



## F E B R U A R Y 2 0 0 3



### BEYOND COURT-ORDERED MEDIATION: USING ADR TO HELP CLIENTS RESOLVE DISPUTES APPROPRIATELY

By Steven Clymer

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**ALL LAWYERS IN LOUISVILLE,  
LAFAYETTE, ERIE AND  
BROOMFIELD SHOULD PLAN TO  
ATTEND THE HAPPY HOUR  
IN LOUISVILLE ON THURSDAY,  
FEBRUARY 13 AT 5:30 PM  
SEE PAGE 6 FOR DETAILS.**

"In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought."<sup>1</sup>

"No later than 35 days after the case is at issue, the parties shall explore the possibilities of a prompt settlement or resolution of the case."<sup>2</sup>

The assumption behind these rules is that ADR has value as an "alternative" to litigation, but there is little hint of ADR's function outside the litigation context. This article examines the use and timing of ADR, both in litigation as well as prior to filing a lawsuit, identifies additional ADR methods, and concludes that attorneys can better assist their clients by

helping them use appropriate ADR methods as early as possible.

#### *Court-ordered mediation and timing*

Here in the 20th Judicial District, all civil and domestic District Court cases are referred to mandatory alternative dispute resolution (ADR). The parties generally choose mediation as the preferred form of ADR. The Court formerly set a deadline for ADR participation that was relatively early in a lawsuit. However, the early deadline was changed some time ago, due at least in part to the feedback from trial attorneys that sufficient discovery is necessary for meaningful settlement discussion. In some cases this is true, and perhaps most evidently in personal injury cases.<sup>3</sup>

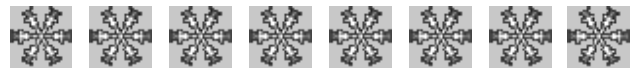
However, in other civil matters, notably business, employment, real estate, construction and other cases, there are diminishing returns in the discovery process. In matters where the parties were participants in the underlying dispute, they generally have independent knowledge of the facts and issues giving rise to the lawsuit. Some discovery is certainly useful to flesh out details and

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PLEASE CALL THE BAR OFFICES TO VOLUNTEER 303.440.4758**

*(continued on page 3)*

# FEBRUARY 2003 *(Details for programs on page 6)*



SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
						1
2	3	4 Employment	5 Collaborative Family Law	6	7 Intellectual Property	8
9	10	11 E-Filing Meeting	12 Real Estate E-Filing	13 Louisville Happy Hour E-Filing	14	15
16	17	18	19 Bench/Bar Family Law Wine Tasting	20 Civil Litigation	21	22
23	24	25	26 Tax, Estate	27 Bio-Ethics Seminar		

**MANDATORY E-FILING MEETINGS:** February 11, 12, and 13 - Boulder County Justice Center Courtroom E  
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 e-mailing [debra.crosser@judicial.state.co.us](mailto:debra.crosser@judicial.state.co.us)

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## BEYOND COURT-ORDERED MEDIATION *(continued from page 1)*

claims, or to pin down witness testimony, but an exhaustive exploration of every fact and witness opinion can be a waste of time and money. Given those considerations, when is the use of ADR most effective?

### ***A call for early intervention***

The answer appears to be earlier use of ADR. Some empirical studies of mediation and other ADR methods in court-annexed programs have recently been published. One such series of studies<sup>4</sup> covered 1,730 cases mediated in nine Ohio counties in an eight-year period. The cases were general civil cases referred from Common Pleas Courts.<sup>5</sup> The Ohio study concluded as follows:

“How does the timing of mediation affect settlement? When mediation was held sooner after the case was filed, settlement was more likely, fewer motions were filed, and case disposition time was shorter, even in cases that did not settle in mediation. No overall relationship was found between mediation's proximity to the trial date and the likelihood of settlement.”<sup>6</sup>

Despite the widely espoused belief that mediation should follow discovery,

“Attorneys' assessments of whether mediation occurred at the right time or was “too early” appeared to be influenced more by their expectations regarding timing or by local legal and court management practices than by the actual timing of mediation.”<sup>7</sup> A recent article in *The Colorado Lawyer*<sup>8</sup> makes a case for early ADR intervention, based on the Ohio study, a study of Federal Court cases using a form of early neutral

evaluation (“ENE”)<sup>9</sup>, and several studies on the corporate use of ADR. That article and the Ohio study both refer to “early” ADR as ADR after a lawsuit has been filed. However, such an analysis is limited by the presumption of the existence of a lawsuit in the first place. If ADR is more effective the earlier it is entered into during the life of a lawsuit, why not use it prior to the filing of a lawsuit?

