UST, or a party in interest, may seek conversion to chapter 7 “for cause,” including, among others, for unreasonable delay, failure to timely file a plan, a material default in the terms of a confirmed plan, and failure to pay domestic support obligations such as child or spousal support.35 The debtor receives a discharge after completing all payments under the chapter 13 plan.36

Chapter 13 trustees have a different role from their chapter 7 counterparts. That is because chapter 13 creditors are typically paid from the debtor’s postpetition income, rather than from the liquidation of assets, though chapter 13 plan payments may also come from liquidation of assets.37 Unlike in a chapter 7 case, the chapter 13 trustee does not take possession of the debtor’s assets unless the plan so provides.38 Part of the chapter 13 trustee’s role is to make sure that the debtor commences timely payments and to advise and assist the debtor in executing the plan.39 The trustee collects the plan payments from the debtor and distributes funds to creditors according to the terms of the confirmed plan.40

Chapter 11
Chapter 11 cases may be filed by either business entities or individual debtors. Although a debtor may liquidate through chapter 11,41 the central goal of chapter 11 is to reorganize the debtor’s obligations through a payment plan that allows the debtor to continue its pre-bankruptcy business activities. Unlike chapters 7 and 13, in a chapter 11 case a trustee is not appointed automatically. Rather, the debtor becomes a debtor-in-possession and manages the bankruptcy estate for the benefit of creditors.42 The court must appoint a chapter 11 trustee for cause upon a request from the UST or a party in interest,43 or because appointment of a trustee would be in the best interest of creditors.44 Appointment of a chapter 11 trustee is generally considered a major blow to a company’s prospects as a going concern since the debtor’s ability to stay in control of the bankruptcy estate is an important reason to choose this chapter over chapter 7. However, while chapter 11 allows the debtor more control and flexibility, these advantages come with a price. The costs of filing and administering a chapter 11 case are significantly higher than those under chapters 7 and 13.

The hallmark of a chapter 11 case is the plan of reorganization. Generally speaking, only the debtor may file a plan during the first 120 days of the chapter 11 case.45 However, any party in interest may file a plan if the debtor has not done so within that period or has not obtained acceptance of the plan by all impaired classes of claims and interest holders within 180 days of filing.46 The court may extend or reduce that exclusivity period for cause, but not beyond 18 months for the debtor to file a plan and 20 months for the debtor to gain its acceptance.47

A plan of reorganization must follow the requirements in Section 1123 of the code, including a designation of classes of claims (held by creditors) and interests (equity interests).48 Among other requirements, the plan must specify whether any classes are impaired,49 which means that the creditor will
receive less than the amount of the claim or interest, and how claims or interests will be treated. The plan must provide for identical treatment of all claims and interests within each class unless a claimant consents to different treatment.

Voting on the Plan

Creditors and interest holders must be allowed to vote on a plan of reorganization before it is confirmed by the bankruptcy court. Before the vote, the debtor must file, obtain approval, and serve creditors and interest holders with a disclosure statement. The statement must contain adequate information regarding the debtor’s business and financial condition as to enable anyone voting on the plan to make an informed judgment about the plan.

After creditors vote, the court determines whether to confirm the plan. To be confirmed, a plan must meet numerous requirements, including that it was proposed in good faith and not by any means forbidden by law. Once confirmed, the debtor emerges from bankruptcy with all its property, unless the plan provides otherwise. For example, the plan may provide for sales of certain assets. The property of the reorganized debtor is owned by the debtor free and clear of debt or equity, unless the plan provides otherwise. The confirmation of the plan generally serves to discharge the debtor (if an individual) of all claims, with certain exceptions.

An order confirming a chapter 11 plan may only be revoked on the basis of a fraud brought to the court’s attention within 180 days of entry of the order. The finality of the confirmation order provides the debtor with a fresh start.

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1 U.S. Const. art. I, §8, cl. 4.
2 Chapters 1, 3 and 5 generally apply to all bankruptcy cases. Chapters 7, 9 (municipalities), 11, 12 (family farmers or fishermen), 13, and 15 (cross-border cases) refer to specific types of bankruptcy cases.
4 See 11 U.S.C. §109(b) (“Persons” may be chapter 7 debtors if they are not railroads, insurance companies, banks, or other specified institutions.); 11 U.S.C. §101(41) (The term “person” under the Bankruptcy Code includes individuals, partnerships, and corporations but generally not governmental units.).
5 See 11 U.S.C. §541(a) (defining “property of the estate”).
6 Assets with de minimis value (the threshold for which may vary by district), or which are subject to liens leaving little equity, will generally be abandoned back to the debtor or left for the secured creditor to foreclose upon.
7 11 U.S.C. §522. California has opted out of the Bankruptcy Code’s exemptions, which means that California debtors must use California’s exemption schemes. See 11 U.S.C. §522(b)(2); CODE CIV. PROC. §703.130.
13 See, e.g., 11 U.S.C. §§323, 542(a), 704(a).
18 The estate’s legal claims may include the right to avoid contract or tort claims the debtor may have possessed prior to the chapter 7 filing, as well as certain prepetition transfers. See 11 U.S.C. §§541, 544-550.
19 The chapter 7 trustee and the trustee’s retained professionals are paid from the estate’s funds, subject to bankruptcy court approval, after proper notice and a hearing, 11 U.S.C. §330. The trustee and retained professionals must file fee applications that comply with the requirements of the code, the Federal Rules of Bankruptcy Procedure, local bankruptcy rules, and guidelines published by the UST. In many chapter 7 cases, the bankruptcy estates are administratively insolvent.
21 FED. R. BANKR. P. 3007.
23 Only individual debtors are entitled to a discharge. 11 U.S.C. §727(a)(1).
27 FED. R. BANKR. P. 3015(b).
28 See 11 U.S.C. §101(30) (The debtor must be an “individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13.”).
33 11 U.S.C. §§1325(a)(3) and (7). The petition and plan must be filed and proposed in good faith. See Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).
43 11 U.S.C. §§104(a)(1) (“Cause” includes “fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management.”).
44 11 U.S.C. §§104(a)(1) (“Cause” includes “fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management.”).
51 11 U.S.C. §1123(a)(4). Besides the mandatory provisions, plans may also include any number and combinations of provisions, so long as they are legal and feasible. 11 U.S.C. §§1123(b)(6).
Measures for Avoiding or Lessening the Sting of Derivative Lawsuits

IN THE LAST FIVE YEARS, derivative suit filings have increased threefold, primarily against corporations in the financial, energy, and technology sectors. One contributing factor to the current increase is the existence of “tag along” derivative suits allowed by the 1998 Securities Litigation Uniform Standards Act. The recent downturn in the economy also played a significant role because shareholders have second-guessed routine judgment calls by corporate management.

The appeal of these suits is that they generally bring an award of attorney’s fees for the successful plaintiff and very little chance of the corporation’s obtaining its fees in the event it is successful in the lawsuit. Thus, trivial or technical mistakes by the board of directors may subject the corporation to massive defense costs and a large fee award for the plaintiff’s lawyer.

A derivative suit is a distant cousin of a class action, essentially a representative action whereby a shareholder of a corporation seeks to make claims on behalf of a class of all shareholders of the corporation against the directors or the corporation. This type of claim is distinguished from the typical tort or contract claim by the shareholder’s allegation of fraud, mismanagement, or a conflict of interest on the part of the directors and by corporate counsel’s limited ability to defend the matter. Thus, the directors and officers must engage their own counsel, generally paid for by the corporation. This puts the corporation’s corporate or litigation counsel at a disadvantage and adds several layers of lawyers to the defense costs. Yet another disadvantage is the shareholder’s right of inspection to obtain corporate documents that might otherwise be undiscoverable under the Code of Civil Procedure.

The defendants in a derivative suit can include directors, officers, financial advisers, and third parties. Only the corporate counsel is exempt, due mainly to the existence of counsel’s attorney-client privilege, which would have to be waived to properly defend. In this regard, it is of the utmost importance to engage counsel experienced in handling derivative suits because they involve motions that are time-sensitive and often have special venue requirements.

Derivative suits are embarrassing, expensive, and inconvenient to the corporation. Thus, it behooves corporations to act decisively to nip a derivative suit in the bud.

Defenses to a Derivative Suit

Three general defenses exist. One concerns the status of the putative shareholder, another the failure of the shareholder to make a demand, and, finally, the business judgment rule and the defense that the corporation did not do the alleged wrong.

The putative shareholder representative must be a shareholder of record or “beneficially holding the shares or the holder of a voting trust certificate” at the time of the alleged wrongdoing. Creditors or bond holders do not qualify. However, there is some authority that convertible debentures, whereby debt may be turned into equity, have sufficient equity to commence a derivative suit.

The shares must be owned both at the time of the questioned event and at the time the suit is commenced—often called the “contem-
in a derivative suit provide security for the expenses, including attorney’s fees, that may be incurred in the defense of the derivative suit. The statutes are modeled closely on the Model Business Corporation Act.27

In California, the corporation or its officers or directors (or former officers and directors) may file a motion for a litigation bond under Corporations Code Section 800(c). The request for the litigation bond is made against the derivative plaintiff and must be filed within 30 days of service of the complaint.28

The maximum amount of the bond is $50,000, and the standard for the motion is that there is no reasonable possibility that prosecuting the action will benefit the corporation.29 In the event the bond is not posted, the action is dismissed.30 If it is posted, and the defense prevails, the defense can claim some or all of the bond for its attorney’s fees.31 The rationale has been clearly stated as a deterrent to such suits.32

The motion for a litigation bond goes to the heart of the case, either in substantive or procedural defenses. It is essentially a minitrial on the merits, so every conceivable defense to the suit should be analyzed and, if appropriate, included in the motion. The motion must be filed within 30 days of service of the summons and complaint.33 The high burden of proof—no reasonable possibility that prosecuting the action will benefit the corporation—falls entirely on the corporation.34

A significant advantage to filing the motion for a litigation bond is that it acts as a stay on all proceedings, including the right of discovery, until 10 days after the hearing on the bond motion.35 If the bond motion is granted, the putative derivative plaintiff has a reasonable period of time to post the $50,000 bond.37 The shareholder may seek an extension of time to file the bond, but such request must be by noticed motion.38

If the bond is not timely filed, the corporation may seek dismissal of the derivative suit.39 A dismissal will probably be without prejudice,40 but refiling the action would present procedural issues, as the corporation could certainly move to dismiss again for failure to post the requisite bond.

