New York American Inn of Court

Alternative Dispute Resolution Program

Thursday, April 27, 2023

Foley & Lardner LLP

CLE Written Materials

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Program Title: ADR: Everything you didn't know you didn't know re: arbitration and mediation!

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TIMED AGENDA

Program Title: ADR: Everything you didn't know you didn't know re: arbitration and mediation!

Time	Description
6:25pm – 6:30pm	**Brief Introduction**
6:30pm – 7:15pm	**Arbitration** Moderator and Participant: Hon. Shira A. Scheindlin; Participants: Bill Crosby, Richard Dolan, Lauren Moskowitz, Jay Safer
7:15pm – 8:00pm	**Mediation** Moderator and Participant: Nelson Timken; Participants: Hon. Helen Freedman, Herb Eisenberg, Rosalind Fink, Aaron Marks

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Panelist Biographies

Shira A. Scheindlin served for 22 years as a U.S. District Judge for the Southern District of New York. She is now a mediator and arbitrator with AAA, FedArb, CPR and ICDR, and is a member of the College of Commercial Arbitrators. She has mediated or arbitrated hundreds of matters and has served as a special master and expert witness. She is the former Chair of the Board of the Lawyers Committee for Civil Rights Under Law, and member of the Executive Committee of the Board of the American Constitution Society.

Judge Scheindlin served as an Assistant U.S. Attorney for the Eastern District of New York, General Counsel for the New York City Department of Investigation, and Magistrate Judge in the Eastern District of New York. She has also served as an adjunct professor at several law schools. Judge Scheindlin presided over complex and highly-publicized cases involving civil rights and public policy, most notably *Floyd v. City of New York,* which ended New York's unconstitutional practice of stop and frisk. She is also the author of the widely cited *Zubulake* series of cases that provided the foundation for modern day e-discovery. Judge Scheindlin has received many awards for her work on the bench.

Judge Scheindlin served as a member of the Advisory Committee on the Federal Rules of Civil Procedure, the ABA's Standing Committee on the American Judicial System, the American Law Institute, and a former Chair of the Commercial and Federal Litigation Section of the New York State Bar Association. Judge Scheindlin is the co-author of the first e-discovery casebook and many articles on a wide variety of subjects. She is the co-author of "If Not Now When?" which reported on the progress of women lawyers appearing in court and its successor "The Time is Now." She is a frequent speaker on ADR, , e-discovery, gender equity and racial justice.

The Honorable Helen E. Freedman (ret.) has served as a neutral with JAMS since 2015 where she has mediated, arbitrated and been a neutral evaluator in numerous commercial, employment, discrimination, and insurance disputes. Prior to that she was a State Court Judge for 36 years. She was appointed to the Appellate Division of the New York State Supreme Court in 2008, having served in the Supreme Court since 1984 and the Civil Court from 1979-1984. She was designated Presiding Justice of the Litigation Coordinating Panel for multi-district litigation in New York State in 2002 and served in that capacity until her retirement. As a Supreme Court Justice, she managed all New York State Rezulin, diet drug, breast implant, latex gloves, Serzone and PPA cases as well as the entire downstate asbestos litigation. She served on the Appellate Term of the Supreme Court from 1995-99 and in the Commercial Division of the New York County Supreme Court from 1999 to 2008.

Justice Freedman continues to serve as a Vice President of the Pattern Jury Instructions Committee of the Association of Justices of the Supreme Court of the State of New York, is a member of the New York State and Federal Judicial Council Advisory Board, and is a member of the Inn of Court. She was the author of New York Objections, a book on trial practice and the making of objections; of Chapter 16 of New York Commercial Litigation; and of articles in law reviews and other publication on the asbestos litigation, mass torts, medical malpractice, and alternative dispute resolution.

Justice Freedman is currently editor of *Judicial Notice*, a publication of the Historical Society of the New York Courts and serves as Secretary of the Board of Trustees of that Society. She also serves on the Board of Directors of the Association to Benefit Children. She is a graduate of Smith College and New York University School of Law.

Nelson's Bio

As a Principal Law Clerk for the New York State Court System for 29+ years, I reduced caseloads by successfully settling and drafting decisions on motions in thousands of commercial, consumer and personal-injury cases. I am skilled in closing cases as a certified, trained, and experienced mediator, arbitrator, and tort-neutral evaluator conducting both in-person and online mediation and arbitration. I earned the title of Fellow of the Chartered Institute of Arbitrators, and belong to the North American Branch. I am a member of the FINRA Panel of Public Arbitrators, since 2017. I am FINRA Chair-qualified since 2022. I frequently volunteer to mediate and arbitrate attorney-client fee disputes involving some of New York's most prestigious firms. I currently serve as Co-Chair of the New York County Lawyers Association Alternative Dispute Resolution Committee. I earned an LLM in International Dispute Resolution from Fordham School of Law in 2022 while working full-time. My independent research at Fordham is being published in Volume 24, No. 2 of the Cardozo Journal of Conflict Resolution this Spring and is entitled "A Proposal to Establish an International Commercial Arbitration Ethics Panel and Hotline to Resolve Disclosure and Conflicts Issues." I speak Spanish, some French, and am learning basic Ukrainian in a class given by the Ukrainian Institute of America (in NYC). I am also a Master of the New York American Inn of Court in Manhattan. I am a monitor for the NYC Bar's Lawyers Assistance Program, helping attorneys re-enter the legal profession. I am seeking transition to a commercial/international law firm or institutional arbitral provider when I leave the court system this December.

Overview

Richard is a co-founder of Schlam Stone & Dolan LLP and the co-head of its civil litigation department and practices complex commercial litigation. In a forty-year career, he has tried almost 100 jury and non-jury cases. Richard has also handled trials, arbitrations, and appeals involving antitrust, securities, telecommunications, bankruptcy, sports, and entertainment law. His clients include Fortune 500 corporations, family businesses, real estate consortiums and partnerships, and electronics manufacturers. Clients frequently seek his advice on strategically negotiating threatened transactional disputes.

Richard advises clients on corporate governance issues and on negotiating and drafting agreements in a wide variety of commercial contexts, including contracts and other business documents. He is currently defending the NYC Police Benevolent Association and enjoys taking on cases that other firms or lawyers reject as politically unpopular.

Before founding Schlam Stone & Dolan, Richard served as an Assistant United States Attorney, Civil Division, for the Eastern District of New York, and prosecuted matters relating to airplane crashes, government contract claims, antitrust actions, medical malpractice, environmental violations, and federal forfeiture. During his four years with the government, he litigated more than 25 cases before the Second Circuit Court of Appeals, including successfully arguing in defense of the constitutionality of numerous federal statutes and regulations.

Richard has been selected to the New York Metro Area list of Super Lawyers® in *Business Litigation, Appellate, and Antitrust Litigation*. Among his publications, he has co-authored the *New York Law Journal's* monthly Eastern District Roundup column since 1990.

Representative Matters

- Representing Governor Patterson and the New York legislature in the Judicial Pay Cases, which were litigated throughout New York State and up to the Court of Appeals;
- Pioneering the use of partition actions in New York to allow property developers to force the sale of buildings they had fractional interests in;
- Successfully representing property developer Extell Development and enforcing purchase agreements in a series of cases arising under ILSA, the Interstate Land Sales Full Disclosure Act;
- Obtaining a Yellowstone injunction on behalf of Extell, preventing Vornado from taking control of the parking garage of a luxury apartment tower on Park Avenue South;
- Trying and then settling a Lanham Act case on behalf of Verizon against Yellowbook in the Eastern District of New York;
- Settling an anti-trust action against Bell Atlantic after a three-week jury trial in the District of Maine;
- Obtaining dismissal of a Robinson-Patman act claim for want of anti-trust injury in the Northern District of Illinois;
- Representing an officer of Air Canada in a criminal anti-trust investigation, resulting in no charges against the individual;
- Representing a Canadian investor in a case concerning the sale of unregistered securities by a UK broker before the District Court and the Second Circuit Court of Appeals;
- Representing Bell Atlantic in a Clayton Act case challenging the merger of AT&T and McCaw Cellular;
- Litigating, up to the Court of Appeals, a number of leading cases on the fiduciary duties owed in family business divorce cases;
- Winning a $30 million verdict against the World Boxing Council on behalf of a boxer who had been cheated out of his world

- French champion title, and subsequently preventing the WBC's bankruptcy plan from being confirmed;
- Representing a boxer in a Council for Arbitration in Sport (CAS/TAS) arbitration against the WBC arising out of the WBC's failure to perform anti-doping tests after a title fight;
- Currently representing an insurance company before the New York Court of Appeals on the issue of whether fraudulent Medicare claims are covered under a computer fraud policy.

AREAS OF FOCUS

- Civil Litigation
-
-
- Appeals

EDUCATION

- University of Pennsylvania Law School, J.D.
- Yale University, B.A.

ADMISSIONS

- Massachusetts
- New York
- Hawaii
- U.S. District Court for the Eastern District of New York
- U.S. District Court for the Southern District of New York
- U.S. Court of Appeals for the Second Circuit

GOVERNMENT SERVICE

- Assistant United States Attorney, Civil Division, Eastern District of New York

PRIOR WORK EXPERIENCE

- Associate, Simpson Thacher & Bartlett

LANGUAGE

- French

Rosalind Fink is a founding member and past president of our Inn. She was – very briefly – a member of JAMS' Employment Law panel, and has frequently used them, along with AAA, FedArb, and the State and Federal courts' mediation services, to aid in settling employment disputes.

After 27 years as head of Brill & Meisel's employment group, she began a solo practice in May, 2021. She has counseled over 1500 individuals or employers in employment-related disputes, representing many in negotiations and, if settlement was not possible, in subsequent litigation or arbitration.

Prior to joining Brill & Meisel, Ms. Fink was the Director of Columbia University's Office of Equal Opportunity and Affirmative Action, and was responsible for ensuring that the University was in compliance with all federal, state and local EO/AA laws and regulations. As part of this work, she developed and implemented Columbia's sexual harassment policies and programs. She also counseled many faculty, staff and students on harassment and discrimination issues.

While at Columbia, she was also an adjunct associate professor at Barnard College, teaching a colloquium for Political Science majors on Civil Rights and Liberties.

Ms. Fink's earlier legal career includes two years as an associate at Proskauer Rose and several years at the New York State Department of Law (the Attorney General's office), rising to a position as head of the Constitutional Litigation Group before she left to join Columbia.

Every year since 2010, Ms. Fink has been chosen as one of the New York Area's Best Lawyers by *New York Magazine* and *New York Law Journal*, and a New York Area Super Lawyer in the *New York Times Magazine.* She also has an AV rating from Martindale-Hubbell.

William (Bill) Crosby, Jr. is Senior Vice President, Associate General Counsel and Managing Attorney at Interpublic Group, a New York based advertising and marketing company with over 50,000 employees worldwide. At Interpublic, where he has been since 2002, Bill oversees global litigation, manages the Latin American legal operations, and serves as the chief of staff for the global legal department. He was an associate at Davis Polk & Wardwell from 1993 until 1995, and at Kay, Collyer & Boose (now defunct) from 1995 until 2002. Bill also serves as an arbitrator and has presided over hundreds of domestic and international disputes involving a variety of contractual and intellectual property issues. He is a fellow of the College of Commercial Arbitrators and serves as a member of the board of directors of the American Arbitration Association. He also serves as co-chair of the NYSBA Dispute Resolution Section's Domestic Arbitration Committee. Bill is a frequent speaker on arbitration related issues (from the in-house and the arbitrator perspectives), as well as litigation and compliance issues. He became a member of the NY American Inn of Court in 2023. Bill is a 1990 graduate of Yale College and a 1993 graduate of Stanford Law School.

Aaron H. Marks, P.C.

Partner, Litigation

Kirkland & Ellis LLP
New York
aaron.marks@kirkland.com
T + 1 212 446 4856

EDUCATION

Emory University School of Law, J.D., 1993
- Editor, *Emory Law Journal*

University of Pennsylvania, B.A.; B.S., 1990

ADMISSIONS & QUALIFICATIONS

New York

"Aaron is a super talented attorney and a big-time litigator. He is a go-to for critical disputes."

Chambers USA, 2022

Aaron Marks is an accomplished trial lawyer focusing on complex commercial litigation relating to securities, financial products, real estate, entertainment, mass torts and trade secrets. He routinely ranks among the best trial lawyers and commercial litigators in the country by industry surveys. The prestigious *Chambers USA* describes Aaron as "outstanding," "an amazing lawyer," and as being an "excellent tactician," "very effective and well prepared," and "very understanding and sensitive to the needs of in-house counsel." Aaron has also been designated a "litigation star" by *Benchmark Litigation*, and *The Legal 500 U.S.* recognizes Aaron among the U.S.'s 50 leading trial lawyers and commercial litigators and named him to the publication's "Hall of Fame." Aaron was profiled by *The American Lawyer* magazine as one of the nation's 50 most accomplished litigators under the age of 45.

REPRESENTATIVE MATTERS

Aaron has been involved in the following representations:

- Blackstone affiliates in broken deal litigation as to sales of several hotel properties in which the purchasers sought to be excused due to the COVID-19 crisis. In one multi-jurisdictional matter, Aaron achieved precedent-setting rulings on summary judgment holding that purchaser's failure to close during the pandemic was not excused. Aaron also secured in that matter an anti-suit injunction enjoining parallel litigation in Puerto Rico.
- H.I.G. Capital and Lionbridge Technologies, Inc. in the defense of trade secret litigation brought by TransPerfect Global, Inc., arising from H.I.G. and Lionbridge's participation as a bidder in the auction sale of TransPerfect. In 2022, Aaron won summary judgement in full.
- Blackstone and affiliated funds in multi-jurisdictional litigation and arbitration concerning media conglomerate RCS Mediagroup's challenge to Blackstone's ownership of multiple commercial buildings in Milan. In 2021, the arbitration tribunal ruled in favor of Blackstone, dismissing attempts to reverse the 2013 sale and claim compensation. Ongoing state court litigation.
- FirstFire Capital in litigation with DarkPulse Inc. in New York federal court and the Delaware Court of Chancery concerning a defaulted note. Defeated a preliminary injunction motion in New York in 2022. Ongoing.
- Blackstone in two putative class actions in Illinois federal court alleging violations of the Illinois Genetic Privacy Act (GIPA) related to Blackstone's acquisition of Ancestry.com. Ongoing.

Aaron H. Marks, P.C.

Partner, Litigation

- Lime Rock Management managing directors in litigation in Connecticut federal court in their response to an application under Section 1782 seeking to obtain discovery for use in a foreign proceeding in Scotland. Ongoing.
- Blackstone affiliates in litigation concerning the J-51 property tax exemption and abatement status for Blackstone's StuyTown property in New York City. Ongoing.
- Confidential real estate company in an arbitration seeking dissolution of a joint venture and damages for alleged breaches of contract and fiduciary duties. Aaron successfully settled the matter in 2021.
- McCormick Foundation and Cantigny Foundation in litigation concerning Tribune's 2007 leveraged buyout and subsequent bankruptcy. A trustee filed suit seeking to recover LBO proceeds from more than $1 billion from the Foundations. In April 2019, the SDNY rejected the trustee's efforts to pursue a constructive fraudulent transfer claim. Dismissal of all claims affirmed on appeal.
- National counsel for a private equity firm in multiple state attorneys general and class actions concerning allegations of usury and RICO conspiracy in connection with consumer lending businesses.
- Various companies in litigations in which bondholders assert that company transactions, including spin-offs, debt exchanges and intellectual property transfers, breached the company's credit agreements and/or indentures.
- Coach, the luxury fashion brand, in the defense of several putative class actions alleging that the company used deceptive comparison pricing at the company's outlet stores.
- A large real estate private equity firm in multiple lawsuits and investigations relating to portfolio companies and other investment vehicles.
- A large hedge-fund administrator in a federal court action against a major software manufacturer for unfair competition and breach of contract.

Prior to joining Kirkland, Aaron was involved in the following representations:

- AMC Networks in the defense of a lawsuit brought by profit participants alleging, among other things, breach of contract, and seeking additional profit distributions from the AMC television series *The Walking Dead.*
- Peter Nygärd and the Nygärd Companies in multiple highly publicized defamation and other tort actions against Nygärd's nemesis, hedge fund manager Louis Bacon.
- National Australia Bank and Royal Park Investments, an entity created in connection with the Belgian State's sale of Fortis Bank to BNP Paribas, in three separate actions against Oppenheimer and its affiliates relating to defendants' misconduct as administrators of three structured finance vehicles, alleging damages of more than $2.5 billion.
- Hilton Worldwide in the defense of a trade secret misappropriation lawsuit brought by Hilton's competitor, Starwood Hotels & Resorts, and in a grand jury investigation conducted by the U.S. Attorney's Office (S.D.N.Y.) relating to the same underlying facts.
- MBIA, one of the world's largest monoline insurers, in litigation brought by 18 of the world's largest banks seeking to overturn MBIA's corporate restructuring which, with the approval of the New York Department of Insurance (now the Department of Financial Services), established a separate company for MBIA's municipal bond insurance business. After a several-week evidentiary proceeding, the New York Supreme Court ruled in favor of MBIA, upholding MBIA's restructuring.
- Purolite International, a specialty chemical manufacturer, in an action against competitor Thermax Ltd. (India) for misappropriation of trade secrets relating to formulae and production processes for ion-exchange resin. The case settled on the eve of trial with a $38 million payment by Thermax.
- Freescale Semiconductor in an expedited action by senior term lenders challenging Freescale's issuance of $1 billion of incremental term loans as barred by an occurrence of a material adverse change.
- Port Authority of New York and New Jersey as trial counsel in the trial concerning the Port Authority's alleged liability arising from the 1993 terrorist bombing of the World Trade Center. The New York Court of Appeals subsequently dismissed the action.
- Interstate Bakeries in litigation against certain lenders that balked on their commitment to provide financing to facilitate the company's exit from Chapter 11 bankruptcy.

Aaron H. Marks, P.C.

Partner, Litigation

- Apollo Management and its portfolio company, Hexion Specialty Chemicals, in litigation arising from Hexion's proposed $15 billion merger with Huntsman Chemicals. Representation involved the prosecution of an expedited proceeding against Credit Suisse and Deutsche Bank to compel specific performance of the banks' commitments to fund the acquisition. Successfully negotiated a settlement with Huntsman, bringing an end to one of the largest-ever battles over a leveraged buyout. *The Wall Street Journal* lauded the settlement as a "sweet deal" for Apollo and Hexion.
- Ernst & Young in a successful appeal and settlement of an accounting malpractice action brought by the creditors of CBI Holdings.
- Basic Element Company, a leading Russian industrial conglomerate, in the trial and appeal of securities fraud claims for insider trading and market manipulation against a major United States investment bank, stemming from the liquidation of a $1.5 billion stake in a Canadian auto parts manufacturer.
- Several of the nation's largest private-equity firms (Apollo Management, Bain Capital, Carlyle Group, Centerbridge Capital Partners, Clayton, Dubilier & Rice, Fortress Investment Group and TPG Capital) in disputes over acquisitions and acquisition financings for several large leveraged buyout transactions. These disputes involved the applicability of material adverse change clauses, post-merger insolvency, and specific performance of debt financing commitments. Most of these buyouts, including Home Depot Supply ($9 billion) and Harrah's Entertainment ($30 billion), funded and closed.
- BankUnited, Florida's largest bank, with respect to non-compete and trade secret lawsuits brought by Capital One.
- Safra National Bank in several arbitrations brought by clients alleging unsuitability and other claims regarding investment portfolios, and in a commercial fraud action brought by Bank of America.
- One of the nation's largest hotel owners in attorney general and putative class actions arising out of alleged consumer fraud, as well as ADA lawsuits as to certain of the owner's hotel properties.
- Real estate developers in litigation concerning ownership, financing disputes, and eminent domain.
- Cigarette manufacturer Liggett Group as lead trial counsel in 10 jury trials, including several in which Liggett was the sole defendant. One of the verdicts in favor of Liggett (returned in 90 minutes) is believed to be the fastest rendered jury verdict in the 60-year history of litigation against cigarette manufacturers. Also led Liggett's defense of the nine-month bench trial of the Department of Justice's RICO lawsuit against the tobacco industry, with the court awarding judgment in Liggett's favor (whereas substantial relief was ordered against all of the other major cigarette manufacturers).
- Video-game maker Take-Two Interactive Software in shareholder derivative actions arising out of alleged insider trading.
- Professional athletes in disputes concerning promotional contracts, endorsement deals and use of performance-enhancing drugs.

PRIOR EXPERIENCE

Kasowitz Benson Torres LLP

PUBLICATIONS

- "Defend Trade Secrets Act: Planning Ahead and Strategic Choices," Corporate Counsel, 2016.
- "The Application of Foreign Law When Litigating a Forum Selection Clause," New York Law Journal, 2015.

MEMBERSHIPS & AFFILIATIONS

- Faculty Member, Emory University Law School Trial Techniques Program
- Board Member, New York American Inn of Court
- Board Member, CaringKind

HERBERT EISENBERG
LAURA S. SCHNELL

JULIAN R. BIRNBAUM
Of Counsel

Herbert Eisenberg is a member of the firm of Eisenberg & Schnell, LLP. He has been practicing plaintiff side employment law for over 30 years. His practice is devoted to representation of employees in all aspects of employment law with a focus on individual and class litigation involving employment discrimination, equal pay, sexual harassment and employment contracts. He has mediated countless discrimination cases and has arbitrated securities industry employment disputes, litigated employee benefit claims under ERISA, fraud claims in the employment context and has handled both public and private sector union-side collective bargaining matters.

Mr. Eisenberg is a frequent speaker at conferences on various aspects of employment law, litigation, mediation and appellate advocacy. He is a former Vice President for Legislation and Public Policy for the National Employment Lawyers Association (NELA) and sat on NELA's Executive Board for twelve years. He is a past President of the National Employment Lawyers Association, New York, (NELANY) and was a member of its Executive Board for seventeen years. He is a former Co-Chair of the Labor and Employment Law Committee of the New York County Lawyers Association. He has taught employment law as an adjunct professor at New York Law School. Mr. Eisenberg has been listed in "Best Lawyers in America" since 1999 and has been listed as a "Superlawyer" since 2006. He is a Fellow of the College of Labor and Employment Lawyers.

Mr. Eisenberg is a graduate of the State University of New York at Buffalo Law School and the State University of New York at Binghamton.

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Jay Safer, Esq.

Law Firm-Title Wollmuth Maher & Deutsch LLP - Partner

Experience Attorney, Arbitrator, Consultant, Educator

Extensive experience as a litigator, single and panel arbitrator, and representing clients. Managed and handled complex U.S. and International litigation, arbitration, and mediation on a wide range of disputes, cases, and consultation including: complex commercial and business matters, court hearings on jurisdiction and compelling and opposing arbitration, application of the New York Convention and Federal Arbitration Act to enforce and confirm international arbitration awards, enforcement of U.S. arbitration awards, enforcement of foreign judgments, contractclaims and breach of contract, mergers and acquisitions, sale and purchase claims, supplier purchaser disputes, franchise disagreements, antitrust, securities, broker dealer relationships, corporate investigations, forgery, fraud, RICO, qui tam, FCPA, labor and employment including termination, banking and financial transactions, lender and borrower defaults and liability, corporate governance, technology, privacy, insurance, construction, real estate, media, defamation, product liability, health care, professional malpractice, ethics, telecommunications, energy, environment, breach of fiduciary duty, partnership, shareholders, entertainment, privacy, trade secrets litigation and protection, trusts and estates, corporate governance, constitutional and regulatory issues, and class actions.

Consultation includes litigation and arbitration preventive measures, pre-litigation and pre-arbitration analysis, document retention and preservation, litigation holds, and e-discovery.

Represented United States and foreign clients in litigation and arbitration in the U.S. and abroad, including a foreign government and involving application of U.S. and foreign law. Worked with local counsel on cases in foreign courts and on arbitrations involving different countries. Provided advice concerning the application and comparison of United States law and laws of other nations. Knowledgeable about the laws and procedures utilized in judicial systems abroad.

Lecturer at Law and Adjunct Professor at Columbia University Law School and Fordham Law School teaching American Litigation and Management of Litigation for the International Lawyer, including arbitration and mediation to foreign lawyers seeking their LLM. Made presentations on litigation, arbitration, and mediation to visiting judges, lawyers, and law students at the law schools and at the courts at the request of judges and court administrators. Presented programs with judges, arbitrators, and attorneys on international and U.S. litigation, arbitration, ADR and trial and evidentiary issues at worldwide conferences, webinars, and court and bar association programs.

Alternative Dispute Resolution Experience

AAA and ICDR Appointed to Roster of Neutrals for U. S. and international arbitration. Extensive ADR experience, participation in arbitrations and mediations, and teaching and speaking in ADR programs.

Engaged as an Arbitrator in numerous arbitrations involving complex commercial and business matters in various industry areas both as a single arbitrator and as Chair and member of a Tribunal panel. In addition, experience has involved a wide range of U.S. and international arbitrations, mediations, and enforcements of arbitration awards including disputes involving contracts, mergers and acquisitions, sales of businesses, investments, energy, healthcare, sales of equipment from U.S. companies to governmental entities abroad, telecommunications, corporate governance, dispute among shareholders, real estate, construction claims, oil and gas leases, insurance, labor and employment, fraud, and entertainment agreements. One and three panel arbitrators, administered by various ADR organizations, ad hoc arbitrations, and under various rules and laws.

Arbitrations and litigating cases on compelling arbitration, interpreting arbitration clauses, determining the scope of the arbitration, assessing the role of the arbitrator,and enforcing arbitration awards all raise numerous issues which an arbitrator needs to understand. Hearing arguments on whether and how the arbitration will proceed, the conduct of the proceedings, working with and discussing rulings with other arbitrators on Tribunals as Chair and as a member, rendering decisions as an arbitrator, keeping apprised of court decisions, participating and attending programs on international arbitration, and teaching international arbitration to applicants for CIArb fellowship provide important comprehension and training. Long experience with international cases, clients and lawyers, and teaching foreignlawyers as a Professor is invaluable.

Alternative Dispute Resolution Training

ICDR International Symposia in Advanced Case Management, 2020; ACE20 - Cyber Security: A Shared Responsibility, 2020; AAA ACE19 Case Finances: What Arbitrators Need to Know, 2019; Arbitrator Performance and Demeanor ~ Meeting Participant Expectations, 2018; AAA Arbitration Fundamentals and Best Practices for New AAA Arbitrators, 2016; AAA Arbitration Awards; Safeguarding, Deciding & Writing Awards (ACE001), 2016; Presented and attended for many years numerous ADR programs around the world and in the US on international arbitration and mediation, teach international arbitration to CIArb Fellow applicants, teach arbitration and mediation issues to foreign lawyers in my Columbia and Fordham law classes, wrote articles on ADR issues, and take and meet AAA annual course requirements for arbitrator and ADR training.

Professional Licenses

Admitted to various Bars including: New York (1972); U.S. District Courts: Southern District of New York (1973), Eastern District of New York (1973), Northern District of New York (1986), District of Connecticut (1984); U.S. Court

of Appeals: Second Circuit (1974), Third Circuit (1994), Eleventh Circuit (1985); U.S. Supreme Court (1992).

Professional Associations

CIArb Fellow-Chartered Institute of Arbitrators; American Bar Association - Litigation, Dispute Resolution, International Law, and Business Law Sections; New York City Bar Association - International Commercial Disputes Committee and Cyber Security Subcommittee and State Courts of Superior Jurisdictions Committee, past Chair Council on Judicial Administration; New York State Bar Association - International Section-Executive Committee, Dispute Resolution Section - Executive Committee, Commercial and Federal Litigation Section- past Chair, Executive Committee, and co-chair Federal Judiciary Committee, past Vice President and NYSBA Executive Committee; NewYork Country Lawyers Association- past member of Board of Directors and chair-International Law Committee; Federal Bar Council-Second Circuit Committee; Foundation, Fellows of the American Bar Foundation and New York Bar Foundation, New York American Inn of Court.

Education

Columbia University Law School (JD-1971); Vanderbilt University (BA-1968).

Publications and Speaking Engagements

Has made television appearances, authored, and contributed to articles and publications on litigation and arbitration.

Many years of speaking engagements on many subjects related to litigation, arbitration, and mediation. Some of these including nation-wide webinars, speaker organization presentations, and Bar Association programs are listed below:

Presented and chaired programs on wide range of topics in International Arbitration and Litigation with panelists from around the world. In October 2019, chaired and presented a Plenary Program on International Arbitration at the NYSBA International Section Global Meeting in Tokyo consisting of representatives of 10 world-wide ADR organizations and International Arbitration Centers including ICDR plus the co-chairs from Japan, Paris, and myself. Over the years, topics included: Hot Topics in Arbitration and Litigation, Investor-State arbitrations, ICSID, and Latin American Treaty Investment, New York Convention, enforcing, opposing, and overturning arbitration awards, ethics and disclosure guidelines, dispute resolution clauses, best practices, taking of evidence in U.S. for proceedings abroad, judgments, default, RICO. International Section conferences included Tokyo, Stockholm, Montreal, Dublin, Panama, Lisbon, Vietnam, Vienna, Sao Paulo, Paris, Guatemala, 2011-2019, Chair of new plenary planned in Madrid, and panel in London 2020, AAA Roundtable on Large, Complex Arbitration Disputes, presented and chaired Global Law Week and many other programs on litigation, arbitration, and mediation, with and to judges and lawyers.

Examples of other programs 2021-2010:

Hear from the Judges: What You Should Know About the Past, Present, and Future Effects of Covid on the Courts and Litigating Cases During the Pandemic and Beyond Cross-border Litigation. When we need the most from our allies around the world: Best

Practices and Recommendations
New York State and Federal Courts: Adapting to the Pandemic and Beyond
Views from the Bench: What's New and Exciting in the NY County Commercial Division in 2020
Program on Hague Convention
Programs on Discovery and E Discovery, document preservation, attorney-client privilege and work product
Program on U.S. Supreme Court decision in Daimler and impact on personal jurisdiction on defendants worldwide
Program on Federal Rules of Civil Procedure and NYS Commercial Division Rules
Program on FCPA
Programs on experts, forensic experts, fraud, and forgery Programs on depositions
Programs on pre-trial practice for NYCLA Civil Trial Practice Institute Program on privacy and confidentiality
Program on trial admissibility, evidence, and impact of the technology

Awards and Honors

Named a leading expert in commercial arbitration by the EuroMoney Legal Media Group; served as a delegate to the UNCITRAL Working Group held at the United Nations; previously named New York Super Lawyer; Top Rated Lawyer in Commercial Litigation; Top Rated Lawyer in Business Law; Top Rated Lawyer in Banking and Finance Law; Top Rated Lawyer in Technology Law; AV Preeminent® Peer Review Rating.

Appointed to Commissions, Councils, Sections, and Committees, including New York State Commercial Division Advisory Council, Federal-New York State Judicial Council Advisory Group, and New York State Advisory Committee on Civil Practice,and was Chair and currently serve as a bar leader in numerous Bar Associations and litigation and ADR sections and committees.

Contact Information

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Lauren A. Moskowitz
Cravath, Swaine & Moore LLP

Lauren A. Moskowitz is a partner in Cravath's Litigation Department. She has a broad practice with a particular focus on general commercial, securities, antitrust and intellectual property litigation, as well as representing clients in a variety of domestic and international arbitration proceedings. Ms. Moskowitz also frequently handles litigation related to financial restructuring and reorganization matters. She is an experienced trial lawyer and has represented clients in critical litigation in jurisdictions throughout the country, including arguing and winning a case before the U.S. Supreme Court. Her clients have included Alcon Laboratories, Amgen, AngloGold Ashanti, the Boston Red Sox, Credit Suisse, CSX Corporation, Epic Games, Goldman Sachs, INEOS, Medinol, Renaissance Technologies and Royal Dutch Shell.

Ms. Moskowitz has been recognized by numerous professional publications, including *Benchmark Litigation*, *Chambers USA*, *Law360*, *New York Law Journal* and *The Legal 500 US*. She has been repeatedly included in *Benchmark Litigation*'s "Top 250 Women in Litigation" list, and was also named to *Crain's New York Business*'s 2021 list of "Notable Women in Law" and *Lawdragon*'s "500 Leading Litigators in America" list. Ms. Moskowitz also received a Distinguished Alumna Award from The Fordham Law School Moot Court Board in recognition of her leadership while in the program and remarkable professional achievements so early in her career.

Ms. Moskowitz previously served as President of the New York American Inn of Court, and is now a member of the Executive Committee. In addition, she is a member of the President's Council of Cornell Women (PCCW), and she was selected to serve as a member of *Law360*'s Securities Editorial Advisory Board.

Ms. Moskowitz received a B.A. with distinction in all subjects in 2002 from Cornell University. She received a J.D. *magna cum laude* from Fordham University School of Law, where she was a member of the National Moot Court Competition team and the Moot Court Editorial Board. Ms. Moskowitz joined Cravath in 2005. From 2006 to 2007, she served as a law clerk to Hon. Shira A. Scheindlin of the U.S. District Court for the Southern District of New York. She returned to Cravath in 2007 and was elected a partner in 2012.

A.D.A. Cyril Heron

Cyril Heron is young Inn member working as an Assistant District Attorney out of the Manhattan District Attorney's Office. Prior to that, he worked in state government in the Consumer Protection and Enforcement Division of New York State's Department of Financial Services. He attended Cornell Law school where he earned his J.D. and an LL.M in International and Comparative Law and prior to that he earned his B.A. in Modern East Asian Languages and B.S. in International Affairs from Florida State University.

Sora J. Kim is an associate at Duane Morris LLP. Ms. Kim practices in the area of corporate law with a focus on international, corporate, and partnership tax.

Ms. Kim advises clients on strategic tax planning for domestic and cross border transactions. She provides advice on structuring, inbound and outbound tax planning, mergers and acquisitions, reorganizations and U.S. tax reform.

Previously, Ms. Kim worked as a senior associate at PricewaterhouseCoopers LLP within the international tax and mergers and acquisitions group. She also worked as a legal aid lawyer at Community Legal Aid and Greater Boston Legal Services.

Ms. Kim received an LL.M. in Taxation in 2017 from Georgetown University Law Center, where she was student note mentor for *The Tax Lawyer*. While at Georgetown, she was also a law clerk to the Honorable Judge Tamara Ashford at the U.S. Tax Court. She is a graduate of Suffolk University Law School, where she was editor in chief of *The Journal of High Technology Law*. She is a graduate of The George Washington University.

Prior to becoming a member of the New York Inn of Court, she was a member of the Bryant Inn of Court in Washington DC and the Boston Inn of Court.

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Bankruptcy, Restructuring & Litigation | Consumer Financial Services Litigation | Construction & Real Estate Litigation | Financial Institutions | Alternative Dispute Resolution & Mediation | Real Estate

MarcAnthony helps formulate and implement comprehensive litigation strategies to best protect or defend clients' interests.

MarcAnthony Bonanno, ACIArb, represents clients in complex bankruptcy-related and commercial litigations, including disputes involving consumer financial services, distressed debt, real estate, and commercial mortgage foreclosures. This work includes representing lenders, loan servicers, and other financial institutions in foreclosure actions.

MarcAnthony represents and counsels clients in commercial disputes that involve breaches of contract, managed care and partnership disputes, products liability, professional malpractice, unfair and deceptive trade practices, and general negligence claims. MarcAnthony is broadening his arbitration and dispute resolution skills and experience with international and domestic tribunals as a Mentee with the Young Institute for Transnational Arbitration (Young ITA) and as an Associate with the Chartered Institute of Arbitrators (ACIArb).

Dedicated to providing pro bono legal services, MarcAnthony assists veterans in obtaining discharge upgrades and pursuing disability benefits for service-connected conditions. In his spare time, MarcAnthony volunteers with the African non-profit, Africa in the Moot, where he volunteers as a coach for the University of Cape Town's Willem C. Vis International Commercial Arbitration Moot competition team and is a US Advisory Team Member for the South African non-profit Ubuntu Football, which focuses on the development of the next generation of South African leaders through sport and education.