### ***Even earlier intervention: the use of ADR prior to a lawsuit***

“While ADR can be effective at any stage of a dispute, it is most likely to produce beneficial results when used early.”<sup>10</sup> The conventional wisdom about some of the benefits of mediation is that mediation can save participants time and money and can preserve the parties' relationships.<sup>11</sup>

However, the reality is that those benefits are severely compromised when the parties are engaged in mediation during litigation. Time and money savings? After a lengthy discovery process and a contentious motions practice, the parties have spent the bulk of the time and money they are going to spend, and settling the case on the eve of trial offers relatively little savings of either. Preserve clients' relationships? Even at the beginning of liti-

gation, it is often too late for that. Trust has been lost, bridges have been burned, and with only the extremely rare exception, the parties will never contract with each other in the future. Even if the parties settle the lawsuit, contractors will never hire that subcontractor again, manufacturers have switched suppliers, and production companies have found new vendors. When an employment case settles, employers will insist that the former employee agree never to apply for a job with that employer or any of its subsidiaries again.

Ironically, when mediation is used to settle pending litigation, one of the main problems to be resolved in the mediation session is the problem of the litigation itself. This is particularly so in a drawn-out or very contentious case. The intended solution has now become a bigger problem than the original dispute!<sup>12</sup> If the parties were able to settle their cases through ADR prior to filing a lawsuit, the promised benefits of ADR could actually be realized.

So, how can parties take advantage of earlier ADR? One way is through preventative planning and the drafting of agreements. When a contract

*continued on page 4*

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## BEYOND COURT-ORDERED MEDIATION *(continued from page 3)*

calls for ADR prior to or in lieu of litigation, the parties or their counsel (or the institutional author of the contract form, such as the Colorado Real Estate Commission of the American Institute of Architects) have planned to use ADR before a dispute arises. Relevant case law provides ample support for court enforcement of such agreements.

### ***Other ADR options***

Without such pre-planned agreements, it becomes necessary for the parties or their counsel to identify a dispute or potential dispute early enough to address it with the application of a proper ADR method. Examples of possible ADR methods

are: ***Preventative Mediation.***

Mediation can be conducted as a preventative measure prior to the emergence of a dispute in a variety of circumstances, for instance at the inception of a business (before or concurrent with entity formation), to address such issues as division of corporate responsibilities; differing contributions of capital, technical expertise or business contacts; money, personality and style differences and work ethics. Mediation can also assist in formation of a partnership “charter,”<sup>13</sup> in setting up partnering<sup>14</sup> in construction matters, and in dealing with a variety of employment issues, such as pre-complaint EEO matters.

***Facilitation.*** Facilitation can be used to assist with group processes ranging from meeting management to group mediation to strategic planning charting the course and direction of the business. More specifically, an outside facilitator can be brought in to assist an organization or an agency with its internal issues (e.g., addressing conflict within or between divisions, work groups or teams; handling issues between managers and their subordinates), as well as its external issues (e.g., public interest matters such as real estate development or environmental issues; mergers and acquisitions or the formation of partnerships or joint ventures; integrating different businesses or cultures working together). Often potentially bad PR can be turned positive by the way in which concerns are handled.

***Ombuds Services.***<sup>15</sup> An ombudsman may be appointed as the neutral person to assist in confidentially resolving the internal or external disputes of an organization. In larger organizations, the ombudsman is an employee of the entity who reports only to the CEO to ensure neutrality. Organizations such as the University of Colorado and Coors<sup>16</sup> employ ombudspeople. Smaller organizations have the option of contracting with external ombuds providers to accomplish the same results without the need for a full-time employee and to assure even greater neutrality.