If the bond is posted and the corporation prevails in the suit or the case is dismissed, the corporation may make a claim on the bond for attorney’s fees.41

Special Litigation Committees

Because the whole purpose of the derivative suit is to benefit the corporation and because the derivative suit often alleges a conflict of interest on the part of the directors as a reason not to make demand upon the corporation, a workable, but expensive, end run on the derivative suit is the utilization of a special litigation committee. This is essentially a group of directors or other persons authorized to look into the allegations of the putative derivative plaintiff and to determine whether the case is worth prosecuting and whether the suit is in the corporation’s best interests. The committee has the right to take over derivative suits, settle the cases, or dismiss them. As with the motion for a litigation bond, the appointment of a special litigation committee can support a motion to stay the litigation while the committee investigates the matter.42 Since one strategy of the derivative plaintiff is to burden the corporation with discovery, the appointment of a special litigation committee has a calming effect on the proceedings, defanging plaintiff’s counsel and allowing the corporation to investigate and act on the derivative allegations without undue interference by plaintiff’s counsel.

The authority for the appointment of a special litigation committee is strictly judicial—there is no specific statutory authority for the doctrine, although most states authorize the use of special litigation committees.43 The general practice is for the corporation’s board to appoint an independent committee to investigate the charges. The committee then recommends prosecution, settlement, or dismissal. The committee should be vested with completely autonomous authority to resolve the issue by resolution of the board and not merely serve an advisory role.44

The concept sounds quite feasible until one understands that the directors will handpick the committee members. The board will, of course, choose well-qualified committee members who are familiar with corporate governance and who may have sat on corporate boards before. The obvious implication is that these handpicked committee members with experience sitting on boards may not be terribly sympathetic toward derivative suits in general, as benefitting the corporation. This possible predisposition is not a factor to disqualify a committee member.45

As attractive as special litigation committees may seem, corporate counsel should examine at least three threshold issues before rushing to appoint one, and the first issue to consider is the expense. Committee members will have to devote considerable time to analyzing the claims and interviewing witnesses, and they will want to be compensated. In addition, the committee may want to retain investigators and lawyers to preserve attorney-client and work-product privileges.

Secondly, the special litigation committee can only adjudicate derivative claims. Since many direct claims are couched as derivative claims, corporate counsel should determine whether the asserted claims are derivative or direct.

The final issue to consider before appointing a special litigation committee is who will serve on the committee. There is no requirement that the committee members be composed of board members, and, given the derivative plaintiff’s willingness to sue board members, it may be wise for the board to appoint independent nondirectors to serve on the committee.46 However, the corporation’s bylaws may limit committee membership to board members, so review of the bylaws is necessary to determine if they allow nonboard members to be appointed to committees.47

There is no magic number of how many persons should be on the committee, but a one-person committee is inherently suspect.48 In order to insulate itself from discovery requests and other litigation tactics by the derivative plaintiff, the committee should consider hiring its own counsel.49 The special litigation committee is appointed by corporate resolution, which needs to be clear and unequivocal in granting the committee absolute authority to investigate the claim, hire counsel and investigators, and, upon completion of the investigation, to recommend the prosecution, settlement, or dismissal of the derivative claim, which the board must then adopt. This assures the committee’s powers, funding, and independence.

Once appointed, the special litigation committee should have absolute discretion to dismiss or prosecute the derivative claim.50 In making that decision, the special litigation committee weighs the merits of the claim and can also determine whether prosecution of the matter is cost-effective or not worth pursuing51 or simply not worth the potential recovery.52 Therefore, the committee may conclude that the case be dismissed53 or settled,54 or the committee can take over the litigation.55

The special litigation committee will issue a report, which, in terms of making it public or subject to discovery, is handled in three different ways, depending on the jurisdiction in which the suit is brought. In New York and several other states, once the special litigation committee has issued its report and recommendation, the trial court is bound to abide by its decision, without further inquiry, except as to the independence of the committee members.56 California seems to follow the New York rule.57 In Delaware, the court must review the committee’s decision for “reasonableness,” essentially allowing the court to second-guess the committee’s decision.58 Massachusetts, North Carolina, and Tennessee have adopted the Delaware rule but modified the analysis in varying ways.59

Typically, the committee will examine the pleadings and documents, as well as interview witnesses. There is no requirement that the witnesses, including the plaintiff, be deposed.60 Indeed, much of the details of the committee’s investigation may be shielded by attorney-client privilege.61 If the corporation is in one
of the states requiring reasonableness as a condition to dismissal, the report should be made public.62

Once the decision of the committee is made to dismiss the action, the committee may move for summary judgment, based on its decision that the prosecution of the derivative action would not benefit the corporation.63 For strategic reasons, this is probably a motion that the committee, as opposed to the corporation, should make. Even though the report is not per se discoverable, the corporation may want to consider having the nonprivileged portions of the report made public to show justification for the business decision to abandon the suit. It is the independent committee’s business judgment, after all, that controls the outcome of a derivative suit.64 Assuming the corporation moved for a litigation bond, and that motion was granted and the bond posted, the corporation may then seek recompense from that bond for its attorney’s fees.65

Most derivative suits are brought by disgruntled stockholders, so transparency and fair dealing will go a long way to eliminate derivative suits. In order to achieve this goal, a corporation can implement one or more of the following measures.

Implement Regular Meetings. The corporation should conduct regular stockholder meetings and avoid transactions that may be construed as self-dealing. Accurate minutes should be maintained for each meeting.

Shareholder Ratification of Board’s Acts. Any shareholder meeting vote should ratify the acts of the directors and officers, both generally and specifically, since the last shareholder meeting.

Implement the Fairness Doctrine. Should a board vote be required on items that may benefit individual directors, the fairness doctrine would suggest that an independent committee be appointed to examine the transaction for fairness.66

Raincoat Provisions. Many corporations elect to exculpate directors from monetary damages in the articles of incorporation. These raincoat provisions restrict individual and class actions brought by shareholders.67 Although California has curtailed the effectiveness of the provisions for derivative-type actions,68 raincoat provisions would apply to quasi-California corporations and still may be used to reduce direct actions against the directors.

Examine Bylaws. Examine the corporation’s bylaws to ensure that non-board members may serve on committees as designated by the board of directors.

While the shareholder derivative suit remains a weapon in the hands of aggressive plaintiff’s counsel, the tangible benefit to the shareholders remains elusive. By conducting
regular board and shareholder meetings that ratify the actions of the directors and officers, the corporation may avert disgruntled shareholder actions. Once a derivative suit is instituted, however, the stay provided by a motion for litigation bond can protect the corporation from litigation. Finally, if the motion for litigation bond fails, the special litigation committee is an expensive but thorough remedy to derivative actions in which the board's independence is questioned.

2 See Advisen MSCAd (online database) at Advisen.com; Reverse Merger Derivative Suits a Challenge for Plaintiff, LOS ANGELES DAILY JOURNAL, OCT. 21, 2011, at 1.
6 Without a litigation bond being posted by a derivative plaintiff, there is no statutory right of attorney's fees. See, e.g., Smith v. Van Gorkom, 488 A. 2d 858, 864 (Del. 1985).
7 The corporation is a nominal defendant and generally may not defend a derivative action filed on its behalf.
8 In California, most bylaws have indemnification provisions. Some articles of incorporation that absolve the directors from liability except for actual fraud are enforceable. See CORP. CODE §§204.5(a), 309(c).
9 CORP. CODE §1600 et seq. gives a shareholder broad rights of inspection unfettered by restrictions of relevancy. Under the Code of Civil Procedure, the documents must be relevant. CIV. PROC. §2017.010.
10 SHAREHOLDER DERIVATIVE ACTIONS: LAW AND PRACTICE §3.2 (2010); CORP. CODE §800(c).
12 Lewis, 502 A. 2d at 971, appeal denied, 504 A. 2d 571 (Del. 1986).
22 Zapata, 430 A. 2d at 788.
25 CORP. CODE §800(d).
27 MODEL BUSINESS CORPORATION ACT §2.02(b)(4).
28 See CORP. CODE §§204(a)(10), 204.5.
California law allows plaintiffs to recover statutory damages and attorney’s fees and costs each time they are denied full and equal access to places of public accommodation (e.g., hotels, restaurants, schools, and stores) because of a construction-related disability access violation related to a plaintiff’s disability.³

A California business or property owner can minimize the risk of being sued by understanding what ADA compliance actually entails, clearly defining in leases or contracts who bears responsibility for meeting applicable legal requirements, and ensuring that appropriate compliance actions are taken. Even if a business or owner is sued, diligent efforts to comply with the ADA can reduce statutory awards and attorney’s fees and costs. The ADA “prohibits discrimination and ensures equal opportunity for persons with disabilities in...public accommodations, commercial facilities, and transportation.”⁴

Places of public accommodation built or altered after January 26, 1993, must be readily accessible and comply with the ADA’s construction-related design standards.⁵ Owners and operators of existing facilities are required to remove architectural barriers that impede access of disabled patrons when removal is “readily achievable.”⁶ If barriers cannot be removed, the property owner or business operator must provide access through alternative methods (also known as reasonable accommodations) if they are readily achievable.⁷

The ADA does not specifically define what constitutes “readily achievable” or provide guidelines as to the amount of time, expense, and effort that must be put forth to remove barriers before alternative methods may be employed. A few examples of alternative methods that have been successfully applied under the proper circumstances include providing home delivery or having

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were published on September 15, 2010, and acceptable. Current ADA design standards build on the construction standards that were in place before January 26, 1991. ADA violations exist, or 2) believed they existed, and may have constructed or granted building department approvals without complying with the construction requirements (for example, fuel pumps) comply with ADA standards, and the California Building Code (CBC) and local ordinances. However, these standards often differ from the ADA’s construction-related design standards. In 2012, the California Division of the State Architect published an online comparison of the 2010 ADA Standards for Accessible Design and the 2010 CBC Accessibility Standards that covers 2,000 different accessibility topics in more than 450 pages. Differences include the size and spacing of Braille lettering required on signage, the location of flush controls on toilets, and how metric measurements are rounded. The comparison also reveals that numerous ADA requirements are not addressed in the CBC. Even if a building department official permits construction or grants an occupancy permit because the official believes the project satisfies ADA requirements, it does not insulate a defendant from being found liable.