Education

Quinnipiac University School of Law, JD, *cum laude*, 2019

- Note Editor, *Quinnipiac Law Review*

Loyola University Maryland, BA, 2016

Bar Admissions

New York

Connecticut

New Jersey

Court Admissions

U.S. Court of Appeals, Veterans Claims

U.S. Bankruptcy Court, District of Connecticut

U.S. Bankruptcy Court, Eastern and Southern Districts of New York

U.S. District Court, District of Connecticut

U.S. District Court, Eastern and Southern Districts of New York

Memberships and Certifications

New York American Inn of Court
Member

Chartered Institute of Arbitrators
Associate

Connecticut Bar Association

New York City Bar Association
Member
European Affairs Committee, 2022–2025

New York State Bar Association

Young Centre for Settlement of Investment Disputes

Young Institute for Transnational Arbitration

Young International Arbitration Group

Young International Council for Commercial Arbitration

Judicial Clerkships

Judicial Law Clerk
The Hon. William I. Garfinkel, U.S. District Court, District of Connecticut, Summer 2017

Articles

Bankers Beware: The Reach of the Procuring Cause Standard*, New York Law Journal*, 2.10.2023

Bankers Beware: The Judicial Divide Over Customary Investment Banking Fees*, New York Law Journal*, 11.15.2022

CHECKLIST OF CONSIDERATIONS FOR ELECTRONIC HEARINGS

ARBITRATION HEARING ROOM & EQUIPMENT CONSIDERATIONS.

- ❑ Has a pre-site inspection of the hearing room been conducted? (Alternatively, has a scaled floor plan or sketch of the existing layout of the hearing room been obtained?).
- ❑ How many Arbitrators will there be?
- ❑ How many lawyers and counsel tables will there be?
- ❑ What day will be used to install the equipment in the hearing room? (It may require an entire day to perform the installation.)
- ❑ Computer Monitors:
  - ❑ What size?
  - ❑ How many?
  - ❑ Rent or Buy?
  - ❑ What types of cables, splitters, converters, etc.?
- ❑ Is an Elmo, VCR, optical disk player or overhead projector needed?
- ❑ Who will perform the pre-site hearing room inspection, hardware layout and equipment setup?
- ❑ What backup hardware devices should be on hand? (e.g., light pens, bar code readers, hard drives, portable storage drives, etc.)
- ❑ What types of disaster recovery should be implemented? (e.g., spare computer, extra drives, tape backup procedures, etc.)
- ❑ Will the arbitrator(s) or parties want any provisions to be made to the Hearing Room equipment during other sessions, hearings, or dark days?

OPPOSING COUNSEL ISSUES.

- ❑ Is opposing counsel planning on bringing computers to the hearing room for the purpose of evidence presentation?
- ❑ If so, which side will actually:
  - ❑ **Design** the installation of the Hearing Room,
  - ❑ **Plan** the installation of the Hearing Room; and
  - ❑ **Perform** the installation at the Hearing Room?

❑ Will opposing counsel be allowed to share monitors? (If so, how will the costs for the same be allocated? Will the cost of the same be allowed to the prevailing party?)

❑ Who should provide input switching from opposing counsel's PC, VCR, or Elmo? Should all counsel just share one main computer?

❑ Will USB Flash Drives or CDs of the hearing exhibits be exchanged with opposing counsel?

❑ If videotaped depositions are being used for the hearing team's direct examination, should they also provide the same bar-coded segments of the videotaped depositions to opposing counsel for cross-examination?

❑ If opposing counsel includes their video segments in with ours (for contiguous playback), and there are last minute changes to the page - line designations, do we stipulate that someone from their side may double check the segments prior to viewing at the hearing? Where will this take place? In our location or at a neutral area?

❑ If, while using trial presentation software, one of the experts marks up or makes notes on the evidence on the screen, and this "mark-up" becomes tagged as a new exhibit, how will this new exhibit be provided to opposing counsel? (Electronic form on disk or as a printed hard copy?)

<u>MISCELLANEOUS ISSUES DURING THE HEARING</u>.

❑ As updated documents are received during the hearing, how and when will the information get loaded and indexed on the systems in the hearing room and in the law office "war room"?

❑ What should be done with the monitors and computer hardware each evening, weekend, and on dark days, if any?

❑ What arrangement should be made with the locale of the hearing if other proceedings are to be held anytime while our equipment is set up? (e.g., Should the monitors be lower to the floor? Should audio video stands be temporarily rolled away? etc.)

❑ How should we handle last minute redaction to documents existing only as images on CDs?

❑ What arrangements should be made for reprinting last minute bar-codes if the number or order of the documents increases or changes?

❑ What is the best use of the bar-codes? (e.g., printing them and sticking them to the bottom of each hard copy document that will be used as a the hearing exhibit or printing an outline of questions for a witness and applying the bar-code labels to the outline next to the question it references? Both? Etc.)

1. Status of Discovery?
2. Updated exchanges of witnesses and evidence? Deadlines for “Last & Final Lists”?
3. Any Special Needs or Circumstances to accommodate? Interpreter? ADA? Special needs?
4. Party and Counsel Representatives to be present? Experts to be present for any part?
5. Hearing “Room” or “Zoom”?
    a. If Zoom call, will it be recorded for "record"?
    b. Remote hearing issues?
6. Hearing Room Setup? Technology?
    a. Technology? Trial Presentation Software? System? Document Cameras?
7. Pre-Hearing Briefs? Opening Statements? Both?
    a. Provide context/framework for evidence.
    b. Identify the specific issues to be decided.
    c. Deal with unfavorable evidence.
    d. Reinforce themes
8. Exhibits?
    a. Exhibit Binders? Digital Evidence (e.g., PDFs? TIFFs?)
    b. Demonstratives?
    c. Stipulations regarding admissibility?
    d. Motions in limine?
    e. Admissibility of exhibits?
        i. All admitted absent objection?
        ii. Admitted only if referenced in hearing or hearing briefs?
    f. Objections to Exhibits?
9. Evidentiary "Rules”? Hearsay? Speaking objections?
10. Arbitrator Questioning of Witnesses?
11. Hearing subpoenas?
12. Time Management/Daily Schedule:
    a. Daily schedule? Expected daily hearing hours? Exceptions for any hearing days?
    b. Chess clock? Allocate time? How?
    c. Presentation and order of evidence (including scope, rebuttal)?
    d. “Out of Order” witnesses?
    e. Will call witnesses?

13. Court Reporter? Transcript? Official record? Cost sharing? Real time? Dirty ASCII?
14. Bifurcation of any issues? Attorney's fees and costs? After award or before?
15. Witnesses: Written direct? Sequence? Exclusion/Sequestration of witnesses?
16. Experts:
    a. Reports in lieu of direct exam?
    b. Daubert or other challenges?
    c. "Hot-tubbing:" pros and cons?
17. Post-hearing briefs? Alternatives?
    a. Slide presentation?
    b. Arbitrator questions?
    c. Traditional briefing?
18. Closing arguments?
    a. Briefing/argument based on guidance from arbitrators?
    b. When?
        i. At the end of the evidentiary hearing?
        ii. After receiving the hearing transcript/slide presentation?
        iii. After transcripts/post-hearing briefs?
19. Post-Hearing rebuttal evidence?
20. Closing the Hearing?
21. Party draft of proposed award or "findings of fact and conclusions of law"?
22. Possible loss of jurisdiction?
23. Form of Award:
    a. Will parties submit proposed award language?
    b. Will parties submit proposed findings of fact or conclusions of law?
    c. Any claims not arbitrated and reserved to the parties?
24. Get mobile phone numbers of parties for emergency SMS text messaging!

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March 14, 2023

SPONSOR CONTENT

Reframing the Opening Session in a Mediation: Tips for Setting a Mediation on a Productive Path

BY ANDREW NADOLNA

Mediations used to begin with extensive opening sessions. Lawyers made presentations similar to opening and closing arguments at trial. Sometimes the mediator asked questions. Sometimes the client would speak.

Now, mediations rarely begin this way. If there is an opening session, it is a shell of its former self, limited to handshakes, introductions and a few words from the mediator about process and confidentiality. This is a missed opportunity. We need to bring back opening sessions, but with time limits and more structure and guidance from mediators. And the focus should be on a high-level sharing of values about the case.

If there is one thing mediation participants almost always agree on regarding opening sessions, it's that they hate them. They don't want to do them. As they historically occurred in the mediation of all types of litigated cases, opening sessions were for many participants either unproductive or entirely counterproductive. Mediators insisted on holding relatively unstructured opening sessions, without guiding the parties and without enforcing time limits. Participants were told this was the equivalent of having their day in court; thus, they treated the opening session as such. Attorneys prepared accordingly, summarizing their arguments and evidence as if they were in front of a judge and jury.

Over time, nearly everybody got tired of this process. The thing about an opening or closing argument is it is designed to lead to something different from a mediation. Openings start trials and give way to the detailed introduction of evidence through witnesses. Closings end trials and lead to deliberations by a judge or jury. Most mediation participants understood this. They also understood at a

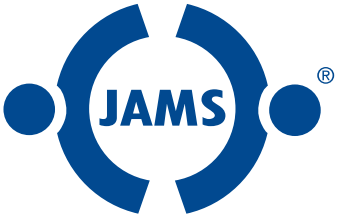
fundamental level a mediation did not flow from this kind of beginning. Participants often painfully experienced the hours spent trying to come back from the intensity of the opening sessions. Over time, more and more the sessions just faded away, usually at the request of counsel for both sides. The opening session either didn't happen at all or was reduced to a few introductions, some comments on confidentiality and then a retreat to separate rooms for the rest of the day, unless there was some reason for the principals to get together.

The problem is that opening sessions in some form are critical for decision-makers. For the most part, the information that a decision-maker can obtain from an opening session is direct and actionable. I used to be a decision-maker at mediations, attending with millions of dollars of settlement authority. Even during those painful opening sessions, I always learned something valuable, and I had no idea what it would be. Among the things I learned were that my case didn't sound as good out loud as it did on paper; one of the lawyers was driving some of the contentiousness in the case, unnecessarily; and the decision-maker on the other side needed to present an issue or concern immaterial to the merits of the case but important to them. There are countless important bits of information in any opening interaction, and they will never come to light and will not inform the negotiating process unless a joint session happens. Without an opening session, the nearly exclusive way to obtain information about the other side is from the mediator. This is good but not sufficient or optimal, as it gives the mediator way too much power way too early in the process.

The challenge has been to find a way to have an opening session that the parties and lawyers view as productive and helpful. Based on my experience presiding over productive opening sessions as a mediator, I can offer a few key elements. First, remember who the audience is. There is no judge or jury. The mediator is important, but they will not be deciding the case. Second, this is not a trial, so any presentation should not be framed as an opening or closing statement. The goal is to find a way to make the points about your case in a way that will be received by the other side. Tone matters. Finding areas of agreement is helpful, such as addressing the business context of a dispute or a long-standing relationship or acknowledging missteps. None of this is meant to suggest that a strong statement of your position is inappropriate. But it should be a brief high-level overview. The goal is to give the other side a chance to reconsider the strength of its own narrative. Third, time limits should be agreed upon in advance and strictly enforced. Fourth, the decision-makers should be given a chance to speak about their expectations for the day.

These elements should lead to a productive and helpful joint session where the decision-makers can discover those actionable bits of information that only direct communication can provide. If handled appropriately, an opening session is still the best way to convene a mediation and set the session on a productive path. We just need to reframe it for mediation.

***Andrew S. Nadolna, Esq.**, is a JAMS neutral based in New York City. He was previously a senior claims executive at AIG for over 15 years and an insurance coverage attorney in private practice. He can be reached at anadolna@jamsadr.com.*



Arb-med/med-arb: how to make it work

By Barbara A. Reeves, Esq., JAMS

FEBRUARY 6, 2023

Lawyers and their clients come into arbitration or mediation wanting a result. They want to win, but they also want expeditious and cost-effective dispute resolution. This article will explore how to use a mixture of mediation and arbitration in the same case with the same neutral, combining settlement-focused mediation and arbitrator adjudication, where the parties agree that the mediator can shift to the role of arbitrator, or vice versa.

Having a single neutral serve in both roles — i.e., having an arbitrator engage in settlement discussions — eliminates the need to educate two neutrals, which results in a savings of both time and cost.

Known as med-arb, arb-med or arb-med-arb, these multimode processes have resulted, in my experience, in a very high rate of settlement.

The basic questions

Med-arb: You're in a mediation but not reaching settlement. Would it be useful if the mediator switched to the role of arbitrator and gave a ruling on some issues within the case or even the entire case? This is **med-arb**, a dispute resolution process in which the parties agree that the mediator first attempts to mediate the dispute and, if mediation is unsuccessful in fully resolving the dispute, switches to the role of arbitrator.

Arb-med and arb-med-arb: You're in an arbitration, but you think now is a good time to mediate. Should you ask your arbitrator to shift to the role of mediator, or directly engage with the parties with respect to settlement? And, if you don't reach settlement (at this time), are you prepared to return to the arbitration with your former arbitrator who was your mediator? This is **arb-med** and **arb-med-arb**, dispute resolution processes in which the parties agree that an arbitrator takes on the role of mediator at some point during the arbitration process.

If mediation resolves the dispute, the settlement agreement may be converted into a consent arbitration award. If, on the other hand, mediation is unsuccessful in fully resolving the dispute, the arbitrator-turned-mediator will return to being an arbitrator, and the arbitration will continue.

When and how

Arb-med or arb-med-arb

During the preliminary arbitration conference, an arbitrator who is also an experienced mediator and who has experience in the mixed-mode arb-med process may raise the idea of using mediation. Alternately, it may arise during arbitration proceedings, or at the conclusion of testimony, or even after the arbitrator has written an award but before it is issued.

Whenever it happens, it is likely the result of the parties concluding that a negotiated resolution via mediation by the arbitrator, who is already familiar with the case, is more beneficial in terms of cost savings and familiarity with the case than reaching out to another mediator. At this point, one needs a med-arb or arb-med-arb agreement that describes the process and confirms the parties' understanding that the neutral will be functioning in both roles.

The neutral will be in caucus with each party and may learn confidential information that the mediator is not authorized to share with the other party. The parties will agree that the mediator may have these confidential caucuses with each party and that they are willing to waive the right to object to those *ex parte* communications.

Additionally, if the matter returns to arbitration, the parties agree not to move to vacate any arbitral award or later disqualify the neutral solely on the grounds that the arbitrator also served as a mediator. This enables the neutral to conduct a mediation using caucuses with each party while still being able to return to the role of arbitrator if the mediation is not successful in resolving the entire case.

Med-arb

The opportunity to combine mediation and arbitration may arise during a pre-mediation call with the mediator when a party identifies an issue that is an obstacle to settlement on which they would like the mediator to hear some evidence and make a ruling.

More often, it arises during the mediation when the mediator and the parties recognize that the matter simply won't settle until there is a ruling on a particular issue. At this point, the mediator can become an arbitrator, issue an enforceable order on the issue and then return to the role of mediator.

Assuming the parties are in agreement, they will need to sign a med-arb agreement, which is similar in purpose and scope to the arb-med-arb agreement discussed above.

The why

Now that you know how to combine mediation and arbitration in the same case with the same neutral, why would you do it?

Having a single neutral serve in both roles — i.e., having an arbitrator engage in settlement discussions — eliminates the need to educate two neutrals, which results in a savings of both time and cost. It may lead to a more creative business solution than could be ordered in an arbitration, and it may be appropriate given the parties' ongoing business relationship. There may be times when the parties wish to get a final resolution immediately, whether for financial reasons or because of a business situation that needs resolution.

When one person is wearing both hats, counsel and the parties are inclined to listen to and take more seriously the mediator's efforts and evaluations.

In such situations, having their arbitrator transition to a mediator role, or vice versa, may be the simplest and best solution and one that can be accomplished with one conference call. This is especially the case when an arbitrator has heard evidence or is otherwise well acquainted with the issues in dispute through prior motions, and may be able to shift to a mediator role immediately.

Likewise, if the parties have been engaged in mediating and they have a rapport with and trust in the mediator, the mediator may be an ideal candidate to adjudicate the dispute if the parties are unable to reach a negotiated settlement.

Furthermore, when one person is wearing both hats, counsel and the parties are inclined to listen to and take more seriously the mediator's efforts and evaluations. That makes sense: When the mediator looks the lawyer in the eye and discusses a potentially weak point in the case, a typical response from an aggressive counsel in the usual mediation is to brush it aside. Usually, it is something that counsel in fact recognizes as a problem but has determined to try to push past the mediator, arguing that the arbitrator may never focus on that point or won't agree that it is an issue, even though counsel knows it is a weak point. This is a form of "spinning" the mediator, which may or may not work, but does interfere with reaching a settlement.

When the mediator is also the arbitrator, one cannot so easily spin the mediator by arguing that the arbitrator will see things differently. Truth telling in mediation increases when counsel know that misrepresentations will come back to haunt them if the case proceeds to arbitration in front of the same neutral.

What about the concern that the mediator may learn information in *ex parte* caucuses that would affect the arbitration process, should the parties return to arbitration? How can a mediator-turned-arbitrator purge his or her mind from what was heard in caucus, and how can the other side respond to confidential communications to which they were not privy?

In general, if the facts are relevant, they are either already known by the other party or will be by the time of the arbitration. If they are irrelevant, the neutral knows how to disregard them.

What *is* shared in mediation that does not come out at arbitration are the parties' interests in settlement that are unrelated to the merits or their belief in the strength of their case but that have to do with their risk tolerance, their desire to control the resolution, and the need for a quick settlement and to avoid the cost, time and expense of further arbitration.

Med-arb, arb-med and active involvement by arbitrators in settlement discussions are not process options that have been widely embraced by parties, counsel or dispute resolution professionals. However, they have been effective. Try them; you might like them.

The opinions expressed in this article are those of the author. They do not purport to be the opinions or views of JAMS.

About the author

Barbara A. Reeves is a mediator, arbitrator and special master with **JAMS**. She specializes in commercial cases, sports and entertainment law, intellectual property matters, health care business disputes and employment cases. She is based in Los Angeles and can be reached at JKroll@jamsadr.com.

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The College of Commercial Arbitrators

Protocols

for

Expeditious, Cost-Effective Commercial Arbitration

Key Action Steps for

Business Users, Counsel, Arbitrators

& Arbitration Provider Institutions

Thomas J. Stipanowich, Editor-in-Chief

Curtis E. von Kann and Deborah Rothman, Associate Editors

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The College of Commercial Arbitrators Protocols for Expeditious, Cost-Effective Commercial Arbitration

Key Action Steps for Business Users, Counsel, Arbitrators and Arbitration Provider Institutions

Table of Contents

Foreword

The College of Commercial Arbitrators was established in 2001. Its mission is to promote the highest standards of conduct, professionalism and ethics in commercial arbitration, to develop "best practices" guidelines and materials, and to provide peer training and professional development. Its membership currently consists of approximately two hundred leading commercial arbitrators in the United States and abroad.

In response to mounting complaints that commercial arbitration has become as slow and costly as litigation, thus substantially diminishing its appeal, the College decided in 2008 to convene the following year a National Summit on Business-to-Business Arbitration to identify the chief causes of the problem and explore concrete, practical steps that can be taken now to remedy them. ***The concept of a National Summit sprang from two key insights: (1) lengthy, costly arbitration results from the interaction of business users, in-house attorneys, the institutions that provide arbitration services, outside counsel and arbitrators; and (2) all of these "stakeholders" must collaborate in identifying and achieving desired efficiencies and economies in arbitration.*** Therefore, in addition to its own Fellows, who have considerable experience and expertise as commercial arbitrators (and, in many cases, as advocates), the College invited to the National Summit in-house counsel from numerous major companies that utilize arbitration, skilled advocates who represent such parties in arbitration in a wide variety of geographic regions and commercial specialties, and individuals who occupy key positions in leading institutional providers of arbitration services.

In anticipation of the Summit, the College appointed Task Forces composed of corporate counsel, outside counsel and arbitrators to study the issues and provide insight and perspective concerning the problems and possible solutions. Thereafter, the College's Summit Planning Committee carefully reviewed submissions from the Task Forces and developed a Draft Report for discussion at the Summit. The Report, edited by Fellows Professor Thomas Stipanowich, Curtis von Kann and Deborah Rothman, concluded with four *Protocols* containing proposed action steps for Business Users and In-House Counsel, Arbitration Provider Institutions, Outside Counsel and Arbitrators. The Draft Report, entitled *"How to Drastically Reduce Cost and Delay in Commercial Arbitration,"*[1] was circulated to all Summit invitees in the early fall of 2009.

The National Summit was convened in Washington, D.C. at the end of October, 2009. A measure of the perceived importance of the Summit was the fact that five of the principal organizations involved in commercial arbitration, namely, the American Bar Association Section of Dispute Resolution, the American Arbitration Association, JAMS, the International Institute

[1] As used in the draft report and in this publication, the term "commercial arbitration" refers to arbitration between two or more commercial entities, i.e., business-to-business arbitration. Neither the Summit nor this report has attempted to address the rather separate and distinct issues that arise in arbitration between businesses and employees or consumers. While those scenarios are certainly worthy of thoughtful study and attention, they are beyond the scope of the present initiative. Furthermore, although the recommendations offered herein may be of great benefit in the context of international arbitration, the focus of this report is on commercial arbitration in the United States.

for Conflict Prevention and Resolution ("CPR"), and the Chartered Institute of Arbitrators, joined the College as co-sponsors of the Summit, along with the Straus Institute for Dispute Resolution of Pepperdine University School of Law and seventy-two Fellows of the College.

More than 180 individuals participated in the Summit, which was designed as a structured "conversation" to elicit participants' input on the proposed *Protocols*. Following panel presentations regarding each of the four *Protocols* (conducted by corporate counsel, outside counsel, arbitrators and executives of "provider" institutions), Summit participants had the opportunity to comment on the proposals and recommend amendments or additions. The Summit concluded with a "town hall" meeting during which electronic voting devices were used to gauge the opinion of Summit participants concerning specific action steps.

In the course of producing this Final Report, the Editors thoroughly analyzed the results of the National Summit as well as numerous additional written recommendations for the improvement of the draft *Protocols* and made material revisions to those documents. The *Protocols* and accompanying commentary are designed to produce simple and straightforward guidance for all stakeholders with the intent of encouraging efforts that promote more expeditious and cost-effective arbitration.[2] The commentary provides information on numerous procedural options and tools designed by various organizations to promote the goals and fulfill the action steps set forth in the *Protocols*.

The College expresses its deep gratitude to all of the Summit sponsors as well as the many individuals and organizations that helped plan, organize and produce the National Summit and *Protocols*. While the views and opinions of all participants were extraordinarily valuable in producing this report, the report is ultimately that of the College which takes full responsibility for any deficiencies that may be found in the document.

It is the fervent hope of the College of Commercial Arbitrators that publication of these *Protocols* will sound a clarion call to action by all constituencies involved in business arbitration, encouraging prompt adoption of effective measures to dramatically reduce process costs and delay, restoring arbitration to its rightful place as a valuable and efficient alternative to litigation in the resolution of business disputes.

Bruce W. Belding
President of the College 2008-2009

Curtis E. von Kann
President of the College 2009-2010

[2] The *Protocols* target ways to reduce cost and delay because those factors are the focus of most current complaints about commercial arbitration. Economy and efficiency are usually among the key concerns of arbitrating parties, but these goals may be in tension with, and may even be outweighed by, a desire for court-like due process. In any event, the *Protocols*' value will be in direct proportion to parties' desire to promote economy and efficiency in arbitration.

About the Editors

Thomas J. Stipanowich, William H. Webster Chair in Dispute Resolution and Professor of Law at Pepperdine University School of Law and Academic Director of the Straus Institute for Dispute Resolution, has had a distinguished career as a scholar, teacher, and leader in the field as well as a commercial and construction arbitrator and mediator, federal court special master, and facilitator. From 2001 until mid-2006, he served as CEO of the International Institute for Conflict Prevention & Resolution (CPR); prior to that time he was a litigator with a national construction law firm and, for fourteen years, a chaired professor of law. He was co-author with Ian Macneil and Richard Speidel of the much-cited multi-volume treatise *Federal Arbitration Law* (Little, Brown & Co. 1994). He edited *Commercial Arbitration at Its Best* (ABA 2001), the report of the CPR Commission on the Future of Arbitration. He co-authored a groundbreaking book and materials for law schools entitled *Resolving Disputes: Theory, Practice, and Law* (Aspen Publishing, 2d ed. 2010). In 2008 he was awarded the highest honor of the ABA Dispute Resolution Section, the D'Alemberte-Raven Award, for contributions to the field of conflict resolution. He has twice (1987, 2010) received the CPR Best Professional Article award, most recently for "Arbitration: The 'New Litigation'" and "Arbitration and Choice." He is one of very few individuals accorded the title of Companion by the Chartered Institute of Arbitrators. He holds a Bachelors (with highest honors) and Masters in Architecture as well as a Juris Doctor (*magna cum laude*, Order of the Coif) from the University of Illinois. He is an arbitrator and mediator with JAMS.

Curtis E. von Kann, a graduate of Harvard College and Harvard Law School, was a civil litigator for sixteen years, principally as an associate, then partner in the Washington, DC law firm of Hogan & Hartson. In 1985 President Ronald Reagan appointed him a Judge of the District of Columbia Superior Court where he presided over hundreds of jury and non-jury trials and was a principal designer of the Court's highly successful civil case management and ADR program. Since 1997 he has served as a full-time arbitrator and mediator in the Washington office of JAMS and has written and spoken widely on a variety of ADR topics. He is currently President of the College of Commercial Arbitrators and was Editor-in-Chief of the first edition of the College's *Guide to Best Practices in Commercial Arbitration.*

Deborah Rothman, a *magna cum laude* graduate of Yale College, received her Masters in Public Affairs from the Woodrow Wilson School at Princeton University and her Juris Doctor from NYU School of Law. After practicing law with Manatt Phelps in Los Angeles, she became President and CEO of Baby Fair Enterprises. Since 1991, she has been a full-time mediator and arbitrator with the American Arbitration Association in New York and Los Angeles, specializing in business, entertainment, franchise, intellectual property and employment matters. She also provides arbitration consulting services in high-stakes arbitrations and has been on the Board of the College of Commercial Arbitrators since 2003.

I

Speed, Economy and Efficiency in Commercial Arbitration: Failed Expectations, Shared Responsibility[3]

Despite meaningful efforts to promote better practices and ensure quality among arbitrators and advocates, criticism of American commercial arbitration is at a crescendo. Much of this criticism stems from the fact that business-to-business arbitration has taken on the trappings of litigation—extensive discovery and motion practice, highly contentious advocacy, long cycle time and high cost.[4] While many business users still prefer arbitration to court trial because of other procedural advantages,[5] the great majority of complaints being voiced by arbitration users are the same: commercial arbitration now costs just as much, and takes just as long, as litigation.[6] Clients and counsel often wonder aloud what happened to the economical and efficient alternative to the courtroom.[7]

As a result, some business clients and counsel have removed arbitration clauses from their contracts. This situation has also contributed to the removal of arbitration provisions

[3] Many elements of this Report are borrowed or adapted from documents prepared in anticipation of the National Summit on Business-to-Business Arbitration and the development of the *Protocols*. These include the reports of Task Force Committees including the Committee on Business Users and House Counsel (Jeff Paquin and James Snyder, Chairs); the Committee on Arbitration Advocates (David McLean and Steven Comen, Chairs); and the Committee on Arbitrators (Louise LaMothe and John Wilkinson, Chairs). Concepts and text were also drawn from two extensive articles prepared in anticipation of the National Summit on Business-to-Business Arbitration: Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1 (Jan. 2010) *available at* http://ssrn.com/abstract=1297526 [hereinafter Stipanowich, *New Litigation*] (analyzing current trends affecting perception and practice in commercial arbitration); Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the New Litigation, (Symposium Keynote Presentation)*, 7 DEPAUL BUS. & COM. L.J. 401 (2009), *available at* http://ssrn.com/abstract=1372291 [hereinafter Stipanowich, *Arbitration and Choice*].

[4] Stipanowich, *New Litigation, supra* note 3, at 6-27.

[5] FULBRIGHT & JAWORSKI, U.S. CORPORATE COUNSEL LITIGATION TRENDS SURVEY RESULTS 18 (2004); Michael T. Burr, *The Truth About ADR: Do Arbitration and Mediation Really Work?* 14 CORP. LEGAL TIMES 44, 45 (2004).

[6] *See, e.g.*, Mary Swanton, *System Slowdown: Can Arbitration Be Fixed?,* INSIDE COUNSEL, May 2007, at 51; Lou Whiteman, *Arbitration's Fall from Grace*, LAW.COM IN-HOUSE COUNSEL, July 13, 2006, http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id= 900005457792; Leslie A. Gordon, *Clause for Alarm,* A.B.A. J., Nov. 24, 2006, at 19, *available at* http://www.abajournal.com/magazine/article/clause_for_alarm/. Barry Richard, *Corporate Litigation: Arbitration Clause Risks*, NAT'L L.J., June 2004, at 3. *See also* Benjamin J.C. Wolf, *On-line But Out of Touch: Analyzing International Dispute Resolution Through the Lens of the Internet*, 14 CARDOZO J. INT'L & COMP. L. 281, 306-07 (2006) (describing the disadvantages of arbitration, including costs similar to litigation and lengthy discovery process and hearings); *See also Mediation—Knocking Heads Together—Why go to court when you can settle cheaply, quickly and fairly elsewhere?*, THE ECONOMIST, Feb. 3, 2000, at 62 (noting arbitration is no "cheaper, fairer or even quicker" than trial).

[7] Stipanowich, *New Litigation*, *supra* note 3, at 9.

from important standard industry contract forms.[8] As one West Coast in-house counsel recently reported,

> We really sell arbitration to our business clients [as a superior alternative to litigation]. Now they are accusing us of false advertising. . . . Literally all of the top general counsel from the largest corporations in the Bay Area were uniform in their frustration with arbitration and many have said . . . they're not agreeing to it anymore.

Such outcomes are unfortunate, because commercial arbitration offers businesses the prospect of a true alternative to litigation— indeed, a spectrum of alternatives. While litigation may prove desirable to parties who require public proceedings, case precedents, and the contempt power of courts, arbitration offers the inestimable range of advantages that come with *choice*—the ability to tailor the process to the dispute. For this key reason, arbitration should always be a prominent contender in the marketplace of alternatives for resolving business disputes.[9]

In recent years, to be sure, much effort has been devoted to providing guidance for arbitrators, business users and advocates. In addition, leading dispute resolution provider institutions have spent considerable time and effort developing and revising arbitration procedures. Despite all of this, the problems—perceived and real—remain.

At the October 2009 National Summit on Business-to-Business described in the Foreword to this report, the views of all participants—including corporate counsel, outside counsel, arbitrators and executives of institutions providing arbitration and other dispute

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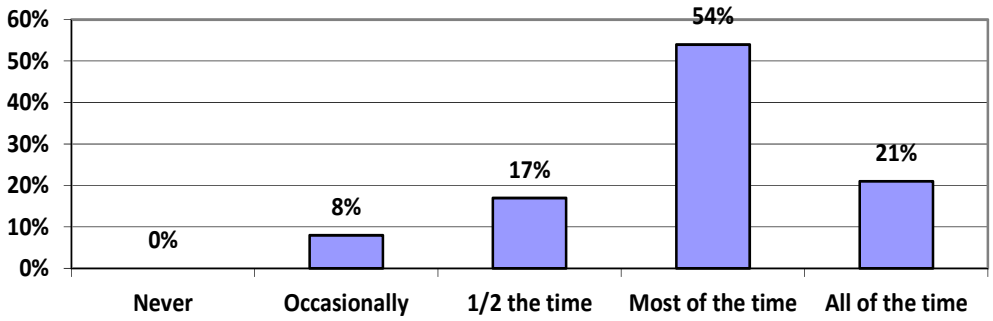
[8] The latest edition of the American Institute of Architects construction forms, the nation's most widely used template for building contracts, eliminates the default binding arbitration provision, long a *sine qua non* of construction contracts; parties must henceforth affirmatively agree to arbitration by checking a box or, by default, go to court. *See* AIA DOCUMENT A201-2007, GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION, art. 15 (2007); AIA DOCUMENT B101-2007, STANDARD FORM OF AGREEMENT BETWEEN OWNER AND ARCHITECT, art. 8 (2007). A new much-heralded rival set of standard contract documents also relegates arbitration to an option rather than a default procedure. CONSENSUSDOCS 240, STANDARD FORM OF AGREEMENT BETWEEN OWNER AND ARCHITECT/ENGINEER, art. 9.5 (2007).

[9] Advocates of arbitration are quick to point out that arbitration awards are likely to prove much more "final" than court judgments, tending to substantially reduce post-hearing process time and costs. Moreover, arbitration offers parties a host of opportunities to craft a process that proves vastly superior to litigation in many cases, such as the ability to choose their decision maker(s) (including subject matter experts), procedures and venue. Parties may also identify the issues that will (and will not) be arbitrated, help set the timetable for the process, and take steps to ensure the confidentiality of proceedings and of documents disclosed during the process. For any or all of these reasons arbitration may be an appealing alternative to litigation regardless of the relative cost and length of arbitration. *See, e.g.,* Curtis E. von Kann, *A Report Card on the Quality of Commercial Arbitration: Assessing and Improving Delivery of the Benefits Customers Seek,* 7 DEPAUL BUS. & COM. L.J. 499 (2009) (concluding that commercial arbitration does quite a good job of meeting user expectations concerning their ability to choose the decision-maker, the opportunity to adapt the process to the needs of individual cases, flexibility in the adjudicative process, privacy of the adjudicative process, accessibility of the decision-maker, efficient and user-friendly case administration, fair and just results, and finality of the decision). Nevertheless, the perception that arbitration processes are unacceptably slow and costly—and in this respect not a demonstrably superior alternative to litigation—has tainted arbitration in the eyes of many business clients and counsel.

resolution services—were sought by means of a "town hall" meeting and electronic voting. While not a scientific survey, the voting data reflected important levels of consensus about the depth of user concerns about arbitration, the roots of those problems, and potential solutions.

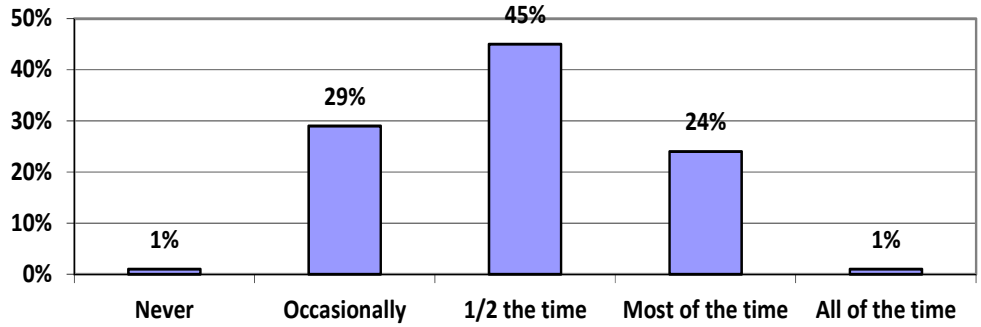
Summit participants overwhelmingly believed that relative speed, efficiency and economy tend to be important to business users of arbitration.

How often do business users desire arbitration to be speedier, more efficient and more economical than litigation?



Moreover, to one degree or another, nearly all participants were convinced that arbitration falls short of users' expectations regarding speed, efficiency and economy at least some of the time. Seven in ten were convinced that this occurred *at least half the time*:

In your experience, how often does arbitration fail to meet the desires of business users when they want speed, efficiency and economy?



Even if these collective perceptions exaggerate to some extent the gap between business users' expectations of arbitration and their actual experiences, there is considerable room for concern.

In order to address this disquieting *status quo*, the Summit focused on identifying the perceived roots of the problem and exploring potential solutions.

II
The Root of the Problem:
Arbitration Has Become Too Much Like Litigation

A. Reduced Use of Trial; Growth of Commercial Arbitration

Over the past three decades large, complex business disputes that used to be filed in court, typically federal court, have been increasingly brought to commercial arbitration. Several factors have contributed to this trend.

A recent ABA Symposium on "The Vanishing Trial" spotlighted an 84% decrease in the percentage of federal cases resolved by trial between 1962 and 2002, and significant parallel declines in state courts.[10] The dramatic fall-off in the rate of trial may be attributed in large part to concerns about the high costs and delays associated with full-blown litigation, its attendant risks and uncertainties, and its impact on business and personal relationships.[11] Businesses have become increasingly gun-shy about entrusting their financial success, even their continued existence, to unpredictable juries or autocratic judges (often with little or no pertinent legal or commercial background or experience). Their first and foremost concern, however, is the costliness and slowness of litigation: in the blunt words of a recent report by a task force of the American College of Trial Lawyers and the Institute for Advancement of the Legal System, "because of expense and delay, both civil bench trials and civil jury trials are disappearing."[12]

The concerns that contributed to the waning of civil litigation offered opportunities for the growth of private adjudication through binding arbitration.[13] Conventional wisdom—and common sense—suggests that businesses choose binding arbitration mainly because it is perceived to be superior to litigation[14] in some or all of the following ways: cost savings, shorter

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[10] Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts,* 1 J. EMPIRICAL LEGAL STUD. 459, 460 (2004).