### ***Benefits to clients***

Preventative mediation and other ADR options can actually deliver the promised benefits by saving time and money (prior to the client spending one to two years of time in litigation,

*(continued on page 10)*

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## PRESIDENT'S PAGE

BY SETH BENEZRA

# MULTI-JURISDICTIONAL PRACTICE: THE ABA RECOMMENDATIONS

In the early 20th Century, states adopted unauthorized practice of law (UPL) provisions that apply equally to lawyers licensed in other states and to non-lawyers. These laws prohibit lawyers from engaging in the practice of law except in states in which they are licensed or otherwise authorized to practice law. UPL restrictions have long been qualified by *pro hac vice* provisions, which allow Courts or administrative agencies to authorize an out-of-state lawyer to represent a client in a particular case before the tribunal. In recent years, some jurisdictions have adopted rules authorizing out-of-state lawyers to perform other legal work in the

jurisdiction.

Jurisdictional restrictions on law practice were not historically a matter of concern because most clients' legal matters were confined to a single state and a lawyer's familiarity with that state's law was a qualification of particular importance.

However, the wisdom of applying UPL laws to licensed lawyers has been recently questioned, given the changing nature of clients' legal needs and the changing nature of law practice. Both the law and the transactions in which lawyers assist clients have increased in complexity, requir-

ing a growing number of lawyers to concentrate in particular areas of practice, rather than being generalists in state law. Often, the most significant qualification to render assistance in a legal matter is not knowledge of any given state's law but knowledge of federal or international law or familiarity with a particular type of business or personal transaction or legal proceeding. Additionally, modern transportation and communications technology have enabled clients to travel easily and transact business throughout the country and even internationally. Because of this globalization, clients now need lawyers to assist them in transactions in multiple jurisdictions or to advise them about multiple jurisdictions' laws.

Although clients' needs and legal practice have evolved, lawyer regulation has not yet responded effectively. In response to professional concerns about the regulation of multi-jurisdictional law practice, ABA President Martha Bennett appointed a Commission on Multi-Jurisdictional Practice in July 2000 to review legal regulation with respect to multi-jurisdictional law issues. In August 2002 the Commission on Multi-Jurisdictional Practice issued its report, which contained a number of recommendations for changes to legal regulations to recognize changes in client needs and legal practices.

The Commission's first recommendation was that the ABA affirm its sup-

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# CALENDAR OF EVENTS



Pre-registration is required for all BCBA CLE programs. Please send a check to the Bar office at least 3 days in advance. You will be charged for your lunch if you make a reservation and do not call to cancel prior to the CLE meeting. BCBA CLE's cost \$15 per credit hour for members and \$18 for non-members unless otherwise noted. CLE credit is \$10 per hour for members of the Young Lawyer Section practicing 3 years or less. Materials are \$5 without CLE credit.

**February 4, 2003**

***Employment Law Section***

Trade Secrets

Speaker: Mark Wiletsky

Caplan & Earnest, LLC

12 Noon

CLE \$15, Boxed Lunch \$10

turkey, veggie or beef

**February 5, 2003**

***Collaborative Family Law Lawyers***

Informational Meeting

Speakers: Kathy Franco

and Daryl James

Boulder County Justice Center

Courtroom C

**February 7, 2003**

***Intellectual Property Section***

Open-Source Software Licensing

Speaker: David Miller

12 Noon

Faegre & Benson, Boulder

CLE \$15, Boxed Lunch \$10

turkey, veggie, or beef

**February 12, 2003**

***Real Estate and Bankruptcy Law Sections***

Bankruptcy Essentials for Real Estate Lawyers

Speakers: Joli Lofstedt, Esq.

and Tom Connolly, Esq.

12 Noon at Dolan's Restaurant

CLE \$15, Lunch \$13

**February 13, 2003**

***Board of Directors Meeting***

4 PM

Lamm & Butler, LLC

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Louisville

**February 13, 2003**

***Louisville/Broomfield Lawyers***

***Happy Hour***

5:30 PM

Garlin Driscoll & Murray, LLC

245 Century Circle, Suite 101

Louisville

**February 19, 2002**

***Bench-Bar Committee***

Sentencing

Speakers: Judge Diane MacDonald,

Judge Dan Hale and Carey Lacklen, PD

12 Noon Brown Bag Lunch

Boulder County Justice Center

Courtroom D

**February 19, 2003**

***Family Law and Availability of Legal Services Sections***

Intersection of Family Law and Public Benefits

Elizabeth Moulton, BCLS

Boulder County Justice Center

Courtroom G

CLE \$15

**February 19, 2002**

***Legal Aid Wine Tasting Fundraiser***

The Dairy Center for the Arts

See page 16 for details.