Another worry for potential defendants is that construction standards differ. Unless a business or property owner can demonstrate compliance is not readily achievable in buildings constructed before January 26, 1993, only actual compliance with ADA construction-related design standards is acceptable. Current ADA design standards were published on September 15, 2010, and apply to all new construction and alterations begun on or after March 15, 2012. Construction begun between September 15, 2010, and March 2012 may comply with either of the standards promulgated in 1991 or 2010. Construction undertaken prior to September 15, 2010, must comply with the 1991 standards.

No matter how much diligence is exercised in trying to achieve ADA compliance, the probability exists that at least one or more technical violations of the ADA’s design and construction standards may be found in any place of public accommodation. ADA standards regulate, at least in part, the construction of almost every facet of a place of public accommodation—the width of aisles, the height of counters, the parking lots, and the operation of door handles, for example. Plaintiffs and their attorneys often seek out basic violations to meet their burden of proof. Under California law, a “violation personally encountered by a plaintiff may be sufficient to cause a denial of full and equal access if the plaintiff experienced difficulty, discomfort, or embarrassment because of the violation.”

Faced with the prospect of statutorily mandated attorney’s fees, defendants often settle quickly because they feel that the plaintiff’s burden to prove “difficulty, discomfort, or embarrassment” is easy to meet. In addition, settling quickly also reduces the amount that plaintiffs are likely to demand in settlement because they will have expended less in attorney’s fees. While it is incumbent upon property owners, landlords, business owners, or any other responsible party to ensure that an entire property, including its structures and amenities (for example, fuel pumps) comply with ADA standards, special attention should be paid to areas frequently targeted by “professional” or “drive-by” plaintiffs. These areas should also be inspected regularly and every time that construction, repairs, or modifications take place.

Some of the most common areas for which violations are alleged are parking lots, public restrooms, and narrow aisles and walkways that prevent wheelchair access. Violations in a parking lot are especially attractive because they do not require plaintiffs to enter a building or even leave their vehicle. Common parking lot allegations include improper (or lack of) striping designating handicap parking spaces and walkways, improper signage, and grading (or slopes) that are too steep. One frequent allegation is the failure to post parking signs that indicate that a location is van accessible, preventing a disabled plaintiff from determining whether there are any parking spaces that will accommodate a van. Current standards require that one in every six accessible parking spaces be van accessible (i.e., 132 inches wide rather than 96) and contain signage indicating the space is van accessible.

Claims of parking lot violations are often coupled with claims regarding bathrooms in order to elicit settlements from multiple sources (e.g., the property owner, landlord, store operator, and common area manager). Typical restroom-related allegations include mirrors and soap and towel dispensers that are mounted too high, grab bars surrounding toilets that are too far from the toilet to accommodate transfer from a wheelchair, noncompliant door handles and latches on restroom stalls, and sinks that lack insulation or wrapping on pipes to prevent persons in wheelchairs from scalding their legs on hot-water pipes when they approach to use the sink. Public restrooms are frequently vandalized and require constant maintenance and repair. As a result, repairs may be noncompliant. A mirror that was properly hung during initial construction may be inadvertently relung too high. Even if the height is off by an inch or less, plaintiffs may still allege that because of this technical violation, they suffered difficulty or discomfort in trying to view themselves in the mirror. These allegations do not always mean that a plaintiff will prevail at trial. Defendants have successfully demonstrated that plaintiffs were not denied full and equal access from checking their appearance in a mirror by presenting evidence of other reflective surfaces at the premises that the plaintiff could have used.

Under federal law, property owners, landlords, tenants and operators of places of public accommodation each bear responsibility for ADA compliance. While these parties may reallocate responsibility for ADA compliance among themselves by contract, a plaintiff will still generally have a claim against each of them. Commercial leases and other real estate contracts must be drafted to clearly delineate who will assume the duty to ensure compliance with ADA requirements. An ambiguous or poorly worded lease or contract often leads to strained relationships between landlords and tenants when disability access suits are brought, along with costly claims for indemnity and contribution as each party attempts to assign responsibility to the other. In the meantime, the plaintiff and his or her counsel may be incurring recoverable attorney’s fees and costs on the underlying claim.

Common commercial lease provisions that create issues are those requiring the tenant to “comply with all applicable laws” and repair or maintain the property at the tenant’s expense. Pursuant to these provisions, landlords expect that tenants will improve the property and bring it into compliance with current legal standards, thus allowing the
property owner to receive the property back at the end of the lease term in an improved condition.

Landlords, however, may not use these provisions to escape liability for ADA violations. In Botosan v. Fitzhugh, a federal district judge cited several grounds for refusing to relieve a landlord of responsibility for ADA violations when its commercial lease contained these provisions. First, the landlord retained “substantial control” over the property; for example, the tenant could not make structural alterations to the premises without the landlord’s consent. Second, “Under the ADA, liability attaches to landlord and tenant alike.” Third, while the landlord argued that under the Code of Federal Regulations, the parties could allocate responsibility for compliance among themselves, the court said this allocation did not mean that a party could insulate itself from liability to a third party. Finally, the court cited with approval an interpretation of this regulation made by the U.S. Department of Justice that if a tenant failed to remove a barrier, the tenant and the landlord would both be liable for that failure.

The DOJ noted that a landlord could seek indemnification from a tenant for any ADA violations. However, indemnification may not be available from a tenant or their own insurance company if ADA violations exist because of the landlord’s own negligence or decision to refrain from making ADA modifications and repairs.

CASp Certification
Since July 1, 2013, commercial landlords in California have been obliged to disclose in any new leases if the property has been inspected and certified reasonable measures to correct the property or filing suit. If the owner or tenant has taken the initiative to comply with disability access laws, plaintiffs may decline to file suit because they are satisfied that the property is ADA compliant, because they fear that any property owner or tenant who went through the expense of CASp certification is more likely to vigorously defend an ADA action than negotiate a quick settlement, or because they know it may result in a reduction in the statutory damages available under state law.

CASp certification does not provide a completely safe harbor, even if a local building department granted certification. If a plaintiff can prove that he or she encountered a disability access violation, a right to recovery still exists. Certification may, however, entitle a defendant to a temporary stay and an early evaluation (settlement) conference if the complaint is filed in state court. Beginning September 2012, the amount of statutory damages available to a plaintiff was reduced from $4,000 to $1,000 per encounter if a defendant demonstrates the alleged disability access violations were remedied within 60 days after the complaint was served and one of the following applies: 1) the property has been CASp certified, and no modifications or alterations affecting compliance with disability access standards took place after certification, 2) a CASp inspection is in process and the defendant has implemented reasonable measures to correct the alleged violation or was in the process of doing so when the plaintiff alleged they were denied full and equal access, 3) new construction or improvements were inspected and approved by a local building department official who is a CASp specialist and no significant alterations took place following certification, or 4) new construction or improvements were inspected and approved by a local building department on or after January 1, 2008, without any subsequent modifica-
and an early evaluation (settlement) confer-

ages may also be entitled to a temporary stay

tial procedural advantages. If defendants rem-

defendant in federal court is bereft of poten-

injunctive relief as moot. The court may then

court dismiss the plaintiff’s federal claim for

edy an alleged ADA violation before final

complaint.34 Significantly, CASp certification

evidence that an alleged violation did not

addition, CASp certification may be used as

tion in statutory damages from $4,000 to

violations within 30 days of receiving the

who have corrected or will correct all alleged

tractors who constructed the property or

any architect who designed the property or

any renovations.

Equally important, a CASp should be

retained to confirm or deny the existence of

the violations alleged in the complaint as

as all other potential violations that may

exist at the property. If violations are found,

they should be remedied immediately. Finally,

defense counsel may also benefit from

helping the court dismiss the plaintiff’s case or

for a federal case or force an early settlement

court. Several federal district courts in California

have already refused the applications of defen-
dants for stays and early settlement confer-

cence because the procedural aspects of state

law conflict with the corresponding provisions

of federal law.35 This is not to say that a defendant

in federal court is bereft of potential

procedural advantages. If defendants re-

medy an alleged ADA violation before final

adjudication, they may move to have the

court dismiss the plaintiff’s federal claim for

injunctive relief as moot. The court may then

decline to exercise supplemental jurisdiction

on the remaining state law claims for damages

and dismiss the entire complaint.36

If served with a state court complaint,
defendants and their counsel should imme-
diately determine if they qualify for a poten-
tial stay and early evaluation conference.