[11] *See* David R. Fine et al, *The "Vanishing" Civil Jury Trial—Report of The Middle District Bench/Bar Task Force*, 80 PA. B. ASS'N Q. 24 (2009) (citing costs and delays among primary reasons for reduced trials); Nathan L. Hecht, *The Vanishing Civil Jury Trial: Trends in Texas Courts and an Uncertain Future*, 47 S. TEX. L. REV. 163 (2006) (same); Stephen Daniels & Joanne Martin, *The Impact It Has Had Is Between People's Ears: Tort Reform, Mass Culture, and Plaintiff's Lawyers*, 50 DEPAUL L. REV. 453, 454 (2000) (noting businesses' fear of litigation). *See also* John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions,* 3 HARV. NEGOT. L. REV. 1, 26 (1998) (94% of surveyed executives believed there had been a "litigation explosion"); VALERIE P. HANS, BUSINESS ON TRIAL 56 (2000) (describing public apprehensions regarding litigation).

[12] INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 3 (Mar. 11, 2009) [hereinafter FINAL REPORT ON LITIGATION REFORM].

[13] As one experienced commercial dispute resolution lawyer explains, "Nature abhors a vacuum, and a vacuum has been created with the decreased frequency of bench and jury trials. This portends good things for alternative dispute resolution processes."

[14] William H. Knull, III & Noah D. Rubins, *Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?,* 11 AM. REV. INT'L ARB. 531, 532 (2000); Richard E. Speidel, *Securities Arbitration: A Decade after McMahon*,

resolution times, a more satisfactory process, expert decision makers, privacy and confidentiality, and relative finality.[15] The untiring efforts of arbitration providers in promoting commercial arbitration rules and standard model clauses have encouraged broader use of arbitration in recent decades, while the growth of a large cadre of relatively sophisticated, accomplished, and well-trained professional arbitrators has undoubtedly enhanced confidence that arbitration will produce a reasonable and fair result. A wide variety of simple as well as sophisticated contractual provisions for the resolution of disputes by arbitrators are now featured in many different kinds of commercial contracts.[16] These phenomena, coupled with plenary judicial enforcement of broadly tailored arbitration provisions, have made arbitration a wide-ranging surrogate for trial in a public courtroom.[17]

B. Importation of Trial Practices into Arbitration

Commercial arbitration is, to a large extent, a victim of its own success. The migration of commercial cases from litigation to arbitration has, predictably, brought into arbitration some of the practices associated with commercial case litigation. Many skilled and experienced attorneys, while happy to accept the foregoing advantages of arbitration, nonetheless generally want to try cases in arbitration with the same intensity and the same tactics with which they were conducted in court. Thus, expanded arbitral motion practice and discovery have developed within the framework of standard commercial arbitration rules which tend to afford arbitrators and parties considerable "wiggle room" on matters of procedure. As a consequence, practice under modern arbitration procedures is today often a close, albeit private, analogue to civil trial.

Aside from the natural human tendency to want to do things "the way we've always done them," there are other drivers of the incorporation of litigation-style proceedings into large commercial arbitration. Litigators, being inherently conservative and cautious, on the one hand, and determined to achieve the best possible result for their clients, on the other, are very reluctant to try a big case—in either a court or an arbitration proceeding—until they have sought all possible evidence, analyzed every issue, and played every legal card at their disposal. If, notwithstanding all these efforts, the client suffers an adverse result, counsel can say with confidence that this did not occur because they held back on any actions that might have produced a better outcome. It must be noted, finally, that these practices—constituting the arguable path of prudence—are also significant contributors to law firm revenues.

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62 BROOK. L. REV. 1335 (1996); COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS 12-13 (Thomas J. Stipanowich & Peter H. Kaskell eds., 2001) [hereinafter COMMERCIAL ARBITRATION AT ITS BEST].

[15] *See* DAVID B. LIPSKY & RONALD L. SEEBER, THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES—A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS 17 (1998) (detailing reasons why companies use mediation and arbitration). *See also* Richard W. Naimark & Stephanie E. Keer, *International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People: A Forced Rank Analysis*, 30 INT'L BUS. LAW. 203 (2002) (simple forced rank analysis of factors of importance to attorneys and clients in AAA international arbitration cases).

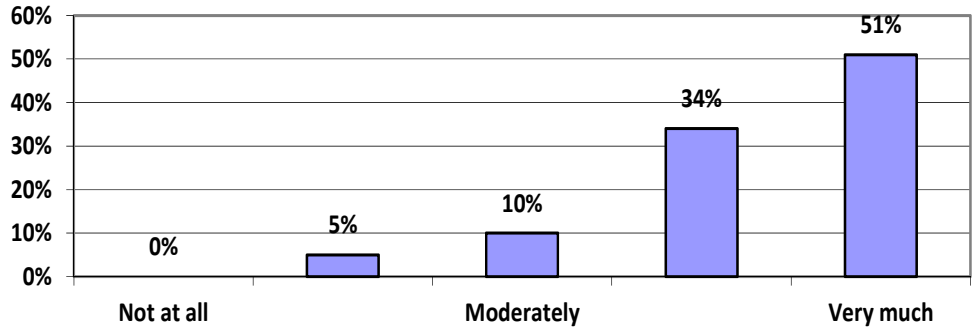
[16] Celeste M. Hammond, *A Real Estate Focus: The (Pre)(As)summed "Consent" of Commercial Binding Arbitration Contracts—An Empirical Study of Attitudes and Expectations of Transactional Lawyers*, 36 J. MARSHALL L. REV. 589, 591 (2003) (commenting on the widespread use of arbitration provisions in commercial contracts).

[17] *See* Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 WIS. L. REV. 831, 839-44.

1. Discovery

Among many aspects of this phenomenon, the expansion of discovery stands out as the primary contributor to greater expense and longer cycle time, as affirmed by a poll of National Summit participants:

> *If you believe arbitration fails to meet the desires of business users regarding speed, efficiency and economy, to what extent does excessive discovery tend to contribute to that result?*



Arbitration hearings are now often preceded by extensive discovery, including requests for voluminous document production and depositions. Since discovery has traditionally accounted for the bulk of litigation-related costs,[18] the importation of discovery into arbitration (which traditionally operated with little or no discovery) is particularly noteworthy. Although many arbitrators and some arbitration rules aim to hold the line on excessive discovery,[19] it is not unusual for legal advocates to agree to litigation-like procedures for discovery, even to the extent of employing standard civil procedural rules.[20] This should not be surprising, since there

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[18] According to a 1999 study, document discovery alone accounts for 50% of litigation costs in the average case, and 90% in active discovery cases. Admin. Office of the U.S. Courts, *Judicial Conference Adopts Rule Changes, Confronts Projected Budget Shortfalls*, THE THIRD BRANCH, Oct. 1, 1999, *available at* http://www.uscourts.gov/News/NewsView/99-09-15/Judicial_Conference_Adopts_Rules_Changes_-_Confronts_Projected_Budget_Shortfalls.aspx. American lawyers devote more time to document discovery than to nearly any other activity, including client counseling, legal research and negotiations. *See* Salvatore Joseph Bauccio, *E-Discovery: Why and How E-Mail is Changing the Way Trials are Won and Lost,* 45 DUQ. L. REV. 269, 269 n.7 (2007). *See also* JAMES S. KAKALIK, ET AL., DISCOVERY MANAGEMENT: FURTHER ANALYSIS OF THE CIVIL JUSTICE REFORM ACT EVALUATION DATA 55 (1998); John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 506 (2000); Wayne D. Brazil, *Civil Discovery: How Bad Are the Problems?*, 67 A.B.A. J. 450 (1981).

[19] *See, e.g.*, INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION (CPR) NON-ADMINISTERED ARBITRATION RULES R. 11 (2007) ("The Tribunal may require and facilitate such discovery as it shall determine is appropriate…taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective.") *See also* JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES, R. 22 (2007); AAA COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES R. 30 (2009).

[20] In some cases arbitrators are confronted by a prior agreement of counsel for arbitrating parties to utilize the discovery provisions of the Federal Rules of Civil Procedure in arbitration. This poses a dilemma for the arbitrator, who may or may not be able to persuade counsel to forego requests for admission and interrogatories and to strictly limit the number of depositions, and also to closely supervise the discovery process to avoid unnecessary delays.

is a tendency to use the tools with which one is most familiar, and lawyers schooled in trial may predictably rely on their knowledge and experience in the private analog of the process. Trial practice, with its heavy emphasis on intensive discovery and related motion practice, is reinforced by ethical rules enshrining the model of zealous advocacy.[21] For lawyers accustomed to full-fledged discovery, anything less may seem tantamount to malpractice.[22]

It is not hard for American lawyers to justify intensive discovery to themselves and their clients. Legitimizing a legal position often requires painstaking reconstruction of past events, a highly labor- and time-intensive activity that may require conscientious sifting of vast amounts of information, most of which is of little or no relevancy. The expectation—or hope—is that the "mining" effort will ultimately produce a picture that supports the position.[23] Alternatively, it might at least forestall an undesired resolution for months or years.[24]

Business clients—especially those with significant interests or assets at stake—are often disinclined to challenge this effort to mine information. They may agree with or rely on the advocate's preliminary counsel that the mining operation will yield productive results;[25] indeed, they may have strategic reasons for using discovery to increase their opponent's costs, and/or delay the final resolution of the dispute.[26]

Arbitrators, intent upon striking a balance between fundamental fairness and efficiency, may be reluctant to push parties to limit such practices or to keep to schedule, especially when all parties have agreed to wide-ranging discovery. These tendencies are likely to be reinforced by the reality that arbitration is founded on an agreement between the parties, leading to the common and reasonable perception that arbitrators have no business second-guessing agreements between counsel regarding the conduct of discovery and other procedures. There are also concerns about an arbitration award being subjected to a motion to vacate based on a failure to consider relevant evidence, especially among arbitrators who lack the confidence of long experience.[27] Some have even suggested that a reluctance to limit discovery may reflect an arbitrator's desire to avoid offending anyone in the hope of securing future appointments.[28]

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[21] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1983).

[22] John Hinchey, Remarks at the Annual Meeting, American College of Construction Lawyers, *Adjudication: Coming to America* (Feb. 22, 2008) (notes on file with author).

[23] *See* Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(A) – 'Much Ado about Nothing?*,' 46 HASTINGS L.J. 679, 697-714 (1995) (noting that overly broad discovery allows parties to go on "fishing expeditions"); Chris A. Carr & Michael R. Jencks, *The Privatization of Business and Commercial Dispute Resolution: A Misguided Policy Decision*, 88 KY. L.J. 183, 222 (2000) (discussing the advent of the "discovery lawyer").

[24] *See* BENJAMIN SELLS, THE SOUL OF THE LAW 88 (1994).

[25] Carr & Jencks, *supra* note 23, at 240.

[26] *See* Sorenson, Jr., *supra* note 23, at 699-700. Discovery has been used as a tactical weapon to impose excessive costs on the opposing party.

[27] There is little case law in this area to provide guidance and reassurance to arbitrators who might otherwise be inclined to more rigorously impose limits over counsel's objection. In Hicks v. UBS Financial Services, Inc., 649 Utah Adv. Rep. 7 No 20080950-CA , filed Feb. 4, 2010 UT, App 26, the Utah Court of Appeals held that "erroneous

For all of these reasons, discovery under standard arbitration procedures has tended to become much like its civil court counterpart. As one corporate general counsel explains:

> [I]f you simply provide for arbitration under [standard rules] without specifying in more detail . . . how discovery will be handled . . . you will end up with a proceeding similar to litigation.[29]

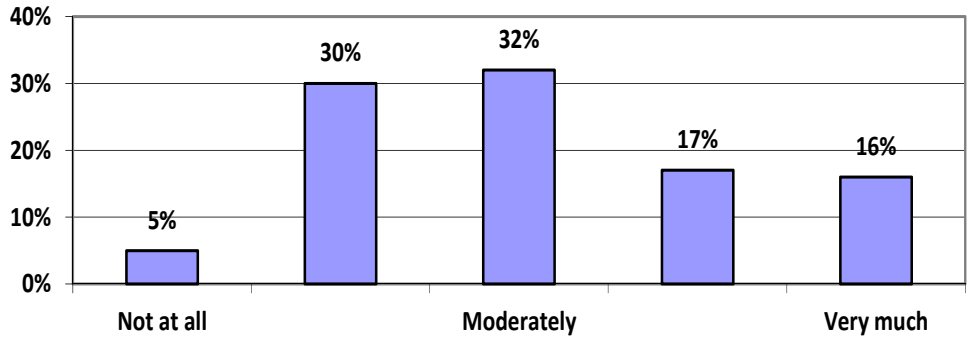
All too often, lamented another corporate lawyer at the National Summit, this expensive, "overblown" process results in little or no useful information, let alone the proverbial "smoking gun."

With the advent of electronic discovery—producing what was recently termed "a nightmare and a morass" for parties in litigation,[30] the costs and stakes of litigation-style discovery have never been higher. Never, moreover, has the need to control discovery in arbitration been more imperative.

2. Motion practice

Another key source of cost and delay in commercial arbitration is motion practice, as reflected in the poll of National Summit participants:

> *If you believe arbitration fails to meet the desires of business users regarding speed, efficiency and economy, to what extent does excessive, inappropriate or mismanaged motion practice tend to contribute to that result?*



discovery decisions" could provide a basis for vacating an arbitration award, but that the showing of "prejudice" resulting from the arbitrator's discovery decisions must be "substantial."

[28] *See* Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. PA. J. LAB. & EMP. L. 685, 717 (2004) (arguing that arbitrators may be less restrictive with discovery than judges because of their concern over obtaining future appointment as an arbitrator).

[29] James Bender, General Counsel, Williams Companies, Remarks at The Torch is Passed, Corporate Counsel Panel Discussion, Annual Meeting, CPR Institute for Dispute Resolution (Jan. 29-30, 2004), *cited in* Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution,"* 1 J. EMPIRICAL LEGAL STUD. 843, 895 n. 292 (2004) [hereinafter Stipanowich, *Vanishing Trial*].

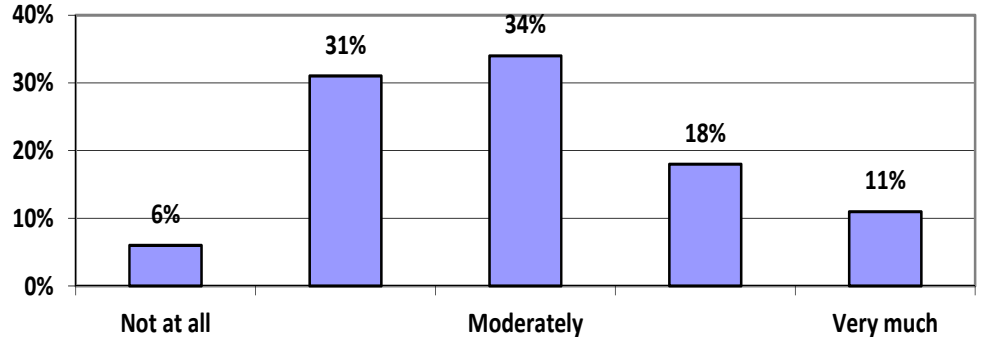
[30] FINAL REPORT ON LITIGATION REFORM, *supra* note 12, at 14.

The use of dispositive motions in arbitration—now contemplated even by some expedited rules[31]—is, practically speaking, a double-edged sword.[32] This import from the court system, prudently employed, is a potentially useful tool for narrowing arbitral issues prior to hearings and full-blown discovery, thus avoiding unnecessary preparation and hearing time. While arbitrators are properly chary of summarily disposing of matters implicating factual issues, there are certain matters that may be forthrightly addressed early on with little or no discovery, such as contractual limitations on damages, statutory remedies, or statutes of limitations and other legal limitations on causes of action.[33] The problem is that, as in court, motion practice often contributes significantly to arbitration cost and cycle time without clear benefits. The filing of motions leads to the establishment of schedules for briefing and argument entailing considerable effort by advocates, only to have the arbitrators postpone a decision until the close of hearings because of the existence of unresolved factual disputes raised by the motion papers.[34]

3. Other concerns

Another contributor to cost and delay is hearings that drag on too long, as reflected in the poll of National Summit participants:

> *If you believe arbitration fails to meet the desires of business users regarding speed, efficiency and economy, to what extent do <u>too-lengthy hearings</u> tend to contribute to that result?*



[31] *See, e.g.*, JAMS ENGINEERING/CONSTRUCTION EXPEDITED RULES, Rule 18 (2009).

[32] COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 14, at 203-06; Zela G. Claiborne, *Constructing a Fair, Efficient, and Cost-Effective Arbitration*, 26 ALTERNATIVES TO THE HIGH COST OF LITIG. 186 (Nov. 2008). *See also* Albert G. Ferris & W. Lee Biddle, *The Use of Dispositive Motions in Arbitration*, 62 DISP. RESOL. J. 17 (Aug.-Oct. 2007).

[33] COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 14, at 48, 53-55. The new Final Report on Litigation Reform states that "parties and the courts should give greater priority to the resolution of motions that will advance the case more quickly to trial or resolution." FINAL REPORT ON LITIGATION REFORM, *supra* note 12, at 22. It also calls for "a new summary procedure . . . by which parties can submit applications for the determination of enumerated matters (such as rights that are dependent on the interpretation of a contract) on pleadings and affidavits or other evidentiary materials." *Id.* at 6.

[34] *See* Romaine L. Gardner, *Depositions in Arbitration: Thinking the Unthinkable*, 1131 PRACTICING LAW INST. CORP. LAW & PRACTICE COURSE HANDBOOK 379, 389-97 (Jul.-Aug. 1999).

As with discovery and motion practice, the cause of drawn-out hearings is often a complex interaction of several factors. It typically starts with attorneys, intent on pursuing their brand of "zealous advocacy" for strategic or tactical reasons, interposing constant objections, introducing redundant testimony, and framing the same question over and over again. It is facilitated by arbitrators who are unable or unwilling to come down too heavily on the parties—perhaps because of lack of skill or native discomfort with proactive management, or because they may be uncomfortably aware of scheduling issues of their own that may need to be accommodated during the course of trying a complex case. The ballooning of hearing time is especially likely within the ambit of open-ended arbitration procedures with considerable "wiggle room"; however, even previously established timetables and prescribed deadlines sometimes fall by the wayside due to mindsets like those described above.

C. Looking Beyond Litigation-Style Arbitration

When effectively managed by competent arbitrators with the cooperation of counsel, a "hybrid system" which combines the basic features of arbitration (process control, confidentiality, finality and chosen expert decision-maker) with court-like discovery, motion practice, and the like is not inherently bad, and may be a perfectly sensible arrangement for some kinds of disputes. For example, a rational choice might be made in favor of such an approach, despite the prospect of expense and extended process, where the stakes are very high.

In many cases, the case management efforts of skilled arbitrators and/or the cooperation of party representatives will result in a highly satisfactory procedure that is carefully tailored to the circumstances at hand—the result, presumably, that was intended by the drafters of standard arbitration procedures that contain significant "wiggle room." In such circumstances, whether by conscious choice or dumb luck, business users enjoy an arbitration experience fully commensurate with their needs and priorities.

But, while some business clients may be perfectly comfortable with this *status quo*, in which the character, length and cost of the arbitration process are heavily dependent on the interaction of arbitrators and advocates, many others are emphatically not. They desire a higher degree of control—and modes of arbitration that deliberately place greater emphasis on economy and efficiency. Consider, for example, the complaint of two in-house attorneys for one of the world's leading companies:

> The overriding objectives [of businesses in choosing an appropriate forum for resolving disputes] . . . are fairness, efficiency (including speed and cost) and certainty in the enforcement of contractual rights and protections. These are complementary objectives, and to focus on one at the expense of the others leads to a result inconsistent with the expectations of the business world and denies basic commercial needs. Too often the practice of . . . arbitration has

> done just that, by focusing on perceived concepts of due process to the detriment of efficiency, resolution and certainty.[35]

Although this quote refers to commercial arbitration in cross-border disputes, it is perhaps even more relevant in the context of arbitration in the U.S. As one director of litigation for a multi-national company observed at the National Summit, "I'm here to tell you that . . . our current experience is that we are getting quicker and more cost-effective results in U.S. courts!"

Besides driving up costs, delay in the resolution of conflict prolongs uncertainty—potentially postponing the collection of amounts owed, affecting the setting of required financial reserves and impairing the reporting of profits, and leaving in doubt questions of contract interpretation. Thus, "[w]hile business leaders . . . expect a fair resolution, taking excessive time can often be just as damaging as a wrong decision."[36]

While concerns about speed, efficiency, economy and certainty have led many businesses to stop using arbitration, the solution is a lot less drastic. Instead of accepting without question a set of arbitration rules that fails to lay the groundwork for effective cost- and time-saving, business users' best chance to achieve harmony between process and business priorities is to take affirmative steps to move beyond the one-size-fits-all approach.

Powerful support for this conclusion comes from the recent report of the American College of Trial Lawyers task force linking the disappearance of civil trials with high cost and delay: the report recommends a wide range of critical changes in the landscape of American litigation, including an end to the "'one size fits all' approach of the current federal and most state rules."[37] If clear procedural choices are perceived as not just desirable but essential in litigation, the same should be ***even more so in arbitration***—since arbitration is almost wholly a creature of contract and therefore highly amenable to choices that "fit the forum to the fuss."[38]

In the litigation system, speed and economy have sometimes been achieved by court order. For years, a handful of state and federal courts have managed to resolve their civil cases much faster, with attendant cost savings, than their peers. While such expedition sometimes results from unique factors, such as abnormally low case loads, in most instances the time and cost savings occur because the court has adopted a successful vehicle for containing the proceedings. For example, the U.S. District Court for the Eastern District of Virginia has been for many years one of the fastest federal trial courts in the country. It did this without any effort to micromanage proceedings in its cases. Instead, it instituted a case management program in which all civil cases (no matter how complex) were set for trial approximately six months after service of process on defendants, all motions were immediately heard and decided (usually from the bench at hearing), and continuances were virtually never granted.

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[35] Michael McIlwrath & Roland Schroeder, *The View from an International Arbitration Customer: In Dire Need of Early Resolution,* 74 ARBITRATION 3, 4 (2008).

[36] *Id*. at 4-5.

[37] *See* FINAL REPORT ON LITIGATION REFORM, *supra* note 12.

[38] Frank E. A. Sander & S. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994).

This arrangement, which came to be known as "the rocket docket," soon became the distinguishing feature of the court's reputation and legal culture. Attorneys who had cases there quickly focused their discovery efforts on the most important evidence, eschewed any attempt to track down every marginal lead or possibility, and generally cooperated in discovery and pre-hearing activities (knowing that failure to cooperate would be quickly sanctioned).

This highly successful cost and time containment program is firmly grounded in the universal truth known as Parkinson's Law—to wit, "work expands so as to the fill the time available for its completion."[39] (This is particularly true, one might add, when those doing the work—outside counsel and arbitrators – are paid by the hour.) Some containment mechanism is an essential ingredient of any successful effort to reduce transaction costs and cycle time.

Unfortunately, while external imposition of such a containment mechanism is readily achievable in litigation (though, regrettably, seldom done), it is not in arbitration. The undoubted broad discretion granted trial judges to manage their calendars and proceedings, vests them with authority to impose reasonable restrictions on discovery, motions, and trial time even if all parties vigorously object. Arbitrators, by contrast, have only such power as is conferred by party agreement. If all arbitration parties agree that each should be able to take twenty depositions, file dispositive motions both before and after discovery, and have twenty days to present their evidence at hearing, an arbitrator who recognizes that a fair and just decision could be reached through a much more abbreviated proceeding may try to persuade the parties to drastically scale back. If unable to use persuasion, however, the arbitrator is powerless to override the parties' agreement on how the arbitration shall be conducted.[40] As noted above, moreover, arbitrators may have other reasons not to push back too strenuously when confronted with an unduly expansive proceeding.

If the intent is to have an expeditious and economical process, therefore, it is incumbent upon business clients and counsel to establish the appropriate framework at the outset, preferably when laying the contractual foundation for arbitration, and thereafter to reinforce those choices by other choices during the course of arbitration. It is axiomatic that the less pre-dispute effort is made to establish an appropriate framework for containing the arbitration, the more likely it is that the arbitration proceedings will spiral out of control, with ad hoc decisions being made at the discretion of the arbitrator in this effort.

But business users cannot be expected to act unilaterally. First and foremost, business users need assistance from reputable providers of arbitration and dispute resolution services in the form of clear, user-friendly procedural choices—including procedures that make speed and economy a true priority. Second, they need outside counsel willing and able to share and promote the values of efficiency and economy during the arbitration process. Finally, they need arbitrators with effective management skills and the audacity to use them.

In the following part we will more closely examine the roles of each of these parties.

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[39] This adage initially appeared in The Economist of November 1955 as the first sentence of a humorous essay by Cyril Northcote Parkinson and was later reprinted with other essays in the book PARKINSON'S LAW: THE PURSUIT OF PROGRESS (London, John Murray, 1958).

[40] This sort of agreement is far from fanciful, as many experienced arbitrators can attest.

III
Business Users & In-House Counsel, Providers, Outside Counsel and Arbitrators Must All Play a Role in Promoting Efficiency and Economy in Arbitration

A. The Need for a Mutual Effort

It is time to return to fundamentals in American arbitration. Those who seek economy, efficiency and a true alternative to the courthouse need more than good arbitrators. Real change must begin with the commitment of business users to thoughtful, informed consideration of *discrete process choices* that lay the groundwork for a particular kind of arbitration—whether they seek a highly streamlined, short and sharp process with tight time frames and firmly bounded discovery, a private version of federal court litigation or something in between. In the absence of specific user guidance, arbitration under modern, broadly discretionary procedures is primarily a product of the interaction of advocates and arbitrators, even the best of whom have limited ability, absent a contractual mandate or the stipulation of all parties to blend efficiency and economy with fundamental fairness. All too often, the result is a process that looks and feels like litigation—which is not what the parties expected in electing arbitration over court trial.

For business users, process choice is an illusion in the absence of appropriate alternative process prototypes from arbitration provider institutions. Even before a dispute arises, at which time heated emotions prevent agreement on something as simple as expedited arbitration rules, clients and counsel tend to have neither the time nor the expertise to craft their own process templates and usually need straightforward, dependable guidance from those who develop and administer the procedures upon which they rely. Provider institutions are awakening to the need to promote real choices in arbitration, but much remains to be done.

Users also require outside counsel able and willing to support and further the goals underpinning their agreement to arbitrate. Among those who promote themselves to business clients, there are wide variations in personal philosophy, approach, pertinent knowledge and ability.

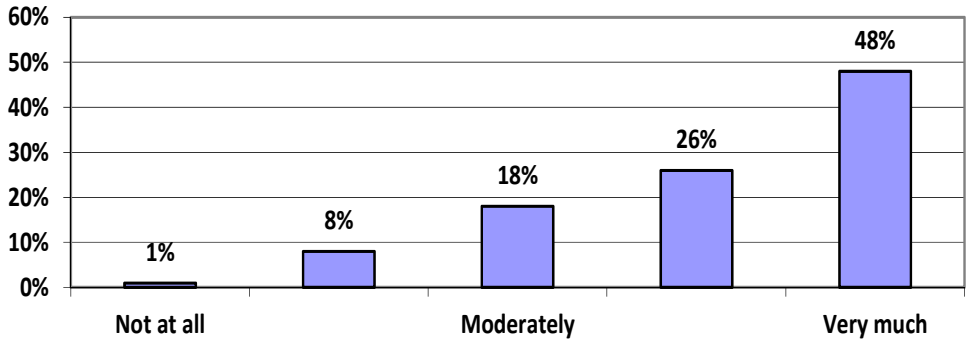
Finally, efficient and economical process depends upon the active efforts of arbitrators to employ effective process management skills, coupled with the discernment and willingness to make early rulings that will effectively truncate or streamline proceedings and the fortitude to enforce agreed timetables. To the extent that business users fail, consciously or unconsciously, to place firm limits on the arbitration timetable, the scope of discovery, and other arbitration procedures, the process management skills of arbitrators—and their interaction with counsel—become all the more critical to an efficient proceeding and speedy outcome.

In the following pages we will examine in detail the roles of each of these four groups of "stakeholders" in the arbitration process, all of which are critical to achieving efficiency and economy in arbitration.

B. The Role of Business Clients and Counsel

Participants at the National Summit thought *corporate in-house counsel* can do considerably more to ensure speed, efficiency and economy *before disputes arise.* Perhaps surprisingly, the in-house counsel participants themselves overwhelmingly agreed with this statement.

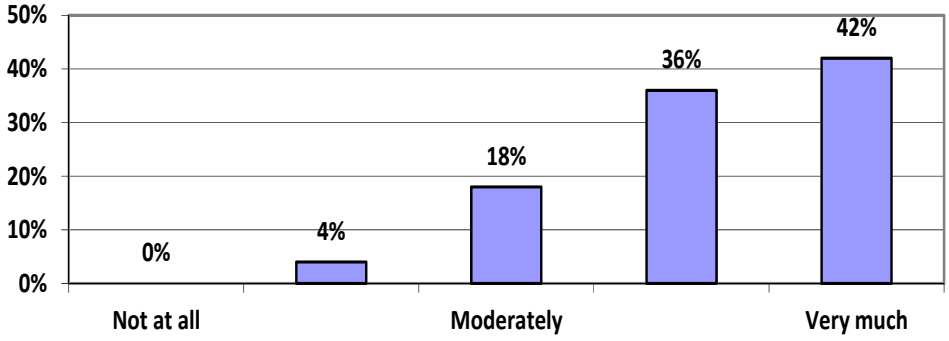
> *When arbitration fails to meet the desires of business users regarding speed, efficiency and economy, how much more can corporate in-house counsel do to help fulfill those expectations before disputes arise?*



Of the four constituencies, *corporate in-house counsel* are best-equipped to assess client goals and priorities across and within transactions. Where speed, economy and efficiency are critical to a client, they have the opportunity to tailor dispute resolution provisions (including binding arbitration) to those particular needs.

Summit participants also believed that corporate in-house counsel could do a good deal more to fulfill client expectations about speed, efficiency and economy later on, in the course of resolving particular disputes:

> *When arbitration fails to meet the desires of business users regarding speed, efficiency and economy, how much more can corporate in-house counsel do to help fulfill those expectations once the decision is made to arbitrate a dispute?*



Rather than "turn over the keys" and relinquish control to outside counsel, in-house attorneys have repeated opportunities to affect the arbitration process, from selection and supervision of counsel to the identification of arbitrators to helping to chart the course of the arbitration process.

1. The Importance of Effective Choice-Making

Business users, guided by knowledgeable and experienced counsel, are in the best position to determine how and when arbitration will be brought to bear on business disputes, and what kind of arbitration process to prescribe. If business parties really want arbitration to be a truly expeditious and efficient alternative to court, they have to assume control of the process and not delegate the responsibility to outside counsel—in other words, principals, and not agents, should act as principals.[41] This must include not only choices made after disputes arise, but also active choice-making at the time of contracting. Ideally, it begins even earlier with strategic discussions regarding the management of conflict in which arbitration is considered among a variety of tools and approaches.[42]

Indeed, at first blush, it would seem that businesses that are incurring excessive transaction costs and delays would be ideally situated to rein them in. Businesses are typically quite experienced in making cost-benefit analyses and in deciding how much they are willing to pay to reduce particular risks to a tolerable level. Experienced counsel (and arbitrators) know, for example, that the law of diminishing returns applies in discovery as it does in nearly everything else. The vast majority of cases end up being decided on the basis of a fairly small body of evidence which is usually obtained in early discovery (or may even be known when the arbitration demand is filed). Continued efforts to turn over every stone and run down every possible lead rarely produce important further evidence (the proverbial "smoking gun") but invariably drive up transaction costs and time greatly. If given the choice between spending $200,000 to achieve 90% assurance of locating most of the important evidence or spending $2,000,000 to achieve 95% assurance, most sophisticated businesses would usually opt for the first choice, while their risk-averse, hourly-billing counsel would often opt for the second.

2. Reasons Business Clients and Counsel Fail to Take Control and Make Effective Choices

Unfortunately, most businesses have not availed themselves of the opportunity to control arbitration costs and speed by adopting arbitration agreements that impose reasonable limits on the arbitration process. Instead, companies tend to reflexively insert standard "boilerplate" arbitration provisions in their transaction contracts, many of which include relatively "loose" procedures that leave considerable leeway to outside counsel and arbitrators.

There appear to be several reasons for the failure of businesses to take active control of their arbitrations from the outset. First of all, it is often difficult to anticipate precisely what disputes will arise under a contract, and what the stakes will be.[43] In-house counsel may feel that the simplest solution to such uncertainty is the adoption of arbitration provisions that leave considerable room for the arbitrators and counsel to adapt the process to whatever circumstances present themselves—the "wiggle room" to which we have alluded.

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[41] *Cf.* BENJAMIN SILLS, THE SOUL OF THE LAW 88 (1994).

[42] *See* GEORGE J. SIEDEL, USING THE LAW FOR COMPETITIVE ADVANTAGE 3 (2002).

[43] *See* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 14, at 6-8.

Second, in most businesses, corporate energy and attention is focused on consummating transactions; in contrast dispute resolution provisions tend to be accorded low priority in contract negotiations, at least partly because raising the specter of conflict seems inappropriate when the emphasis is on coming together.[44] Those insiders who say "but let's also make careful arrangements for what happens if things go wrong" risk being viewed as obstructionists who might derail the deal. Perhaps, too, some transactional lawyers are reluctant to make a negotiating point of arbitration, fearful that that may require trading off more "substantive" elements.

There is also the problem that transactional lawyers often lack direct experience with resolving post-negotiation conflict; for this reason they may have a tendency to fall back on inadequate boilerplate or falter in the minefield of customized drafting.[45] In the effort to define client goals and translate them into meaningful process choices, in-house counsel, the "gatekeeper to legal institutions and facilitator of . . . transactions,"[46] must play a critical role. But the pertinent knowledge and experience about dispute resolution is often reposed in litigators, not transactional counsel.

When disputes arise, moreover, there is undoubtedly a tendency on the part of in-house counsel to turn matters over to outside counsel and monitor outcomes and invoices but not actively co-manage the process. In this, perhaps, there is the perceived comfort of being able to delegate responsibility to another for the consequences of an adjudicative strategy. If the strategies are not in tune with the goals of the client, however, the consequences may be unfortunate, as reflected in the conclusion of one corporate general counsel:

> Arbitration is often unsatisfactory because litigators have been given the keys . . . and they run it exactly like a piece of litigation. It's the corporate counsel's fault [for] simply turning over the keys to a matter.[47]

3. Business Clients and Counsel Must Change These Realities

Despite the often daunting obstacles confronting client and counsel regarding arbitration and dispute resolution, there are compelling reasons why in-house advisors should devote more time and energy to overcoming current obstacles and why business clients should heed and support their efforts. As detailed in Part IV, effective process choices can provide tangible benefits for business and avoid costly and delay-producing legal consequences, thus

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[44] *See id.*

[45] John M. Townsend, *Drafting Arbitration Clauses: Avoiding the Seven Deadly Sins*, 58 DISP. RESOL. J. 28, 30 (Feb.-Apr. 2003).

[46] *See* William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 LAW & SOC'Y REV. 631, 645 (1980-1981).

[47] Stipanowich, *Vanishing Trial*, *supra* note 29, at 895 (quoting Jeffrey W. Carr, Vice President and General Counsel, FMC Technologies, Inc.). *See also* David B. Lipsky & Ronald L. Seeber, *In Search of Control: The Corporate Embrace of ADR*, 1 U. PA. J. LAB. & EMP. L. 133, 142 (1998); Craig A. McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation,* 14 OHIO ST. J. DISP. RESOL. 1 (1998); Lande, *supra* note 11.

fulfilling legal counselors' ethical obligations to actively promote consideration of appropriate dispute resolution alternatives.