**February 20, 2003**

***Civil Litigation/Medical-Legal Section  
New Frontiers in Soft Tissue Treatment***

Speakers: Dr. Julie Stapleton,

Dr. Justin Green and Trudy Zahler,

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12 Noon CLE \$15, Lunch \$13

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**February 26, 2003**

***Tax, Estate Planning and Probate***

Estate Planning 2003:

What's Hot, What's Not

Speaker: Theodore Atlass,

Atlass Professional Corporation

The Academy

970 Aurora, Boulder

12 Noon

CLE \$15, Lunch \$13

**February 27, 2003**

***Bio-Ethics Forum: The New Genetics  
Sponsored by Boulder Valley Rotary  
and BCBA***

Millenium Hotel, Boulder

11:15 am to 5: 30 pm

General admission \$60

\$120 for attorneys with CLE credit -

3 general and 3 ethics

See page 8 for details

**March 11, 2003**

***Employment Law Section***

Fair Labor Standards Act

Speaker: Chris Leh

Caplan & Earnest, LLC

12 Noon

CLE \$15, Boxed Lunch \$10

Turkey, veggie or beef

**March 13, 2003**

***Civil Litigation and Family Law Sections***

Discovery, Hidden Assets, and Ramifications in Family Law Cases

Speaker: Bruce Fest

12 Noon Brown Bag Lunch

Boulder County Justice Center

Courtroom E

CLE \$15

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PRE-REGISTER FOR CLE  
PROGRAMS. EVERYONE  
APPRECIATES HAVING ENOUGH  
MATERIALS AND CLE FORMS!**



## LAWYERS' ANNOUNCEMENTS



**STEVENS, LITTMAN, BIDDISON  
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is pleased to announce that

**JESSICA CATLIN, TODD WHELAN  
and KAREN ROMEO**

have joined the firm as associates.

Ms. Catlin is located in the Boulder Office and practices in the areas of estate planning and civil litigation; Mr. Whelan is located in the Boulder Office and practices civil litigation.

Ms. Romeo is the former Chief Deputy District Attorney for the Fifth Judicial District. Ms. Romeo is located in the firm's Vail office. Her practice will emphasize all aspects of litigation, including commercial disputes, domestic relations, personal injury and criminal law emphasizing juvenile matters.

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## MULTI-JURISDICTIONAL PRACTICE: THE ABA RECOMMENDATIONS *(continued from page 5)*

port for the principle of state judicial regulation of the practice of law. The Commission noted that in its opinion the principle of the regulation of the practice of law by the state judicial branch of government, which includes jurisdictional limits on legal practice, should be preserved. The Commission noted that in the European Union, a lawyer in one member-state may establish a law practice in another member state with relative ease. It proposed that jurisdictional restrictions be relaxed in the United States.

These proponents of a national scheme of attorney licensing have suggested various ways in which the concept of law practice without jurisdictional limits might be implemented. One suggestion was that all jurisdictions enact laws providing that any United States lawyer may practice law in any jurisdiction, permanently or on a temporary basis, without a requirement of additional admission.

Another plan contemplated a national compact whereby states would permit other states' lawyers to provide legal services in the state on a temporary basis. A lawyer from one state could move to another state and become a member of the bar in that state without taking another bar exam, provided the lawyer was a member in good standing of the state bar, was of good character and had paid all the relevant fees.

A third proposal, the so-called "driver's license" model, envisioned a uniform registration system that would enable a lawyer licensed in one jurisdiction to establish an office or otherwise have a systematic and

continuous presence in another jurisdiction for the practice of law.

Those in favor of permitting national law practice have suggested that eliminating geographical limits will promote client interests and that regulatory interests that are said to justify these limits can be adequately served without them. In general, consistent with the duty of competence, they argued that out-of-state lawyers will undertake legal work only if they are qualified to perform that work.

