# Forum



# Messing With a Time-Tested Method

By Michael A.S. Newman

Arbitration has an ancient history. Sir Edward Coke's report in *Vynior's Case* (1609) was the first published decision about arbitration, but even at that time arbitration was old, indeed older than English common law itself. It was old in the sixth century when the Angles and Saxons, progenitors of the common law, drove the Roman Britons up into the hills and marshes of Wales. It was old when Cicero spoke on the floor of the Roman Senate, and even when Solon rewrote the laws of Athens. The ancient Egyptians utilized arbitration. Arbitration is no innovation.

And, yet, for many years, the American judiciary viewed this method of dispute resolution, whereby disputants agree to take litigation out of the sphere of the courts, with hostility and suspicion.

The hostility ended at a blow with the passage of the Federal Arbitration Act in 1925, when Congress announced a complete reversal of the governmental attitude toward arbitration. As the Supreme Court noted, the act signaled a rejection of "generalized attacks on arbitration" that "res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991). On the contrary, the act established a federal policy favoring arbitration and requiring the rigorous enforcement of agreements to arbitrate, pre-empting contrary state law.

Nonetheless, the California Legislature has taken aim at arbitration agreements with A.B. 2947, a bill that prohibits residential care facilities from requiring the elderly to waive "any legal rights, remedies, or forums" as a condition to entering the facility.

The ostensible purpose of this bill is "to protect elders and dependent adults and to ensure that they have the full protections afforded through administrative and law enforcement processes, as well as recourse to civil action." To this end, the bill would provide that "[e]lder and dependent adults shall not be deprived of those legal rights, duties, remedies, forums, and procedures by the use of coerced and involuntary waivers." Among other things, this would mean that a residential care facility would not be permitted to require an elderly or dependent adult to sign an arbitration agreement as a condition of entering the facility.

Admittedly, the bill has some ambiguous language that appears to exempt arbitration agreements from its scope. The very last section of the bill provides that "[n]othing in this act is intended to affect existing law relating to the enforceability or unenforceability of an arbitration agreement."

For clarification, I called the office of Assemblyman Mike Eng, the legislator who introduced A.B. 2947. Eng's office confirmed that the intent of A.B. 2947 was indeed to invalidate arbitration agreements signed as a condition of entering the facility. When asked what the final section of the bill meant, in that case, it was explained that the purpose of the clause was to preserve the validity of any arbitration agreement entered at any other time — for example, after the elder or dependant adult had already been admitted to the facility.

Although the ostensible purpose of this bill is to protect the elderly by permitting them the option of a jury trial in any action against the care facility, in fact, the primary beneficiary of the bill will be the trial bar. The trial bar does not like arbitration. At the simplest level, a jury trial is more expensive, can involve ruinously intrusive and burdensome discovery, and is more laden with procedure. All of this amounts to higher legal fees for attorneys.

But this does not necessarily mean that consumers are ill served by arbitration. In fact, numerous studies suggest the opposite to be the case. For example, a recent analysis by Navigant Consulting, looking at nearly 34,000 California debt collection arbitration cases, found that 32.1 percent of the consumer debtors named in cases that did not settle prevailed in the arbitrations. The statistics showed that consumer debtors fared much more poorly in conventional lawsuits.