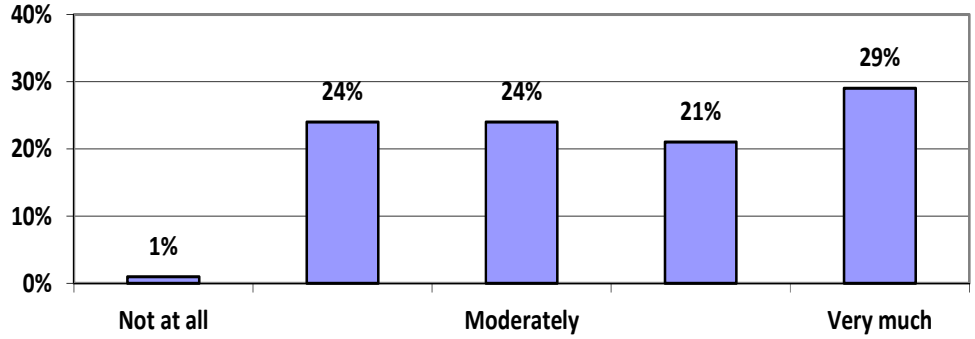
Selecting the right "template" is the first critical choice point for business users and in-house counsel. It is, however, essential to make other good choices after disputes arise. The selection of the right advocates and arbitrators can reinforce earlier process choices by ensuring adherence to the contractual arbitration "template;" the wrong outside counsel or arbitrator may undermine earlier procedural choices.

Finally, business clients and in-house counsel should recognize that, however skilled and committed their outside counsel, it is critical for the user to maintain overall control of the process of dispute resolution. This should begin with an early case assessment that sets the stage for strategic control of the conflict management process. As they do with other large expenditures, businesses should set an appropriate and realistic budget for arbitration and should forbid outside counsel from exceeding that budget without express approval. In-house counsel should attend, in person or by telephone, the initial case management conference and all important subsequent conferences and hearings during the arbitration process, should require periodic status reports from outside counsel, and should actively partner in the management of the arbitration rather than relinquishing such control to outside counsel.

C. The Role of Provider Organizations

National Summit participants also perceived that organizations providing arbitration services should play a major role in bridging the gap between user expectations and experiences regarding speed, efficiency and economy in arbitration:

> *When arbitration fails to meet the desires of business users regarding speed, efficiency and economy, how much more can institutions that provide arbitration rules, panels and administrative services do to help fulfill those expectations?*



Business users rely heavily on the organizations that publish and promote (a) arbitration and dispute resolution procedures, (b) lists of pre-screened, experienced arbitrators and other "neutrals" and (c) related administrative services. In many different respects, these "provider institutions" channel the expectations and behavior of business parties and the arbitrators that serve them and set the stage for the success or failure of arbitration. Their offerings should be closely examined and compared, but never taken for granted.

The published commercial arbitration procedures of major provider institutions offer a number of perceived advantages. For busy lawyers they offer a seemingly "tried and true" alternative to the minefield of customized drafting combined with an administrative support system and access to lists of pre-screened, trained neutrals. Many in-house counsel report that, unless a client is entering into an exceptionally significant commercial relationship or preparing a contract template that will be used multiple times,[48] it is unrealistic to expect counsel to spend considerable time planning and drafting arbitration agreements. Even in circumstances where more attention is appropriate, drafting dispute resolution agreements from whole cloth without reliance on published templates can be a dicey proposition. It therefore makes sense to examine and compare what different administrative institutions have to offer.

The incorporation of a boilerplate arbitration provision is also much less likely to raise the eyebrows of those on the other side of the negotiating table. To the extent that national or regional entities are known and respected in the marketplace, incorporating their rules is less likely to entail a drain on negotiators' time or an expenditure of a party's "bargaining chips."

But while drafters seeking guidance from the websites of institutions sponsoring arbitration have a seemingly wide variety of choices, there are few readily available, reliable guideposts that dependably link specific process alternatives to the varying goals and expectations parties may bring to arbitration.[49] Moreover, despite devoting a great deal of time and effort to developing and promoting institutional rules, most organizations offer a limited range of process templates for commercial arbitration. For example, some institutions heavily emphasize a single set of commercial arbitration rules which may be excellent for certain purposes but less advantageous for others (such as small and medium cases); by incorporating that institution's rules in an arbitration agreement, however, parties will be bound to employ those rules for whatever disputes arise. Relatively few procedures, for example, incorporate "tiered" approaches to dispute resolution in a single document.[50]

Very recently, some providers that heretofore had published a single set of "one-size-fits-all" arbitration rules are starting to give more attention to the diverse needs of business

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[48] *See* Stipanowich*, Arbitration and Choice, supra* note 3, Part III.A. (discussing options for "tailoring" arbitration provisions).

[49] Leading providers provide some basic guidance for drafters about ways of incorporating their own rules in the contract. *See, e.g.*, AAA, DRAFTING DISPUTE RESOLUTION CLAUSES: A PRACTICAL GUIDE (Amended and Effective September 1, 2007); JAMS GUIDE TO DISPUTE RESOLUTION CLAUSES FOR COMMERCIAL CONTRACTS (Rev. June 2000). One relatively comprehensive set of guideposts for business users is the product of the CPR Commission on the Future of Arbitration. See generally COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 14. Even this extensive guide, however, does not approach process questions from the standpoint of various specific user goals. A more recent CPR publication does, however, address many key drafting issues. CPR INSTITUTE FOR DISPUTE RESOLUTION, CPR DRAFTER'S DESKBOOK (Kathleen Scanlon ed., 2002).

[50] The AAA has offered a multi-tiered approach in its basic rules for a number of years. See, e.g., AAA's COMMERICAL ARBITRATION RULES (Amended and Effective September 1, 2007) and AAA's CONSTRUCTION INDUSTRY ARBITRATION RULES (Amended and Effective October 1, 2009). *See generally* Thomas J. Stipanowich, *At the Cutting Edge: Conflict Avoidance and Resolution in the Construction Industry* in ADR & THE LAW 65-86 (1997) (describing rationale for American Arbitration Association's tiered construction procedures).

users of arbitration. For example, there has been a trend among leading U.S. arbitration institutions to create discrete templates for expedited or streamlined arbitration.[51] In light of growing concerns about the scope and cost of arbitration-related discovery, moreover, various institutions have devoted attention to that subject, and choices may now be discerned among existing procedures.[52] These are important steps toward the goal of moving beyond a "one-size-fits-all" approach to arbitration, but much more can be done both from the standpoint of developing alternatives and providing business users with user-friendly roadmaps.

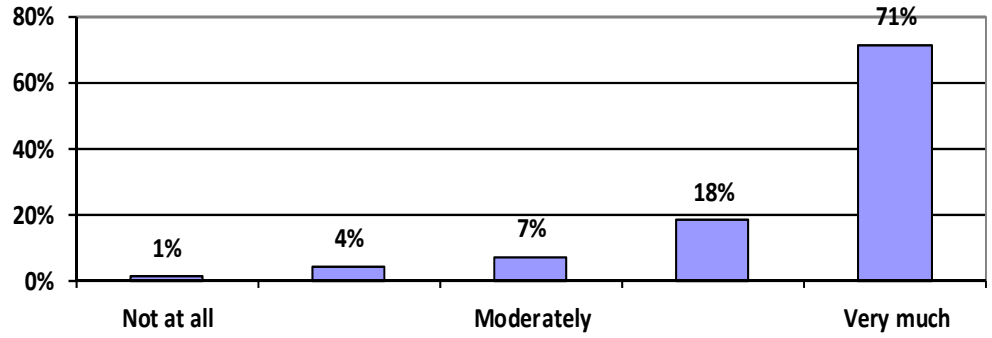
Moreover, providers are ideally positioned to collect and share information about the experience of users with streamlined procedures or other economy- and efficiency-focused devices. Such information is likely to be of critical importance to business clients and counsel as they consider the relative value and appropriateness of different process choices.

Perhaps most importantly, the community of users continues to seek more and better information about the capabilities and skills of arbitrators; this is a significant business opportunity for providers that are able to figure out how to obtain, mine and transmit reliable and relevant data.

D. The Role of Outside Counsel

Legal advocates have considerable control over the arbitration experience, including cost and cycle time. Effective advocates, with the cooperation of opposing counsel and the arbitrator, may overcome the deficiencies of arbitration provisions embodying inadequate procedures. Ineffective advocates, on the other hand, may undermine the best-crafted procedural framework. Not surprisingly, National Summit participants believed that outside counsel could do a great deal more to help meet clients' expectations of speed, efficiency and economy in arbitration:

> *When arbitration fails to meet the desires of business users regarding speed, efficiency and economy, how much more can outside counsel (advocates in arbitration) do to help fulfill those expectations?*



[51] *See* Stipanowich, *Arbitration and Choice, supra* note 3, Part III.B.

[52] *See id.,* Part III.C.

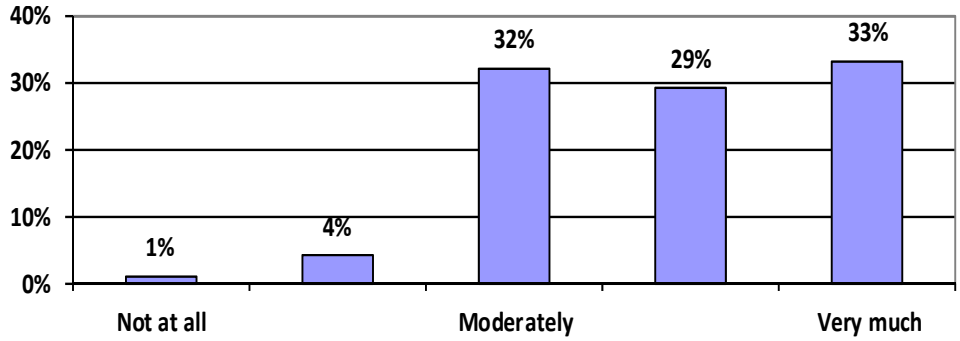
Thoughtful, experienced lawyers who understand arbitration and appreciate the significant differences between arbitration and litigation are in the best position to navigate through the arbitration process in a way that most effectively promotes client goals such as economy and efficiency. At each stage of the process—communicating with administrators, selecting arbitrators, providing arbitrators with guidance for the creation of effective procedural orders and establishing a timetable, setting and participating in hearings, and creating a roadmap for the final award—they have opportunities to further these goals. Some advocates may find it possible to collaborate with opposing counsel in order to develop integrative process solutions that promote expedition and economy along with other mutual benefits.[53]

More attention needs to be given to specific ways advocates can most effectively move the arbitration process along and reduce costs. Advocates, like arbitrators and business users, must also be alerted to the scenarios in discovery, motion practice and hearings that can drive up costs without proportionate benefits.

E. The Role of Arbitrators

Most National Summit participants agreed that arbitrators, too, must share responsibility for meeting user expectations regarding speed, efficiency and economy:

> *When arbitration fails to meet the desires of business users regarding speed, efficiency and economy, how much more can arbitrators do to help fulfill those expectations?*



The critical role of arbitrators in achieving efficiency and cost-saving—and in striking an appropriate balance between efficiency and fairness—is well understood by many experienced arbitrators.[54] That role also helped inspire recent published guidebooks[55] and prompted

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[53] *See generally* Zela G. Claiborne, *Constructing a Fair, Efficient, and Cost-Effective Arbitration*, 26 ALTERNATIVES TO THE HIGH COST OF LITIG. 186 (Nov. 2008) (describing possibilities for collaborative process design).

[54] *See generally* John Wilkinson, *The Future of Arbitration: Striking a Balance Between Quick Justice and Fair Resolution of Complex Claims*, 8 BNA EXPERT EVIDENCE REPORT 189 (Apr. 21, 2008) (discussing ways arbitrators may bring tools to bear).

[55] *See, for example,* THE COLLEGE OF COMMERCIAL ARBITRATORS GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION, 2nd Ed. (James M. Gaitis, Curtis E. von Kann and Robert W. Wachsmuth eds., Juris Net 2010).

leading arbitration provider institutions to develop more rigorous education and training programs for arbitrators. Such guidance, however, does not normally single out approaches that promote economy and speed, but addresses a variety of purposes. Arbitrators need to understand parties' priorities and act accordingly, but in the absence of clear evidence to the contrary arbitrators should assume that their role is to move proceedings forward as quickly and efficiently as possible, consistent with fundamental fairness.[56]

As noted above, more emphasis needs to be placed on specific ways of promoting fairness and on spotting and avoiding circumstances that enhance costs and delays without proportionate benefits. Special attention should be given to care in setting timetables and managing discovery, motion practice and hearings.

F. The Central Lesson

To summarize, the dramatic "success" of arbitration in evolving into a primary role in the resolution of commercial disputes has brought with it complaints that arbitration has become too much like litigation: too slow, and too costly. While much has been done to improve the understanding of business users and the performance of arbitration provider institutions, advocates and arbitrators, there is a need to focus on the specific ways all stakeholders—beginning with business clients and in-house counsel—can more effectively reduce the cost and length of arbitration. This is the purpose of the *Protocols for Expeditious, Cost-Effective Commercial Arbitration*, presented below with accompanying commentary.

[56] *See, e.g.*, McIlwrath & Schroeder, *supra* note 35, at 6 (discussing priorities of corporate counsel).

IV
Protocols for Expeditious, Cost-Effective Commercial Arbitration

General Principles

These *Protocols* are premised on the National Summit consensus that the pace and costs of commercial arbitrations are driven by dependent variables: specific steps taken, or not taken, by each of the four constituencies of the arbitration process (i.e., the parties, the advocates, the arbitrators and the arbitration providers). The *Protocols* are, accordingly, structured to provide specific steps that each constituency can take to alter the current trajectory of increasing costs and extended proceedings in arbitration. For example, if the arbitration provider whose rules control a case provides no option for limited discovery and if the parties and their counsel are battling every issue, the arbitrator's ability to contain discovery costs is seriously constricted. These *Protocols* therefore also contemplate that, in adopting specific steps, the constituencies will strive to cooperate and coordinate their actions, yielding maximum impact. Common to the *Protocols* for each constituency are these overarching principles:

Be deliberate and proactive. Promoting economy and efficiency in arbitration depends first and foremost on deliberate, aggressive action by stakeholders, starting with choices made by businesses and counsel at the time of contract planning and negotiation and continuing throughout the arbitration process. Service providers must actively support good choices in a variety of ways, including publishing and promoting clear procedural choices and putting forward effective arbitrators. Arbitrators must aggressively manage the process from day one of their appointment. All these activities may be strongly reinforced by the cooperative efforts of counsel.

Control discovery. Discovery is the chief culprit of current complaints about arbitration morphing into litigation. Arbitration providers should offer meaningful alternative discovery routes that the parties might take; the parties and their counsel should strive to reach pre-dispute agreement with their adversary on the acceptable scope of discovery, and arbitrators should exercise the full range of their power to implement a discovery plan. The *Protocols* do <u>not</u> assume that the parties in every case will favor truncated discovery; some disputes require deeper discovery to allow for more efficient hearings. The pivotal point is that, by having options to consider and then by electing an appropriate option for the particular dispute, the overall costs of arbitration can still be contained, if only because disputes over the scope of discovery can be averted by agreements and a scheduling order at the outset.

Control motion practice. Substantive motions can be the enemy or the friend of the effort to achieve lower costs and greater efficiencies. Some see current motion practice as adding another layer of court-like procedures, resulting in heavy costs and delay. Others see current motion practice as missing an opportunity for reducing costs and delay, where clear legal issues that might be disposed of at the outset are instead deferred by arbitrators, to allow parties to conduct discovery and then offer their proofs. Recognizing whether in a particular

case a substantive motion would advance the goal of lower cost and greater efficiency is among the most challenging tasks these *Protocols* present to the constituencies; they aim to promote cooperation and close consideration of the role a motion might play.

Control the schedule. Since work expands to fill the time allowed, it is critical to place presumptive time limits on activities in arbitration or on the overall process, coupled with "fail safe" provisions that ensure the process moves forward in the face of inaction by a party. At hearings, for example, the use of a "chess clock" approach is of proven value in expediting examinations and presentations. Some experienced in-house counsel favor establishing overall time limits in large, complex disputes as well as smaller cases.

Use the Protocols as tools, not a straitjacket. While there are certain categories of cases that are alike except for the identity of the parties and other participants, most commercial arbitrations with a substantial amount at stake are distinct in at least some way, be it the twist of circumstance that sparked a dispute or the array of legal issues presented. These *Protocols* offer actions that might apply to the broad range of cases, and yet embedded in them is recognition that parties' needs vary with circumstances and that a well-run arbitration will at some level be custom-tailored for the particular case. The parties and their counsel are encouraged to embrace those elements of the *Protocols* that are most appropriate to their circumstances as understood at contract time or after disputes have arisen.

Remember that arbitration is a consensual process. Arbitration is rooted most often in an arbitration agreement made when the parties were in a constructive, business-enhancing mode. When a dispute arises, the reaction will vary. Some parties, looking to do business again in the future or accepting of the occurrence of a dispute, will be able to cooperate productively towards a common goal of cost containment. Other parties, by the point of a dispute, are entrenched in their respective perspectives of what occurred and why the other side is to blame; parties in this mind-set face a daunting challenge to look beyond grievances in order to find cost savings that might benefit each side. These *Protocols* aim to meet the diverse settings in which cases arise, recognizing that the prescribed behavior ultimately cannot be imposed but can only be encouraged, in a context where the constituencies' efforts permit formulation of the best plan for the particular case.

A Protocol for Business Users and In-House Counsel

While not all business users seek economy and efficiency in arbitration, these are priorities for most businesses much or most of the time. The high cost and/or length of commercial arbitration appear to be the greatest sources of dissatisfaction with the process. There are, however, a number of choices available to business users—in preparing to sign a contract, after disputes arise, and throughout the arbitration process—that will promote cost- and time-saving in dispute resolution. The following Actions are recommended as options for business users and in-house counsel in making choices regarding arbitration. They may be embraced wholly or selectively in light of business priorities in particular relationships and kinds of disputes.

1. Use arbitration in a way that best serves economy, efficiency and other business priorities. Be deliberate about choosing between "one-size-fits-all" arbitration procedures with lots of "wiggle room" and more streamlined or bounded procedures.

Promoting economy and efficiency in arbitration depends first and foremost on proper contract planning. Reflexively "plugging in" a standard form arbitration provision forfeits the single best opportunity business users have for tailoring procedures to limit the scope of discovery, establish timetables and create other boundaries for arbitration. Traditional "one-size-fits-all" provisions afford considerable leeway for arbitrator discretion but also create opportunities for counsel to expand, often excessively, the dimensions and density of the arbitration. The potential benefits of this flexibility must be balanced against significant downsides—the possibility of strategic or tactical manipulation by counsel, and the tendency to convert arbitration into a replica of litigation.

In most cases an arbitration clause should be part of a comprehensive dispute resolution process that might include executive negotiation, mediation and, finally, arbitration. An effective dispute resolution provision incorporating appropriate procedures of a well-established "provider institution" is usually of mutual beneficial to the parties (see *Protocol for Arbitration Providers*).

Comments:

Those charged with choosing business dispute resolution provisions must take a much more considerate approach to the selection of arbitration procedures—preferably after discussing key goals with the affected executives. If customized provisions seem appropriate, special caution is required in the crafting.[57] Choice regarding arbitration is too important to be left until the eleventh hour of negotiation; process options should be considered and developed

[57] One famous nightmare scenario of one-off drafting which generated nine years of litigation involved a contractual provision for expanded judicial review of arbitration awards. *See* Kyocera Corp. v. Prudential-Bache Trade Services, Inc., 341 F.3d 987, 1000 (9th Cir. 2003) *overruling* LaPine Technology Corp. v. Kyocera Corp., 130 F.3d 884, 888 (9th Cir. 1997).

ahead of time.[58] By today's standards, simply ticking off basic options ("mediation," "arbitration") and throwing in convenient boilerplate clauses without reflection might be characterized as malpractice; lawyer-counselors must have or gain access to the knowledge and sophisticated tools necessary to address key process choices and issues.

A number of companies have embraced systematic approaches to handling conflict. They have articulated business goals to be achieved in their program, developed effective mechanisms for the early assessment and affirmative management of conflict,[59] and promoted various appropriate dispute resolution tools (including executive negotiation, mediation and arbitration).[60] Approached in this way, as part of a thoughtful and multi-faceted approach to resolving conflict, arbitration is more likely to prove its particular value as a response to business needs and priorities. Binding arbitration is often a favorable alternative to the litigation process, but it is ill-suited to being the sole process option for serving the day-to-day needs of businesses. Rather, the first step should normally be negotiation, followed in most instances by mediation. Keep in mind that mediation not only offers significant opportunities for effective resolution of claims and controversies but may also reap dividends for commercial relationships. Moreover, even if mediators are unable to help the parties reach a complete settlement of substantive issues, they may be in a position to facilitate the tailoring of arbitration procedures most appropriate to the resolution of those same issues.[61]

If a business client places high priority on speed, efficiency and economy in its arbitrations, consideration should be given to adopting (or carefully adapting) arbitration procedures that effectively address those concerns through one or more of the following, discussed at greater length below:

- mandatory pre-arbitration negotiation and/or mediation;
- early "fleshing out" of claims and defenses;
- early identification by arbitrators of legal or factual issues amenable to early disposition that will narrow or focus the issues in dispute, and procedures to resolve those issues;
- meaningful limits on the scope of discovery;
- expedited procedures for resolving motions and discovery disputes;
- overall time limits on arbitration;

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[58] *See* Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the New Litigation, (Symposium Keynote Presentation)*, 7 DEPAUL BUS. & COM. L.J. 401, 400-03 (2009) [hereinafter Stipanowich, Arbitration and Choice], *available at* http://ssrn.com/abstract=1372291.

[59] *Id*.

[60] By way of comparison, the Final Report on Litigation Reform calls on courts to "raise the possibility of mediation or other forms of alternative dispute resolution early in appropriate cases." INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 3 (Mar. 11, 2009) [hereinafter FINAL REPORT ON LITIGATION REFORM].

[61] *See generally* COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS Ch. 1, 2 (Thomas J. Stipanowich & Peter H. Kaskell eds., 2001) [hereinafter COMMERCIAL ARBITRATION AT ITS BEST] (discussing general strategies for conflict management and drafting considerations).

- "fast-track" procedures for appropriate cases;
- relying on one rather than multiple arbitrators when appropriate.

2. Limit discovery to what is essential; do not simply replicate court discovery.

Since the most critical factor in the cost and length of litigation or arbitration is nearly always the scope of discovery, parties seeking efficiency and economy in arbitration must make it clear that discovery in arbitration is not for the litigator who will leave no stone unturned.[62]

The first and by far the best opportunity for business users to place meaningful limits on discovery is in the arbitration agreement or incorporated arbitration procedures. There are a number of ways in which arbitration provider institutions' procedures might limit discovery (see *Protocol for Arbitration Providers,* Action 3). A pre-dispute agreement, while not always achievable, is more likely to produce favorable results since post-dispute it is much more difficult to achieve consensus.

A second opportunity occurs when a dispute arises and outside counsel is retained. At this point, in-house counsel may promote discovery limits by acknowledging that, while scaling back on discovery carries some risk that some significant evidence may not be found, the client is prepared to accept that risk in order to secure the greater benefit of a process that is substantially faster and less expensive than litigation. Inside and outside counsel should thoroughly discuss the cost versus benefit of various courses of discovery that might be pursued in the arbitration and memorialize in writing the client's decision concerning the nature and extent of discovery it wishes to initiate (see *Protocol for Outside Counsel*, Actions 2, 5).

If business users have failed or been unable to avail themselves of either of the first two opportunities, it may still be possible to convince the arbitrator(s) to limit the scope of discovery (see *Protocol for Outside Counsel*, Action 3; *Protocol for Arbitrators*, Action 6).

Comments

With regard to options for meaningfully limiting the scope and nature of discovery, see the extensive commentary under the *Protocol for Arbitration Providers*, Action 3.

3. Set specific time limits on arbitration and make sure they are enforced.

Business users should consider agreeing to binding limits on the length of the arbitration in the arbitration agreement. This could be accomplished by simply setting a deadline (e.g., one year) for completion of the arbitration or by incorporating provider rules that establish a

[62] INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION, RULES FOR NON-ADMINISTERED ARBITRATION Commentary to CPR Rule 11 (2007) [hereinafter CPR RULES], *available at* http://www.cpradr.org/ClausesRules/2007CPRRulesforNonAdministeredArbitration/tabid/125/Default.aspx#Commentary.

timetable for each phase of the arbitration. A pre-dispute arbitration agreement might establish different deadlines or timetables corresponding to different total amounts in controversy (see *Protocol for Arbitration Providers*, Action 4). Arbitrators could be afforded authority to establish procedures and timelines for achieving the contractual limits as well as discretion to vary the limits in truly exceptional circumstances.

Some experienced in-house counsel favor prescribing overall time limits in large, complex disputes as well as smaller cases. If binding time limits are not desired in all cases, however, business users should at least consider their application in disputes involving amounts below a certain dollar figure.

Contractual time limits, like other stipulated boundaries, are only effective if they are recognized and enforced. Thus, it is critical for outside counsel to advocate such enforcement and for arbitrators to respond accordingly (see *Protocol for Outside Counsel,* Action 3; *Protocol for Arbitrators*, Action 3).

If businesses are unwilling or unable to establish pre-dispute timetables for arbitration but still hope to set an acceptable deadline, it will be necessary to seek a post-dispute agreement with the other party (if consensus is realistically achievable) or an appropriate arbitral order.

Comments:

C. Northcote Parkinson's famous "law" that work expands to fill the time available for its completion[63] encapsulates the fundamental truth that human beings find it nearly impossible to terminate working on an important matter when there is still time left to do more. This is especially true in commercial arbitration where the stakes are often high, those doing the work are typically conscientious "Type A" lawyers, and all actors – both counsel and arbitrators – are being paid by the hour. However, if work on the matter is firmly limited to a fixed period of time, lawyers are very good at determining how to use that time most effectively by concentrating on the most important tasks and dispensing with activities that offer less promise.

Time limits are accepted norms in many critical aspects of modern life, whether it be delivering a Supreme Court argument, or preparing a multi-billion dollar case for trial in certain state and federal courts, or taking a college entrance exam. There is no reason why time limits cannot be placed on completing a commercial arbitration, and many thoughtful observers believe that such limits are the single most effective device available for reining in arbitration cost and delay. Moreover, time limits in arbitration, particularly where arbitrators have authority to increase the limit in exceptional circumstances, are eminently achievable. One senior attorney, who manages a large portfolio of highly complex arbitrations for one of the world's largest corporations, reported at the National Summit that her company has never had a dispute that could not be fairly and efficiently arbitrated within one year.

[63] *See* PARKINSON'S LAW: THE PURSUIT OF PROGRESS (London, John Murray, 1958).

The best way to impose time limits on arbitration is to include those limits in the arbitration clause or incorporate provider rules that contain such limits. All expedited or streamlined rules are distinguished by fixed or presumptive time limits, although these vary considerably in detail. The *AAA Expedited Procedures*, aimed at small-dollar claims, contemplate the shortest cycle time, with an anticipated time horizon of around sixty days.[64] CPR's procedures embody a conceptual hundred-day time frame, including a maximum of sixty days to the hearing, thirty days for hearings, and ten days for deliberation and preparation of an award.[65] Importantly, the 100-day period does not begin until the date set by the arbitrators at an initial pre-hearing conference; it thus does not include critical early procedures including the selection of arbitrators and detailed statements submitted by both parties.[66] JAMS' models also include shortened procedural stages.[67]

An agreement to time limits, standing alone, is obviously insufficient; drafters must incorporate specific process elements that facilitate a shorter arbitration. These include faster arbitrator selection procedures, early sharing of detailed information, tightly bounded discovery, and (possibly) limitations on the length of the final award.

Importantly, one Summit participant, a senior in-house dispute resolution lawyer at a leading global corporation, urges business users to use time limits in cases of all sizes:

> [E]xpedited [arbitration] rules are often limited to very small dollar values. I am urging my lawyers to break that paradigm. . . . We are not talking about setting the bar at a couple of hundred thousand, [but rather cases involving] $50 million or less in six months, more than $50 million, 12 months.[68]

Once set, timetables should be adhered to in the absence of extraordinary circumstances. One experienced advocate and arbitrator explains:

> Binding limits on the length of proceedings can and should be [utilized]. Often, however, . . . the parties mutually agree they will take the time limits off and [the arbitration] goes on forever.[69]

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[64] The hearing is "to be scheduled to take place within 30 days of confirmation of the arbitrator's appointment." AAA COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, SECTION E: EXPEDITED PROCEDURES (2009) [hereinafter AAA EXPEDITED PROCEDURES], E-7. Awards are to be rendered within 14 days of the close of hearing. *Id.*, E-9. In the absence of a showing of good cause, the hearing itself is limited to a day. *Id.*, E-8(a). *Cf.* CONSTRUCTION INDUSTRY ARBITRATION RULES AND MEDIATION PROCEDURES F-9 (2009) [hereinafter AAA CONSTRUCTION INDUSTRY FAST TRACK RULES].

[65] INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION, EXPEDITED ARBITRATION OF CONSTRUCTION DISPUTES R. 1.3 (2006) [hereinafter CPR EXPEDITED ARBITRATION].

[66] *See id.*, Rules 3, 5, 9.3.

[67] *See* JAMS STREAMLINED ARBITRATION RULES & PROCEDURES (2009) [hereinafter JAMS STREAMLINED RULES].

[68] Michelle Leetham, Esq., Bechtel Corporation, Rossdale Group ADR Teleconference (May 5, 2010).

[69] Larry Harris, Esq., Partner, Greenberg Traurig, Washington, D.C., Rossdale Group ADR Teleconference (May 5, 2010).

4. Use "fast-track arbitration" in appropriate cases.

Businesses should use, in appropriate cases, fast-track (expedited or streamlined) arbitration. Businesses wishing to employ fast-track procedures in a pre-dispute arbitration agreement must either specify those procedures and the circumstances under which they will be used or incorporate an arbitration provider's rules that detail such procedures and the circumstances of their application.

Some businesses may be willing to utilize, in cases of certain types or certain dollar amounts, a highly truncated approach in which discovery and motions are not permitted; the parties' arbitration demand and response are accompanied by detailed statements of their claims and/or defenses as well as all facts to be proven, supplemented by citation to all legal authorities relied upon, copies of exhibits, and summaries of the testimony of all lay and expert witnesses, after which the case proceeds to an immediate hearing (see *Protocol for Arbitration Providers*, Action 5).

Comments:

See comments under Action 3 above.

5. Stay actively involved throughout the dispute resolution process to pursue speed and cost-control as well as other client objectives.

Sophisticated in-house counsel know that it is absolutely essential for business principals and senior in-house counsel to stay actively involved throughout the dispute resolution process. They should conduct an early case assessment to determine how much of an effect the dispute may have on the business's important interests, the prospects for a successful outcome, how much time and money the business is prepared to devote to the resolution of the dispute, and what resolution approach is likely to be most effective. If outside counsel is not involved in early case assessment, in-house counsel should convey the internal assessment to outside counsel and request their independent analysis (see *Protocol for Outside Counsel*, Action 2). As they do with other large expenditures, businesses should set an appropriate and realistic budget for arbitration and should forbid outside counsel from exceeding that budget without express approval. In-house counsel should attend the first case management conference as well as all important subsequent conferences and hearings during the arbitration process in person or by telephone, should require periodic status reports from outside counsel, and should actively partner in the management of the arbitration rather than relinquishing such control to outside counsel.

Comments:

In-house counsel must play an important part in forward planning and continuous management of the arbitration schedule; minimization of interruptions through firm stances supported by flexible solutions such as consensus; and preparing their companies to deal

appropriately with changing circumstances.[70] Communication must be healthy not only with traditional stakeholders but with "the key business person(s) who will often have the best handle on the value to the business of the disputed matter, including its risks. They will discuss frankly the expense, delay, and lost opportunity cost of proceeding in the most litigation-like manner in arbitration, especially discovery and motion costs, scheduling the evidentiary hearing (how soon and how lengthy), and hearing procedures. In arbitration the parties can and should decide how much process they want, and want to pay for."[71]

In-house counsel are a vital part of the effort to distinguish the tone of an arbitration process from that of litigation. This is noted with particular frequency by some commentators in the area of labor disputes, who advocate approaching arbitrations in terms of bottom line savings over the long term.[72] An efficient arbitration process may have a significant impact on relationships with current and past commercial partners.

6. Select outside counsel for arbitration expertise and commitment to business goals.

In-house counsel should select outside arbitration counsel for their expertise in arbitration, not litigation, their likely effectiveness as advocates in the arbitration process, taking account of the key players (opposing party and counsel, the arbitration provider institution, and prospective or appointed arbitrators), and their ability to meet client's objectives regarding speed and economy (including the client's decision regarding the extent of resources to be devoted to the matter). In-house counsel should explore the possibility of billing arrangements other than pure hourly billing such as fixed fees, contingency fees, and other arrangements that incentivize counsel to conduct the arbitration and resolve conflict as efficiently and expeditiously as possible (see *Protocol for Outside Counsel, Action 7*).

Comments:[73]

An international organization recently sponsored a competition among major law firms with the aim of identifying a firm whose practice embodied effective methods of managing and resolving business-related disputes. The entries revealed very different conceptions of what constitutes effective dispute resolution. Some firms simply touted big court victories, while others focused on their expertise in commercial arbitration. Still others portrayed a variegated

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[70] COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 226.

[71] JOAN GRAFSTEIN, IMPROVING COMMERCIAL ARBITRATION: THE VIEW OF AN ARBITRATOR AND FORMER IN-HOUSE COUNSEL (April 30, 2010), *available at* http://www.lexisnexis.com/Community/UCC-Commerciallaw/blogs/ucccommercialcontractsandbusinesslawblog/archive/2010/04/30/improving-commercial-arbitration-the-view-of-an-arbitrator-and-former-in-house-counsel.aspx.

[72] "The Dispute-Wise studies found that the most dispute-savvy businesses considered the full spectrum of legal disputes as a portfolio — where the focus was not on 'winning' each individual dispute through protracted litigation but on 'winning' back the loyalty of Stakeholders who will stay with you for the long haul if you treat them with fair-mindedness and integrity when disputes inevitably occur." THE METROPOLITAN CORPORATE COUNSEL, EXPERTS IDENTIFY ADR TRENDS AND BEST PRACTICES (January 1, 2006), *available at* http://www.metrocorpcounsel.com/current. php?artType=view&EntryNo=4160.

[73] These comments are drawn in large measure from Stipanowich, *Arbitration and Choice*, *supra* note 58.

practice employing different approaches, including early case assessment, negotiation, mediation, arbitration and litigation to address particular client needs.

Business clients typically rely heavily on outside counsel to represent their interests in the management of conflict, including arbitration. These advocates have as much to do with realization of a client's goals and expectations as procedures, administrative framework or neutrals. The wide variation in approaches to conflict makes it inevitable that some law firms—and lawyers—will be more suitable for particular clients—and particular circumstances—than others. Selection of a law firm or lawyer that lacks the willingness or capability to align itself with the client's goals may undermine the most careful contract planning.

Unless a legal dispute is inevitably destined for the courtroom, something beyond litigation experience is essential in outside counsel. Litigation experience is not in itself sufficient to qualify one as arbitration counsel—the legal and practical differences are simply too great. Moreover, as our discussion of varied client goals reveals, arbitration and court trial are very often appropriately relegated to a secondary or tertiary role, forming a backdrop or backstop for efforts at informal dispute resolution.[74] With that in mind, an effort should be made to ensure that counsel is capable of understanding and fulfilling a client's specific goals and priorities in addressing disputes. Consider the following list of questions that might be asked before retaining counsel to resolve a dispute:

- Do you have experience helping clients consider the appropriateness of options for early resolution of disputes? What options do you discuss?
- What methods do you use to analyze options?
- What is your experience with and attitude toward negotiated resolution of disputes? With mediated negotiation?
- Have you had formal training in negotiation or mediation theory and practice?
- What is your experience with commercial arbitration, including arbitration under the relevant procedures and administrative framework?[75] Are you familiar with the case managers or case administrators for this matter?
- Are you familiar with the provider institution's list of arbitrators?
- Are you familiar with applicable ethics rules?
- What experience have you had negotiating, arbitrating or litigating with opposing counsel? What is the nature of your relationship?
- How does your arbitration advocacy differ from your advocacy in litigation?
- What techniques have you found to be most effective in promoting efficiency and economy in commercial arbitration?
- What professional service models do you employ other than hourly fees? Are you willing to explore incentives for early resolution?