Regardless of whether the complaint is filed

in federal or state court, defendants would be

well advised to review the terms of all leases

or contracts for the property to determine

who bears responsibility for compliance with
disability access laws and be prepared to ten-
der the action if contractual responsibility or

indemnification belongs to another party.

Consideration should also be made as to

who else may be responsible for alleged vio-
lations including, but not limited to, con-

tractors who constructed the property or

made repairs, common area managers retain-
ed to maintain the parking lot and other

common areas surrounding the property, and

any architect who designed the property or

any renovations.

Currently, every court has been willing to rule that

some attorneys who represent plaintiffs in these

lawsuits, most courts are unwilling to take this

step.37 However, knowing what does and
does not constitute ADA compliance, iden-
tifying who the potentially responsible parties

are under a lease or contract, and seeing that

compliance measures are actually undertaken

can minimize the risk that a suit will even be

filed or limit recoverable damages, fees, and

costs if one is filed.

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2 42 U.S.C. §12182(a), (b).
3 See Unruh Civil Rights Act, codified at CIV. CODE §§51 et seq. The act incorporates the ADA and authorizes recovery of up to $4,000 in statutory damages plus attorney’s fees and costs for prevailing plaintiffs for each encounter with disability access violations. CIV. CODE §52(a).
8 Public accommodations and commercial facilities designed or constructed after January 26, 1993, or altered after January 26, 1992, are required to comply with the ADA Architectural Guidelines for Buildings and Facilities. The architectural guidelines have been updated several times since they were first adopted, most recently on September 15, 2010, and published as the 2010 ADA Standards of Accessible Design. See http://www.ada.gov/2010ADASTandards/index.htm.
10 See id. See, e.g., id. at 366.
11 See Comparative Analysis of the 2010 Americans with Disabilities Act Standards and the 2010 California Building Code Chapter 11B Accessibility Standards,
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15 See id.

16 Plaintiffs may also demonstrate denial of full and equal access if they demonstrate that they were “deterred from accessing a place of public accommodation on a particular occasion.” CIV. CODE §55.56(b).

“A plaintiff demonstrates that he or she was deterred from accessing a place of public accommodation on a particular occasion only if both of the following apply: 1) The plaintiff had actual knowledge of a violation or violations that prevented or reasonably dissuaded the plaintiff from accessing a place of public accommodation that the plaintiff intended to use on a particular occasion, and 2) the violation or violations would have actually denied the plaintiff full and equal access if the plaintiff had accessed the place of public accommodation on that particular occasion.” CIV. CODE §55.56(d).

17 CIV. CODE §52(a).

18 Section 208.4 of the 2010 Standards requires one in every six accessible parking spaces to be van accessible. Section 502.6 requires signage to be displayed designating each van-accessible parking space. See http://www.ada.gov/regs2010/2010ADAStandards/2010ADAstandards.htm#pgfId-1006250.


21 See CIV. CODE §3513.


23 28 C.F.R. §36.201(b).

24 Modern Dev. Co. v. Navigators Ins. Co., 111 Cal. App. 4th 932 (2003) (The plaintiff’s ADA claims were not covered by the insurer’s commercial general liability policy when the alleged injuries were caused not by an accident but by the architectural configuration of business location and the insured’s alleged failure to remove architectural barriers.).

25 CIV. CODE §1938.

26 See the California Department of General Services Voluntary Certified Access Specialist Program, at http://www.dgs.ca.gov/dsa/Programs/programCert/casp.aspx. See also S.B. 262 (2003).


28 CIV. CODE §55.53(d).

29 BUS. & PROF. CODE §5600(d).

30 CIV. CODE §55.56 (prescribing the statutory damages available to plaintiffs in construction-related accessibility claims).

31 CIV. CODE §55.56(f)(1); see also S.B. 1186 (2013).

32 CIV. CODE §55.56(f)(2).

33 CIV. CODE §55.54(a).

34 CIV. CODE §55.53(d)(3).


THE NOERR-PENNINGTON DOCTRINE provides immunity from antitrust laws to those who petition the government through lobbying,1 the initiation of a lawsuit, or the submission of forms required for the approval of governmental action.2 The doctrine has also been expanded to other causes of action. Courts within the Ninth Circuit, for example, have held that the Noerr-Pennington doctrine is not limited to antitrust and applies to all civil causes of action.3 California state courts have also taken an expansive view of Noerr-Pennington and have routinely applied it to areas outside antitrust.4

Some have pushed for even greater expansion of Noerr-Pennington immunity and have recently attempted to persuade judges that the doctrine is not only a rule of liability but also a rule of evidence that can shield statements that concern petitioning from even being considered by a jury. However, the recent case of AMCORD v. Hernandez suggests that even courts that take an expansive view of Noerr-Pennington may be willing to push the doctrine only so far and no farther.5

The Noerr-Pennington doctrine originated in 1961 with the U.S. Supreme Court’s decision in Eastern R. Presidents Conference v. Noerr Motor Freight, Inc.6 In that case, a trucking company sued 24 railroad companies under Sections

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2 and 3 of the Sherman Antitrust Act for conducting a public relations campaign designed to influence legislation detrimental to the trucking industry and “create an atmosphere of distaste for the truckers among the general public.” While the campaign of the railroad companies was intended to restrain the trade of truckers and to monopolize the market, the Supreme Court concluded that no violation of the Sherman Act had occurred. The Court’s basis for this conclusion was that the Sherman Act could not be read to infringe upon the “right to petition” guaranteed by the First Amendment:

To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act. Secondly, and of at least equal significance, such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.

Four years later, in United Mine Workers v. Pennington, the Supreme Court reaffirmed this holding, stating that “Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.” The first court to officially identify that, with Noerr and Pennington, the Court had established an antitrust “doctrine” was the U.S. District Court for the Northern District of California in Trucking Unlimited v. California Motor Transport Company. According to the Northern District: The Noerr and Pennington cases establish the rule that violation of the Sherman Act cannot be predicated upon combined attempts to influence the passage of laws or attempts to influence public officials in the enforcement of laws even when the sole purpose and intent of the persons engaging in such activity is, and the result may be, to destroy their competitors.

While the Supreme Court in Trucking Unlimited ultimately concluded that the allegations before it were of unprotected conduct, the court did not disturb the district court’s articulation of the Noerr-Pennington doctrine.

Thus, at the time of the Supreme Court’s decision in Trucking Unlimited, there was little disagreement as to the meaning and scope of the Noerr-Pennington doctrine, which simply provided that a party cannot incur antitrust liability for attempting to influence the government, even if the purpose is anticompetitive.

Expansion of Noerr-Pennington

However, courts would soon differ in their application of the Noerr-Pennington doctrine, particularly regarding whether it serves as a shield to liability only in the antitrust context, or whether it is also applicable to other causes of action. The first case to expand Noerr-Pennington beyond antitrust was Sierra Club v. Babbitt. In Sierra Club, the Northern District of California considered whether the Sierra Club was subject to state law tort liability for interference with advantageous relationship for filing a complaint against the defendant and by asserting administrative appeals. The District Court held that liability was precluded under the Noerr-Pennington doctrine despite the fact that the claim at issue was a state law tort rather than a Sherman Act violation:

This court agrees that when a suit based on interference with advantageous relationship is brought against a party whose “interference” consisted of petitioning a governmental body to alter its previous policy a privilege is created by the guarantee of the First Amendment. This court, however, does not believe that privilege should depend upon malice. For the reasons given by the Supreme Court in [Noerr]...this court is persuaded that all persons, regardless of motive, are guaranteed by the First Amendment the right to seek to influence the government or its officials to adopt a new policy, and they cannot be required to compensate another for loss occasioned by a change in policy should they be successful.

The Sierra Club holding marks the decoupling of Noerr-Pennington doctrine from the Sherman Act. The District Court justified this departure by interpreting Noerr-Pennington as being rooted solely in the First Amendment’s right to petition rather than being a doctrine designed to accommodate the Sherman Act to the protections of the First Amendment.

A number of courts eventually followed the lead of the Northern District. For example, in 1981, West Virginia’s Supreme Court of Appeals in Webb v. Fury used Noerr-Pennington to dismiss a coal mining company’s libel action against environmental groups, in part for communications made to regulatory agencies. Citing Sierra Club, the Webb court stated that the “clear import of the Noerr-Pennington doctrine is to immunize from legal action persons who attempt to induce the passage or enforcement of law or to solicit governmental action even though the result of such activities may indirectly cause injury to others.”

Thus, the Webb court accepted that Noerr-Pennington applies outside the antitrust context. Moreover, the Webb court’s description of Noerr-Pennington immunity was particularly broad and suggested that any “attempt to induce the passage or enforcement of law or solicit government action” would be immunized, irrespective of whether the petitioner was affirmatively lying to the government for his or her own purposes. On this latter point, however, the West Virginia court quickly reversed itself in Harris v. Adkins, stating:

We agree with the reasoning in McDonald, which contained no dissent, and we can find no persuasive reason why our Constitution should provide greater protection than the First Amendment as to the right to petition. Accordingly, we hold that the right to petition the government found in Section 16 of Article III of the West Virginia Constitution is comparable to that found in the First Amendment to the United States Constitution. It does not provide an absolute privilege for intentional and reckless falsehoods, but the right is protected by the actual malice standard of New York Times Co. v. Sullivan.

Ultimately, then, the Harris court recognized that Webb had gone too far in its expansive interpretation of the Noerr-Pennington doctrine. The Supreme Court in McDonald had decided that First Amendment rights are on parity and that the “right to petition” is afforded no more protection than, say, the right to free speech (which may undoubtedly be curtailed in certain circumstances). Nevertheless, the Harris court did not challenge Webb’s extension of Noerr-Pennington beyond the antitrust context.