On the other hand, groups opposed to national practice argue that regulatory interests served by jurisdictional restrictions could not otherwise be served under some circumstances, such as when unsophisticated state residents retain out-of-state counsel to render services concerning matters in the state governed by state law. After hearing the competing arguments, the Commission concluded that the ABA should not recommend the wholesale elimination of jurisdictional limits on law practice. The Commission's conclusion was that, for the present, the judicial branch of government in each state should identify these particular practices comparable to *pro hac vice* representation that should be explicitly authorized.

The Commission's first recommendation was that Model Rules of Professional Conduct Rule 5.5 be amended to add a 5.5(b) and (c). Rule 5.5(b) would prohibit a lawyer from establishing an office or other presence in the jurisdiction unless permitted to do so by law. Rule 5.5(c) would identify circumstances in which a lawyer who is admitted in

United States jurisdiction and not disbarred or suspended may practice law on a temporary basis in another jurisdiction. Those circumstances would include: (1) temporary work in association with a lawyer admitted to practice law in the jurisdiction, who actively participates in the representation; (2) services ancillary to pending or prospective litigation or administrative agency proceedings in a state where the lawyer is admitted or expects to be admitted *pro hac vice* or is otherwise authorized to appear; (3) representation of clients in, or ancillary to, alternative dispute resolution, such as arbitration or mediation; and (4) non-litigation work that arises out of or is reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

The Commission proposed adoption of a Rule 5.5(d) to identify multi-jurisdictional practice standards relating to (i) legal services by a lawyer who is an employee of a client; and

*continued on page 12*

## BEYOND COURT-ORDERED MEDIATION (continued from page 4)

with the accompanying attorney's fees and costs). In the author's experience, these methods truly can preserve relationships if used early enough. The types of clients that can benefit from these services are individuals and entities in the public sector (cities, states, agencies, school districts) and private sector (family and closely held businesses all the way up to large employers, as well as non-profit organizations).

### Conclusion

Within the litigation context, attorneys need not wait for the court order to mediate. As recent studies have shown, better results for clients are probable the earlier the ADR intervention, including mediation and early neutral evaluation. Prior to lawsuits being filed, attorneys can

help clients deal with disputes most appropriately by being aware of ADR methods and referring clients to those methods when appropriate.

Often the objection will be raised: How can attorneys have any advance knowledge of a potential or impending dispute, if clients do not come to attorneys until the dispute is already full-blown? That discussion is outside the scope of this article.

However, a partial solution may be for counsel to be in regular communication with clients, so that deeper relationships can develop and attorneys can be more aware of disputes at earlier stages. One method of fostering such relationships may be through the practice of "preventative law."<sup>17</sup> Then, with increased awareness of their clients' needs and knowledge of appropriate ADR tools, lawyers can be of greater service to their clients without waiting for courts to order mediation.

*Steve Clymer, J.D. is the president of ACCORD Dispute Resolution Services, Inc., and provides ADR services, including the methods described in this article. He can be reached at 303-530-2137, or through [www.mediatelaw.com](http://www.mediatelaw.com). © 2003 Steven Clymer*

### Footnotes

1. Colorado Rules of Professional Conduct. Rule 2.1. Attorney as Advisor. *Emphasis added.*
2. C.R.C.P. 16 (b)(6).
3. In personal injury cases, settlement discussions are generally more fruitful after a plaintiff has reached maximum medical improvement and has exhausted reasonably needed treatment options such as surgery, and after the defense has had the opportunity to review the plaintiff's medical records and conduct an independent medical examination or Samms interviews of the treatment providers. Generally, those milestones need to have passed for a productive mediation session to occur, so the plaintiff's damages can be more accurately assessed, and so all information is available to determine causation and possible apportionment issues.
4. Wissler, "Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research," 17:3 *Ohio State Journal on Dispute Resolution* 641 (2002).
5. In Ohio, Common Pleas Courts are courts of general jurisdiction, comparable to Colorado's state District Courts.

6. Wissler at 698.

7. More than twice as many attorneys in a court in which mediation generally occurred after discovery was completed said mediation took place "too early" as in another court in which mediation occurred within a month or two after the case was filed. *Citation omitted.* Wissler footnote 256 at p. 698.