As noted above, even after vouchsafing the role of advocate to appropriate outside counsel, a prudent client or inside counsel will continue to be involved in the conflict resolution

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[74] COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 5-6, 10-33, 39-41.

[75] Depending on the circumstances, this might include an exploration of experience with expedited rules, rules for large or complex arbitration, or appellate arbitration rules.

process. This means being present at key decision points before and during arbitration, including pre-hearing conferences at which the timetable and format for the arbitration are discussed and established.[76]

7. Select arbitrators with strong case management skills.

In-house counsel should be actively involved, alongside outside counsel, in selecting arbitrators who are able and willing to promote effective cost- and time-saving procedures. Information from provider institutions may be supplemented by intra-firm communications and discrete queries to listservs and social networking programs. Counsel might agree to pre-screen prospective arbitrators by means of a questionnaire or joint or separate interviews; counsel should be forthright in asking prospective arbitrators about their philosophy and style of case management (see *Protocol for Outside Counsel,* Action 3).

Counsel should be aware that (1) the requirement that its arbitrators continually upgrade their process management skills and (2) the quality and scope of information regarding prospective arbitrators, may offer key points of comparison among arbitration provider institutions (see *Protocol for Arbitration Providers*, Points 7, 10).

Comments:[77]

It has been said that "the arbitrator *is* the process." This is not mere hyperbole: while the appropriate institutional and procedural frameworks are often critical to crafting better solutions for business parties in arbitration, the selection of an appropriate arbitrator or arbitration tribunal is nearly always the single most important choice confronting parties in arbitration;[78] a misstep in the choice of arbitrator(s) may undermine many other good choices.

One should never choose an arbitral institution without doing due diligence regarding the institution's panel or list of neutrals and ascertaining whether or not the requisite experience, abilities and skills are represented. In order to inform and channel the eventual selection process, moreover, it may be appropriate to prepare reasonable guidelines for the choice of neutral(s) for particular kinds of disputes. In considering candidates, some or all of the following may be relevant: legal, professional, commercial or technical background; notability;[79] hearing management experience and skills; attitudes about arbitration; current schedule and availability.

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[76] *See* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 183-190.

[77] These comments are drawn in large measure from Stipanowich, *Arbitration and Choice*, *supra* note 58, 432-434.

[78] JAY FOLBERG ET AL., RESOLVING DISPUTES—THEORY, PRACTICE & LAW 470-73 (2008) ("the choice of arbitrators [is] critical for two reasons: They will likely provide the only review of the case's merits, and arbitrators will have primary control over the process itself.").

[79] Notability in the sense of perceived standing within a commercial community or industry, while insufficient in itself, may be especially desirable if an authoritative pronouncement or application of pertinent norms and practices is needed. Int'l Produce, Inc. v. A/S Rosshavet, 638 F.2d 548, 551-52 (2nd Cir. 1981) ("The most sought-after arbitrators are those who are prominent and experienced members of the specific business community in

Again, the relevant questions depend on goals and priorities. If those priorities include low cost, efficiencies, and the avoidance of undue delay, the following queries may be helpful:

- Should a single arbitrator be sufficient for selected classes or kinds of disputes?[80]
- Does the prospective arbitrator (or chair of the arbitration tribunal) have experience in process management, and does that experience reflect well on his or her ability to supervise an efficient, economical process?
- Is the prospective arbitrator committed to the concept of promoting economies and efficiencies throughout the process?
- Is the prospect available for expedited hearings, or for hearings over the period during which the arbitration is likely to occur? What other standing or prospective commitments does the arbitrator have?

It is reasonable for parties to expect arbitrators to give them what they bargained for.[81] While arbitrators should always seek appropriate ways of promoting efficiency and economy in the absence of contrary agreement, clear contractual language emphasizing the primacy of such expectations should give rise to special effort on their part. Business users and counsel should emphasize to the arbitrator their expectations about arbitrator techniques like the following:

- Emphasizing speed and cost-saving to the parties at the outset, particularly the firmness of the schedule and granting continuances only for good cause;[82]
- Functioning as role models (cooperating with other arbitrators, including party-arbitrators; avoiding scheduling conflicts wherever possible);[83]
- Actively managing the process, beginning with a pre-hearing conference resulting in an initial procedural order and timetable for the entire arbitration;[84]
- Simplifying arrangements for communication, including the elimination of unnecessary communications through case administrators or third parties;[85]
- Simplifying, clarifying, and prioritizing issues;[86]

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which the dispute to be arbitrated arose."); Charles J. Moxley, Jr., *Selecting the Ideal Arbitrator* 60 DISP. RESOL. J. 24, 27 (Aug. 2005) (prominence of arbitrator increases confidence in the process).

[80] H. Henn, *Where Should You Litigate Your Business Dispute? In an Arbitration? Or Through the Courts?* 59 DISP. RESOL. J. 34, 37 (Aug.-Oct. 2004); COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 14, at 46.

[81] *See* John Tackaberry, *Flexing the Knotted Oak: English Arbitration's Task and Opportunity in the First Decade of the New Century*, Society of Construction Law Papers 3 (May 2002).

[82] *See* Louis L. C. Chang, *Keeping Arbitration Easy, Efficient, Economical and User Friendly*, 61 DISP. RESOL. J. 15 (May-Jul. 2006); COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 215-220.

[83] COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 6-8.

[84] THE COLLEGE OF COMMERCIAL ARBITRATORS GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION 2nd Ed. Chs 6, 9 (James M. Gaitis, Curtis E. von Kann and Robert W. Wachsmuth eds., Juris Net 2010) [hereinafter CCA GUIDE TO BEST PRACTICES].

[85] *Id.*, Ch. 6 § V(L).

[86] *Id.,* §§ V(B)-(D), (I); Ch. 7 §§ III(B)-(C), (E)-(L).

- Addressing jurisdictional issues and reasonable requests for interim relief as soon as practicable;[87]
- Facilitating and actively monitoring information exchange/discovery;[88]
- Employing electronic means of communication and document management as appropriate; [89]
- Scheduling hearings with as few interruptions as possible;[90]
- Planning and actively managing the hearings (ending each hearing day with housekeeping sessions); [91]
- Anticipating potential problems (such as the unavailability of witnesses, unanticipated circumstances) and seeking creative solutions to minimize delay.[92]

8. Establish guidelines for early "fleshing out" of issues, claims, defenses, and parameters for arbitration.

Businesses should consider agreeing that before the preliminary conference, parties will provide preliminary statements of legal and factual issues, key facts to be proven, estimated damages broken down by category, and likely witnesses and types of experts (see *Protocol for Arbitration Providers*, Action 8). They should also consider requesting that, following the first, or at the latest, the second case management conference, the arbitrators issue comprehensive case management orders that incorporate limitations on discovery and motion practice, and set time frames and hearing dates that will not be varied except for good cause shown (see *Protocol for Arbitrators*, Actions 3, 4).

Comments:[93]

One significant insight emerging from the development of streamlined rules is the critical importance of requiring parties to furnish detailed information regarding claims and defenses at the front end of the process. By way of illustration, the JAMS expedited construction model calls for claimants to file a

> Submission of Claim . . . including a detailed statement of . . . claim including all material facts to be proved, the legal authority relied upon . . . , copies of all

[87] *Id.,* Ch. 2 § III; Ch. 6 §§ III(C), V(D); Ch. 7 § III(B), (D).

[88] *Id.*, Ch. 8.

[89] *Id.,* Ch. 6 §§ II(D), IV, V(L).

[90] *Id.,* Ch. 9(VI).

[91] *Id.,* Ch. 9 *passim.*

[92] *Id.*, §§V, VI(A)-(D), VII(C)-(D), IX(A), (F).

[93] These comments are drawn in large measure from Stipanowich, *Arbitration and Choice*, *supra* note 73, 410-411.

documents that Claimant intends to reply upon in the arbitration and names of all witnesses and experts Claimant intends to present at the Hearing.[94]

Respondents are then required to prepare a Submission of Response of similar substance and form within twenty days of service of the Submission.[95] These requirements represent a dramatic departure from the current norm in arbitration practice and demand significant adjustment in the expectations of advocates. They can be, however, a critical element of an efficient process, as recognized by the new *Final Report on Litigation Reform,* which concludes that the failure to effectively identify issues early-on "often leads to a lack of focus in discovery."[96]

Of course, the onus of these rules is likely to fall disproportionately on respondents, since claimants will have the opportunity to make preparations in advance of making an initial demand. For this reason, current procedures emphasize arbitrator discretion to give respondents reasonable time extensions.[97] Where arbitration is preceded by negotiation or mediation, moreover, both parties will be on notice of the likelihood that claims will be brought to arbitration.

Recently, some business users have expressed concerns about the cost of "front-loading" preparation costs by requiring extensive disclosure at the outset. These concerns may be at least partially addressed by a simpler approach to "putting flesh on the bones" at the beginning of the arbitration, such as having the parties submit informal memoranda or letters describing the background of the disputes and the factual and legal issues.

In expedited processes the pre-hearing conference assumes special significance as a tool for process planning and guidance.[98] Arbitrators may also find it necessary or appropriate to conduct frequent telephonic status meetings to ensure that progress is being made toward meeting deadlines.

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[94] JAMS STREAMLINED ARBITRATION RULES & PROCEDURES R. 7 (2009) [hereinafter JAMS STREAMLINED RULES]. *See also* INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION EXPEDITED ARBITRATION OF CONSTR. DISPUTES R. 3 (2006) [hereinafter CPR EXPEDITED ARBITRATION] ("Statement of Claim" is to include a detailed statement of all facts to be proved, legal authorities relied upon, copies of all documents Claimant intends to rely on, and names, CV and summary opinion testimonies of expert witnesses Claimant intends to present.").

[95] *See* CPR EXPEDITED ARBITRATION, *supra* note 94.

[96] FINAL REPORT ON LITIGATION REFORM, *supra* note 60. The Report calls for notice pleading "to be replaced by fact-based pleading . . . that "set[s] forth with particularity all the material facts that are known to the pleading party to establish the pleading party's claims or affirmative defenses." *Id.* at 5.

[97] *See, e.g.,* CPR EXPEDITED ARBITRATION, *supra* note 94, Rule 3.6 (permitting the Tribunal to extend the time for the Respondent to deliver its Statement of Defense); *Id*. at Rule 11(e)(permitting Arbitrator to extend deadlines).

[98] *See id*. at Rule 9. A pre-hearing conference held before the arbitration hearing may be necessary to deal with difficult preliminary issues, such as specifying issues to be resolved or stipulating uncontested facts. Joseph L. Daly, *Arbitration: The Basics*, 5 J. AM. ARB. 1, 40 (2006); COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 176-78.

9. Control motion practice.

Businesses should also consider agreeing to procedures for limiting "reflexive" motion practice and expediting the presentation and hearing of motions that have the potential to promote cost- and time-saving in arbitration (see *Protocol for Arbitration Providers*, Action 6).

Comments:[99]

As stated in Part II, the use of dispositive motions in arbitration is a double-edged sword.[100] This import from the court system, prudently employed, is a potentially valuable tool for narrowing arbitral issues prior to hearings and full-blown discovery, thus avoiding unnecessary preparation and hearing time.

The problem is that, as in court, motion practice often contributes significantly to arbitration cost and cycle time without clear benefits. The filing of motions often leads to the establishment of schedules for briefing and argument that entail considerable effort by advocates, only to have the arbitrators postpone a decision until the close of hearings.[101] As two GE counsel lamented:

> Any business lawyer knows that even the most complex disputes usually boil down to one or two critical issues that, once decided, will either determine the lion's share of the dispute or encourage parties to settle. And yet, the experience of many companies . . . is that tribunals in international commercial arbitrations, whether out of concern for due process or other reasons, are rarely willing to grant such relief in the early stages of a proceeding when doing so would have the greatest impact and benefit for the parties.[102]

While it is generally appropriate for arbitrators to steer clear of dispositive motions involving extensive factual issues, there are certain matters that may be forthrightly addressed early on with little or no discovery or testimony, such as contractual limitations on damages, statutory remedies, or statutes of limitations and other legal limitations on causes of action.[103]

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[99] These comments are drawn in large measure from Stipanowich, *Arbitration and Choice*, *supra* note 58, 412-413.

[100] COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 203-06; Zela G. Claiborne, *Constructing a Fair, Efficient, and Cost-Effective Arbitration*, 26 ALTERNATIVES TO THE HIGH COST OF LITIG. 186 (Nov. 2008). *See also* Albert G. Ferris & W. Lee Biddle, *The Use of Dispositive Motions in Arbitration*, 62 DISP. RESOL. J. 17 (Aug.-Oct. 2007).

[101] For a discussion of deposition handling in arbitrations, see Romaine L. Gardner, *Depositions in Arbitration: Thinking the Unthinkable*, 1131 PRACTICING LAW INST. CORP. LAW & PRACTICE COURSE HANDBOOK 379, 389-97 (Jul.-Aug. 1999).

[102] Michael McIlwrath & Roland Schroeder, *The View from an International Arbitration Customer: In Dire Need of Early Resolution,* 74 ARBITRATION 3, 3 (Feb. 2008).

[103] COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 48, 53-55. The new Final Report on Litigation Reform states that "parties and the courts should give greater priority to the resolution of motions that will advance the case more quickly to trial or resolution." FINAL REPORT ON LITIGATION REFORM, *supra* note 60, at 22. It also calls for "a new summary procedure . . . by which parties can submit applications for the determination of enumerated

If dispositive action is foreseen as a useful element in arbitration, there should be an appropriate provision in the arbitration procedure.[104]

At the time of appointment, moreover, parties should assess whether potential arbitrators are temperamentally and philosophically capable of rendering dispositive awards. Indeed, some leading arbitrators insist that motions should be addressed directly and energetically, since in many cases a prompt telephonic discussion may avoid the need for extensive briefing.[105]

10. Use a single arbitrator in appropriate circumstances.

Businesses should consider using a single arbitrator when appropriate. Some in-house counsel believe the costs and practical problems associated with three-member tribunals often outweigh the benefits, and are willing to submit all but the most complex cases to a single arbitrator. Others believe that collegial decision-making usually produces better decisions by decreasing the chance that important points will be overlooked or misunderstood, and that the additional cost of having three arbitrators, which is typically a fairly small part of total arbitration costs, is well worth the expenditure in important cases. Before providing for a three-member tribunal, counsel should always consider whether the complexity of the issues, the stakes involved, or other factors warrant the use of three arbitrators. A strong argument can often be made for sole arbitrators in cases with low or moderate damages exposure. (Depending on the parameters set for the use of a single arbitrator, parties may need to modify the arbitration procedures incorporated in the arbitration agreement to address this issue.)

In cases with three-member panels, businesses should consent to having the chair decide discovery disputes and other procedural matters unless all parties request the involvement of the full tribunal.

Comments:

Using a single arbitrator instead of a panel is an obvious choice for those seeking economy and efficiency; it simplifies every stage of arbitration from appointment to award-writing. Thus, some expedited procedures assume that a single arbitrator will be appointed unless the parties agree otherwise.[106]

While employing a multi-member tribunal may make some lawyers more sanguine about streamlined arbitration of larger claims, it increases costs and increases the likelihood of

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matters (such as rights that are dependent on the interpretation of a contract) on pleadings and affidavits or other evidentiary materials." *Id.* at 6.

[104] *See, e.g.,* JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES R. 18 (2007) [hereinafter JAMS COMPREHENSIVE RULES].

[105] *See* Chang, *supra* note 82, at 16.

[106] *See, e.g.,* AAA EXPEDITED PROCEDURES, *supra* note 64, E-4; JAMS STREAMLINED RULES, *supra* note 67, Rule 12(a). *But see* CPR EXPEDITED ARBITRATION, *supra* note 65, Rule 5.1 (providing for three neutral arbitrators).

delay. If drafters are truly serious about maintaining timelines, they should require each appointee to the tribunal to expressly represent to the parties that he or she has the time available to ensure that the expedited timetable will be achieved.[107]

11. Specify the form of the award. Do not provide for judicial review for errors of law or fact.

Business users should specify in the arbitration agreement the form of award desired (e.g., bare, reasoned, findings of fact and conclusions of law, etc.) and, where appropriate, a limit on the length of the award, bearing in mind that the more detailed the award, the more costs increase.

Business users should not include in their arbitration clauses an agreement that attempts to authorize courts to review arbitration awards for errors of fact or law. Besides raising issues of enforceability under arbitration law, such provisions may entail significant additional process costs and delays without commensurate benefits. If a business is not content to accept judicial review that is limited to the few grounds for vacatur set forth in the Federal Arbitration Act or comparable state statutes, a course that best achieves the finality which is among the major benefits of arbitration for most business users, it should incorporate in its arbitration clause a well-designed appellate arbitration procedure such as those sponsored by some provider institutions.

Comments:

1. Increased cost and cycle time through questionable choice-making: agreements to expand judicial review

Although increased costs and delays are in large measure a result of business users' failure to plan for arbitration by making appropriate process choices, contract planners may only exacerbate these problems if they make the wrong choices. A contractual provision providing for judicial review and vacatur of arbitration awards for errors of law or fact may well prove to be a "bad choice."

Consistent with the understanding that arbitration offered businesses the opportunity to avoid the "needless contention that [is] incidental to the atmosphere of trials in court,"[108] Congress in the Federal Arbitration Act produced a spare legal framework for the judicial enforcement of arbitration agreements and awards. A keystone of this structure is the rigorously restrained template for judicial confirmation, modification or vacatur of arbitration awards, including a narrow statutory imprimatur for vacating awards (limited in essence to situations where due process was not accorded or where arbitrators clearly acted in excess of their contractually-defined authority[109]). These strictures imbue arbitration awards with a meaningful—or, depending on one's point of view, an awful—finality. The fear of being

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[107] *See, e.g.,* CPR EXPEDITED ARBITRATION, *supra* note 65, Rule 7.2. It makes sense to obtain such a commitment from a sole arbitrator as well.

[108] Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 614 n. 44 (1928).

[109] *See* 9 U.S.C. § 10 (West Supp. 1994).

saddled with a truly bad award gives some business lawyers pause—especially when the potential business consequences are dire. This fear inspired in recent years the emergence of a species of arbitration agreements calling for more searching judicial scrutiny of awards, including review of awards for errors of law or fact.[110] Conceptually, one supposes, the result would be a hybrid in which the benefits of private arbitration would be coupled with the checks and balances of the civil appellate process. But the sword is double-edged and the pitfalls for unwary drafters multiple.

While there has been a lot of emphasis on the legalities of contractually expanded judicial review, considerably less attention has been given a more fundamental question—namely, "Do contract planners do their clients a favor by including such provisions in commercial arbitration agreements?" The one gathering of experts that directly addressed the issue, the CPR Commission on the Future of Arbitration, an aggregation of leading arbitrators and attorneys specializing in arbitration, responded with a resounding "No!"[111] They viewed such provisions as undermining key conventional benefits of arbitration, including finality, efficiency and economy, and expert decision-making.[112] Such provisions would, they believed, increase costs and delay the ultimate resolution of conflict without commensurate countervailing benefits. Moreover, such provisions pose particular challenges for drafters, both from the standpoint of creating practical, workable standards for review and addressing all of the pre- and post-award procedures required to implement enhanced review,[113] including: dollar or subject matter limits on review; the creation of an adequate record; the making of a sufficiently specific, reasoned award; notice requirements; the possibility of remand to the original arbitrator(s); and the handling of related costs.

The extreme downside of contracting for expanded review in an atmosphere of uncertainty regarding the legal propriety and enforceability of such provisions was famously exemplified by the nine-year battle punctuated by two decisions of the Ninth Circuit. In *LaPine Technology Corp. v. Kyocera*,[114] the court concluded that it was obliged to honor the parties' agreement that any arbitration award would be subject to judicial review for errors of fact or law. But after six more years of legal maneuvering before the district court and the original arbitration panel, the Ninth Circuit reconsidered its original decision *en banc* and reversed

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[110] *See* Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 HARV. NEGOT. L. REV. 171, 183-184 (2003); Dan C. Hulea, *Contracting to Expand the Scope of Review of Foreign Arbitral Awards: An American Perspective*, 29 BROOK. J. INT'L L. 313, 351 (2003); but *see* Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 AM. REV. INT'L ARB. 147, 150 (1997).

[111] COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 291 (summarizing conclusions of CPR Commission).

[112] *Id.*

[113] *See, e.g.,* Ronald J. Offenkrantz, *Negotiating and Drafting the Agreement to Arbitrate in 2003: Insuring against a Failure of Professional Responsibility*, 8 HARV. NEG. L. REV. 271, 278 (Spring 2003); Kevin A. Sullivan, Comment, *The Problems of Permitting Expanded Judicial Review of Arbitration Awards under the Federal Arbitration Act* 46 ST. LOUIS U. L.J. 509, 548-59 (Spring 2002). *See also* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 297.

[114] La Pine Tech Corp. v. Kyocera Corp., 130 F.3d 884 (9th Cir. 1997) (attorneys were able to provide for expanded judicial review in the arbitration clause that they drafted), *overruled by* Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 1000 (2003).

itself, declaring that enforcing expanded review provisions such as those before it would "rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process."[115]

Compounding the drafter's dilemma is the fact that such provisions have not been uniformly embraced by federal and state courts. The federal circuits split on the question of whether expansion of the FAA grounds for judicial review was permissible; state court decisions also reflect a divergence of authority.

Seeking to resolve the split among federal circuits, the U.S. Supreme Court held in *Hall Street Associates, L.L.C. v. Mattel, Inc*. that the Federal Arbitration Act (FAA) does not permit parties to expand the scope of judicial review of arbitration awards by agreement.[116] Justice Souter's opinion, joined by five other justices, declared that the grounds for judicial review of arbitration awards set forth in §§ 10–11 of the FAA are the exclusive sources of judicial review under that statute.[117] Moreover, the FAA's provisions for confirmation, vacatur and modification should be viewed as "substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway."[118] Having strained mightily to nail down the coffin lid on contractually expanded review under the FAA, however, the Court affirmatively invited consideration of other avenues to the same ends,[119] as where parties "contemplate enforcement under state statutory or common law . . . where judicial review of different scope is arguable."[120] Although it may be some time before the full import of this invitation is clarified, it is likely that state statutes or controlling judicial decisions promoting contractually expanded review will become "safe harbors" for such activity. New Jersey is perhaps the sole example of a statutory template for parties that wish to "opt in" to the legislative framework for elevated scrutiny of awards;[121] in *Cable Connection, Inc. v. DIRECTV, Inc.*,[122] California's highest court recognized a more general "safe harbor" for contractually expanded judicial review under that state's law.

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[115] *Kyocera*, 341 F.3d at 998.

[116] Hall Street Associates LLC v. Mattel Inc., 128 S.Ct. 1396, 1404-1405 (2008).

[117] *Id.* at 1403.

[118] "Any other reading [would open] the door to full-bore legal and evidentiary appeals that can 'rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process." *Id. (quoting Kyocera*, 341 F.3d at 998).

[119] In a highly unusual move, the Court had requested additional briefing on these issues after the initial arguments; its March decision concluded that the supplemental arguments raised new points which required a remand for the development of the issues. The Ninth Circuit subsequently issued a remand order to the district court, concluding that the High Court decision "preserved the issue of sources of authority, other than the Federal Arbitration Act, through which a court may enforce an arbitration award. . . ." Hall Street Associates LLC v. Mattel Inc., No. 05-35721, 2008 U.S. App. LEXIS 14490 (July 8, 2008).

[120] 128 S. Ct. at 1406.

[121] New Jersey law permits parties to arbitration agreements to "opt in" to a heightened standard of review established by the statute. New Jersey Alternative Dispute Resolution Act, N.J. STAT. ANN. 2A, §§ 23A-12. (1999).

[122] Cable Connection, Inc. v. DIRECTV, Inc., 190 P.3d 586 (Ca. 2008).

The foregoing survey of the complex legal landscape surrounding contractually expanded judicial review illustrates the risks and uncertainties confronting those who would seek to include such provisions in their arbitration agreements. In some cases contract planners may come to the conclusion that the difficulties of securing judicial oversight of arbitration awards require them to forego arbitration entirely, at least for certain classes of cases.

2. Alternatives to expanded judicial review; appellate arbitration processes

There are other, less radical choices for those concerned about protection from "off the wall" arbitration awards. These include identifying arbitrators who are likely to deliver an authoritative and rational decision, requiring the arbitrators to produce a detailed rationale for their awards, placing limits on awards of monetary damages (including upper and lower limits for the award), a baseball arbitration format requiring arbitrators to make a choice between two alternative monetary awards, and a prohibition on certain kinds of relief, such as punitive damages.[123] For those who seek a close analogue to judicial review, however, an appellate arbitration procedure may afford the most suitable alternative.

Appellate arbitration procedures afford parties the opportunity of a "second look" at an arbitration award in a controlled setting while avoiding the delays and legal uncertainties associated with expanded judicial review, since properly constituted agreements for "second-tier" arbitration are just as enforceable as any other arbitration agreements, as are resulting awards.[124] Appellate arbitration procedures have been utilized in a variety of commercial contexts, and at least two major institutions,[125] the International Institute for Conflict Prevention & Resolution (CPR) and JAMS, have published appellate arbitration rules that may be utilized in commercial cases.[126]

Crafting an appropriate arbitral appeal process involves consideration of numerous procedural issues, including the qualifications of the appellate arbitrator(s) and method of selection; scope limits on appealable disputes; filing requirements; administrative fees; time limits on filing and appellate procedures; applicable standards of review; the type of record that will be maintained of the original arbitration hearing, and transmitted to the appellate arbitrator(s); the format of the original arbitration award; the form of argument on appeal (written, oral, or both); the remedial authority of the appellate arbitrator(s); the possibility of remand of the award to the original panel or to a different panel; and the handling of costs, including the potential shifting of costs if an appeal is unsuccessful.[127] Given the transaction

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[123] *See id*. at 277-281.

[124] *See, e.g*, *Cummings v. Future Nissan*, 2005 WL 805173 (Cal. Ct. App. 3rd Dist Apr. 8, 2005) (affirming lower court order confirming award by appellate arbitrator).

[125] *See* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 299-300.

[126] *See* INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION, CPR ARBITRATION APPEAL PROCEDURE (1999); JAMS ARBITRATION APPEAL PROCEDURE (revised June 2003), *available at* http://www.jamsadr.com/rules/optional.asp.

[127] *See* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 298-304. *See also* Paul Bennett Marrow, *A Practical Approach to Affording Review of Commercial Arbitration Awards: Using an Appellate Arbitrator*, 60 DISP. RESOL. J. 10 (Aug.-Oct. 2005).

costs associated with their formulation, fully customized appellate rules are probably feasible only in exceptional cases (such as long-term relationships or large-scale business transactions). In most cases, parties will probably want to rely on existing institutional models.

12. Conduct a post-process "lessons learned" review and make appropriate adjustments.

At the conclusion of the arbitration, in-house counsel should conduct a thorough analysis of lessons learned and should make appropriate adjustments in arbitration policies, agreements, rules and management to address concerns regarding efficiency and economy.

Comments:

Self-evaluation is a fundamental strategy for every successful enterprise. Arbitration should be regarded no differently from other strategic processes. Executives and in-house counsel should review the entire proceeding and consider the financial and strategic impact of each tactical decision. These *Protocols* offer a road map for some key decision points to consider, while sections like Action 5 above may assist in-house counsel specifically in a frank self-evaluation. Questions that might be asked include these: Did the particular dispute resolution clause in this contract work well for us in this situation? Why or why not? Did the arbitration rules incorporated in that clause work well? Did our initial case assessment turn out to be accurate? If not, how can we improve our assessments in the future? Are we satisfied with the budget and effort level that we set for this case? Did outside counsel stick to the budget and represent us both effectively and efficiently? Was our fee arrangement with outside counsel appropriate? Did the arbitrator(s) conduct the proceeding efficiently? If not, how could it have been better conducted? Overall, was arbitration preferable to litigation in this instance?

Business users should also seek out arbitration providers who support evaluation and feedback processes through their arbitrators and rules (see *Protocol for Arbitrations Providers*, Actions 10 and 13).

A Protocol for Arbitration Providers

Business users rely heavily on arbitration providers for arbitration procedures, arbitrator selection and administrative services. In order to effectively promote economy and efficiency, providers need to offer users clear-cut process choices and develop and share information on their relative value and effectiveness. They also need to take measures to ensure that parties can find arbitrators with the proper case management skills and philosophy. The following specific Actions should be undertaken by providers for the purpose of achieving these goals.

1. Offer business users clear options to fit their priorities.

Instead of promoting a single "one-size-fits-all" set of procedures, institutions that provide dispute resolution services for business disputes should publish and actively promote a variety of templates, including arbitration clauses and procedures to give users real choices that fit their priorities, including time and cost savings. A provider's website should be organized in a manner that facilitates clear and easy access to different process choices, and should offer straightforward guidance (including, if possible, specific user feedback) about the benefits and costs to users of each process choice.

Comments:

Conceptually, between an arbitration model that seeks maximum expedition and economy and a model that incorporates litigation-like procedures while still preserving many of the advantages of arbitration (selection and accessibility of the decision-makers, privacy, finality, etc.) lies a broad spectrum of graduated arbitration models, each allowing a little greater process with a little less economy. To enable commercial arbitration users to choose the balance that is right for them, or even different balances for different kinds of cases, arbitration providers should offer a basic complement of dispute resolution clauses and rule sets that reflect several different points along the spectrum. Each rule set should prescribe procedures and staged timelines that permit completion of the arbitration by specified deadlines.

For example, the most economical ("fast track") model could involve a highly truncated arbitration with no discovery or motions and award issuance within 90 days of commencement (see *Protocol for Arbitration Providers,* Actions 5 and 8 below). Next could be a streamlined arbitration model that would offer a modicum of discovery (perhaps five document requests and four hours of depositions) but still provide for completion of the arbitration within six months. A standard arbitration model might allow somewhat more discovery and motions practice, though still far less than in litigation, and provide for completion of the arbitration in nine months (see *Protocol for Business Users and In-House Counsel*, Actions 2, 8, 9, and 11, and *Protocol for Arbitration Providers,* Actions 3, 4, 6, and 11). Finally, providers should offer a customized model, in which arbitrators would be empowered to develop, after consulting with counsel, customized procedures, perhaps litigation-like in some respects, which would nevertheless permit completion of the arbitration within one year in all but the most exceptional circumstances. Offering the arbitral counterpart of four, progressively fuller fixed-

price menus would truly provide business users with meaningful, easily implemented choices among arbitration models.

User feedback can be valuable in convincing business users and outside counsel of the viability of alternatives to traditional standard procedures. Dependable information about the application of process choices will make business users and outside counsel significantly more likely to "jump in" and take advantage of fresh options. Providers should aggressively solicit and organize feedback about specific options and their effectiveness in meeting users' priorities and standards.

See comments under *Protocol for Business Users*, Action 1, above. See also Actions 4, 5, 10 and 13 below for discussion of other related issues.

2. Promote arbitration in the context of a range of process choices, including "stepped" dispute resolution processes.

Resolving conflict through negotiation or mediation usually affords parties a superior opportunity to avoid significant cost or delay, and offers several other potential benefits, including greater control over outcome, enhanced privacy and confidentiality, preservation or improvement of business relationships, and better communications. Even if it fails to produce settlement, moreover, mediation may also "set the table" for arbitration. Therefore, provider-developed arbitration clauses and procedures should be employed within comprehensive, stepped dispute resolution provisions that begin with executive negotiation and mediation.

Comments:

See *Protocol for Business Users*, Action 1, above.

Stepped dispute resolution clauses can project a note of flexibility when a commercial agreement is created, while still assuring a binding, arbitrated resolution of any disputes that defy settlement.

One example of arbitration as part of a basic layered dispute resolution process is the following provision for arbitration as a “third layer” process following negotiation (“layer one”) and mediation (“layer two”):

> C. LAYER THREE: THE ARBITRATION STAGE (c) Arbitration. If the mediation provided for in "b" above does not conclude with an agreement between the Parties resolving the Dispute, the Parties agree to submit the Dispute to binding arbitration under the [insert incorporated commercial arbitration procedures]. If the Parties cannot agree on an arbitrator, the person who served as mediator shall select the person to serve as arbitrator from a list compiled by the Parties or, where the Parties do not compile a list, from a list maintained by a bona fide dispute resolution service provider or private arbitrator. The arbitrator's award shall be final, binding and may be converted to a judgment by a court of competent jurisdiction upon application by either party. The arbitrator's award shall be a written, reasoned opinion (unless the reasoned opinion is waived by

the Parties). The Parties shall have ten (10) days from the termination of the mediation to appoint the arbitrator and shall complete the arbitration hearing within six (6) months from the termination of the mediation. The arbitrator shall have the authority to control and limit discovery sought by either party. The arbitrator shall have the same authority as a court of competent jurisdiction to grant equitable relief, and to issue interim measures of protection, including granting an injunction, upon the written request with notice to the other party and after opposition and opportunity to be heard. The arbitrator shall take into consideration the Parties' intent to limit the cost of and the time it takes to complete dispute resolution processes by agreeing to arbitrate any Dispute.[128]

An option to consider is that of an "arbitration reset button." Contained in tiered dispute resolution clause, this clause provides that if the parties' dispute is not first resolved through the prerequisite executive negotiation and/or mediation, "then, within ___ days [or immediately] following the executive discussions and/or mediation, the parties shall confer and determine whether they wish to mutually renegotiate the default arbitration provision contained herein."[129]

A less formal approach to the "reset button" concept may occur in the context of mediation. Where the parties are unable to reach full agreement on substantive issues, it may be possible for an experienced mediator to facilitate a new or modified agreement respecting arbitration procedures. A mediator can play an invaluable role in escorting parties into a structured and economical arbitration process. For example, a mediator can:

- Facilitate agreement on exchange of document and other information;
- Help clarify which issues have been resolved in mediation and frame issues to be resolved in arbitration;
- Encourage parties to jointly submit the one or two most significant questions of law or fact to the arbitrator for speedy resolution, and then return to mediation.
- Assist in selection of an arbitrator;
- Help the parties define or refine any provided arbitration procedures;
- Remain available during the arbitration process itself as a resource to resolve issues informally.[130]

3. Develop and publish rules that provide effective ways of limiting discovery to essential information.

Because discovery is usually the chief determinant of arbitration cost and duration, and because arbitration procedures that leave parties and arbitrators significant "wiggle room"

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[128] Adapted from Robert N. Dobbins, *Practice Guide: The Layered Dispute Resolution Clause: From Boilerplate To Business Opportunity*, 1 HASTINGS BUS. L.J. 161, 171 (2005).

[129] Posting by James M. Gaitis to mediate-and-arbitrate@peach.ease.lsoft.com (May 13, 2010) (on file with author).

[130] *See* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 18.

often result in litigation-like discovery, provider institutions should develop and publish procedures that give business users the ability to effectively limit the scope of discovery in arbitration through their pre-dispute agreement. As a general matter, discovery should be restricted to information that is material and not merely relevant. Among the possible approaches to limiting discovery:

- **limiting document production to documents or categories of documents for which there is a specific, demonstrable need; requiring parties to describe requested documents with specificity, explain their materiality, assure the tribunal they do not have the documents, and make clear why they believe the other party has possession or control of the documents;**
- **prohibiting requests for admission, and instead encouraging party representatives to confer regarding stipulation of facts;**
- **prohibiting form interrogatories and limiting the number of interrogatories;**
- **setting limits on the number and length of depositions, and limiting arbitrator discretion to authorize additional depositions to situations where there is a demonstrated need for the requested information, there are no other reasonable means of obtaining the information, and the request is not unduly burdensome to other parties;**
- **directing parties to cooperate on voluntary information exchange/discovery;**
- **directing arbitrators to manage discovery disputes as expeditiously as possible (e.g., by offering to resolve issues through prompt conference calls before resorting to extensive briefing and written argument);**
- **authorizing arbitrators to consider, when awarding fees and costs, the failure of parties to cooperate in discovery and/or to comply with arbitrator orders, thereby causing delays to the proceeding or additional costs to other parties.**

Special attention should be given to detailed procedures for managing electronic records and handling electronic discovery much more efficiently than is currently done in federal and state courts. At a minimum, the description of custodians from whom electronic discovery can be collected should be narrowly tailored to include only those individuals whose electronic data may reasonably be expected to contain evidence that is material to the dispute and cannot be obtained from other sources. In addition to filtering data based on the custodian, the data should be filtered based on file type, date ranges, sender, receiver, search term or other similar parameters. Normally, disclosure should be limited to reasonably accessible active data from primary storage facilities; information from back-up tapes or back-up servers, cell phones, PDAs, voicemails and the like should only be subject to disclosure if a particularized showing of exceptional need is made.