Rejected Applications outside Antitrust

Not all courts have been inclined to follow Sierra Club and many have refused to apply Noerr-Pennington beyond antitrust cases. The Tenth Circuit in Cardtoons, L.C. v. Major League Baseball Players Association explained:

While we do not question the application of the right to petition outside of antitrust, it is a bit of a misnomer to refer to it as the Noerr-Pennington doctrine; a doctrine which was based on two rationales. In our view, it is more appropriate to refer to immunity as Noerr-Pennington immunity only when applied to antitrust claims. In all other contexts, including the present one, such immunity derives...
1. The Noerr-Pennington doctrine was originally developed in the context of the:
   A. Clayton Antitrust Act.
   B. Sherman Antitrust Act.
   D. None of the above.

2. In Eastern R. Presidents Conference v. Noerr Motor Freight, Inc., the U.S. Supreme Court considered the following First Amendment rights:
   A. Free exercise of religion.
   B. Right of petition.
   C. Free speech.
   D. Free press.

3. A party may be held liable under the Sherman Act 
   A. if the government ordains the rules.
   B. if the government is present.
   C. if the government is not present.
   D. if the government is not present.

4. The first court to recognize that a doctrine had 
   A. Kansas City v. Missouri.
   B. Noerr v. United Mine Workers.
   C. National Labor Relations Board v. Trucking Unlimited.
   D. None of the above.

5. It is well settled that Noerr-Pennington doctrine applies outside the antitrust context.
   A. True.
   B. False.

6. In Noerr, the U.S. Supreme Court held that a 
   A. violation of the Sherman Act occurred because the railroad companies’ public relations campaign against truckers was fundamentally anticompetitive.
   B. violation of the Sherman Act occurred because the railroad companies’ public relations campaign against truckers was fundamentally anticompetitive.
   C. violation of the Sherman Act occurred due to the railroad companies’ public relations campaign against truckers was fundamentally anticompetitive.
   D. None of the above.

7. At the time of Trucking Unlimited, there was a jurisdiction split concerning whether the Noerr-Pennington doctrine applied outside the antitrust context.
   A. True.
   B. False.

8. The first case to expand Noerr-Pennington beyond the antitrust context was:
   A. Sierra Club v. Butz.
   B. Webb v. Fury.
   D. Sliding Door Company v. KLS Doors.

9. Only in the last five years have courts begun to apply Noerr-Pennington beyond the antitrust context.
   A. True.
   B. False.

10. In Webb v. Fury, the West Virginia Supreme Court suggested that Noerr-Pennington immunizes all petitioning, irrespective of whether it is alleged that the petitioners affirmatively lied to the government.
    A. True.
    B. False.

11. The Noerr-Pennington doctrine provides greater protection to the right to petition than to other First Amendment rights.
    A. True.
    B. False.

12. In Cardtoons, L.C. v. Major League Baseball Players Association, the Tenth Circuit stated that Noerr-Pennington immunity is only applicable in the antitrust context.
    A. True.
    B. False.

13. In Cardtoons, the Tenth Circuit stated that Noerr was based on a construction of the Sherman Act and that it was not a First Amendment decision.
    A. True.
    B. False.

14. No recent cases in jurisdictions outside of the Tenth Circuit have followed the Cardtoons court’s view on Noerr-Pennington outside antitrust.
    A. True.
    B. False.

15. In Sliding Door, the Central District followed Cardtoons and rejected the application of Noerr-Pennington outside the antitrust context.
    A. True.
    B. False.

    A. True.
    B. False.

17. California state courts generally hold that Noerr-Pennington immunity applies outside the antitrust context.
    A. True.
    B. False.

18. In People ex rel. Gallegos v. Pacific Lumber Company, the appellate court looked toward this Supreme Court decision to determine that Noerr-Pennington applies outside the antitrust context:
    A. Noerr.
    B. Pennington.
    C. California Transport.
    D. BE&K Constr. Co.

19. California courts generally hold that the Noerr-Pennington doctrine is a rule of evidence.
    A. True.
    B. False.

20. In Hernandez v. AMCORD, Inc., the court followed Cardtoons and ruled that the Noerr-Pennington doctrine is inapplicable outside antitrust.
    A. True.
    B. False.
from the right to petition. This distinction is not completely academic. Antitrust cases that grant Noerr-Pennington immunity do so based upon both the Sherman Act and the right to petition. These precedents, founded in part upon a construction of the Sherman Act, are not completely interchangeable with cases based solely upon the right to petition.20

The Cardtoons court continued:

If we were to refer to immunity based solely on the right to petition as Noerr-Pennington immunity, it would be very tempting to apply Coastal States in the present case. To do so, however, would be inappropriate. First, Coastal States rejected the right to petition as a basis for Noerr. “Noerr was based on a construction of the Sherman Act. It was not a first amendment decision....” Second, and even more instructive, the Fifth Circuit specifically noted that its use of the term “petitioning immunity” went beyond the guarantees of the petition clause. “We reject the notion that petitioning immunity extends only so far as the first amendment right to petition and then ends abruptly.”21

This passage cuts to the heart of the controversy surrounding Noerr-Pennington. Is the doctrine based in the First Amendment right to petition, or is it based on the Sherman Act? If it is based on the right to petition, it should logically apply to other causes of action and not be limited to antitrust. On the other hand, if it is rooted in the Sherman Act or at least in antitrust legislation, its application to other causes of action would not necessarily be appropriate.

On this question, the Tenth Circuit takes the latter view. “Petitioning immunity” applies only in the antitrust context. Outside of antitrust, the First Amendment right to petition is afforded protection under the First Amendment, but that right is qualified, as are freedom of speech and freedom of the press.

The Cardtoons decision provides a common-sense rationale for Noerr-Pennington immunity in the antitrust context and a reason why such immunity need not be extended automatically outside of antitrust. Because all political activity usually represents an attempt by the “petitioner” to augment the power of his or her organization, any petitioning by a competitor would be anticompetitive, by its very nature, giving rise immediately to a colorable Sherman Act violation. For this reason, the Noerr-Pennington doctrine sensibly sought to reconcile the Sherman Act with the First Amendment and, in so doing, provided virtually unlimited immunity to petitioning in the Sherman Act context. However, in the non-antitrust context, the danger to the First Amendment is not present and, logically, causes of action not involving antitrust should not be afforded any more protection than are given to other First Amendment rights.

Other courts reject the notion that Noerr-Pennington can be used to provide immunity to non-antitrust petitioning. Recently, in Shirokov v. Dunlap, Grubb & Weaver PLLC,22 the District Court of Massachusetts refused to extend Noerr-Pennington immunity to the plaintiffs’ allegation that the defendant had fraudulently obtained a copyright: The Noerr-Pennington doctrine, as originally formulated by the Supreme Court, rests on two separate grounds. First, it relies on a statutory interpretation of the Sherman Act that limits the scope of the Act so as to not reach activity associated with the political process....Second, it rests on the First Amendment right of citizens to petition the government....Because the instant dispute is not regulated by the Sherman Act, this Court is reluctant to apply the Noerr-Pennington doctrine. A number of courts have acknowledged the incongruity of applying the Noerr-Pennington doctrine outside of the antitrust context where immunity is cognizable only on First Amendment grounds.23

The Shirokov court thus agreed with the Cardtoons court that the Noerr-Pennington doctrine is particular to antitrust and that it is not merely an expression of the First Amendment’s right to petition.

A Broader View

Still, many jurisdictions, including the Ninth Circuit and California state courts, have generally accepted that the Noerr-Pennington doctrine applies outside of the antitrust context. Within the Ninth Circuit, this view was recently reaffirmed in Sliding Door Company v. KLS Doors.24 In that case, the plaintiff had sued defendant for patent infringement.25 The defendant countered against the plaintiff for Lanham Act violations, in part, because the plaintiff had distributed communications to one of the defendant’s customers that said that the defendant was engaging in patent infringement.26 While this case did not involve an antitrust issue, the Central District Court ruled that the defendant’s counterclaim was barred by the Noerr-Pennington doctrine:

Plaintiff contends that the email sent to customers here falls under the Noerr-Pennington doctrine and is, therefore, protected under the First Amendment right to petition. Communications “are sufficiently within the protection of the Petition Clause to trigger the Noerr-Pennington doctrine, so long as they are sufficiently related to petitioning activity.”...The communication at issue here is related to the petition activity of filing the suit since it was an email sent to purchasers of potential purchasers notifying them that Plaintiff had sued Defendants for patent infringement and that it would also pursue its intellectual property rights as to “those who purchase any infringing product.” In addition, the email was sent on February 6, 2013, shortly after the lawsuit was filed. While the communication can be construed to contain advertising or promotion as discussed above, the Ninth Circuit has noted that “in nearly every instance in which Noerr-Pennington has been applied, including Noerr itself, the petitioning conduct at issue was carried out to further the petitioning party’s commercial interests.”...Therefore, Defendants’ claims for false advertising under the Lanham Act arise from communication related to the litigation and are barred by the Noerr-Pennington doctrine.27

In other words, the fact that the communications in question informed the defendant’s customer of pending patent infringement litigation precluded Lanham Act liability under the Noerr-Pennington doctrine. In the district court’s view, these communications were immunized by the First Amendment’s right to petition.

The holding in Sliding Door is based largely upon the Ninth Circuit’s decision in Sosa v. DIRECTV, Inc.28 In Sosa, DirectTV, a satellite television company, had previously sued several companies that had been selling “smart cards” to end users, allowing them to illegally access DirectTV’s programming.29 During discovery, DirectTV uncovered these companies’ customer lists, including the purchasers of the smart cards, and sent them letters informing them that they were required to forfeit this equipment and pay DirectTV an unspecified sum of money.30 The customers reacted by filing a lawsuit against DirectTV alleging extortion and unfair business practices.31 However, the Ninth Circuit ruled that DirectTV was protected under Noerr-Pennington doctrine.