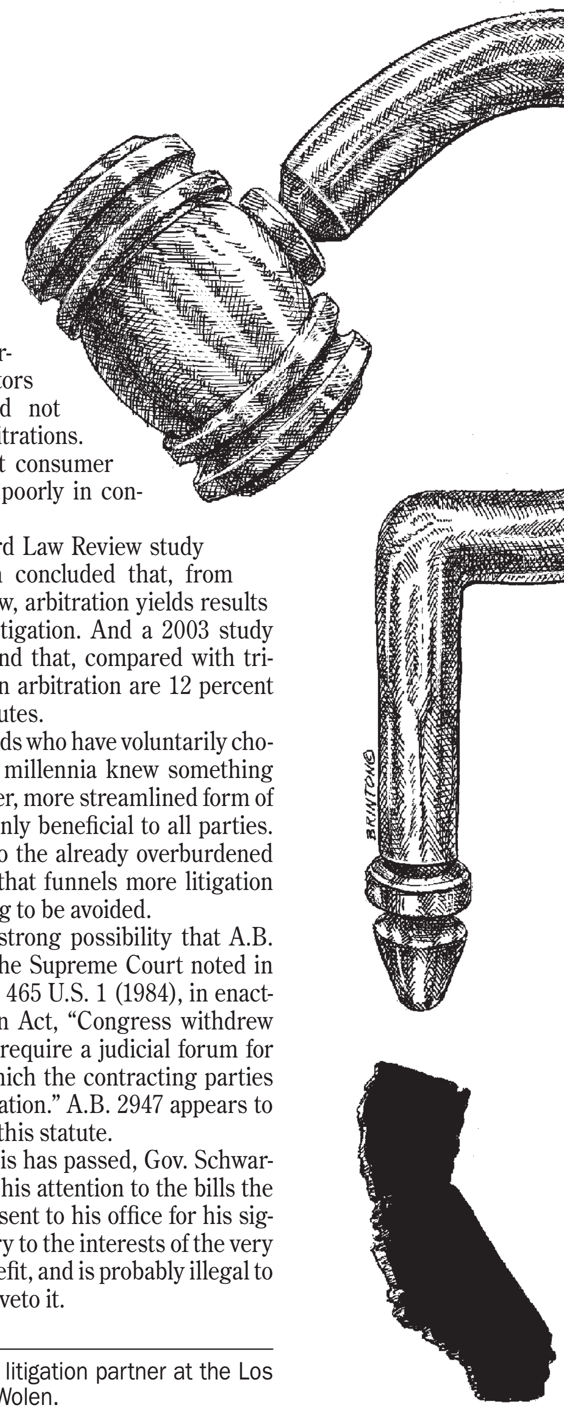
Similarly, a 2005 Stanford Law Review study of employment arbitration concluded that, from the employee's point of view, arbitration yields results as good, or better than, litigation. And a 2003 study published by the ABA found that, compared with trials, employees' win rates in arbitration are 12 percent higher in employment disputes.

Maybe the many thousands who have voluntarily chosen arbitration over three millennia knew something our legislators don't. A faster, more streamlined form of dispute resolution is certainly beneficial to all parties. Moreover, it is beneficial to the already overburdened court system. Legislation that funnels more litigation into our courts is something to be avoided.

Finally, there is a very strong possibility that A.B. 2947 violates the law. As the Supreme Court noted in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), in enacting the Federal Arbitration Act, "Congress withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." A.B. 2947 appears to be a clear contravention of this statute.

Now that the budget crisis has passed, Gov. Schwarzenegger will need to turn his attention to the bills the California Legislature has sent to his office for his signature. A.B. 2947 is contrary to the interests of the very people it is designed to benefit, and is probably illegal to boot. The governor should veto it.

**Michael A.S. Newman** is a litigation partner at the Los Angeles office of Barger & Wolen.



### Submit a Column

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# Google-Yahoo Deal Could Encourage a High Degree of Secrecy

By Warren S. Grimes

You may be one of the dwindling number of Americans who prefer newspapers to the Internet. But regardless of your information source, you should know about the pending Google-Yahoo deal now afloat in cyberspace. These two firms are the dominant providers of Internet search engines, the tool that facilitates online searches for information or for a product or service. Google has roughly 70 percent of the search engine market; Yahoo has roughly 20 percent (Microsoft and a few other firms share the remaining 10 percent). Search engines are triggered when the user types in a key word or phrase. To make money from these Internet search tools, the firms sell advertising on the search sites.

John Wanamaker, who more than a century ago pioneered department store ads, complained that he was wasting half his advertising dollars. "The trouble is," he said, "I don't know which half." Search advertising offers an answer. A search engine provides a list of results on one side of the page and, usually above and to the right of this list, targeted ads for the very item being researched. The advertiser pays each time an Internet user clicks on the ad. Because of its ability to hone in on interested buyers, this is one of the most powerful and rapidly growing forms of Internet advertising. In 2007, roughly $8.6 billion was spent on search ads in the United States.

The pending deal will allow Yahoo to post on its site ads that sellers place with Google. In return, Google will compensate Yahoo. Both firms expect to make money from this arrangement. Advertisers that buy Google search advertising will potentially reach larger numbers of customers — those using either firm's search engine. So everyone will benefit, right?