Comments:[131]

In litigation, parties have broad rights to discover any evidence that may be reasonably calculated to lead to the discovery of admissible evidence without regard to whether such

[131] These comments are drawn in large part from Stipanowich, *Arbitration and Choice*, *supra* note 58, 414-425.

evidence is truly material to the outcome of the case.[132] This approach, coupled with lack of focus at the outset of discovery, means that "discovery costs far too much and becomes an end in itself."[133] Thus, the recent *Final Report on Litigation Reform* calls for dramatic overhauling of the court discovery process based on a "principle of proportionality."[134]

Parties who choose to arbitrate presumably do so with the expectation of reduced discovery. As observed in the Commentary to the *CPR Rules*,

> "[a]rbitration is not for the litigator who will 'leave no stone unturned.'" Unlimited discovery is incompatible with the goals of efficiency and economy. The Federal Rules of Civil Procedure are not applicable. Discovery should be limited to those items for which a party has a substantial, demonstrable need."[135]

Yet, as discussed in Part II, discovery is now very much a part of arbitration processes.[136] The rising scope and cost of discovery in arbitration have been a long time in the making, due in large part to the lack of formal guidelines. As technology, litigation intensity, and the popularity of arbitration have exacerbated the problem, the need for more comprehensive guidelines has become overwhelming. In cases of any size or complexity cogent arguments may be framed in support of document discovery and for a number of depositions. While there are those who will draw firm lines, the response will vary with the arbitrator. Arbitrators will be especially reluctant to draw lines in the face of a broad litigation-style discovery plan embraced by counsel for the parties.[137] Because arbitration is first and last a consensual process, even arbitrators who suspect that business parties would have preferred a more attenuated process will tend to bow to a mutual agreement of the parties' counsel in the absence of (1) clear contractual guidance regarding the parties' intent to circumscribe discovery or (2) clear arbitral authority to modify the agreement of counsel regarding discovery. They are left with the alternative of encouraging or cajoling parties to consider more carefully tailored discovery; for

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[132] THE FEDERAL RULES OF CIVIL PROCEDURE, for example, state:

> Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party….relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

FED. R. CIV. P. 26(b)(1).

[133] FINAL REPORT ON LITIGATION REFORM, *supra* note 60, at 2.

[134] *Id.* at 7-16.

[135] CPR RULES, *supra* note 62, Commentary to CPR Rule 11.

[136] It is worth noting that we have evolved from no mention of prehearing discovery in the Federal Arbitration Act, 9 U.S.C. §§1-14 (1925), and the UNIFORM ARBITRATION ACT (1955) to highly deferential language in the REVISED UNIFORM ARBITRATION ACT (2000).

[137] The CPR Commentary encourages parties' counsel "to agree, preferably before the initial pre-hearing conference, on a discovery plan and schedule and to submit the same to the Tribunal for its approval." *Id.*

this purpose, some arbitrators insist that business principals be present at the pre-hearing conference to participate in the discussion on discovery.[138]

Parties desiring explicit, non-litigation-like guidelines for information exchange and discovery in arbitration, including those who are concerned about the impact of discovery on the cost and duration of arbitration, now have a variety of templates to consider.

1. Emerging discovery templates

Organizations that publish leading arbitration procedures and other institutions have begun to develop specific provisions setting clear limits on discovery or establishing standards to guide arbitral discretion in addressing discovery disputes.

The International Bar Association (IBA) Rules on the Taking of Evidence in International Commercial Arbitration[139] were an early and excellent standard aimed at limiting information exchange. Though designed for international proceedings that involve parties and practitioners from civil law countries as well as sovereign states applying common law, the *IBA Rules* are sometimes applied by agreement in purely domestic (U.S.) arbitration. *The ICDR Guidelines for Arbitrators Concerning Exchanges of Information* are a more recent standard designed for international disputes.[140]

On the domestic scene, discovery limitations are most often built into streamlined or expedited arbitration rules like the *JAMS Streamlined Arbitration Rules & Procedures*.[141] The *CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration* is another effort to offer counselors and drafters clear choices regarding information exchange and discovery.[142] It offers parties the opportunity to select among several alternative standards regarding pre-hearing exchange of documents and witness information—some of which are useful templates.

Emerging standards may enhance the ability of arbitrators to effectively address information exchange issues by encouraging deliberate weighing of burdens and benefits. They

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[138] Alternatively, some arbitrators require principals of the clients to sign-off on any discovery plan submitted by outside counsel.

[139] INTERNATIONAL BAR ASSOCIATION, IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION (May, 29 2010) [hereinafter IBA RULES], *available at* http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx

[140] INT'L CENTER FOR DISPUTE RESOLUTION, ICDR GUIDELINES FOR ARBITRATORS CONCERNING EXCHANGES OF INFORMATION (May 2008) [hereinafter ICDR GUIDELINES], *available at* http://www.adr.org/si.asp?id=5288.

[141] JAMS STREAMLINED RULES, *supra* note 94, R. 13.

[142] INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION, CPR PROTOCOL ON DISCLOSURE OF DOCUMENTS AND PRESENTATION OF WITNESSES IN COMMERCIAL ARBITRATION (2008) [hereinafter CPR PROTOCOL ON DISCLOSURE] (designed in part "to afford to parties to an arbitration agreement the opportunity to adopt certain modes of dealing with pre-hearing disclosures of documents and with the presentation of witnesses, pursuant to Schedules.") *available at* http://www.cpradr.org/ClausesRules/CPRProtocolonDisclosure/tabid/393/Default.aspx.

may also offer arbitrators other tools, including explicit authority to condition production on the payment by the requesting party of associated reasonable costs.[143]

2. Document exchange and discovery

Standard procedures often provide for some exchange of documents, at least to the extent they are non-privileged and relevant to the dispute.[144] In some cases, such production is to occur within a fairly short time frame.[145] Some parties, however, may want to narrow (or expand) this framework or establish more specific standards for document exchange.

A straightforward template for more limited information exchange/discovery may be found in the leading international standard on the subject, the *IBA Rules on the Taking of Evidence in International Commercial Arbitration*.[146] This standard, a compromise in which U.S.-style discovery is tempered by the influence of prevailing practices in civil law countries, initially requires each party only to submit "all documents available to it on which it relies."[147] It also establishes a procedure for arbitral resolution of disputes over further document production that requires parties to describe requested documents with specificity, explain their relevance and materiality, assure the tribunal that they do not have the documents and make clear why they believe the other party has possession or control of the documents.[148]

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[143] *See, e.g., Id.* at § 1(e)(2). *See also* ICDR GUIDELINES, *supra* note 140, 8.a., which provides:

> In resolving any dispute about pre-hearing exchanges of information, the tribunal shall require a requesting party to justify the time and expense that its request may involve, and may condition granting such a request on the payment of part or all of the cost by the party seeking the information. The tribunal may also allocate the costs of providing information among the parties, either in an interim order or in an award.

[144] *See, e.g.*, JAMS COMPREHENSIVE RULES, *supra* note 104, (providing for the parties to "cooperate in . . . the voluntary and informal exchange of all relevant, non-privileged documents, including, but without limitation, copies of all documents in their possession or control on which they rely in support of their positions.").

[145] The JAMS COMPREHENSIVE RULES call for document exchange "within twenty-one (21) calendar days after all pleadings or notice of claims have been received." JAMS COMPREHENSIVE RULES, *supra* note 104, Rule 17(a). Under the JAMS STREAMLINED ARBITRATION RULES & PROCEDURES, this period is reduced to 14 days. *See* JAMS STREAMLINED RULES, *supra* note 67, R. 13(a).

[146] IBA Rules, *supra* note 139.

[147] *Id.*, Article 3, Section 1.

[148] The IBA Rules call for Requests to Produce to contain

> (a)(i) a description of a requested document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist;
>
> (b) a description of how the documents requested are relevant and material to the outcome of the case; and
>
> (c) a statement that the documents requested are not in the possession, custody or control of the requesting Party, and of the reason why that Party assumes the documents requested to be in the possession, custody or control of the other Party.

Id. at 5.

In a similar vein, the *JAMS Streamlined Arbitration Rules & Procedures* call for "voluntary and informal" exchange of all relevant, non-privileged documents and other information, but admonish parties to limit their requests to "material issues in dispute" and to make them "as narrow as reasonably possible." Depositions are not permissible "except upon a showing of exceptional need" and with arbitrator approval. Electronic data may be furnished in the form most convenient for the producing party, and broad requests for email discovery are not permitted.[149] (The more expedited *AAA Construction Industry Fast-Track Rules*, aimed at smaller dollar claims, contemplate no discovery beyond exhibits to be used at the arbitration hearing "except . . . as ordered by the arbitrator in exceptional cases."[150])

The *CPR Protocol on Disclosure*[151] offers parties a choice of four discrete "modes" for document disclosure. These include: Mode A (No disclosure save for documents to be presented at the hearing); Mode B (Disclosure as provided for in Mode A together with "[p]re-hearing production only of documents essential to a matter of import in the proceeding for which a party has demonstrated a substantial need"); Mode C (Disclosure provided for in Mode B together with disclosure, prior to the hearing, "of documents relating to issues in the case that are in the possession of persons who are noticed as witnesses by the party requested to provide disclosure"); and Mode D (Pre-hearing disclosure of documents regarding non-privileged matters that are relevant to any party's claim or defense, subject to limitations of reasonableness, duplication and undue burden).[152] Some arbitrators limit each party to a certain number of document requests, including subparts.[153]

3. Limits on depositions

In the interest of economy or certainty, some parties may want to provide that no depositions, or a specific, limited number of depositions, will be conducted in their

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The IBA RULES appear to have influenced the recent ICDR GUIDELINES FOR ARBITRATORS CONCERNING EXCHANGES OF INFORMATION, which empower the arbitrators,

> upon application, [to] require one party to make available to another party documents in the party's possession, not otherwise available to the party seeking the documents, that are reasonably believed to exist and to be relevant and material to the outcome of the case. Request for documents shall contain a description of specific documents or classes of documents, along with an explanation of their relevance and materiality to the outcome of the case.

ICDR GUIDELINES, *supra* note 140, Guideline 3(a).

[149] *Compare* JAMS STREAMLINED RULES, *supra* note 94, *with* CPR EXPEDITED ARBITRATION, *supra* note 65.

[150] *See* AAA CONSTRUCTION INDUSTRY FAST TRACK RULE, *supra* note 64, F-9.

[151] CPR PROTOCOL ON DISCLOSURE, *supra* note 142, § 1. *Cf.* Lawrence W. Newman & David Zaslowsky, *Predictability in International Arbitration*, 100 N.Y. L. J. 3. (May 25, 2004).

[152] *Id.*, Schedule 1.

[153] *See, e.g.,* Wendy Ho, *Discovery in Commercial Arbitration Proceedings*, Comment, 34 HOUS. L. REV. 199, 224-227 (Spring 1997).

arbitration.[154] A variant of this approach, used by some arbitrators, is to provide each party with a maximum number of hours for deposing persons within the other party's employ or control. Such limitations may be tempered by giving arbitrators discretion to allow additional depositions in exceptional circumstances where justice requires.[155] A useful example of a clear limit coupled with narrowly cabined arbitrator discretion is contained in Rule 17 of the *JAMS Comprehensive Arbitration Rules*, which permits each party to take a single deposition; [t]he necessity of additional depositions is to be determined by the Arbitrator based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing parties and the witness.[156]

Another proposed response to the burgeoning discovery problem is the adoption of the international arbitration practice of substituting detailed sworn witness statements for direct examination.[157] Such statements, provided to all participants in advance of the hearing, might provide a rough surrogate for depositions and save hearing time. Adjustments to the international practice, such as abbreviated direct examination, might be necessary to provide comfort to American lawyers and arbitrators. The new draft *CPR Protocol on Disclosure* offers parties the choice of embracing such an approach in their arbitration agreement, possibly in lieu of depositions.[158]

4. Guiding and empowering arbitrators.

Another approach to controlling discovery hinges on and provides a useful framework for the "good judgment of the arbitrator." A set of guidelines for arbitrator-supervised discovery developed by the New York State Bar Association (and subsequently adopted in summary form by JAMS) offers tools for arbitrators to manage discovery and other procedural aspects of arbitration.[159] Such guidelines operate on the presumption that parties have not yet established strict guidelines for discovery, and therefore depend upon the arbitrator(s) to control discovery by giving early and active attention to the process, using persuasion and other methods to achieve results appropriate to the specific circumstances and the parties' indicated preferences (see *Protocol for Arbitrators*, Action 6).

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[154] The ICDR GUIDELINES note that "[d]epositions, . . . as developed in American court procedures, are generally not appropriate procedures for obtaining information in international arbitration." ICDR GUIDELINES, *supra* note 140, 6.b.

[155] *See supra* note 94 (discussing discretionary authority of arbitrator under JAMS STREAMLINED RULES).

[156] JAMS COMPREHENSIVE RULES, *supra* note 104, Rule 17(b).

[157] The witness statement concept is embodied in the IBA Rules. IBA RULES, *supra* note 139. Article 4, Sections 4-9.

[158] CPR PROTOCOL ON DISCLOSURE, *supra* note 142, at 2-3, 5, 8-9.

[159] *See* NEW YORK STATE BAR ASSOCIATION DISPUTE RESOLUTION SECTION ARBITRATION COMMITTEE, REPORT ON ARBITRATION DISCOVERY IN DOMESTIC COMMERCIAL CASES (June 2009), *available at* http://www.nysba.org/Content/NavigationMenu42/April42009HouseofDelegatesMeetingAgendaItems/DiscoveryPreceptsReport.pdf (describing factors to consider when artfully drafting arbitration clauses); *see also*, JAMS, RECOMMENDED ARBITRATION DISCOVERY PROTOCOLS FOR DOMESTIC, COMMERCIAL CASES (Jan. 6 2010), *available at* http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Arbitration_Discovery_Protocols.pdf.

Should arbitrators or counsel have the last word on the scope of discovery? In this respect, expert opinion and current standards vary, although under most standards arbitrators must respect and adhere to party agreements regarding discovery. The *AAA Rules for Large, Complex Cases* authorize the arbitrator(s) to override party agreements and "place such limitations on the conduct of such [agreed] discovery as the arbitrator(s) shall deem appropriate."[160] Although both the JAMS and CPR Rules give arbitrators considerable authority regarding exchange of information, neither set of procedures is explicit regarding the authority of arbitrators to "trump" or modify agreements regarding discovery;[161] however, the *JAMS Arbitration Discovery Protocol* recognizes that, while party agreements regarding the scope of discovery should be respected by arbitrators,"[w]here one side wants broad arbitration discovery and the other wants narrow discovery, the arbitrator will set meaningful limitations."[162]

Since parties can always amend their arbitration agreements (even, in most jurisdictions, by amending the provision of the agreement that says it may only be amended by a writing signed by the CEOs of both companies), any provision giving the arbitrator the last word on discovery (or anything else) could theoretically be rescinded by a subsequent agreement of the parties. If that happens, the arbitrators should convene a meeting with

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[160] AAA COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES (2009) [hereinafter AAA COMMERCIAL RULES], L-4(c). An even stronger statement of the "final authority" of arbitrators regarding discovery is set forth in the ICDR GUIDELINES:

> 1. a. The tribunal shall manage the exchange of information among the parties in advance of the hearings with a view to maintaining efficiency and economy. The tribunal and the parties should endeavor to avoid unnecessary delay and expense while at the same time balancing the goals of avoiding surprise, promoting equality of treatment, and safeguarding each party's opportunity to present its claims and defenses fairly.
>
> b. The parties may provide the tribunal with their views on the appropriate level of information exchange for each case, *but the tribunal retains final authority to apply the above standard.* To the extent the Parties wish to depart from this standard, they may do so only on the basis of an express agreement in writing and in consultation with the tribunal. (Emphasis added.)

ICDR GUIDELINES, *supra* note 140, 1.a-b.

[161] The JAMS COMPREHENSIVE RULES grant each party one deposition as of right, and call for "the necessity of additional depositions . . . [to] be determined by the Arbitrator based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing Parties and the witness." JAMS COMPREHENSIVE RULES, *supra* note 104, Rule 17(b). The JAMS COMPREHENSIVE RULES do not give any indication about what happens when the parties have agreed to multiple depositions.

While empowering the Tribunal to "require and facilitate such discovery as it shall determine is appropriate" taking into account parties' needs, expeditiousness and cost-effectiveness, the CPR RULES also do not address the impact of mutual agreement on discovery issues by the parties. CPR RULES, *supra* note 62, Rule 11. However, the CPR Protocol on Disclosure appears to anticipate that "[w]here the parties have agreed on discovery depositions, the Tribunal should exercise its authority to scrutinize and regulate the process . . . [and possibly impose] strict limits on the length and number of depositions consistent with the demonstrated needs of the parties." CPR PROTOCOL ON DISCLOSURE, *supra* note 142, at 5.

[162] See JAMS, RECOMMENDED ARBITRATION DISCOVERY PROTOCOLS FOR DOMESTIC, COMMERCIAL CASES (Jan. 6 2010), *available at http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Arbitration_Discovery_Protocols.pdf.*

principals present and make sure that they (not just their counsel) want to override the "last word" provision so that outside counsel may engage in much more extensive (and costly) discovery than the arbitrator considers warranted.

5. E-discovery

Particularly troublesome has been the area of electronic discovery. As one leading participant in the development of guidelines for the management and discovery of electronic information explains,

> If the law of e-discovery were allowed to develop on an ad hoc basis, one decision at a time, companies with their complex information technology systems would be eaten alive by process costs. It is essential to develop best practices that work in a real world.[163]

The challenge for arbitrators and arbitration providers is to address these same concerns effectively, but in the context of a highly discretionary system without uniform rules or precedents that is conventionally aimed at efficiency and expedition in conflict resolution.[164] Issues include the essential scope of and limits on e-discovery, and the weighing of burdens and benefits;[165] the handling of the costs of retrieval and review for privilege;[166] the duty to preserve electronic information, spoliation issues and related sanctions.[167]

Will it be possible for arbitrators to effectively meet the challenges of e-discovery in an efficient and relatively economical manner? The answer will depend in part on the effectiveness of choices made by counselors and drafters. But they cannot make good choices when good choices are not drafted and promoted by arbitration providers.

Arbitral institutions are in a unique position to assume more responsibility for providing this critical guidance. Concerns regarding the relative burdens associated with e-discovery may lead parties to consider adopting language similar to that contained in the *ICDR Guidelines*

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[163] THE SEDONA GUIDELINES: BEST PRACTICE GUIDELINES & COMMENTARY FOR MANAGING INFORMATION & RECORDS IN THE ELECTRONIC AGE 11-20, 31-43 (Charles Ragan et al., The Sedona Conference Sept. 2005).

[164] Irene C. Warshauer, Electronic Discovery in Arbitration: Privilege Issues and Spoliation of Evidence, 61 DISP. RESOL. J. 9, 10 (Nov. 2006-Jan. 2007); Jennifer E. Lacroix, *Practical Guidelines for Managing E-Discovery Without Breaking the Bank*, in PLI PATENTS, COPYRIGHTS, TRADEMARKS AND LITERARY PROPERTY COURSE HANDBOOK SERIES 645-665 (Jan. 2008); Theodore C. Hirt, *The Two-Tier Discovery Provision of Rule 26(B)(2)(B) – A Reasonable Measure for Controlling Electronic Discovery?* 12 RICH. J. L. & TECH. 12 (2007); Thomas Y. Allman, *The "Two-Tiered" Approach to E-Discovery: Has Rule 26(B)(2)(B) Fulfilled its Promise?* 14 RICH. J. L. & TECH. 7 (2008).

[165] *See generally* THE SEDONA GUIDELINES, *supra* note 163.

[166] For a discussion of these and other issues, see John B. Tieder, *Electronic Discovery and its Implications for International Arbitration*; (unpublished article, on file with Watt, Tieder, Hoffar & Fitzgerald, LLP); Jessica L. Repa, *Adjudicating Beyond the Scope of Ordinary Business: Why the Inaccessibility Test in Zubulake Unduly Stifles Cost-Shifting During Electronic Discovery*, Comment, 54 AM. U. L. REV. 257 (Oct. 2004); Warshauer, *supra* note 164, at 11 (discussing the development of "claw-back" agreements, which permit a party to produce all of its relevant documents for review without waiving privilege).

[167] Warshauer, *supra* note 164, at 12-15.

which permit a party to make documents maintained in electronic form "available in the form . . . most convenient and economical for it, unless the Tribunal determines, on application . . . that there is a compelling need for access to the documents in a different form."[168] Moreover, requests for such documents "should be narrowly focused and structured to make searching for them as economical as possible." The *Guidelines* conclude by permitting arbitrators to engage in "direct testing or other means of focusing and limiting any search."[169] The use of "test batch production"—such as pilot tests using key search words on a limited scale—is emerging as a critical way of identifying areas that require special attention in advance of major production.

Parties may be able to avoid many of the costs—if not all the risks—of the revelation of privileged material in electronic data by agreeing to have the arbitrators issue a pre-arbitral order relieving the parties of the obligation to conduct a pre-production privilege review of all electronic documents and ordering that the attorney-client and work product privileges are not waived by production of documents that have not been reviewed.[170] Parties may also wish to consider identifying likely informational needs and agreeing on what information needs to be preserved, in what format, and for how long.[171]

A prototypical, multi-faceted template addressing various aspects of pre-hearing disclosure of electronic information is contained in the *CPR Protocol on Disclosure*.[172] That Protocol presents parties with four discrete alternatives regarding pre-hearing disclosure of electronic documents. The alternatives range from no-pre-hearing disclosure, except with respect to copies of printouts of electronic documents to be presented in the hearing, to full disclosures "as required/permitted under the *Federal Rules of Civil Procedure*." The intermediate options permit parties to limit production to documents maintained by a specific number of designated custodians, to limit the time period for which documents will be produced, to identify the sources (primary storage, back-up servers, back-up tapes, cell phones, voicemails, etc.) from which production will be made, and to determine whether or not information may be obtained by forensic means.[173]

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[168] ICDR GUIDELINES, *supra* note 140, Section 4.

[169] *Id.*

[170] Warshauer, *supra* note 164, at 11.

[171] THE SEDONA GUIDELINES, *supra* note 163; William B. Dodero & Thomas J. Smith, *Creating a Strong Foundation for Your Company's Records Management Practices*, 25 ACC DOCKET 52 (Nov. 2007).

[172] *See* Newman & Zaslowsky, *supra* note 81.

[173] *See* CPR PROTOCOL ON DISCLOSURE, *supra* note 142, Schedule B, Modes B, C. The Protocol also offers a set of General Principles which may be adopted by themselves or in tandem with a particular "mode" for pre-hearing disclosure of electronic documents. It provides:

> In making rulings on pre-hearing disclosure, the tribunal should bear in mind the high cost and burden associated with requests for the production of electronic information. It should be recognized that e-mail and other electronically created documents found in the active or archived files of key witnesses or in shared drives used in connection with the matter at issue are more readily accessible and less burdensome to produce when sought pursuant to reasonably specific requests. Production of electronic materials from a wide range of users or custodians tends to be costly and burdensome and should not be permitted without a showing of

6. Other considerations

Depending on the circumstances, parties may consider it appropriate to include other provisions, such as a term giving arbitrators explicit authority to weigh the burdens and benefits of a discovery request, or the ability to condition disclosure on the requesting party paying reasonable costs of production.[174] It may serve efficiency to provide that the chair of the tribunal serve as discovery master; in cases in which confidentiality of sensitive information is of prime concern, there might be a provision for the use of a special master to supervise certain aspects of discovery.[175]

4. Offer rules that set presumptive deadlines for each phase of the arbitration; train arbitrators in the importance of enforcing stipulated deadlines.

In the interest of economy and efficiency, providers should ensure that parties have the opportunity to adopt arbitration procedures that include a presumptive deadline for completion of arbitration. The procedures should facilitate compliance with the final deadline through the inclusion of presumptive time limits for each phase of the arbitration, and by giving arbitrators explicit authority to employ procedures and set deadlines appropriate to the goal of meeting the overall deadline. Providers should also ensure that their training programs offer arbitrators instruction in the importance of adhering to stipulated timetables or deadlines for arbitration except in circumstances clearly beyond the contemplation of the parties when the time limits were established (see *Protocol for Arbitrators*, Action 3).

Comments:

See comments under *Protocol for Business Users*, Action 3.

5. Publish and promote "fast-track" arbitration rules.

Providers should offer a variety of procedural choices with varying degrees of emphasis on expedition and economy, including at least one set of procedures that place heavy emphasis on those goals (see *Protocol for Business Users and In-House Counsel,* Action 4). A "fast-track" approach may feature some or all of the following:

- **relatively short presumptive deadlines;**
- **limits on the number of arbitrators;**

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extraordinary need. Requests for back-up tapes, deleted files and metadata should only be granted if the requesting party can demonstrate a reasonable likelihood that files were deliberately destroyed or altered by a party in anticipation of litigation or arbitration and outside of that party's usual and customary document-retention policies.

Id., Section 4(a).

[174] *See supra* note 89.

[175] *See* JAMS COMPREHENSIVE RULES, *supra* note 104, Rule 17(b).

- **expedited arbitrator appointment procedure;**
- **early disclosure of information;**
- **heavily curtailed discovery and motion practice;**
- **limits on the length and form of the award.**

If fast-track procedures are published separately from a provider's standard procedures, the provider should take measures to ensure that users are equally aware of the fast-track option and are provided with user-friendly guidance on how and when to employ the fast track procedures.

Comments:

See comments under *Protocol for Business Users*, Action 3.

6. Develop procedures that promote restrained, effective motion practice.

Properly employed, motions to narrow or dispose of claims or defenses can promote efficiency and economy in arbitration. Presently, however, there are two major concerns about motion practice in arbitration: (a) the reflexive use of motion practice in arbitration by some litigation attorneys, and (b) the reflexive denial of motions by arbitrators pending a full-blown hearing on the merits of the entire case. Providers should attempt to address these concerns by publishing guidelines for effective and efficient resolution of motions, particularly dispositive motions. This might involve a simple method for screening motions at the outset, including factors to be considered by arbitrators in deciding whether to entertain a motion. In the interest of time- and cost-saving, would-be movants might be required to set up a conference call with the arbitrator(s) and opposing counsel to discuss the issue before filing any motion (see *Protocol for Business Users*, Action 9; *Protocol for Arbitrators*, Action 7).

Comments:

See comments under *Protocol for Business Users*, Action 9.

7. Require arbitrators to have training in process management skills and commitment to cost- and time-saving.

Provider institutions should conduct training in managing hearings fairly but expeditiously, with particular emphasis on ways of reducing cost and promoting efficiency, and should require arbitrators to complete such training before being included on the provider's roster, and to update their knowledge and skills annually. Providers should also consider requiring arbitrators to make a pledge to actively seek ways to promote cost- and time-saving in a manner consistent with the agreement of the parties and fundamental fairness (see *Protocol for Arbitrators*, Action 1).

Comments:

Arbitrators need to anticipate that their predominant challenges are more likely to be encountered during the period prior to hearings. Of increasing importance is the critical role of the pre-hearing conference in establishing discovery and motion practice guidelines for the rest of the arbitration process. Arbitrators must be equipped with process management skills not only for the hearing itself, but for the pre-hearing period.

Among the many steps that skilled arbitrators may take during pre-hearing case management are the following: promoting dialogue between parties; addressing jurisdictional issues; developing a timetable and management plan; addressing requests for interim relief; facilitating information exchange and discovery; addressing dispositive motions; planning the hearings; planning the form of the final award; administrative details like rules, locations, fees, confidentiality, and communication methods.[176]

An arbitrator with a proper skill set will approach the pre-hearing proceedings as aggressively and deliberately as the hearings themselves, increasing the likelihood not only of achieving resolution of the matter before the hearing begins, but of ensuring a hearing that has set and met parties' expectations for efficiency.

8. Offer users a rule option that requires fact pleadings and early disclosure of documents and witnesses.

Providers' should afford users the option of adopting rules that require fact pleading rather than notice pleading in both demands and answers, and require that claimants and respondents serve with their initial pleadings a detailed statement of all facts to be proven, all legal authorities relied upon, copies of all documents supporting each claim or defense, as well as a list of witnesses they expect to call. Such rules should require that parties supplement their documents and witness lists periodically prior to the hearing.

Comments:

See *Protocol for Business Users*, Action 8, and the related entry in Appendix A.

9. Provide for electronic service of submissions and orders.

Arbitration procedures should require that all pleadings, motions, orders and other documents filed in the arbitration be served electronically on each arbitrator and each parties' counsel except where that method of service is impractical (as with documents of too great a length to be conveyed electronically) or where other special considerations require another method.

Comments:

A number of providers and services have begun providing for electronic service of arbitration-related documents. See Appendix A for examples.

[176] COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, Ch. 4.

10. Obtain and make available information on arbitrator effectiveness.

Providers should conduct a post-arbitration telephone interview with arbitrating parties and counsel to obtain information on arbitrator effectiveness in managing arbitration fairly and expeditiously. Such information should periodically be furnished to arbitrators in a way that precludes their identifying the sources of the comments. Such information should also be made available in summary form (and without attribution) to parties and counsel selecting arbitrators. Providers should remove from their rosters those arbitrators who prove incapable of efficiently managing business arbitrations (see *Protocol for Business Users*, Action 7).

Comments:

Perhaps more commonly associated with other dispute resolutions processes, evaluation of neutrals should be a core service offered by arbitration providers. As standards evolve, arbitrators must continue to be held accountable for their knowledge and skill levels. Care should be taken to focus evaluations on objective measures of arbitrators' management skills and knowledge levels and to make effective use of timing and language to prevent evaluations from being colored by arbitration outcomes.[177]

11. Provide for expedited appointment of arbitrators.

Provider rules should expedite the selection of the tribunal by providing that, if all arbitrators have not been appointed within a specific time (say, thirty days from the filing of the arbitration demand), the provider will appoint the arbitrators. The rules should also impose stringent time limits for all communications by parties and by prospective arbitrators that are required as a part of the appointment process.

Comments:

Arbitrations can be greatly delayed when the appointment of arbitrators drags on for many weeks or even months. While arbitrator selection is certainly an important step in the arbitration process, it is one that can be accomplished expeditiously by diligent counsel, particularly when the rules furnish the strong incentive of divesting foot-dragging parties of the right to select their arbitrators.

See below for examples of expedited procedures for appointment of arbitrators.

- AMERICAN ARBITRATION ASSOCIATION, AAA COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, SECTION E: EXPEDITED PROCEDURES R. 4 (June 1, 2009), *available at* http://www.adr.org /sp.asp?id=22440. ("If the parties are unable to agree… each party may strike two names from the list [of arbitrators] and return it to the AAA within seven days

[177] *Cf.* Donald P. Crane & John B. Miner, *Labor Arbitrators' Performance: Views from Union and Management Perspectives*, 9 J. LAB. RES. 1 (Mar. 1988) (discussing a study of performance evaluations of labor arbitrators by union representatives and management representatives that found the arbitrators' awards to so color the evaluation results that the results were either unrelated or negatively related).

from the date of the AAA's mailing... If the appointment… cannot be made from the list, the AAA may make the appointment...")

- AMERICAN ARBITRATION ASSOCIATION, SECURITIES ARBITRATION SUPPLEMENTARY PROCEDURES R. 3(a) (June 1, 2009), *available at* http://www.adr.org/sp.asp?id=22009 ("The list [of proposed arbitrators] must be returned to the AAA within 10 days from the date of the AAA's transmittal to the parties. If for any reason the appointment of an arbitrator cannot be made from the list, the AAA may make the appointment . . .").
- ADR CHAMBERS, EXPEDITED ARBITRATION RULES R. 5 (2010), *available at* http://adrchambers.com/ca/expedited-arbitration/expedited-arbitration-rules/ ("If ADR Chambers is not notified of the selection of an arbitrator… within 5 business days after the Response has been delivered . . . ADR Chambers will select the arbitrator . . .").
- AMERICAN DISPUTE RESOLUTION CENTER, INC., RULES OF EXPEDITED CONSTRUCTION ARBITRATION R. E-4 (Sept. 11, 2009), *available at* http://www.adrcenter.net/pdf/Construction/ExpRules.pdf ("The parties must return their selections to ADR Center within ten calendar days. If ADR Center is unable to appoint the arbitrator from the parties' selections, the Case Manager will appoint the arbitrator.").

12. Require arbitrators to confirm availability.

Providers should require arbitrators being considered for appointment in expedited proceedings to expressly confirm their availability to both manage and hear the case within a specific number of days prior to being confirmed.

Comments:

Per the 2009 International Arbitration Report, the ICC Court now requires arbitrators agreeing to serve in ICC arbitrations to disclose details regarding their availability.[178]

Similarly, the *CPR Expedited Arbitration Rules* provide:

> Any arbitrator appointed by the parties or by the CPR Institute shall accept appointment by expressly representing to the CPR Institute within 2 days of appointment that he or she has the time available to devote to the expeditious process and time periods for Pre-hearing Conference, discovery, hearing and award contemplated by these Rules and to facilitate the expedition contemplated in these Rules.[179]

Obviously, most arbitrators understand the concept of scheduling, but requiring explicit affirmation of availability is intended to serve as reminder to all arbitrators of the importance of avoiding unnecessary delay throughout the entire process. In fact, with the advent of

[178] ICC COMMISSION ON ARBITRATION, ICC PUBLICATION 843 -TECHNIQUES FOR CONTROLLING TIME AND COSTS IN ARBITRATION §12 (2007) *available at* http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf.

[179] CPR EXPEDITED ARBITRATION RULES, *supra* note 65, Rule 7.2.

electronic calendars, the day is not far off when parties will be able to view prospective arbitrators' calendars to determine for themselves if candidates have sufficient time available in the relevant time frame.

13. Afford business users an effective mechanism for raising and addressing concerns about arbitrator case management.

Providers that offer administrative services, including arbitrator appointment services, should offer users a meaningful mechanism (such as a designated ombud) for addressing party concerns and complaints regarding the arbitrators or the arbitration process. Among other things, the individual/office would be authorized to explore opportunities for addressing concerns about process speed and cost.

Comments:

Identifying and resolving issues with arbitrator case management while still mid-process has a number of advantages, including preserving efficiency; identifying long-term issues with procedures or arbitrators while the matter is still fresh; and increasing party satisfaction with outcomes.

Conflict resolution studies have shown that outcome satisfaction is generally improved by the opportunity to provide feedback during the proceedings. "Increasing shared information is a basic strategy in ameliorating all conflicts. Consultation and feedback mechanisms between parties provide a consistent and reliable method of sharing information."[180]

14. Offer process orientation for inexperienced users.

Providers should make available to business parties and to counsel online or in-person orientation programs that summarize and illustrate (a) the principal differences between arbitration and litigation and (b) how to use arbitration to accomplish the parties' goals of fair, economical and efficient resolution of disputes.

Comments:

Properly educated parties are far more likely to accept efficient process options, establish a constructive tone, set aside courtroom-style tactics in favor of flexibility, and reach an outcome without being frustrated by preconceptions regarding arbitration.

Note that—as discussed under Action 1—user feedback can be an effective way to "sell" a process to parties unfamiliar with the distinctions between arbitration and litigation.[181]

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[180] ERIC BRAHM & JULIAN OUELLET, DESIGNING NEW DISPUTE RESOLUTION SYSTEMS (Sept. 2003), *available at* http://www.beyond intractability.org/essay/designing_dispute_systems/.

[181] Jeffrey R Cruz, *Arbitration vs. Litigation: An Unintentional Experiment*, 60 DISP. RESOL. J. 10 (Jan. 2006) (addressing "combative" construction dispute advocates with candid, anecdotal observations about the advantages of a well-managed arbitration).

A Protocol for Outside Counsel

Business users depend on outside counsel to promote their business interests, which often include economy and efficiency, in arbitration. Outside counsel should be careful to clarify their client's goals and expectations for resolving disputes, and should approach arbitration in a manner that reflects these expectations and exploits the differences between arbitration and litigation. The following Actions are offered as specific guidance to Outside Counsel for this purpose.