The Ninth Circuit suggested that its conclusion was compelled by Supreme Court precedent, particularly by BE&K Constr. Co. v. NLRB.32 In the view of the Ninth Circuit, the BE&K court recognized that Noerr-Pennington was an antitrust doctrine but indicated that the immunity afforded to antitrust laws in response to petitioning should also apply to labor laws.33 In his con-
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currence, Justice Stephen Breyer disagreed that the outcome in BE&K was supported by Noerr-Pennington principles:

For another thing, I do not believe that this Court’s antitrust precedent determines the outcome here....That precedent finds all but sham lawsuits exempt from the reach of the *antitrust laws*....It does not hold employers enjoy a similar exemption from the reach of the labor laws. And it should not do so, for antitrust law and labor law differ significantly in respect to their consequences, administration, scope, history, and purposes.34

Despite this disagreement, the proposition relied upon by the district court in *Sliding Door*—that Noerr-Pennington immunity extends beyond the antitrust context—has been followed by numerous courts within the Ninth Circuit.35

California state courts also generally follow the Ninth Circuit’s approach to Noerr-Pennington. In *Vargas v. City of Salinas*, citizens who favored a ballot measure sued the city of Salinas for publishing articles that described the negative effect that the ballot measure would have on municipal services.36 The plaintiffs’ lawsuit was dismissed without measure. The plaintiffs’ contention, it explicitly stated that Noerr-Pennington applies outside the antitrust context. The Noerr-Pennington doctrine “has since been extended to virtually all civil liability for legitimate petitioning activity.”38

For this proposition, the Sixth Appellate District cited the First Appellate decision *People ex rel. Gallegos v. Pacific Lumber Company*, which also determined that Noerr-Pennington applies outside of antitrust.39 However, the Gallegos court’s determination was based upon an interesting reading of California Transport v. Trucking Unlimited.40 California Transport involved a Clayton antitrust claim rather than a Sherman antitrust claim. Apparently, the Gallegos court believed that because California Transport applied the Noerr-Pennington doctrine to the Clayton Act, this rule must also apply to all civil liability. This is not self-evident. The Clayton Act, like the Sherman Act, is an antitrust law. In any event, the proposition that Noerr-Pennington extends to virtually all civil liability for legitimate petitioning activity is not stated in California Transport. Nevertheless it suffices to say that California courts generally agree that the Noerr-Pennington doctrine may be applied outside the antitrust context.

**Excluding Relevant Evidence**

One recent case—*Hernandez v. AMCORD, Inc.*—suggests that California state courts are unwilling to apply Noerr-Pennington to exclude evidence.41 In *Hernandez*, the Second Appellate District considered whether the trial court properly excluded evidence of the defendant-manufacturer’s lobbying activities under the Noerr-Pennington doctrine. The court ruled that the evidence was improperly excluded. The court held that the Noerr-Pennington doctrine is not a rule of evidence. Relying on *Pennington*, the court observed that it would be within the province of a trial court to admit evidence of efforts to influence public officials, if the court deemed the evidence probative and not unduly prejudicial. Such an admission could be made under the established judicial rule of evidence that testimony of prior or subsequent transactions may be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny. As the *Hernandez* court held, “[W]hile a corporation’s petitioning of government officials may not itself form the basis of liability, evidence of such petitioning activity may be admissible if otherwise relevant to show the purpose and character of other actions of the corporation.”42 *Hernandez* cites with approval decisions limiting the doctrine to instances in which the cause of action is “based on the act of lobbying or filing a lawsuit.”43 Even in that setting, Noerr-Pennington is applicable only as a bar to liability, not as a bar to evidence.

The issue of whether Noerr-Pennington applies outside of the antitrust context remains open to debate. While cases such as *BE&K Constr. Company v. NLRB* have touched upon the issue,44 the U.S. Supreme Court has yet to squarely decide it. Evidence of this lack of clarity is the current divergence in interpretations among and within the circuits and state courts. However, *Hernandez* suggests that even courts that are willing to take an expansive view of Noerr-Pennington have their limits.
7 Id. at 129.
8 Id. at 137-8.
11 Id.
14 Id.
16 Id. at 938.
18 Id. at 448.
21 Id. at 890-1. (citing Coastal States Mkrg., Inc. v. Hunt, 694 F. 2d 1358, 1364-66 (1983)).
25 Id. at *2.
26 Id. at *3-4.
27 Sliding Door Co., 2013 U.S. Dist. LEXIS 71304, at *18-19 (quoting Sosa v. DIRECTV, Inc., 437 F. 3d 923, 935, 935 n.8 (9th Cir. 2006)).
28 Id.; Sosa v. DIRECTV, Inc., 437 F. 3d 923 (9th Cir. 2006).
29 Sosa, 437 F. 3d at 926.
30 Id.
31 Id.
33 BE&K Constr. Co., 536 U.S. at 525.
37 Id.
38 Id. at 1343 (citing People ex rel. Gallegos v. Pacific Lumber Co., 158 Cal. App. 4th 950 (2008)).
40 Id. (citing California Transp. v. Tracking Unlimited, 404 U.S. 508, 510-11 (1972)).
42 Id. at 679 (citing United Mine Workers v. Pennington, 381 U.S. 657, n.3 (1965)).
43 Id. at 680 (citing Mason v. Texaco, Inc., 741 F. Supp. 1472, 1500-01 (D. Kan. 1990)).
THE RISE OF international arbitration as a means of resolving cross-border business disputes is evidenced by the caseloads reported by prominent administering institutions and the extension of international arbitration to such new areas as investor-state arbitration. However, international arbitration presents a number of challenges relating to evidentiary rules and procedure.

In a typical case involving two parties of differing nationalities, it is common that the lawyers and arbitrators involved come from different jurisdictions, and that a half dozen or more jurisdictions are represented in the hearing room. In this environment the difficulty in organizing the presentation of evidence is obvious. Procedural rules have to be understood by all and accord with reasonable standards of fairness that appeal to parties from different jurisdictions.

To meet this challenge, a set of standardized rules of evidentiary procedure have been developed. The IBA Rules on the Taking of Evidence in International Arbitration (IBA Rules) depart from a number of the usual practices in arbitration and litigation in California. Significant areas of divergence include due process, discovery, expert witnesses, and evidentiary procedure.

Arbitral due process requires that a party be able to present its case and be afforded equal and unbiased treatment. These broad criteria may be met by a variety of procedural approaches, and it is not a requirement that, for due process to be respected, arbitral tribunals seated abroad or in the United States follow American litigation-style evidentiary procedure.

This principle derives from the fact that arbitration is a consensual process that the parties have chosen as an alternative to the intricate rules and procedures of the court system. Thus, arbitrators are not required to adopt court procedures in order to fulfill their mandate. This principle is put into practice when parties are of different nationalities, as it is a fair assumption that their choice for arbitration was influenced by a desire to avoid the court system of one party or the other.

Therefore, the most popular sets of international arbitration rules—such as the International Centre for Dispute Resolution (ICDR) or the International Chamber of Commerce Court of Arbitration Rules (ICC)—typically allow tribunals to exercise wide discretion in determining the methods for presenting evidence. For example, the 2012 ICC Rules use broad language: “The

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representing a wide array of jurisdictions and legal backgrounds to develop the IBA Rules. Originally adopted in 1983, the most recent iteration of the IBA Rules debuted in 2010. In general, these rules lay out the common modes of evidentiary procedure used in international arbitration and cover the presentation and use of documentary evidence, fact and expert witnesses, inspections by arbitrators, the conduct of a hearing, and the accepted objections to the disclosure and admissibility of evidence. The IBA Rules are often adopted as nonbinding guidelines but are nonetheless instructive.

**Document Discovery**

In international arbitration, contemporaneous documents are generally considered the most reliable form of evidence. Article 3 of the IBA Rules establishes rules and standards relevant to the presentation, confidentiality, and discovery of documents.

Document discovery in international arbitration bears a faint resemblance to discovery conducted in U.S. courts. Because international arbitration draws its procedural approach from a mix of legal heritages, the common law practice of discovery has been historically balanced against civil law jurisdictions, where discovery does not exist. Indeed for many European practitioners and others who come from countries that derive their procedural approach from the civil law tradition, discovery is often viewed with suspicion if not outright hostility.

Thus, a wholesale adoption of liberal documentary discovery has never been accepted on the basis of facts already pled in the case; however, the representations of counsel may also be given weight. In sum, the rule in regard to relevance simply calls for the moving party to articulate convincingly why it believes that a particular document will support a particular contention.

The formula also calls for a party to demonstrate the materiality of a request for production. This standard is distinguishable from relevance and refers to the tribunal's right to evaluate the requested records in the light of whether such documents will bear upon the final award. As another international tribunal phrased it, “[T]he…likely merit of the point the requesting party seeks to support.” Even if a party establishes a clear connection between the document it seeks and a contention it wishes to prove, the tribunal may nevertheless determine that the contention itself would not affect the outcome of the case and thus deny the request.

Unlike U.S. practice, international arbitrators tend to place the time for document discovery after each party has made their case in writing, or what is often referred to as the filing of the statements of claim and defense. There are several reasons for this, but a core one is that in order to identify whether documents meet the standard for relevance and materiality, a tribunal must first understand the case. Because this approach is often taken, parties may be expected to present their statement of claim and defense on the strength of the evidence they already have in their possession, before any document disclosure is allowed. This is not to say that tribunals will not approve earlier requests for production, but these requests tend to be more the exception than the rule.

**Fact Witnesses and Witness Statements**

The general preference for documentary evidence in international arbitration notwithstanding, fact witnesses are often relied on as well. Usually, each witness submits a written statement. For various reasons, not the least of which is procedural economy, the written statements serve as direct testimony. Furthermore, a witness statement is often required before a witness is allowed to testify at a hearing.