8. See Adams and Cook, "The Case for Early ADR Intervention," 31 *The Colorado Lawyer* 12 (Dec. 2002).

9. In that program in the U.S. District Court for the Western District of Missouri, an ENE-type meeting was held within 30 days after responsive pleadings were complete, in which the parties heard at a meeting how the other party viewed the issues and merits of the case, heard a neutral assessment of the strength and weaknesses of their own case, and looked at the projected costs for the case to proceed through litigation. Cases in that program were resolved 28% faster for about one-half the cost. See Adams and Cook at 14 and 15.

10. Mazdoorian, "Building an ADR Program: What Works, What Doesn't", 8:3 *Business Law Today* 37, 40 (March/April 1999).

11. Other benefits include the removal of the risks inherent in litigation; the ability to design creative resolutions free from the limitations of court-ordered resolutions; and the perception that agreements voluntarily entered into are generally more satisfying to the parties, and therefore have a greater degree of compliance than "win-lose" outcomes mandated by a judge or jury.

12. Instead of dealing with the issues which flow from consequences of the dispute (how the parties may function in a business or other relationship in the future, what can be done to remedy the issues such as breach of trust in a working relationship, etc.), the compelling issues which drive resolution are the costs and attorneys fees that have been incurred and are still to be incurred in order for the parties to merely get "their day in court", as well as factors such as the economic consequences of litigation, an adverse judgment, collectability of a favorable judgment, possible bankruptcy, the unpredictability of the jury process, and the twist of cost shifting measures such as statutory offers of settlement add to the strategy of litigation.

13. See Gage, Martin, and Gromala, "Mediation during Business Formation", available at [www.mediate.com](http://www.mediate.com).

14. See Muller and Coughlin, "Partnering - An Update," available at [www.mediate.com](http://www.mediate.com).

15. The word *ombudsman* comes from Scandinavia, where the appointment of a neutral person to address citizen complaints about the government began approximately 200 years ago.

16. Coors employs an ombudsperson as a part of its internal "RESOLVE" program. Presentation by Franci Milner, Assistant General Counsel at Coors Brewing Company at November 12, 2002 BCBA CLE program, "ADR: Early Intervention in Employment Law."

17. See Dietel and Lynch, "Preventative Law: An Idea Whose Time Has Come," p. 8:3 *Business Law Today* p. 59 (March/April 1999). Preventative law is a type of practice consisting of attorneys acting proactively to help clients conduct risk management through "legal audits" and other means to identify legal issues and potential disputes before they arise. In these economic times, preventative law may provide lawyers an opportunity to offer improved service, while building their business. Readers should also be aware of collaborative law. For information on collaborative family law, see Franco, "Collaborative Law Brings Magic to the Practice," *Boulder County Bar Association Newsletter* February 2002. Collaborative law is also being used in other practice areas, including employment law and other civil areas. See, e.g., the website of a Cincinnati, Ohio based collaborative law group at [www.collaborativelaw.com](http://www.collaborativelaw.com). 2137, or through [www.mediatelaw.com](http://www.mediatelaw.com).

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## PRO BONO PAGE

Twenty-four cases were referred during December. Thank you to the following attorneys:

Jeff Ballas  
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Howard Bernstein  
Eric Butler  
Mark Clevenger  
Christina Ebner  
James Figg  
Rebecca Hill  
Alex Garlin  
Kim Gent  
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Pete Rogers  
Michael Ruderman  
Mary Street

Pro Se Program volunteers:

Christie Coates  
Anne Mygatt  
Bev Nelson  
Georgiana Scott

### Boulder County AIDS Project:

Thank you to the following attorneys who accepted pro bono referrals for the Boulder County AIDS Project during the month of December:

Paul Bierbaum  
Christina Ebner  
Stephanie Hult

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## MULTI-JURISDICTIONAL PRACTICE: THE ABA RECOMMENDATIONS *(continued from page 9)*

(ii) legal services that the lawyer is authorized by federal or other law to render in a jurisdiction in which the lawyer is not licensed to practice law.

The Commission recommended that the ABA amend Rule 8.5 of the Model Rules of Professional Conduct to clarify the authority of a jurisdiction to discipline lawyers licensed in another jurisdiction who practice law within their jurisdiction pursuant to the provisions of Rule 5.5, as discussed above.

The Commission also recommended that the ABA amend Rules 6 and 22 of the Model Rules for Lawyer Disciplinary Enforcement to promote effective disciplinary enforcement with respect to lawyers who engage in multi-jurisdictional practice and to renew efforts to encourage states to adopt Rule 22, which provides for reciprocal discipline.