1. Be sure you can pursue the client's goals expeditiously.

Outside counsel should only accept an advocacy role in arbitration when they have determined what the client's goals are in the particular case and are sure they have the knowledge, experience, and availability to pursue those goals effectively, efficiently and expeditiously. They should be familiar with the arbitration rules and provider involved in the particular case and should have in-depth knowledge of ways to save time and money in arbitration without compromising either the fairness of the process or the soundness of the result. They should also be certain that they or a partner have the negotiation and mediation skills that may be required at various stages of the arbitration.

Comments:

Rules of professional responsibility in nearly all jurisdictions make it unethical for attorneys to accept an engagement which they are not competent to perform.[182] While that provision has generally been thought to require knowledge and experience in the type of substantive work the attorney is being asked to carry out, the recent client focus on reducing excessive cost and delay in commercial arbitration suggests that the ethical obligation may well extent to knowledge of how to conduct an arbitration efficiently and expeditiously. Arbitration is quite different from litigation in many respects, and techniques that work well in one process may be ineffective, even harmful in the other. Counsel who agree to represent parties in commercial arbitrations need to have a solid understanding of the arbitration rules that will apply, the practices of the provider that is administering the arbitration, and the growing body of state and federal arbitration law. They should know how to navigate the arbitration process in an economical yet effective way. Since arbitrations frequently require or precipitate negotiations and/or mediation between the parties, whoever will serve as lead counsel at the arbitration hearing should be certain that he or she or a partner has the skill needed to effectively conduct such adjunct activities.

[182] ABA MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.1 Competence (2010), *available at* http://www.abanet.org /cpr/mrpc/ rule_1_1.html; CA RULES OF PROFESSIONAL CONDUCT Rule 3-110 (Sept. 2009) *available at* http://rules.calbar .ca.gov/Rules/RulesofProfessionalConduct/CurrentRules.aspx; NY STATE UNIFIED COURT SYSTEM, PART1200 – RULES OF PROFESSIONAL CONDUCT Rule 1.1: Competence (2009) , *available at* http://www.nysba.org/Content/Navigation Menu/ForAttorneys/ProfessionalStandardsforAttorneys/NYRulesofProfessionalConduct4109.pdf; ARTICLE VII: ILLINOIS RULES OF PROFESSIONAL CONDUCT, Rule 1.1. Competence (2010), *available at* http://www.state.il.us/court/ supremecourt/rules/ art_viii/artviii.htm.

2. Memorialize early assessment and client understandings.

Outside counsel should provide the client at the outset with a careful early assessment of the case, including a realistic estimate of the time and cost involved in arbitrating the matter at various levels of depth and detail. Counsel should reach an understanding with the client concerning the approach to be followed, the extent and nature of any discovery to be initiated, the possibility and desirability of a negotiated settlement, the desired overall timetable for arbitration, and the resources the client is prepared to devote to the matter. Counsel should memorialize those understandings in writing and should adhere to the client's expectations and budget. Counsel should periodically review these understandings with the client and should memorialize any significant changes in the client's instructions (see *Protocol for Business Users and In-House Counsel*, Actions 5, 6).

Comments:

Studies show that many disputes arise between clients and counsel because of a failure to reach, at the outset of the engagement, a clear understanding of what counsel is expected to do (and not do) and what that work will likely cost the client.[183] The potential for such problems are clearly present in engagements, like arbitration and litigation, where the lawyer's work may be quite intensive and extend over a period of many weeks. It is essential that outside counsel should make an early and realistic assessment of the case, including the cost and time which various alternative approaches to the arbitration may involve. Ultimately it is up to the client to determine, as a matter of business priorities, what amount of time and money it is willing to devote to the case. Once that decision is made, outside counsel should memorialize it in writing, along with other important client instructions, and should revisit the matter periodically and note any changes that may have occurred in the client's expectations.

3. Select arbitrators with proven management ability. Be forthright with the arbitrators regarding your expectations of a speedy and efficient proceeding.

Outside counsel should help their client select arbitrators with the experience, knowledge and capabilities that are likely to further the client's business goals, including expectations as to cost and time. Counsel should do a thorough "due diligence" of all potential arbitrators under consideration and should, consistent with the Code of Ethics for Arbitrators in Commercial Disputes, interview them concerning their experience, case management practices, availability and amenability to compensation arrangements that would incentivize them to conduct the arbitration efficiently and expeditiously.

Parties desiring speed and economy in the arbitration process should be forthright in conveying their expectations to the arbitrators regarding the duration of the proceedings, beginning at the time candidates for appointment as arbitrator are identified. These expectations can be set down in writing at the beginning of the arbitration process and, even

[183] 2007 LAWYER-CLIENT FEE ARBITRATION REPORT CARD: HALT REPORT CARD FINDS LAWYER-CLIENT FEE DISPUTE PROGRAMS NOT MAKING THE GRADE (Sep. 17, 2007), *available at* http://www.halt.org/reform_projects/lawyer_accountability/lawyer-client_fee_arbitration/report_card.php.

if unilateral and non-binding, may have an impact on scheduling and management decisions made by the arbitrators during the proceedings (see *Protocol for Arbitrators*, Action 3).

Comments:

One of the most important functions of outside arbitration counsel is selecting, in consultation with in-house counsel, the arbitrator(s) for the case. In addition to the traditional considerations such as intelligence, integrity, familiarity with the subject matter, and availability, outside counsel these days also need to determine whether the arbitrator candidates have the knowledge, skill and temperament to manage the arbitration efficiently. Much can be learned on this score by talking with lawyers who have participated in other cases the candidates have arbitrated and by interviewing the candidates concerning the procedures and practices they follow in conducting arbitrations.[184] Counsel should advise the candidates of their client's expectations concerning the cost and length of the arbitration proceedings and should determine whether the candidates are able and willing to meet those expectations. It is not inappropriate to ask prospective arbitrators, through the case manager, about their availability to conduct the hearing during a specific time frame.[185] Counsel may also wish to explore with the candidates alternative billing arrangements that may encourage them to manage the arbitration efficiently.

4. Cooperate with opposing counsel on procedural matters.

If saving time and money is an important client goal in the arbitration, counsel should make clear to the client that the fullest benefits of time- and cost-saving (i.e., those concerning procedures for preparing for and conducting the hearing) can ordinarily only be achieved when opposing counsel cooperate fully and freely with each other and with the arbitrator to achieve those benefits. Counsel should obtain the client's consent to such cooperation and should pursue that approach regarding all procedural and process issues in the arbitration. Counsel should meet and confer early with opposing counsel in order to foster a cordial and professional working relationship and to reach as many agreements as possible concerning matters that will be taken up at the Preliminary Conference and should continue to meet and confer regularly thereafter (see *Protocol for Arbitrators*, Actions 2, 3, 4).

Comments:

Psychologists tell us that, when people have a dispute, there is a natural tendency ("reactive devaluation") to view with suspicion anything proposed by the other side.[186] This phenomenon, coupled with the hostility often accompanying commercial conflict and the ego satisfaction of trouncing one's opponent, frequently impels counsel in arbitration and litigation

[184] Canon III of the ABA/AAA CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (2004) provides that a prospective arbitrator may respond to party inquiries designed to determine his or her suitability and availability for the appointment but may not engage in *ex parte* communications concerning the merits of the case.

[185] This procedure is already offered, for example, by CPR Institute's Director of Dispute Resolution Services.

[186] Ross, L. and C. Stillinger, *Barriers to Conflict Resolution*, 8 NEG. J. 389-404 (1991).

to fight with their opposite number on every substantive and procedural aspect of the case. The most sophisticated outside counsel realize, however, that zealous advocacy on the merits does not preclude cooperation on procedure, which is typically in the best interest of both parties, especially if they wish to reduce cost and delay. Arbitration being entirely a creature of party agreement, arbitrators normally solicit agreement on procedural matters more aggressively than judges and will not take kindly to counsel who refuse to agree to sensible process arrangements. In most cases, if counsel pursue a professional and cooperative relationship with each other concerning the scope of discovery and motions, the length and location of the hearing, stipulations on facts not genuinely in dispute, and similar matters, it is possible to achieve substantial savings of time and money without compromising the client's substantive position. If in-house counsel is inexperienced in arbitration, it may be necessary for outside counsel to explain why such cooperation is beneficial for the client and secure the client's consent to such an approach.

5. Seek to limit discovery in a manner consistent with client goals.

Make clients aware that ordinarily discovery in arbitration will be much more limited than in litigation, even in the absence of clear rules and guidelines, and cooperate with opposing counsel and the arbitrator in looking for appropriate ways to limit or streamline discovery in a manner consistent with the stated goals of the client (see *Protocol for Arbitrators*, Action 6).

Comments:

Discovery is far and away the greatest driver of cost and delay in litigation and in arbitration. In the *Protocol for Arbitration Providers*, Action 3 and the accompanying commentary discuss thoroughly the opportunities and resources available to in-house and outside counsel to greatly reduce discovery in arbitration, thus capitalizing on one of its principal advantages over litigation. Outside counsel have an obligation to make sure the client understands the limitations inherent in arbitration discovery, to assess how much (if any) discovery is truly needed in the case, and to ascertain how much time and money the client is willing to expend in turning over stones. Once that assessment is made, outside counsel should cooperate with opposing counsel and the arbitrator in establishing discovery limitations that match the client's goals.

6. Periodically discuss settlement opportunities with your client.

During the arbitration, counsel should periodically discuss with their client the possible advantages of settlement and opportunities that may arise for pursuing settlement. Unless the case has been thoroughly mediated already, counsel should ask the client to consider the possibility of mediating with an experienced mediator (who is not one of the arbitrators) at an appropriate stage in the arbitration, before substantial sums are spent on preparing for and conducting the hearing.

Comments:

In arbitration as in litigation, a reasonable settlement that avoids risk and heavy transaction costs is often in a client's best interest. Some clients seem to think that settlement may be pursued before arbitration but not once the arbitration has begun. In fact, propitious opportunities for settlement often appear at multiple points during arbitration, including during discussions with opposing counsel in preparation for the preliminary conference, after briefing or rulings on significant threshold matters, on completion of all or particular discovery, after submission of dispositive motions, during the hearing, and after submissions of post-hearing briefs. At all of these stages, outside counsel should re-evaluate their initial case assessment and discuss with the client the pros and cons of pursuing settlement. If a professionally conducted mediation did not precede the arbitration (and sometimes even if it did), counsel should raise with the client the possibility of a thorough mediation with a neutral not involved in the arbitration. In major cases, some experienced outside counsel like to establish two parallel tracks toward resolution, namely, the arbitration conducted by arbitration counsel and a separate, ongoing mediation dialogue conducted by separate counsel who are particularly skilled in the quite different mediation process.

7. Offer clients alternative billing models.

Counsel should offer clients professional service models other than an hourly fee basis, including models that provide incentives for reducing cycle time or the net costs of dispute resolution (see *Protocol for Business Users*, Action 6).

Comments:

In-house counsel are increasingly demanding that outside counsel offer alternatives to hourly billing. Arrangements such as a fixed fee for the entire arbitration or a reduced hourly rate coupled with a "success bonus" of some sort may reduce the client's transaction costs and incentivize economy and efficiency by outside counsel.[187]

8. Recognize and exploit the differences between arbitration and litigation.

Counsel should recognize the many differences between litigation and arbitration, including the absence of a jury on whom rhetorical displays and showboating may have some effect. Arbitrators are generally experienced and sophisticated professionals with whom posturing and grandstanding are almost always inappropriate, counter-productive, and wasteful of the client's time, money and credibility with the arbitrators. Counsel should keep in mind that dispositive motions are rarely granted in arbitration, and should employ such motions only where there will be a clear net benefit in terms of time and cost savings. Counsel should be aware that arbitrators tend to employ more relaxed evidentiary standards, and should therefore avoid littering the record with repeated objections to form and hearsay. An

[187] Ian Meredith & Sarah Aspinall, *Do Alternative Fee Arrangements Have a Place in International Arbitration?*, 72 ARBITRATION 22, 22-26 (2006).

advocate who objects at every turn is likely to try the patience of a tribunal and undermine his or her own credibility (see *Protocol for Arbitrators*, Actions 6, 7, 9).

Comments:

Veteran actors know that the gestures and speech patterns that work well on the stage are often ineffective, even annoying in the much different milieu of cinema or television. Arbitration is a much different milieu from litigation and requires similar adjustments in technique. Outside counsel who are serious about reducing cost and delay in arbitration must be thoroughly familiar with those differences, some obvious, some subtle, and adapt their strategy and style in ways that capitalize on arbitration's flexible, streamlined, more intimate character.

9. Keep the arbitrators informed and enlist their help promptly; rely on the chair as much as possible.

Counsel should work with opposing counsel to keep the arbitrators informed of developments in the interval between the preliminary conference and the hearing so that the arbitrators may assist in resolving potential problems and avoid inefficiencies and unnecessary expenditures of time at the hearing. If it becomes apparent during the pre-hearing phase that one or more significant pre-hearing issues cannot be resolved by agreement of the parties, counsel should not delay in putting the arbitrators to work. Failure to do so could result in the need to postpone the hearing, thus generating avoidable delay and unnecessary costs. Agreeing to have the chair of a three-arbitrator tribunal resolve discovery, scheduling, and other procedural orders will generally produce significant savings of time and money without impairing any party's substantive rights (see *Protocol for Business Users*, Action 10; *Protocol for Arbitrators*, Action 8).

Comments:

Counsel who are primarily litigators and accustomed to dealing with overloaded, somewhat inaccessible judges often fail to take advantage of one of the key benefits of arbitration, namely, readily available decision-makers. Arbitrators who are good case managers know that festering, unresolved issues can seriously derail the best of schedules and thus welcome the opportunity to promptly break any logjams that counsel cannot quickly clear. Outside counsel should not be shy in seeking arbitrator assistance whenever good faith cooperation fails to resolve any process impediments. Many such obstacles can be removed in a short conference call with a sole arbitrator or tribunal chair, without necessity of any written submissions that drive up costs. The flexibility, informality and economy potential of arbitration can only be fully realized if counsel share responsibility with the arbitrators for moving the case along at a brisk pace.

10. Help your client make appropriate changes based on lessons learned.

Once arbitration is completed, counsel should conduct an evaluation of the entire process with the client and attorneys involved in the representation. Counsel should memorialize

lessons learned and make appropriate changes to dispute resolution provisions, firm arbitration training, and firm procedures and policies (see *Protocol for Business Users*, Action 12).

Comments:

Action 12 of the *Protocol for Business Users and In-House Counsel* describes the sort of post-arbitration evaluation that should be conducted by in-house counsel in every case. Outside counsel should be part of that evaluation. In addition, however, outside counsel should conduct their own internal assessment of how they performed in the subject engagement. Did they make an accurate initial assessment of the case? Did they establish with the client a clear understanding of the client's goals and the way in which counsel would pursue them, including the cost and length of the arbitration? Did they take advantage of all opportunities presented for reducing transaction time and costs? What could they have done better? Only by answering questions of this kind will outside counsel be equipped to make necessary changes in their retainer agreements and billing models, training programs, and arbitration procedures and strategy.

11. Work with providers to improve arbitration processes.

Outside counsel should work with arbitration providers to create more effective choices for business arbitration through the development of new alternative process techniques, rules and clauses.

Comments:

Insights gained by outside counsel during arbitration and through post-arbitration evaluations can be very helpful to providers in improving their clauses, rules and administrative procedures. Outside counsel should freely share such insights with providers to the extent that is consistent with the client's business goals and any confidentiality provisions in the subject arbitration.

12. Encourage better arbitration education and training.

Outside counsel should help improve laws governing dispute resolution, including arbitration, and should encourage more effective legal, business and judicial education regarding arbitration and other forms of dispute resolution.

Comments:

Through their affiliations with law schools, bar associations, other professional organizations, and various local and national civic groups, outside counsel are often in a position to affect education and legislation concerning arbitration. Improving arbitration awareness and understanding among business executives, lawyers, judges and the general public increases the opportunities for effective use of this valuable dispute resolution process and may have the collateral benefit of increasing the demand for counsel's arbitration services.

A Protocol for Arbitrators

Whether or not business users have tailored arbitration procedures to most effectively promote economy and efficiency, they commonly rely on arbitrators to conduct arbitration proceedings economically and efficiently. Arbitrator training, experience and philosophy may all play a part in their ability to accomplish these goals through thoughtful case management; adherence to contractual limits on discovery, timetables, etc.; and effectively distinguishing, and appropriately acting upon, dispositive motions that might conclude or streamline a dispute. The following Actions are offered as detailed guidance for arbitrators in addressing these concerns.

1. Get training in managing commercial arbitrations.

It is axiomatic that all arbitrators should have the knowledge, temperament, experience and availability required by the appointment, as well as a working knowledge of arbitration law, practice and procedures of administrative organizations, and the various opportunities for realizing economies and efficiencies throughout the arbitration process. Those who wish to arbitrate large and complex commercial cases should secure special training in how to manage such arbitrations with expedition and efficiency without sacrificing essential fairness, should identify that training in their biographical materials, and should pledge to conduct the arbitration so as to adhere to any time limits in the arbitration agreement or governing rules (see *Protocol for Arbitration Providers*, Action 7).

Comments:

Just as "one size fits all" is not a cost-saving approach to arbitration rules, it is also true that being an effective arbitrator in one field does not assure effectiveness in another. Commercial arbitration, for example, is quite different from labor arbitration or consumer arbitration. One serving as an arbitrator in any of these fields should be well grounded in the arbitration law, practice, and management techniques particular to that field. Fortunately, many institutions, including the American Bar Association, the American Arbitration Association, JAMS and CPR, offer specialized instruction in managing the sort of large, complex cases that typify commercial arbitration. In addition, there are a number of excellent published practice guides, including *The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration* (James M. Gaitis, Curtis E. von Kann & Robert W. Wachsmuth, eds. 2nd ed. Juris Net 2010) and *Commercial Arbitration at Its Best: Successful Strategies for Business Users* (Thomas J. Stipanowich & Peter H. Kaskell, eds. 2001). In short, the resources are there for those who seek to learn how to arbitrate commercial cases fairly but efficiently.

2. Insist on cooperation and professionalism.

Arbitrators should communicate clearly and unequivocally from the outset their expectation that counsel can and will cooperate fully and willingly with each other and with the arbitrator in all procedural aspects of the arbitration. Arbitrators should establish a professionally cordial atmosphere, one that reinforces expectations of cooperation and reasonableness and

affords counsel the fullest opportunity to contribute to shaping the arbitration process. Arbitrators should lead by example by being prepared and punctual for all arbitration proceedings and by fixing and meeting deadlines for their own actions, such as ruling on motions, issuing orders and the like (see *Protocol for Outside Counsel*, Actions 4, 5, 8).

Comments:

Arbitrators set the tone of any arbitration, and establishing a tone of professionalism and mutual respect among participants greatly increases the prospects for developing cooperative approaches to expedite the proceedings. Arbitrators must make clear that they expect reasonable and constructive conduct by counsel and must model such conduct in their own interactions with counsel and parties. Arbitrators can hardly insist on counsel's compliance with deadlines if they themselves are late in issuing rulings, appearing at hearings, and the like. Arbitrators who make their expectations of cooperation clear and lead by example will have built a solid foundation on which to rest reasonable and efficient management actions.

3. Actively manage and shape the arbitration process; enforce contractual deadlines and timetables.

Arbitrators should recognize that commercial parties are generally looking for "muscular" arbitrators who will take control of the arbitration and actively manage it from start to finish, encourage and guide efforts to streamline the process, make a serious effort to avoid unnecessary discovery or motions, and generally conduct the arbitration fairly and thoughtfully but also expeditiously. Commercial arbitrators should utilize their considerable discretion and the natural reluctance of counsel and parties to displease the ultimate decision-maker so as to fashion, with the input and cooperation of the parties and their counsel, an arbitration process that is appropriate for the case at hand and as expeditious as possible while still affording all parties a full and fair hearing.

Arbitrators should routinely enforce contractual deadlines or timetables for arbitration except in circumstances that were clearly beyond the contemplation of the parties when the time limits were established (see *Protocol for Business Users*, Action 3). They should also encourage parties to "tee up" particular issues for early resolution when the resolution of such issues is likely to promote fruitful settlement discussions or expedite the arbitration (see *Protocol for Arbitration Providers*, Action 6; *Protocol for Outside Counsel*, Action 8).

Comments:

A recurrent plea from National Summit participants was that arbitrators take active control of commercial arbitrations. Even when counsel are cooperating with one another, there are inevitably many points during an arbitration when someone needs to make a decision or take other action to keep the proceeding "on time and under budget." All arbitration rules give arbitrators considerable discretion in managing the arbitration process. Business users, in-house counsel, and outside counsel want arbitrators who will accept that responsibility and act. Especially if they have set a collegial tone at the outset and thoughtfully consider the views of

counsel on process issues that arise, arbitrators will find that parties welcome pro-active management by the neutral person(s) to whom they have entrusted the resolution of their dispute. With input from counsel, arbitrators must announce clear procedures and deadlines and must enforce them absent exceptional circumstances. In the commercial arbitration world of today, it is no longer up to arbitrators to decide whether to be pro-active or laissez faire. Thoughtful, well-informed and active management of the arbitration is now a critical part of the service parties are paying arbitrators to deliver. Just as Harry Truman reminded us that those who can't stand the heat should get out of the kitchen, those who are unwilling to devote serious attention to managing their cases should not serve as commercial arbitrators.

4. Conduct a thorough preliminary conference and issue comprehensive case management orders.

As early in the case as possible, arbitrators should conduct a thorough Preliminary Conference in the manner prescribed in Chapter 6 of *The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration.* Arbitrators should emphasize the importance of participation by senior client representatives of each party, in person or by phone, in this critical opportunity to develop a sensible and economical plan for the arbitration. Whenever feasible, the first conference should be conducted in-person, since that setting is more conducive than conference calls to fostering cordial and cooperative relations among parties and counsel. After the conference, arbitrators should issue a comprehensive "case management order" setting forth the procedures and schedule that will govern the arbitration. Arbitrators should only permit departures from those procedures and schedule for good cause shown (see *Protocol for Outside Counsel*, Actions 3, 4, 5).

Comments:

The single greatest tool for achieving a fair and efficient commercial arbitration is a well-conducted preliminary conference. It is the best opportunity for all participants to focus their attention and creativity on how to make the arbitration run smoothly and economically. It is also the ideal time for client representatives to appreciate how costly and protracted a "scorched earth" campaign will be and how much time and money can be saved by scaling back on discovery, motions and hearing time. That is why arbitrators should insist that senior client representatives (business executives or in-house counsel) attend the conference.

Because the preliminary conference is such a critical phase of the arbitration, it must not be given short shrift. Arbitrators should assure that lead counsel appear at the conference and that all parties have reserved ample time for careful consideration of all issues. If possible, the conference should be conducted in-person, which is more conducive to cooperation and mutual brainstorming than a conference call. Unless the amount at stake is quite modest, the increased productivity of an in-person conference is almost always worth the added expense.

A productive preliminary conference requires thorough preparation by all participants. Arbitrators should provide counsel with an agenda of matters to be taken up at the conference and should invite counsel to add to the list. Arbitrators should require counsel to discuss the agenda items in an effort to reach agreement on as many items as possible and provide to the

arbitrators, prior to the conference, a joint email setting forth the agreements they have reached and their respective positions on points of disagreement. How best to conduct a preliminary conference could be a course in itself. *The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration* devotes thirty single-spaced pages to the topic. While that discussion should be consulted in full, here is a summary checklist of the matters that ought to be determined at the preliminary conference:

- Identity of ALL parties to the arbitration (no *et al* descriptions).
- The specific claims, defenses and counterclaims (if any) to be decided. Are all stated with sufficient specificity?
- Under what arbitration agreement is the arbitration being conducted?
- What law governs the arbitration procedure?
- What law governs the merits of the claims and defenses?
- What rules will apply in the arbitration?
- Is there any dispute concerning the arbitrability of any claim or defense?
- Do the arbitrators need any additional information (e.g., names of testifying witnesses and key actors who may not testify) in order to make additional disclosures?
- Does any party seek to join additional parties? On what authority and basis?
- Does any party seek consolidation with another arbitration? On what authority and basis? Who is authorized to make the decision if a party is opposed to consolidation?
- What discovery (if any) will be permitted? What procedures will apply? (See *Protocol for Arbitration Providers*, Action 3.)
- What motions (if any) will be permitted? What procedures and time frames will apply? (See *Protocol for Business Users and In-House Counsel*, Action 9.)
- Does the arbitration involve specialized scientific or technical matters for which the arbitrators should have a "tutorial"? If so, can the parties agree on a treatise or other publication for the arbitrators to read, or neutral expert to teach the Panel?
- Would appointment of one or more neutral experts be appropriate?
- How will the parties submit documents and information to the arbitrators and to each other- email, fax, electronic filing, hand delivery?
- At what location(s) will the hearing be held?
- On what dates will the hearing be held?
- Do the parties need subpoenas for non-party witnesses? What authority to issue?
- Procedures and standards for seeking a continuance of the hearing.
- Procedures for the conduct of the hearing (see Action 9 below).
- Nature of the award (see Action 10 below).
- Due date of the award.

Following the preliminary conference, arbitrators should promptly issue a case management order that memorializes the determinations made on all the foregoing matters and any others addressed at the conference. If subsequent developments require some adjustments in that order, an amended case management order should be promptly be prepared and issued.

5. Schedule consecutive hearing days.

In order to avoid the delay and excess costs caused by having multiple hearing sessions, arbitrators should schedule the hearing on consecutive days whenever possible. Arbitrators should encourage the parties to make a realistic estimate of the number of hearing days they will need and should reserve a sufficient number of days for completing the hearing in the time allotted, even if unexpected developments, or unduly optimistic estimates, lead to a somewhat longer hearing than originally projected.

Comments:

Arbitration hearings that do not run on consecutive days involve much greater expense than those that do.[188] Apart from the possibility of repetitive travel expenses, there is duplicative deployment, preparation and refreshing tasks for all participants and added work that people think to do in the time between sessions. Spreading the hearing out over a period of weeks or months obviously protracts the arbitration. Arbitrators should attempt to schedule consecutive hearing days whenever possible.[189] Arbitrators should also be sure that a realistic number of days are reserved for the hearing. Counsel frequently underestimate, sometimes drastically, the amount of time they will take for examinations and arguments at the hearing. It is better to schedule an ample number of days and cancel those not needed than to schedule too few days and then have to find, on the calendars of busy lawyers and arbitrators, additional, mutually available time for completing the hearing.

6. Streamline discovery; supervise pre-hearing activities.

Arbitrators should make clear at the preliminary conference that discovery is ordinarily much more limited in arbitration than in litigation and should work with counsel in finding ways to limit or streamline discovery in a manner appropriate to the circumstances. Arbitrators should actively supervise the pre-hearing process. They should keep a close eye on the progress of discovery and other preparations for the hearing and should promptly resolve any problems that might disrupt the case schedule (usually through a conference call preceded by a jointly-prepared email outlining the nature of the parties' disagreements and each side's position with regard to the dispute, rather than formal written submissions) (see *Protocol for Outside Counsel*, Action 5).

Comments:

The necessity of containing discovery and multiple ways of doing so are thoroughly discussed in the *Protocol for Arbitration Providers*, Action 3. Such procedures are typically set at the preliminary conference and memorialized in the case management order. However, it is

[188] The AAA COMMERCIAL RULES provide that, "Generally hearings will be scheduled on consecutive days or in blocks of consecutive days in order to maximize efficiency and minimize costs." AAA COMMERCIAL RULES, *supra* note 160, at R. L-4(h).

[189] When a hearing may require multiple weeks, it may be appropriate to have one week day off per week so that counsel and arbitrators can keep up with their other cases.

equally essential for arbitrators to monitor the parties' progress with discovery and other pre-hearing activities and to quickly step in if unexpected developments threaten to disrupt the schedule. Some arbitrators like to schedule periodic conference calls to check the status of pre-hearing activities. Others fear this may encourage counsel to pile up problems for the periodic calls rather than work them out themselves and thus instruct counsel to request a conference call promptly after serious, good faith efforts at resolution have failed. Whichever approach is taken, arbitrators need to "stay on top of the case" from preliminary conference to hearing to make sure that the parties' expectations about the length of the arbitration are met.[190]

An excellent template for arbitrator control of discovery is provided by the *New York State Bar Association Report on Arbitration Discovery* and *JAMS Recommended Arbitration Discovery Protocols* based on the Report.[191]

7. Discourage the filing of unproductive motions; limit motions for summary disposition to those that hold reasonable promise for streamlining or focusing the arbitration process, but act aggressively on those.

Arbitrators should establish procedures to avoid the filing of unproductive and inappropriate motions. They should generally require that, before filing any motion, the moving party demonstrates, either in a short letter or a telephone conference, that the motion is likely to be granted and is likely to produce a net savings in arbitration time and/or costs.

Arbitrators should explain to parties that dispositive motions involving issues of fact are granted less frequently in arbitration than in litigation because there is no appellate court to reinstate the case if they erred in dismissing it. However, there are matters for which a dispositive motion, especially a motion for partial summary disposition, might provide an opportunity for shortening, streamlining or focusing the arbitration process—as, for example, where arbitrators are able to rule on a statute of limitations defense, determine whether a contract permits claims for certain kinds of damages, or construe a key contract provision. Thus, arbitrators should encourage parties to be judicious in filing motions but should be willing to entertain and rule on them in situations where the motion presents a realistic possibility of shortening, streamlining or focusing the arbitration process.

Comments:

After discovery, motions are probably the leading cause of excessive cost and delay in commercial arbitrations. Veteran litigators, acting largely out of habit, frequently file motions

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[190] The ICDR has established a voluntary set of guidelines designed to promote fair and expeditious arbitration proceedings by encouraging voluntary exchanges of the most material documents. *See* ICDR GUIDELINES, *supra* note 140.

[191] NEW YORK STATE BAR ASSOCIATION, REPORT ON ARBITRATION DISCOVERY IN DOMESTIC COMMERCIAL CASES (2009) *available at* http://www.nysba.org/Content/NavigationMenu42/April42009HouseofDelegatesMeetingAgendaItems/DiscoveryPreceptsReport.pdf; JAMS RECOMMENDED ARBITRATION DISCOVERY PROTOCOLS FOR DOMESTIC, COMMERCIAL CASES (2010) *available at* http://www.jamsadr.com/arbitration-discovery-protocols/.

for summary disposition and other relief, which impose substantial burdens of briefing and argument on all counsel and intensive factual and legal review by arbitrators. While arbitrators certainly have the authority to grant such motions, the absence of appellate review typically and properly makes them quite cautious about doing so, especially when the other side has had little or no discovery. On the other hand, there are purely legal issues, such as statute of limitations, interpretation of a contract, or identifying the required elements of a cause of action, which arbitrators can and should undertake to decide early in a case, particularly when a decision in favor of the movants could substantially reduce transaction time and cost for both sides. Arbitrators need to educate counsel on which sorts of motions are likely to be productive in arbitration and which are not and then establish procedures for processing the former quickly and efficiently.[192]

8. Be readily available to counsel.

Arbitrators should recognize that their acceptance of an arbitral appointment carries with it an obligation to be reasonably available to the parties to resolve procedural, process or scheduling disputes that could delay the timely resolution of the case. Thus, they should be willing on fairly short notice (generally not more than two or three business days) to hold a conference call with the parties in order to resolve such matters.

In litigation, parties sometimes wait months to present an issue to a judge or to receive the judge's decision; often the case is at a near standstill until the issue is resolved. Arbitration parties can escape these long delays, but only if arbitrators are prepared to hear their arguments promptly and issue prompt decisions. Arbitrators who are committed to speed and economy in commercial arbitration must encourage counsel to consult them quickly when obstacles to schedule compliance arise, must be willing to convene a conference call within a few days of such a contact, and must be able to rule either at the end of the call or very shortly thereafter.

9. Conduct fair but expeditious hearings.

Arbitrators should conduct hearings in a manner that is both fair and expeditious as described in detail in Chapter 9 of *The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration.*

[192] For example, arbitrators may provide in their case management order that (1) prior to filing any dispositive motion, the moving party must provide the arbitrator with a letter of not more than five pages explaining why the motion is ripe, likely to be granted, and likely to save time and money in the arbitration; (2) the opposing party may have five days to respond with a five page letter; and (3) the arbitrator will promptly decide whether to entertain the motion. If he or she does so, the arbitrator may set an expedited briefing schedule and page limits on the briefs. After receiving the briefs, the arbitrator may deny the motion without argument or schedule a prompt oral argument (perhaps by phone) and then rule. *See generally* CCA GUIDE TO BEST PRACTICES, *supra* note 84.

Comments:

Every day of a hearing, in which one or more lawyers, paralegals, client representatives and witnesses are in attendance, having prepared hours for that day's events, typically costs a client many thousands of dollars. While it is certainly important that the proceedings be fair and contribute to a sound result, it is also important that the proceedings be efficient and respectful of the parties' time and money. Conducting a fair but efficient hearing is almost entirely in the hands of the arbitrators and is the best hallmark of a truly accomplished commercial arbitrator. Chapter 9 of *The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration* provides 45 pages of guidance on how to accomplish that goal and should be reviewed in detail. Major steps toward an efficient arbitration hearing include the following:

- Make clear to counsel that, unless formal rules of evidence apply (which is rare in arbitration), virtually all non-privileged evidence offered by any party will be received and traditional objections (hearsay, foundation, etc.) will not be entertained. Urge counsel to focus on the probativeness of evidence, not its admissibility.
- Determine what order of proof is most appropriate for the particular case, including sequencing the hearing in progressive phases, taking both sides' witnesses issue by issue, or ruling on threshold issues before receiving evidence on other issues.
- Encourage the parties to submit a joint collection of core exhibits in chronological order with key portions highlighted.
- Establish an expedited procedure for receipt of other exhibits. For example, require all parties to submit their tabbed, index exhibits in advance of the hearing and advise counsel that all such exhibits will be received en masse at the start of the hearing save for any that are privileged or genuinely challenged as to authenticity.
- Require that parties show demonstrative exhibits, including power point slides, to each other a reasonable time before they are used in the hearing so that time is not wasted in assessing and possibly challenging their accuracy.
- Discuss with counsel the possible use of written direct testimony for some or all witnesses.
- Establish procedures to narrow and highlight the matters on which opposing experts disagree. For example, require experts to confer before hearing and provide the arbitrators with a list of the points on which they agree, the points on which they disagree, and a summary statement of their respective opinions on the latter.
- Limit the presentation of duplicative or cumulative testimony.
- Make appropriate arrangements for receiving by conference call or otherwise testimony from witnesses in remote locations.
- Consider receiving affidavits or pre-recorded testimony regarding less critical matters.
- Sequester witnesses until they testify unless all parties request otherwise.
- Establish and maintain a realistic daily schedule for the hearing. Start hearings on time and don't allow excessive recesses and lunch breaks.

- Encourage the parties to employ a “chess clock” that limits the total number of ours available to counsel for examination and argumentation.
- At the close of each hearing day (NOT the beginning), discuss with counsel any administrative matters that need attention and monitor their progress against the projected hearing schedule. If needed to meet the scheduled completion date, consider starting hearings earlier, ending them later, or having one or more weekend sessions.
- Don't hesitate to tell counsel when a point has been understood and they may move on, or when a point was not understood and requires clarification.
- Make sure, well prior to the hearing, that counsel have worked out all logistical arrangements concerning transcripts, shared use of power point or other equipment, etc.
- Freely take witnesses out of turn when necessary to accommodate scheduling conflicts.
- Prohibit parties from running out of witnesses on any given day. "Call your next witness" is a powerful tool for keeping a hearing moving.[193]

Through these and similar techniques practiced by experienced arbitrators, commercial arbitration hearings can be conducted both fairly and efficiently.

10. Issue timely and careful awards.

Arbitrators should issue carefully crafted awards that meet the parties' needs in terms of format, level of detail, and timing, and that are unlikely to lead to additional cost and delay due to vacatur and further proceedings. See Chapter 11 of *The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration.*

Comments:

Arbitration award are of multiple types (e.g., interim awards, partial final awards, and final awards) and multiple forms (e.g., bare awards, reasoned awards, awards with findings of fact and conclusions of law). There are pros and cons to each form and type. *See generally* Chapter 11 of *The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration*.[194] Arbitrators should explain these considerations to the parties and ascertain what sort of award they want. Arbitrators should then exercise maximum care and judgment in crafting such an award and issuing it within any applicable time limit. Vacatur proceedings can add substantially to the cost and length of an arbitration; arbitrators thus have a duty to the parties to render awards that are as "vacatur-proof" as possible.

[193] *Id.* at Ch. 9.

[194] *Id.* at Ch. 11.