Article 4 of the IBA Rules covers witness statements, with article 4.5 describing the form and content customarily used. Most often, the written witness statements are presented in the form of a first-person account. One tribunal, for example, ordered that a statement “Contain the evidence that the Party presents of that witness in the form of a narrative.” This type of narrative, as described by Article 4.5(b), often sets forth a complete picture of the factual basis for the statements and indicates whether the infor-
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mation is based upon direct knowledge (e.g., an eyewitness account), the recollection of others, or the review of documents.

The accepted practice before international arbitral tribunals is that if a witness submits a written reference to documents or supporting evidence, that evidence should either be previously admitted to the record or appended to the statement. Surprise testimony is frowned upon and may be a cause for exclusion.

Article 4.5 confirms that a witness statement should include an affirmation that the facts it reports are true. While U.S. practitioners may be comfortable asking witnesses to swear an oath under penalty of perjury, or request witnesses to notarize their statements, these practices are not generally adhered to in international arbitration. The formality with which such a declaration is made is often not a cause for a tribunal to assign any further weight to the testimony.

**Expert Testimony**

There are essentially two modes of presenting expert testimony in international arbitration. The first is through introduction by a party of an expert’s testimony. Referred to as the party-appointed expert, the role and the purpose of this expert is familiar to U.S. practitioners. This approach is to be distinguished from the second mode of introducing expert testimony, which is the tribunal-appointed expert. As the phrase suggests, the tribunal-appointed expert is retained to work on behalf of the tribunal and does not accept direct compensation for his or her work from either party.

In the modern practice of international arbitration, the use of party-appointed experts has eclipsed tribunal-appointed experts and has become the more-often-used means of introducing expert testimony. This being said, concern has been voiced in the international arbitration community over battles of the experts, in which technical debates between experts do little to shed light on the issues in the case.

To address this problem, Article 5.4 of the IBA Rules permits a tribunal to require experts to meet and confer and produce a joint report. This simple but useful procedural mechanism allows arbitrators to narrow the issues by directing the experts to show where their positions differ and where they are on common ground. It is rare for two experts to be utterly unable to find any points of agreement.

A joint report is not the only method of avoiding battles of the experts. International arbitrators are known to request that experts appear jointly to answer questions from the tribunal. This procedure is generally referred to as expert witness conferencing and is provided for in Article 8.3(f) of the IBA Rules. Proponents of witness conferencing argue that experts will tend to take a less partisan and more constructive approach to testifying if they testify alongside their counterparts. Many tribunals have found it useful to observe an expert’s reactions and answers in the company of the opposing expert. Parties to an international arbitration should thus not be surprised if their tribunal asks for a joint report and a joint appearance from their experts.

While these procedures address party-appointed expert witnesses, it is more common than in U.S. courts that an international tribunal may also appoint an expert to act on its own behalf. Lawyers from the civil law tradition tend to favor tribunal-appointed experts because of their widespread use in those jurisdictions.

**The Tribunal-Appointed Expert**

This method of adducing evidence is inquisitorial in nature, as it is carried out at the direction of the tribunal and not the parties. As a consequence, the tribunal-appointed expert may act on behalf of the arbitrator, request additional evidence from the parties, conduct interviews of witnesses, prepare a report for the tribunal, and appear at the hearing to answer questions as required.

Because the use of tribunal-appointed experts is fairly common in international arbitration, the IBA Rules include Article 6, which details the standards for the appointment and administration of a tribunal-appointed expert. Article 6.2 sets forth the general practice for qualifying an expert. The expert must provide assurances of his or her independence prior to appointment. There is little guidance given in the IBA Rules about how to assess the independence of an expert, but international jurisprudence tends to support the application of a criterion of justifiable doubt. Under this standard, if there is sufficient evidence to support a prima facie finding that the expert would be partial to one party or its argument, he or she should be disqualified.

Because the tribunal-appointed expert operates under the control and pursuant to an arbitrator’s mandate, the parties to an international arbitration are obliged to cooperate with the expert and produce evidence if requested. This is expressly stated in Article 6.3 of the IBA Rules. Furthermore, the IBA Rules state that an appointed expert must treat the parties with equality in producing his or her report, allowing each party to be privy to the evidence and inspections that the expert relies upon.

Hearings in international arbitration tend to be dominated by the taking of evidence, with little time given to opening arguments and submissions. It is not uncommon for tribunals to place limitations on opening arguments and ask counsel to limit the direct testimony of witnesses to 10 minutes. Closing arguments are also often prohibited by tribunals that prefer to focus the hearing on the cross-examination of relevant witnesses.

Article 8 of the IBA Rules provides guidance on the conduct of hearings in international arbitration. It is common practice for the party who has not submitted a witness’s statement to call that witness to appear at the hearing. This practice derives from the general principle that the witness statement itself serves as the primary or main portion of any direct testimony offered into the record.

It follows that if the direct testimony is on record, it is the opposing party's decision on whether to call the witness to challenge the written testimony at the hearing. The tribunal may determine to hear a witness at the hearing sua sponte, as provided in Article 8.5.

It is comparatively rare for parties to an international arbitration to raise numerous objections to the questions posed to witnesses. Most notably, the hearsay objection is generally not adhered to in international arbitration, and arbitrators are typically slow to chastise witnesses for failing to provide yes or no answers in response to leading questions, as long as the tribunal is satisfied that a good faith effort to address the question has been made.

Nevertheless, Article 8.2 of the IBA Rules provides that the tribunal controls the hearing and that arbitrators may limit witness testimony for irrelevance and immateriality, because the testimony is duplicative or otherwise covered by privilege. An example may be taken from an ICC hearing conducted in Paris, where the arbitrator stopped a line of questioning because it seemed to be aimed at exposing the witness’s personal liability. As the arbitrator could not establish a connection between exposing the witness’s personal, legal liability and the questioning party’s arguments in the case, he prohibited the examination of the witness from moving forward on those issues. On later challenge to the enforcement of the award, the Seventh Circuit Court of Appeals upheld the arbitrator’s limitation as appropriate because it had not affected the adverse party’s ability to present its case on the relevant matters at hand.

**Rules on Admissibility and Privilege**

As may be anticipated by lawyers who have participated in arbitrations generally, evidentiary rules are not applied strictly in international arbitration either. Although arbitrators tend to admit evidence without many
restrictions, there are some well-defined exceptions to this liberality in international arbitration.

Article 9 sets forth those exceptions. This section of the IBA Rules permits arbitrators to reject evidence or requests for disclosure that are irrelevant, burdensome, or subject to governmental secrecy or privilege. Rejection is also allowed if it would be otherwise unfair to permit the disclosure or admissibility of the evidence.

Of these principles, privilege may be the issue that raises the most difficulties in international arbitration. Privilege, whether it is attorney-client or otherwise, often poses a conflict-of-law problem because communications may be made by attorneys or others who are qualified to make confidential statements in jurisdictions that have no connection to the place of arbitration or the substantive law of the proceedings.35 Also, in countries where document discovery is not a usual practice, the rules on privilege are oriented towards the protection of different rights and may be held by lawyers but not by clients.36 These problems naturally pose different considerations compared to privilege questions analyzed under California law alone.

**Objections Based on Privilege**

International arbitrators have struggled to find equitable ways in which to deal with objections based on privilege in an international context. And, through the development of case law and academic writings, several transnational principles have emerged that are now generally accepted. Those rules are set forth in Article 9.3 of the IBA Rules and require arbitrators to consider whether the communication in question was issued in connection with obtaining legal advice or settlement negotiations, the expectations of the parties at the time of making the statement, the possibility that privilege was waived, and the equities of the situation.37

As one can imagine, it may become burdensome to engage in a separate conflicts analysis for each communication over which privilege is raised. The solution that is generally accepted is to apply the most favorable privilege to all communications in the proceeding. This theory prescribes that if different possible privileges may be afforded to communications in the proceeding based on a conflict-of-law or private international law analysis, the privilege providing the greatest and widest protection of confidentiality should be applied equally to all communications offered in the proceeding.18

The IBA Rules have done a lot to make procedures more uniform. The standards are multinational in character and differ significantly from standard U.S. practice. California practitioners who may serve as counsel or arbitrators must therefore be aware of the unique approaches to evidentiary procedure that are accepted and preferred in international arbitration.

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1 Statistics may be found at http://www.iccwbo.org and 4 The ICDR International Arbitration REPORT ER 3 (Sept. 2013).
3 See Article 9.3, IBA Rules art. 6.3.
4 Statutory law: see supra note 36, at 765.
5 See supra note 36.
6 See supra note 36.
LOS ANGELES COURTS are once again on the cutting edge of technology—this time in the decision of Bender v. County of Los Angeles, a recent case in which trial presentation costs were deemed fully recoverable.

In the past, much of the preparation work for trial has been recoverable, including demonstratives, animations, videos, video editing, preparing an exhibit database, and printing oversized boards. Oddly enough, the time spent during trial actually showing the evidence to the jury was generally not on the list. Although the courts have openly appreciated and encouraged the use of technology in trial for many years, even to the point of installing trial presentation equipment in many of our courtrooms, associated costs to make it all happen in trial were not specifically addressed.

In a subsection of Bender devoted to assessing the costs for trial technology, the court wrote:

Under Code of Civil Procedure section 1032, the prevailing party is entitled as a matter of right to recover costs. Section 1033.5 identifies cost items that are allowable [and] items that are not....and further provides that “[i]tems not mentioned in this section....may be allowed or denied in the court’s discretion....Any allowable costs must be reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation, and reasonable in amount....We review a costs award for abuse of discretion.