The Commission encouraged the ABA to use a national lawyer regulatory data bank to promote interstate disciplinary enforcement mechanisms and to urge jurisdictions to adopt the international standard lawyer numbering system. The Commission recommended that the ABA urge jurisdictions to require lawyers to report to the lawyer regulatory agencies in all of the jurisdictions in which they are licensed and any status changes in those other jurisdictions.

The Commission also recommended that the ABA adopt proposed model rules on *pro hac vice* admission of lawyers to practice before courts and administrative agencies in jurisdictions in which the lawyer is not

admitted to practice.

The Commission recommended that the ABA adopt a proposed model rule on permanent admission by motion of the lawyer admitted to practice in another United States jurisdiction and engaged in active practice for a substantial period of time and in good standing in all jurisdictions where admitted.

In addition, the Commission made recommendations to allow licensing of non-U.S. lawyers as legal consultants or allow temporary practice by foreign lawyers under certain identifiable circumstances.

The Commission's recommendations reflect a sensible first step toward multi-jurisdictional practice. The recommendations have now been formally adopted by the American Bar Association. It is now up to each state to decide whether to adopt the proposed rules.

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## WHY BOTHER TO INVEST IN SMALL START-UPS WHEN THE U.S. SUPREME COURT HAS MADE IT EASY TO AVOID PATENTS?

BY RICK MARTIN

The world of intellectual property has become bipolar. The U.S. Supreme Court just affirmed for Walt Disney Co. 20 more years of copyright protection on Mickey Mouse of 1928 as well as protection for hundreds of thousands of books, songs and movies, including *Gone with the Wind*. Congress' 1998 20-year copyright extension was affirmed as constitutional. It is easy for any small or large outfit to copy and duplicate Mickey Mouse. Therefore, big media business needs copyright protection to prosper. Notice how big media business lobbied both the Congress and the U.S. Supreme Court to get its way.

But the opposite is true for the needs of big business when it comes to patent protection. Little guys and most big guys cannot compete against IBM, GM, Hitachi, Sony, Dow Chemical and the Fortune 500. The reason is simple. IBM owns millions of man-years of know-how, a fortune in reputation and a worldwide service and support network. IBM and the Fortune 500 really don't need patents to keep competitors out. The market barriers of high tech know-how, loyal employees, wealth and marketing savvy were powerful enough to push RCA, Univac, Singer Friden, Honeywell, NCR, Burroughs and others from the mainframe business. It was not IBM patents that crunched the competition.

Fortune 500 firms use patents as gentlemen's trading chips, stock value chips and licensing royalty instruments. However, small to medium businesses and individual inventors need patents to survive

because simple products are easily knocked off without a patent to protect them.

America's patent system is systematically being weakened by the Fortune 500 and the majority of the 30,000 or so patent lawyers who are employed by giants (directly or indirectly). Last month 50 patent lawyers in Denver participated in a seminar that focused on a ten-year legal trend in Congress, the U.S. Supreme Court and the Federal Circuit (appeals court for patents) to weaken the U.S. patent system.

Why is corporate America undermining our patent system? Because it is cheaper to steal an idea from a little firm than to do the research in-house. Another reason is to harmonize U.S. corporate interests with multi-national giants like Hitachi and Siemens. What is good for worldwide corporate giants is being pushed in America's congress and courts. (One difference: in Europe a corporation may be the inventor; here the inventor is an individual, although the patent is often assigned to an employer.)

I resent this trend since I service over a thousand small firms and inventors who provide hundreds of jobs in Colorado. About 75% of America's employment base consists of small businesses. I believe that simple but novel products invented by an American deserve the protection intended by the U.S. Constitution.

Here is a short laundry list of dirty deeds by our Congress and courts.

Billions of dollars are siphoned from the Patent Office to pay for general government expenses. Thus an inventor is taxed twice as much as an ordinary citizen. This is the subject of a class action lawsuit out of Puerto Rico. The proposed fee increases for the Patent Office will simply keep most of the little inventors out altogether. In the meantime the patent office is two years behind in filing patent assignments and five years behind in granting software patents. The 150-year-old Doctrine of Equivalents created by the U.S. Supreme Court to allow words to more readily capture the essence of an invention has been virtually killed by the Court. Two new doctrines of death for a patent were created by the Federal Circuit in the past year. They are the doctrine of prosecution laches (better not delay in presenting your patent just because money is tight) and the dedicate to the public doctrine (if you describe it and don't precisely claim it, you gave it to the "public," which equates to the Fortune 500 who can afford to launch your product).