Not so fast. In fact, important buyers of advertising oppose the arrangement. They say it will reduce competition, offering buyers of search ads fewer choices at higher prices.

The opportunity to shop between the two large firms may be effectively lost because Yahoo will have little incentive to place a seller's ad on its search sites if a Google ad will pay a higher return. Yahoo's president has conceded as much, saying that Yahoo will use Google's ads when they "better monetize." Yahoo may be unhappy with its 20 percent market share — and eager to charge higher prices for the ads that it does run — but advertisers are left with fewer choices and higher ad costs that'll be passed on to consumers.

The importance of continued competition is heightened because the industry operates with a high degree of secrecy. The advertiser gets to make a bid in an auction to determine whose ad gets favorable placement. It's not, however, a public auction: Advertisers don't know what factors are weighed and the search engine firms aren't talking. The pernicious effects of this secrecy might be mitigated if search engine providers aggressively competed, but if the deal to cooperatively sell ads goes through, the incentives for hard-nosed competition would be dampened. Worse, the essential terms of the pending deal that could affect these incentives have not been disclosed. That too remains a secret.

The Justice Department's antitrust division is investigating this deal and has taken the unusual step of hiring an outside consultant — former antitrust division chief Sanford J. Litvack (who served during the Carter presidency) — to assist it.

Whatever the division decides, its analysis should be revealed so that advertisers, consumers and antitrust experts can fairly evaluate the decision. The division's record in making meaningful disclosure has been unsatisfactory, particularly when a decision is made to drop an investigation of a planned merger or joint venture.

That's not good government, especially in a high-stakes arrangement between the two most powerful and collectively dominant firms in Internet searches.

**Warren S. Grimes**, a former counsel to the House Judiciary Committee, is a professor of law at Southwestern Law School in Los Angeles.



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## Letters to the Editor

### ADA Suits Should Have Measures Forcing Settlement Attempts

I am writing in response to the letter from Don A. Ernst, Sept. 22, 2008, under the title "Disability Law Protections Must Be Preserved." Ernst, president of the Consumer Attorneys of California, touts SB 1608 as a law that will prevent litigation abuse in ADA and Unruh Act cases. SB 1608 has some very good provisions. Local building departments will be required to have personnel trained in disability access regulations. Architects must take additional continuing education credits covering access requirements.

SB 1608 also creates a new certified access inspector program about which Ernst is apparently speaking that he claims will prevent litigation abuse. Companies that obtain an inspection and certificate that are still sued will have the ability to stay litigation for a period of time to attempt settlement of the dispute. While this plan is a step toward avoiding some litigation abuse, I suggest, Mr. Ernst, that a simpler plan with no cost to the state would work much better. The law should require a prelitigation attempt at settlement that provides for a real effort on the part of the complaining party to secure voluntary compliance with the regulations.

In nearly every other area of litigation, the filing of a lawsuit follows prelitigation settlement negotiations. For private attorney general attorney fees, our Supreme Court requires a prelitigation attempt at settlement. Why not in ADA and Unruh? If the goal is remediation of old (and some new) places of public accommodation, the complaining party should seek voluntary action. If the property owner does not honor the legitimate request to fix door pressure, lower mirrors, lower soap dispensers, provide parking spaces and the like, then the owner deserves to be sued.

So long as there is no requirement for a prelitigation attempt at settlement, there will be abuse in ADA litigation. The filing of lawsuits is simply too lucrative when attorney fees are statutorily awardable only to the complaining party.

**James S. Link**
Pasadena

### Legal Education Should Follow Med School Model

Matt Valenti's article "Case (books) Closed?" (Sept. 22) is on the mark regarding the primary deficiency in U.S. legal education: a lack of emphasis in teaching skills necessary to practice law.

Law school course curriculum should emulate the medical school model. To graduate, a medical student must pass a comprehensive exam following the first two years of "academic" education regarding core subjects. The third and fourth years of medical school focus on "rotations" in which the student is assigned to observe and learn in clinical settings such as hospitals and medical clinics.

The third year of law school similarly should be spent taking trial advocacy and other "practical lawyering" classes, with assignments to observe and report on time spend in the district attorney's office, public defender's office, county counsel, law firms, etc. Graduation from law school and passing the Bar exam should not qualify one to practice law without further certification as to practical training.

**William Crosby**
Barnes Crosby Fitzgerald Zeman
Irvine