Plaintiff’s memorandum of costs included a claim for $24,103.75 for courtroom presentations. These costs consisted of “Trial Video Computer, PowerPoint Presentation and Videotaped Deposition Synchronizing” and the cost of a trial technician for nine days of trial. Plaintiff used a PowerPoint presentation in closing argument that consisted of a detailed summary of trial testimony, documents and other evidence as well as a “comprehensive evaluation of such evidence vis a vis jury instructions.” The costs included charges for creating designated excerpts from deposition transcripts and video, converting exhibits to computer formats...and design and production of electronic presentations.... Defendants’ motion to tax costs challenged this item, contending case law establishes these costs are not recoverable and that similar costs were “specifically disallowed” in Science Applications International Corp. v. Superior Court....

The trial court carefully considered all of defendants’ contentions but ultimately declined to tax any part of these costs, explaining its reasoning in considerable detail. In essence, the court thought the costs should be allowed—in a case like this where attorney fees are recoverable costs—if the services in question “enhanced counsel’s advocacy during the trial,” so long as the costs were “reasonably necessary to the conduct of the litigation.” The court found both points to be so: the synchronizing of the videotaped depositions, for example, including the cost of employing a projectionist to recover and retrieve the excerpts selected by counsel, both enhanced counsel’s advocacy during trial and was reasonably necessary to the conduct of the litigation.

Defendants contend, based on Science Applications, the costs at issue are “explicitly nonrecoverable” and the trial court “had no discretion to award them.” In Science Applications, the appellate court approved some technology costs and disapproved others. It approved costs of over $57,000 for graphic exhibit boards and over $101,000 for a video “to help the jury appreciate the difference” between manual and computer-assisted dispatch systems that were an issue in the case....It disallowed costs of $200,000 for “document control and database for internal case management”; more than $47,000 for “the production of laser disks ‘containing’ trial exhibits”; a “graphics communication system” with costs of more than $9,000 for equipment rental and $11,000 for an on-site technician; and more than $35,000 “to have videotape depositions edited for effective presentation of the testimony to the jury.”...The Science Applications court was concerned with technology costs in “staggering proportions,” observing if costs “are routinely awarded for high-powered technology, most parties will be unable to litigate.”...

Almost 20 years have passed since Science Applications was decided, during which time the use of technology in the courtroom has become commonplace (including a technician to monitor the equipment and quickly resolve any glitches), and technology costs have dramatically declined. In a witness credibility case such as this, it would be inconceivable for plaintiff’s counsel to forego the use of technology to display the videotapes of plaintiff’s interviews after his beating, in the patrol car and at the sheriff’s station, and key parts of other witnesses’ depositions. The court in Science Applications was “troubled by review of a case in which a party incurred over $2 million in expenses to engage in high-tech litigation resulting in recovery of only $1 million in damages.”...This is not such a case. The costs at issue total just over $24,000, and the trial court specifically found the trial technology enhanced counsel’s advocacy and was reasonably necessary to the conduct of the litigation. The court acted well within its discretion in allowing recovery of these costs.

With obvious value to all prevailing litigants, the decision in Bender is a significant step toward enabling and providing the benefits of technology to many who might otherwise go without.

Ted Brooks is a trial consultant, author, and speaker, with offices in Los Angeles and San Francisco. He has provided trial presentation services in many high-profile and high-stakes matters, including the Dodgers McCourt divorce and People v. Robert Blake. You may read more of Ted’s articles on his blog: http://trial-technology.blogspot.com.
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- $120—LACBA member
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The event will take place at the Millennium Biltmore Hotel, 506 South Grand Avenue, Downtown. Hotel valet parking costs $20; self-parking at Pershing Square costs $10. On-site registration (with breakfast and reception) will be available from 7:45 A.M. to 8:15 A.M., while lunch will be from 12:15 P.M. to 1:30 P.M. A cocktail reception hosted by JAMS will take place from 5:30 to 7 P.M. with hosted hors d’oeuvres and limited host bar. The program will take place at 8:15 A.M. to 5:30 P.M. Materials will be provided electronically to those who preregister and on a flash drive to walk-in registrants. Select handouts will be in hard copy form. The registration code number is 012120.

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**Thirty-Hour Basic Mediation Training**

Starting on TUESDAY, MARCH 4, the Center for Civic Mediation and LACBA will host a program to introduce the core principles and methods of alternative dispute resolution. Speakers Talin S. Bahadarian, Lynne S. Bassis, Gail Nugent, and John Rodriguez will provide a strong foundation in mediation skills through lecture, small group exercises, and role-playing. Rich in theory and practice, the training covers the nature of conflict, the history of mediation, the structure and management of the mediation process, intake and convening, mediation models, cultural awareness and diversity, legal requirements and ethics, maintaining neutrality, communication skills, negotiation, breaking impasses, closure, and drafting agreements. Participants receive an overview of various practice settings. The training fulfills the requirements of the California Dispute Resolution Programs Act. Early bird discount applies when registering 21 days prior to the start of the program, which will take place at the Ken Edwards Center, 1527 Fourth Street in Santa Monica. Parking at KEC is very limited and is not guaranteed to visitors. During regular business hours (Monday-Friday, 8 A.M. to 6 P.M.), park in visitor and metered spaces only. Cars parked in assigned spaces may be ticketed or towed. Street parking and parking in the 4th Street public parking structure are alternatives.

The program will take place from 6 to 9 P.M. weekdays and 9 A.M. to 4 P.M. Saturdays on March 4, 5, 6, 8, 11, 12, 13, and 15. Discounts are available for groups of five. The registration code number is 012212.

- $645—Center for Civic Mediation Associates member
- $675—LACBA member
- $690—all others (early bird)

The Los Angeles County Bar Association is a State Bar of California MCLE approved provider. To register for the programs listed on this page, please call the Member Service Department at (213) 896-6560 or visit the Association Web site at http://calendar.lacba.org, where you will find a full listing of this month’s Association programs.
Factors to Consider before Renewing a Family Law Judgment

A POTENTIAL CLIENT SAYS, “I got this judgment in my dissolution of marriage for child support, spousal support, and property division, and the bum who has the money has not paid me.” The attorney asks, “When was the judgment entered?” The client answers, “It was either 9 years or a little over 10 years, I’m not sure. I am so upset I couldn’t bear to look at the judgment. I want not only the money owed but compound interest for all the aggravation I’ve endured.” What should the attorney tell the potential client, and what authority supports the answer?

The place to start is the question of whether it is necessary to renew a family law judgment in California. Section 4502 of the Family Code holds that the “period for enforcement and procedure for renewal of a judgment or order for child, family, or spousal support is governed by Section 291.” That section provides that a money judgment, judgment for possession or sale of property, or a judgment for child, family, or spousal support is exempt from the renewal requirements for other judgments. Also, a judgment that provides for the possession or sale of property is likewise exempt from the renewal requirement. Other judgments—for example, civil money judgments—are only good for a 10-year period and must be renewed within that period.1

Section 291 covers any judgment entered in a dissolution of marriage. Even if the judgment contains an equalization payment, there would be no legal requirement to renew the judgment. However, attorneys should be aware that the portion of a judgment that requires division of personal property is not covered by Section 291. If part of the judgment requires one party to give personal property to the other, an attorney for the other party should make sure to renew the judgment before 10 years passes from the date of entry if there are problems with compliance. No exemption from the renewal requirement exists for other civil judgments, so the 10-year rule for renewal is still in effect for them.

The key factor that distinguishes a family law judgment and another civil judgment is that the family law judgment stems from a dissolution of marriage or legal separation proceeding. These judgments often contain provisions dividing property, providing for custody and visitation of minor children, and for spousal and child support. Because a family law matter deals with such intimate issues there is often a lot of emotion embodied in a family law judgment.

In most other respects a family law judgment is just as enforceable as any other; however, certain aspects of collecting some types of family law judgments and orders are different. For example, a judgment for child or spousal support can have priority over other types of judgments when it comes to garnishing wages. Additionally, the amount a support creditor is entitled to garnish is up to 50 percent of the debtor’s net earnings, while any other judgment creditor is only entitled to garnish up to 25 percent of a debtor’s net earnings.2 It is also interesting to note that the Family Code provides that laches is only a defense to enforcement of child, spousal, or family support to any portion of the judgment owed to the state.3 If a party owes the state reimbursement for public assistance, the state can be barred from attempting to collect that money from the obligor. On the other hand, a former spouse is never barred from collecting spousal, child, or family support based on laches. Child support is collectable even when the child or children are over the age of majority.

The only purpose of renewing a family law judgment (other than one requiring distribution of personal property) would be to try to

The renewed judgment will then begin to accrue interest once again at the legal rate of 10 percent.

3Fam. Code §219(d).

Ira M. Friedman and David Friedman are partners in the Beverly Hills law firm of Friedman & Friedman. They are certified family law specialists.
February 10, 2013

To whom it may concern,

My name is Alison Triessl. I am a criminal defense attorney specializing in murder, third strike and drug cases. Without a doubt, Jack Trimarco’s polygraphs have been an invaluable asset to my practice.

I recently represented USTA Tennis official Lois Goodman who was accused of murdering her husband. She did not commit the crime and Jack Trimarco’s polygraph was instrumental in negotiations with the District Attorney which resulted in a dismissal of all the charges.

Whenever I consider whether to have a client take a polygraph, there is only one name in the conversation – Jack Trimarco. His level of credibility, professionalism, and experience is unparalleled in the field and garners the respect of prosecutors and defense attorneys alike.

I have worked with Mr. Trimarco for over twelve years and simply put, I adore him. Not only is he the best in the field, he is an absolute pleasure to work with. He is a hardworking, dedicated professional with unquestioned qualifications and integrity.

Warm regards,

Alison Triessl
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