Wal-Mart has more than 50 patent theft lawsuits against it at any one time. Countless small inventors don't even bother to fight a Fortune 500 gorilla. Thus the small firm based in American never blossoms, and a child labor sweatshop puts out an American idea. Only a few corporate shareholders reap the profits from the American inventor, who doesn't know what hit him.

The Supreme Court essentially

*(continued on page 14)*

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## WHY BOTHER TO INVEST IN SMALL START UPS? *(continued from page 13)*

affirmed the death of the doctrine of equivalents for any claim element narrowed by prosecution of the patent. I estimate about a third of the value of the million or so current U.S. patents went down the drain.

A patent is useful only to the extent that it can stop someone from copying the invention. If the patent is narrowly defined when enforcement is sought against an infringer, the patent has less scope. Most of the damage has been done by changing the legal rules that define infringement.

It is difficult to crunch into a page 200 years of patent law, but here's a go at it. For literal patent infringement, each element in a claim must literally be found in the knock-off product, but it is too easy to get around that by some trivial change.

In the mid-19th century, the Supreme Court realized that the words in a patent would not fully capture a technical device such as the plow invented by John Deere, a farmer. The words in a patent claim have to be stretched to fit the function of the device and its elements, to cover a knock-off that performs substantially the same function in the same way. Thus the equitable Doctrine of Equivalents was born, making a screw equivalent to a bolt and making a patent claim reach beyond the claim's literal reading. This protection is necessary because all patents live an inevitably short life of 17 years or so. Then everybody may legally copy the invention.

On the other hand, competitors must be able to determine whether an alternative to the invention falls within a patent claim. Under this

rubric, the Supreme Court last year cut down the Doctrine of Equivalents to a sliver in *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 122 S. Ct. 1831 152 L. Ed. 2d 944, (2002). For any patent claim narrowed in the patent process, in amendments designed to meet objections by the patent office - and initial broad claims to an invention are almost always honed in interaction with the examiner - infringement may only be literal; anything slightly smaller, bigger, lighter, denser, etc. than what is described is not covered by the patent.

Only three narrow exceptions are left by *Festo*. For example, if technology changes in a way that was unforeseeable by the person writing the patent, so that he could not have written a claim on it, a patent claim may cover new technology doing the same thing. These minimal exceptions just cover up the destruction of the doctrine. As Judge Newman wrote in her dissent to the Federal Circuit, opinion below, 234 F. 3d 558 (2000): "The result is to negate infringement by equivalents..., thereby providing a blueprint for ready imitation of patented products."

The only trick to maintain the old days is to file one very narrow claim at patent filing time. Then wait over a year for the patent office search. Then craft some broader claims and fax a draft of them to the examiner. Then call the examiner and verbally craft the rest of your 20 to 50 claims, making sure the examiner will allow them before you officially mail them in. Then receive a second office action with all your claims allowed. Never "narrow your patent," and you are back to the good old days. But here are some problems. First, my

time and costs will go up at least 25%. Next, you'll wait an extra six months for your patent. Finally, the patent office will grind to a halt if everybody uses up examiner interview time like this. Maybe that will make the justices happy - more taxes and more government employees for the patent office!

The Supreme Court has made the patent process fit only for the rich and patient large-firm inventors. You little guys are going to start losing lawsuits and licensing opportunities. Soon most small inventors will get the picture: Why bother to patent anything? Why bother to be an entrepreneur and add wealth and jobs to America's middle class? Why bother to invest in small start-ups when their patents will be easy to knock off?

*This article was submitted by RICK MARTIN, Reg. Pat. Atty., PATENT LAW OFFICES OF RICK MARTIN, P.C. [www.patentcolorado.com](http://www.patentcolorado.com) and email: [martin44@ix.netcom.com](mailto:martin44@ix.netcom.com). Rick Martin's office is in Longmont. Editorial assistance provided by Barry Satlow.*

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