Appendices

Appendix A: Bibliography/Helpful Sources

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Appendix B: Summit Sponsors

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Mediation Success: It's Not Magic!

BRUCE A. FRIEDMAN, ESQ. AND STACY L. LA SCALA, ESQ.

Trial lawyers and their clients spend a tremendous amount of time and money preparing cases for trial, yet nearly all cases settle. Almost all cases are mediated, but preparing for mediation is different from preparing for trial. If more time, energy and thought went into preparing for mediation, the success rate of all cases even the most contentious matters, would significantly increase. Here is how to make that happen.

Timing of Mediation

Mediations are normally set where a key date in litigation is pending. For instance, an impending trial date, motion to dismiss, summary judgment or class certification motion present leverage opportunities and are helpful in focusing the parties on issues in the case and in assessing risk.

However, more difficult, but increasingly more common, is early mediation. Critical to the success of early mediation is the exchange of information among counsel. While litigation instinct urges limiting disclosure of key positions through "confidential" briefs, this belief is misplaced. Mediation, and in particular the brief, is an opportunity for counsel and client to provide a clear and concise position statement that will be communicated directly to the opposing party, without the filter of opposing counsel.

On this point, no mediator is going to advocate more effectively than trial or in-house counsel, who have lived with the dispute, sometimes for years. Don't waste this rare occasion to speak to the decision-makers on the other side of your dispute.

A note of caution regarding pre-litigation mediations: While it is important to have those involved in the dispute participate and provide factual support for positions, it is equally important to have an independent set of eyes to provide a reasonable and rational evaluation of the mediation and its impact on the businesses and/or individuals involved.

Bruce A. Friedman

Stacy L. La Scala

Once litigation has commenced, setting a mediation can radically alter the course of litigation. In particular, the parties' focus on litigation minutia must shift to a global perspective, where positions, costs and potential results must be evaluated and understood.

Timelines for reporting, reserving (in the case of insurance), briefs and coordination of key individuals become a priority. At the time of the mediation, key decisions have to be made on the willingness to settle versus the impact of failure to settle. In many instances, the decision not to settle can have a monumental effect on the businesses and individuals involved.

Selecting the Mediator

Choosing an experienced mediator is very important. The mediator should have some years of experience in mediating cases and have a style that reflects the challenges of your matter. An experienced mediator has many tools that may be employed to assist in reaching a resolution. These tools are learned over the course of many mediations in terms of what works in any given situation and at different times in the mediation process. For instance, an experienced mediator utilizes timing to facilitate discussions,

evaluate positions and employ settlement strategies, such as ranges, brackets, anchoring and brokering, to name a few.

Your mediator should also have subject matter expertise. If you are engaged in a dispute in a general area of law, such as M&A, construction or insurance, a mediator with subject matter expertise in that area understands the issues, knows the law, speaks the lexicon of the field and provides reliable input in terms of evaluating the case. However, when a narrow and specific issue is involved, finding a mediator with that particular expertise is like finding the proverbial needle in a haystack, so you should look for a mediator with experience and a style that reflects the needs of your case. If you have to choose between subject matter expertise and experience, the pendulum swings to experience.

Effectiveness and success at mediation is another metric that should be evaluated in selecting a mediator. A mediator who routinely gets cases settled should not be overlooked in the selection process. You must seek information on the mediator's track record from counsel who have used the mediator's services. Questions to ask include: Does the mediator engage in pre-mediation discussion of the case? How is the mediation organized? Does the mediator routinely follow up with the parties in the event of an unsuccessful mediation session?

Creativity and tenacity are also very important elements of a successful mediator's attributes. Does the mediator have a reputation for offering creative solutions when the parties are stuck? Does the mediator counsel the parties on the offers and counteroffers made during the mediation or recommend the amount that a party should consider demanding or offering?

Finally, is the mediator capable of providing you with a neutral evaluation and valuation of the case that is rational and trustworthy? If you can find all of these attributes in your mediator, then you are on your way to a successful mediation.

The Mediation

Critical to the success of a mediation is an objective neutral analysis of the strengths and weaknesses of liability and damages. Trial counsel must provide their clients, and clients must demand, such an analysis of the case. Factual disputes must be analyzed, legal disputes must be critically examined, and causation and damages must be discussed. Once understood, then the mediation brief should of course present your best case. If there are issues that you wish to address in confidence, then these should be discussed with the mediator in a pre-mediation telephone call or meeting or provided in a side letter with your brief.

Posturing is expected, but a word of caution: If you posture too hard and too convincingly at the mediation, you may convince the mediator that you are serious about the position that you are taking, which may run counter to your client's desire to settle the case. Transparency and willingness to engage in a rational discussion of the strengths and weaknesses of your case are essential. In fact, you will often gain credibility with your mediator when you acknowledge weaknesses and convey an understanding of the impact of those weaknesses.

In fact, by trusting and working with your mediator, as in the sharing of weaknesses of your case, you give your mediation a much greater possibility of success–no magic wand is required. It's fairly straightforward: Take off your trial hat and become a problem-solver at the mediation. In the end, a realistic assessment of the case will result in a reasonable settlement.

Bruce A. Friedman, Esq. *is an accomplished dispute resolution professional who has mediated and settled a wide range of cases including insurance, class action, professional liability, business, real estate and entertainment. Mr. Friedman began his neutral career in 2011 following 37 years as a trial lawyer handling cases in the areas in which he now mediates. He was lead trial counsel in dozens of jury trials, bench trials, and arbitrations. He routinely represented clients in high-stakes litigation. Mr. Friedman has been recognized by Chambers USA as a leading mediator.*

Stacy L. La Scala, Esq. *is a JAMS mediator who has resolved a wide array of disputes, including construction, insurance, business/commercial, and professional liability matters. Mr. La Scala's construction and insurance practice includes a wide variety of essentially every type of commercial, industrial, public works and residential matter.*

A Proposed Protocol For The Identification And Admission Of Arbitration Hearing Exhibits In Voluminous Document Cases

At last year's annual meeting, **Gene Farber** led a thought-provoking discussion in his annual ethics practicum on the problems of dealing with voluminous arbitration hearing exhibits – usually in large and complex cases. In arbitrations involving only a few exhibits, it sometimes makes sense to simply admit all proposed or jointly proposed exhibits *en masse* into evidence before or at the beginning of an arbitration hearing. However, in complex construction or commercial arbitration cases, the en masse admission of all of the exhibits into evidence may be ill-advised for some of the reasons discussed in this article.

Parties to an arbitration proceeding and their counsel often fail to appreciate the impact that their designated arbitration hearing exhibits can have on the cost, expense and fairness of the arbitration hearing. Section 10(a)(3) of the Federal Arbitration Act provides that it is grounds for vacatur of an arbitration award "*where the arbitrators were guilty of misconduct … in refusing to hear evidence pertinent and material to the controversy*." (Emphasis added.) Assuming that "*to hear evidence*" also means "*to read documentary evidence*," this can be problematic. If a party's identified arbitration hearing exhibit is admitted into evidence, whether en masse or otherwise, then an arbitrator can reasonably assume that the party considered the exhibit "*pertinent and material to the controversy.*" If so, then this suggests that the arbitrator has a *duty* to read all of it in deliberating about the award. But in voluminous exhibit cases, many admitted exhibits are often not mentioned or discussed during evidence presentation or closing argument.

Lawyers sometimes make indiscriminate, unorganized en masse designations and/or admissions of voluminous arbitration hearing exhibits to avoid the expense to their clients of a careful vetting of their relevance and admissibility. But doing so may unwittingly but drastically increase the cost of the arbitrators' fees because the arbitrator's price tag for reading all of the exhibits may be "sticker shock" for all concerned. But the arbitrator may not have a choice because failing to read all of the documents might be grounds for a vacatur motion by the unsatisfied parties.

The en masse admission of voluminous arbitration hearing exhibits is also problematic because particular exhibits (1) may not be referenced or discussed by any witness or counsel at all during the arbitration hearing; (2) may have been designated solely for possible or contingent cross-examination, impeachment, rebuttal, or spontaneous explanation or elaboration of a witness's testimony, but then is not used for that purpose; (3) may be relevant in part, when the rest of the document is not; and (4) may become irrelevant or unnecessary for an arbitrator's consideration because other evidence or stipulations presented at the hearing render the exhibit's original purpose irrelevant.

The proposed Protocol that follows seeks to strike a balance between the parties' reasonable expectations and desires that arbitration be less formal than litigation while also satisfying the requirements of due process that parties reasonably expect from the arbitration process itself. It seeks to avoid unnecessary expense to the parties occasioned by an arbitrator's review of unnecessary, cumulative, redundant, or irrelevant exhibits designated by the parties or their counsel or because the exhibits are not relevant in their entirety. It also seeks to identify and address the designation of voluminous arbitration hearing exhibits sufficiently in advance of the arbitration hearing so that the parties' counsel can (1) manage expectations about the cost and expense of arbitration, (2) adequately prepare for the arbitration, and (3) avoid getting sandbagged by the surreptitious concealment of important evidentiary documents buried in an opponent's mass production of voluminous arbitration hearing exhibits.

Below is a suggested protocol for addressing arbitration hearing exhibits in cases involving voluminous exhibits. I do not offer it as the "be all or end all" of this subject, but rather as a possible solution to the problems discussed above, and as a point of departure for the Fellows' further consideration of this

---<Continued on Page 6>---

important topic. I welcome your constructive comments and suggestions to it.

By stipulation of the parties and order of the arbitrator(s), the following additional rules are adopted for the parties' pre-marking, identification, designation, and introduction of exhibits into evidence at any arbitration hearing:

1) Immediately following the Final Pre-Hearing Preliminary Hearing with the arbitrator(s) in this matter, the parties shall promptly and jointly meet and confer to create a Joint Arbitration Hearing Exhibit List (the "Exhibit List") in this matter in the form of that shown in the Appendix to this Supplement. The Exhibit List shall: (1) include a numbered index with document descriptions, (2) identify exhibits that any party deems critical in its case, and (3) eliminate duplicate hearing exhibits filed by the parties. The lead Claimant shall promptly serve the Exhibit List on all parties when and as revised and updated. The parties shall follow the same process in the event the Exhibit List is revised at any time before the close of the hearing.

2) Any document identified in the Exhibit List is not automatically admitted. It shall be admitted only if the party moves to admit the document and there is no sustained objection to its admission and:

a) A party clearly and conspicuously requests in the Exhibit List that the arbitrator(s) read the exhibit in whole or in part. If a party requests that only part of an exhibit is required to be read by the arbitrator(s), then such party shall designate such part on the Exhibit List. The arbitrator(s) shall be obliged to read the exhibit or portions of the exhibit so designated. In all other cases the arbitrator(s) shall be obliged to read the entire exhibit – irrespective of whether such portions are the subject of witness authentication or testimony during the arbitration hearing.

b) A document on the Exhibit List shall also be admitted if a party or its counsel references or discusses the exhibit during the arbitration hearing and in so doing identifies it by its pre-marked exhibit number. Any such exhibit so identified, referenced or discussed is deemed admitted if there is no sustained objection to it, provided, however, that if a party only references a portion of the exhibit's text from a particular page, paragraph or section of the exhibit, then only that particular page, paragraph or section of the exhibit so referenced or discussed shall be deemed offered into evidence, unless counsel for any party requests otherwise.

c) If a party wants the arbitrator(s) to review a deposition or other transcript of witness testimony as evidence, then the party shall provide the arbitrator(s) and opposing parties with a copy of the same in an OCR-enabled Portable Document Format (".PDF"), with the relevant portions to be read by the arbitrator(s) highlighted in yellow, in which case the arbitrator(s) need only read and analyze the parts so identified. Any identified portions of any such deposition transcript, and any exhibits referenced in them, shall also be deemed admitted, unless any objection to the same is sustained by the arbitrator(s).*

3) If an exhibit not otherwise admitted in evidence in whole or in part as indicated above is identified and listed on the Parties' Joint Arbitration Hearing Exhibit List, but is not actually referenced or discussed by any person during the arbitration hearing, then the arbitrator(s) need not read all or any part of it.

4) At the conclusion of each day's arbitration hearing, the parties or their counsel may send the arbitrator(s) and all other parties a daily designation of those exhibits or parts thereof that were actually referenced or discussed by any person during that day's arbitration hearing. ♦

The CCA Bag Keeps Moving

The CCA bag restricted its travels during the pandemic but we were glad to see it along with all of the Fellows at the Scottsdale meeting. After the meeting, it took a trip to the Grand Canyon and **David Singer** was kind enough to show it to us.♦

Contemporary Issues in International Arbitration and Mediation

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Hawking Our Wares in the Marketplace of Values—Sell Quality Not Cost When Promoting Mediation; the Interplay of Global Norms of Justice and Harmony in the Mediation Forum

Simeon H. Baum

I. INTRODUCTION: A TALE OF TWO PANELS—META CONSIDERATIONS EMERGING FROM THE CONFERENCE

One benefit of an event like Fordham's 6th Annual Conference on International Arbitration and Mediation is that it affords participants the occasion to hear experts in the field—those on the panels and those in the more comfortable audience seats—express observations and insights that lead the listeners to further, general reflections on ADR. My presentation for this conference, titled *Attitude, Atmospherics and Techniques in Transforming Impasse into Opportunity* was delivered for the first day's panel: "Mediation: a Functional Approach." The Conference director, Art Rovine, so dubbed our panel to distinguish it from the next day's mediation panel, which focused on variations in mediation across the international spectrum and thus was named: "Mediation: Geography and Institutions."

Our own, earlier panel's focus was on approaches, skills, insights, and techniques in mediation, and process variations, without necessarily making comparative references across nations or cultures. For that panel I drew on an article that I contributed to a recently published book on impasse breaking.[1] This article bore the pithy title: *The Technique of No Technique: A Paean to the Tao-te Ching and Penultimate Word on Breaking Impasse.* This piece—appearing in a compendium of impasse breaking techniques—makes a simple point. When it comes to promoting continued party engagement

[1] Definitive Creative Impasse-Breaking Techniques, Molly Klapper, ed. (New York State Bar Association 2011). http://www.nysba.org/AM/Template.cfm?Section=Shop&template=/Ecommerce/ProductDisplay.cfm&ProductID=5141

and resolution, of far greater effect than any technique or method is the mediator's character, orientation and presence. More particularly, this presence communicates a caring and openhanded connection, a quality of deep listening and flexibility, and the trust and respect that engenders confidence and generates a reciprocal attitude from the parties. It is more important to be freshly and deeply attentive and responsive to what actually presents itself in mediation than to be busy sorting through, and applying tools from, one's bag of impasse breaking tricks.

We will return to the central message of that article and my presentation later in this chapter. For now, we should note that the presentation drew heavily on a 2,500 year old Chinese classic: the *Tao te Ching*. This classic is the most central text of the Taoist tradition, which, along with the Confucian and Buddhist traditions, constitutes one of the three major religious-philosophical traditions of China.

Having disposed of my duties as panelist on day one, I relished the opportunity to hear the geographically oriented panelists speak on day two. Sure enough, a second of these three Chinese traditions was featured in Joseph McLaughlin's remarks. When discussing the viability of mediation as a process for use in China, Joe McLaughlin observed that the Confucian tradition, as one which values harmony in the five relations,[2] has long supported the use of mediation. He made this point in the context of discussing cultural differences, and followed a bit later with a memorable tale from his own experience representing the Chinese government in arbitration. When he reported a legal victory, his client's representative, a Chinese minister, to Joe's surprise described it as a "catastrophe." This victory had caused the counterparty to "lose face," making it much harder to negotiate a compromise through the use of a neutral third party and to do business together in the future. Again, there, a higher value was placed on harmonious relations than on being "right" and victorious.

Another aspect of Joe McLaughlin's remarks caught my attention. Joe began his presentation with the question of how to incentivize parties around the world to enter the mediation process—this was not specifically a geographical question but a universal question to institutions and parties. His response lists the most commonly referenced grounds: savings in time and cost, and reduction of disruption. He adds to the list the results of a

[2] These relationships run between: (1) ruler and subject; (2) father and child; (3) husband and wife; (4) older sibling and younger sibling; and (5) elder and junior friends. Harmony in these relations is supported by cultivating the qualities of: li, propriety; jen, humanity; reciprocity; yi, righteousness; http://faithresource.org/showcase/Confucianism/confucianismoverview.htm, Chan, Wing-tsit, A Source Book in Chinese Philosophy.

recent study which shows that parties are often ineffective at predicting court outcomes. Plaintiffs frequently reject offers in mediation that exceed what they get at trial. Defendants, while less frequently wrong, are on average off by over $1 million to their detriment when they make the error of rejecting an offer and waiting for the trial outcome. Finally, Joe noted that mediation affords parties flexibility in designing resolutions that take into account not only the relative legal risk and cost, but also other factors, like the possibility of an ongoing business relationship. This places a value on party autonomy, as well.

I came away from Joe's remarks mulling over two interrelated reflections. First, what do we risk when we sell ADR, and mediation in particular, by focusing on savings in time and expense? What should be mediation's chief selling point? For me, Joe's mention of flexibility, autonomy and even his cross-cultural insight into the importance of harmony in Chinese culture hold the key. In selling mediation, we can describe what is unique about the mediation process itself—how it affects parties' communication and relationship; how it liberates parties to consider a wide range of needs, interests and realities; its humanistic focus; its possibilities for empowerment, recognition and understanding; its fostering of creative and appropriate resolutions; and its unique capacity to serve as a forum for the integration of the norms of justice and harmony. Quality of the process, rather than quantitative measures of time and expense, is major in selling mediation.

This leads directly to the second reflection. As a forum that fosters effective communication, respect for parties, and the ability to adjust to party needs, sensibilities, values, principles and circumstances, mediation is an ideal setting to bridge cross-cultural misunderstandings. A corollary is that in mediation, as a facilitated negotiation, it is critical to recognize cultural differences that might, if misunderstood, impede the negotiation. Some of a broader set of classic examples are misunderstandings where one culture might communicate directly where another might communicate indirectly; high or low context cultures; cultures which are more assertive or more accommodating or conflict avoiding; hierarchical as opposed to egalitarian cultures; cultures with different boundaries between the public and the private; cultures more or less comfortable with uncertainty; and cultures focused more on long term relationships or on short term transactional outcomes, such as in the Chinese minister example cited by Joe McLaughlin.[3]

[3] Fascinating work on cross cultural differences has been undertaken by Geert Hofstede. Charts by which he compares cultural differences of various countries can be found at: http://www.geert-hofstede.com.

Mediators sensitive to these cross cultural differences can help parties grow in understanding and avoid needless impasse.

It is natural for a regular conference on international ADR to reflect on cross cultural differences and on means for bridging cross cultural misunderstanding. This model presumes a pluralistic global community. While pluralism is rightly in vogue, we cannot fail to observe such remarkable growth in global community that, occasionally, a universal human community emerges. As a, perhaps, novel advance in this discussion, we will take a step beyond simply looking to avoid cross cultural misunderstandings in a pluralistic world. Beyond bridging divergent communities, there are times when we can borrow cultural norms or values from different communities to enhance our own—to the benefit of each. One instance can be found in appropriating the harmony norm that Joe identified, which can be found in both Taoist and Confucian traditions, to clarify the nature of mediation and to enhance the quality and function of that process. Thus the second effort in this piece will be to consider mediation as a forum for integrating the norms of harmony and justice.[4]

II. SELLING QUALITY, NOT QUANTITY, IN ADR AT HOME & IN THE INTERNATIONAL MARKET

The use of alternative dispute resolution processes continues to rise both within the United States and on the international scene. As cross border transactions increase, there is a growing desire to find dispute resolution forums that offer no "home court" advantage. Arbitration and mediation provide an answer to this need. The New York State Bar, for example, has recognized the importance of ADR to international business transactions through the work

[4] For roughly 20 years, I have seen mediation as a unique forum with the extraordinary capability of integrating the norms of justice and harmony. Apparently, I am not alone. Approaching the end of this paper, I found a far more detailed exposition of this theme in the work of Omid Safa, In Search Of Harmony: The Alternative Dispute Resolution Traditions Of Talmudic, Islamic, And Chinese Law (December 2, 2008), http://law.wm.edu/academics/intellectuallife/researchcenters/postconflictjustice/documents/Safacomparativelawpaper.doc. *See, also*, A. Berner, "Divorce Mediation: Gentle Alternative to a Bitter Process", in *Jewish Law Articles*, > www.jlaw.com/Articles/berner.html (visited 12 March 2000), suggesting that the search for peace and harmony is given paramount importance by of the same traditions whose prophets have trumpeted the call for justice. *See, also*, Berner's unpublished, "Pshara: The law of Compromise & Justice in Jewish Jurisprudence."

of a Task Force in which Joe McLaughlin played a significant role.[5] Further evidencing the recognition of the importance of arbitration on domestic and international fronts, the NYSBA Dispute Resolution Section has issued protocols for discovery in domestic commercial arbitration and for international arbitration.[6]

As ADR use spreads, providers and enthusiasts, including counsel who would introduce the idea of mediation to their clients or adversaries, continue to refine their sales pitch. For years, savings in time and cost have been major selling points for mediation, and not without good cause. There is little doubt that cases can be brought to resolution in mediation in far less time and for much lower cost than would be incurred were the case to continue down the litigation track. Despite this intuitively plain observation, years ago, the RAND Corporation issued a report concerning mediation in Federal District Court pilot programs, stating that there was no statistically significant evidence that mediation saved parties time and cost.[7] This caused quite a stir in ADR circles. Closer analysis of that report revealed that emphasis needed to be placed on the concept of "statistical significance"; RANDs data was just too thin. The available data did show, in the limited cases studied, savings of time and cost, after all.[8] Subsequent studies and the wealth of

[5] *See*, Final Report of the New York State Bar Association's Task Force on New York Law in International Matters, with accompanying brochure "Why Choose New York For International Arbitration?" June 25, 2011, http://www.nysba.org/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentFileID=53613. The Report offers reasons to adopt New York law in international transactions, and to feel comfortable resorting to New York courts. Nevertheless, the Report stresses advantages that can be found in using ADR processes as well. It annexes a brochure on international arbitration (beginning at page 85), and also contains a section stressing the importance of mediation as an alternative to both arbitration and litigation. *See, id., at* page 34.

[6] In 2009, while I was Chair of NYSBA's Dispute Resolution Section, a task force led by Carroll Neesemann, John Wilkinson and Sherman Kahn published a Report on Arbitration Discovery in Domestic Commercial Cases. *See*, http://www.nysba.org/Content/NavigationMenu42/April42009HouseofDelegatesMeetingAgendaItems/DiscoveryPreceptsReport.pdf. That report addressed proposes a balance between the extremes of excessive and insufficient discovery aided by a list of factors to be considered by arbitrators in making discovery decisions. The following year, NYSBA's Dispute Resolution Section prepared a set of Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of International Arbitration. *See*, http://www.nysba.org/Content/NavigationMenu42/November62010HouseofDelegatesMeetingAgendaItems/internationalguidelines.pdf.

[7] RAND, "An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act" (1996) (the "RAND ADR Report").

[8] *See* observations of *Report of New York County Lawyers Association Committee on Arbitration and ADR Comment on ADR Program Implemented Pursuant*

experience with mediation over the years show that mediation does save parties time and cost.[9]

One factor that emerged from the early RAND Report was that, apart from benefits of time and cost, the vast majority of parties and counsel who used mediation were satisfied with the process. Satisfaction studies begin approaching the most significant features of mediation—that there are process differences that create a different quality of experience for participants in this form of dispute resolution. It is important that mediation experts, attorneys, in-house counsel, and corporate representatives responsible for the creation or choice of dispute resolution mechanisms keep their focus on this qualitative benefit of mediation. Beyond quality of the process, flexibility of results and attendant control of the dispute resolution outcome is also a key, related selling point.

Apart from RAND type challenges on time and cost, which have generally fallen by the wayside, one reason to stay focused on qualitative benefits is the consequence of quality or value-based critiques. To argue primarily in terms of time and cost can lead purists and persons of integrity to conclude that they are willing to wait and pay the price for the "right" result. These users might believe that they should reject mediation as a poor substitute for justice; a lazy, pusillanimous short cut; and avoidance of cost, delay, risk, and difficulty that persons, or companies, of integrity would face. The argument continues that we need legal outcomes to build the great society; to enhance long term utopian goals of progressive development of social good. If, as a society, we are to send a message to future disputants that certain rules must be obeyed, then short term losses—in the form of cost, delay, risk and disruption in connection with a particular case—must be shouldered by today's disputants for the benefit of future humanity.

In short, the preceding critique puts the norm, value and ideal of justice front and center. We will turn later to examine the role of justice in mediation and to consider the degree to which individualized justice, as well as positive societal impact, is furthered by that process. We will address that in the context of a discussion of mediation as a forum in which we can integrate the norms of justice and harmony. At this point, it bears noting that a focus

to Civil Justice Reform Act of 1990 In the United States District Court for the Eastern District of New York, as sent to the ADR Advisory Group to the United States District Court for the Eastern District of New York, (September 22, 1997), http://www.mediators.com/adr-com.html.

[9] *See, e.g.*, Report to the Judicial Conference Committee on Court Administration and Case Management, entitled "*A Study of the Five Demonstration Programs Established Under the Civil Justice Reform Act of 1990*," by The Federal Judicial Center, (January 24, 1997).

on quality of the mediation process and the benefits it offers in controlling and fashioning an appropriate outcome does not generate the same offended reaction as do arguments about time, cost, and disruption. This does not, of course, negate the additional efficiency values of saving time, limiting cost, and reducing disruption through mediation.

III. QUALITATIVE ADVANTAGES FOSTERED BY THE MEDIATION PROCESS

Listed and developed below are aspects of the mediation process which provide qualitative advantages over dispute resolution approaches found in litigation and arbitration.

Depth and Range

Mediation has been variously defined. A centrist view is that mediation is a negotiation or dialogue facilitated by a neutral third party. Many things can happen, emerge, and be addressed in a negotiation or dialogue. The wide range of human valences addressed in mediation is part of what makes this so rich and rewarding a process. We go far beyond assessment of legal issues and can span the range from intimate personal disclosures, to business considerations and financial constraints, social pressures, hierarchical concerns and personal, philosophical, cultural or even religious values. A skilled mediator can facilitate discussion in a manner appropriate to each. Empathetic, compassionate listening appears for emotions. Appreciative inquiry applies to values, experiences and perceptions. Creative wonder fosters brainstorming. Reflective questioning and analytic clarity can develop legal alternatives; including risk and transaction cost analysis. Thoughtful encouragement, practical engagement, and creative testing of possibilities foster business discussions. Humor, tact, clarity, and sensitivity keep discussions moving between the parties and overcome snags, awkwardness and entanglements. The ability to have these various human dimensions handled in a way that is appropriate for each is a vital selling point of mediation.

Freedom

Mediation, as Joe McLaughlin pointed out, has some universal features. It is an expression of party freedom. Parties, not counsel, court, jury, or arbitrators,

make the decisions that affect the mode of their interparty communication as well as the outcome of their negotiation. Freedom is a quality worth selling.

Flexible, Free, Creative, Appropriate Resolutions (Individualized Justice)

A corollary to this freedom is the nature and form of the parties' resolution. Parties can fashion agreements that work best for their needs, independent from legal considerations. They can do business deals that a court could never invent. They can issue apologies which a court can never force. They can preserve, restore, and even enhance relationships in ways beyond the capacity of any third party to impose.

Acknowledging Actual Circumstances

Mediation can take into consideration the entirety of parties' circumstances and look to develop a negotiation process and resolution that is sensitive to and works for these circumstances. These are wonderful qualities of mediation, well worth touting.

Process Control, Flexibility and Responsiveness

Unlike trial, mediation is a process which is designed for party control. Mediators check in with the parties, and with counsel, to see whether it makes sense to continue in joint session or in private meetings, known as caucuses. Mediators take cues from parties on what issues they would choose to address. The flexibility and responsiveness of the process, to accommodate the reality, needs, interests, preferences, communication styles, and timing considerations of all participants is yet another selling point worth highlighting.

Fostering Empowerment and Recognition

Mediation theorists identify various quality enhancing features of mediation. The transformative mediation school sees mediation as a process that can focus on the quality of parties' communication, and as a consequence the quality of their relationship. Conflict, itself, is seen as a crisis in relationship. The mediator in this view has the dual purpose of fostering party empowerment, and fostering recognition. Empowerment involves recognizing the wide range

of choices that present themselves at any moment—whether it is the choice to negotiate or not, choices to make or withhold disclosures of information, to express an emotion or simply to note it internally without expressing it, choices to engage in brainstorming, risk analysis, case and transaction cost analysis, to express empathy or understanding of the other party, and how, when and under what terms to resolve the dispute. Understanding that one can make this range of choices builds a feeling of control and empowerment which, consequently, reduces that party's defensiveness. This generates the sense that it is safe to try to understand the other party's perspective and to show recognition of that other party's needs, interests, feelings, and life situation. This growth of empathy or of recognition is the moral transformation from which "transformative" mediation draws its name.

Building Understanding

Similarly, mediators Himmelstein and Friedman promote an "understanding based" model of mediation. This involves digging beneath the opposing positions or claims to understanding more deeply what is going on for each of the parties. The mediator's orientation brings peace, rather than conflict, into the room.

Humanistic Focus Nevertheless Observing the Shadow of the Law

These approaches, as well as the centrist, facilitative, problem solving model have a humanistic focus. Of chief concern is not simply a set of rights that needs to be vindicated or obligations that need to be enforced. People, and life realities—not simply surrounding systems or rules—have primacy in the mediation arena. This is not to say that legal issues do not impinge on the parties' bargaining or undergo analysis and development in discussions held within the mediation context. Particularly in commercial mediation parties come to mediation with counsel, prepare the mediator with pre-mediation statements that can include law and legal analyses, and can participate in risk analysis that includes assessment of legal implications and possible outcomes. This is underscored by the number of times the phrase popularized by Robert Mnookin is quoted: parties "bargain in the shadow of the law."[10]

[10] Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale LJ 950 (1979).

Nevertheless, the mediation process is designed to cultivate discussion and exploration of much more than the legal shadow. Using active listening skills—validation, empathy, clarification, summarizing, reflecting back—mediators foster an environment where parties' emotions, perceptions, values, goals, aspirations—as well as hierarchical, social and economic needs and constraints—may be expressed and have significance. Pure legal analysis might limit the locus of truth to a statute or a line of cases and their decisions and verdicts. The humanistic focus of mediation recognizes persons, in all their simple depth and varied complexity, as a legitimate locus of truth.

Holistic Healing—The Great Quality that Needs a Different Marketing Brand

The word "holistic" almost invites a wry "Kumbaya." Its core meaning, though is that not the part, but the whole is involved in defining both problem and solution. Not just the intellect, but emotions; not just the facts, but also values and perceptions; not just legal obligations, but equities and feasibility in light of financial capacity; not just a judgment based on past facts, but a recognition of present circumstances and future possibilities. As indicated above, a comprehensive approach is taken in mediation. Mediators maintain a fully open mind and heart—a 360 degree orientation. We have seen the humanistic focus that respects the person as a whole. We have also seen that all actual circumstances are considered. This openness and comprehensiveness—living people given a forum for genuine encounter in a living world—is major. Law can have its black and white, and also grey. Mediation is in living color.

This living color includes not just the parties to the action, but other affected parties and the broader circumstances as well. Workplace disputes can involve recognition of the broader hierarchy. For example, in addressing a harassment claim against a manager, discussion of that manager's objectives and pressures can, at times, build understanding. When negotiating a settlement with a claim involving insurance, the various levels of authorization above the representative adjuster can be better understood and, possibly, given a human face. Family pressures, social and community pressures—all can be acknowledged in mediation.

The law also bears the weight of the broader society. The need for precedent, *stare decisis*, the compromises that go into the drafting of a governing statute influence the creation of laws that impinge on the parties to a particular dispute. A great difference between the way broader society is seen as operating in law and in mediation, is that with law, the concerns might have

nothing to do with the parties. The parties bear their weight. In mediation, understanding the broader circumstances, social or otherwise, offers illumination and lightens the load. It creates opportunities for greater understanding, acknowledgment, and voluntary acceptance of the social reality. It also, in identifying these surrounding others, can, at times, reveal ways to change the circumstances—arguments, offers, or adjustments that can be made to or for these others to make a resolution possible.

Relationship Preservation or Enhancement; I And Thou

In his seminal work, *I And Thou*, Martin Buber makes the revolutionary point that there are two fundamental modes of being for each of us. These are represented by two word pairs for relationships in which we stand and that define our core selves: I-Thou and I-It. For Buber, all of science, economics, business, aesthetics, law and the rest are in the realm of "I-It" to the extent by which we reduce any living reality to a subset of a field of knowledge for classification and manipulation. Taking the stance of the scientist, economist, philosopher, engineer, accountant, lawyer, judge, businessman, and the like limits not only the "object" of one's examination, but limits the examiner himself (or herself) to the type of "I" that apprehends the "it." By contrast, full encounter with another who is recognized as "You" in his or her living wholeness—person to person—blows away all classifications and manipulations. This is the realm of love, of full appreciation and recognition, of genuine, engaged understanding. As with the "it" pair, so the "Thou" pair defines not just the other, but also oneself, opening a subjectively realized world of infinite, transcendent yet actualizing value. This is an "I" in relation which has a quality of wholeness that obliterates the subject-object distinction.

A beautiful description, but what does it have to do with commercial mediation? For Buber, true humanity is realized only in the I-Thou relationship, but it is the melancholy of our fate that we continually lapse from I-Thou to I-It. Moreover, we need "it" to survive. As we enter commercial mediations, on the domestic or international front, the more participants are capable of relating to each other as full human beings, the more we can break through strategic and positional bargaining and come to deeper understanding that generates a richer deal. There are recorded times in major negotiations where person to person recognition, genuine dialogue, provided an essential break through.

Taken down a notch, there is nearly universal recognition that mediation can create an atmosphere that increases the chance for parties to address and repair their relationships. It is difficult enough, at times, to bridge

cultural divides in international business transactions, let alone in transactions that have gone sour. A process that fosters safe communication on all the multiple levels in which we engage and react is certainly one to be recommended. If, as Joe McLaughlin's Chinese minister understood, there is more value in continuing relations than in winning a particular legal battle, then the process that best fosters that understanding should be enthusiastically embraced for cross cultural dispute resolution, let alone by cultures that value relationships and harmony or our own domestic scene. Even in the so-called individualistic, autonomy loving West, there is a recognition that relationships matter. Witness the JPMorgan Chase "relationship managers," the vast customer relations industry, and or praise of "networking."

Enhanced Communications and Problem Solving

Use of active listening, "looping" [FN] in the understanding based model, reflecting back in the transformative model [FN], and generally setting a tone induces the parties to engage in constructive conversation is yet another feature of mediation that provides a qualitative basis that should make it attractive. If one has the choice of entering a process in which one can speak and possibly be understood as opposed to a discussion in which words are weapons in a battle, which process would most people choose? If one sees an opportunity to grow in understanding and has a choice of that route or a route that keeps one frozen in one's own, limited perspective, which route would one choose?

The same questions can apply to the problem solving dimensions of mediation. The Fisher/Ury model developed in *Getting to Yes* and its progeny, presents a way for negotiators (and participants in mediation) to shift from being hard on the people to being hard on the problem. These negotiation theorists suggest that as we focus on the parties' interests and needs, we can develop options that can meet these needs and promote mutual gain. They suggest that this cooperative effort, which requires candid disclosures and flourishes with creative brainstorming and clear comparison of deal proposals against the parties' present alternatives (including anticipated outcomes of any pending or potential litigation), produces outcomes that are superior to the win/lose outcomes of litigation or the rough, and harsh, compromises achieved through hardball positional bargaining. Decent, supportive communication, rather than provocative use of threats and *ad homina*, increase the likelihood that parties will take the risk to engage in this brainstorming, disclose interests and assessments, and generate the options that lead to mutually satisfying deals. Mediation provides a forum and process designed to overcome the chicken and egg problem of generating the trust necessary

to lead disputing parties to essay this joint, mutual gains problem solving approach. Given this possibility, would the autonomous, aware user choose the battles of litigation, arbitration and positional bargaining, or the possibility of integrative gains and civil process offered by mediation?

Bridging Cross Cultural Differences

While not the focus of this piece, it is widely recognized that mediation is an excellent forum for bridging misunderstandings that are rooted in cross cultural differences. There are cultural differences in approaches to time. A culturally sensitive mediator in a matter with German and Syrian parties might be better able to handle the German indignation when the Syrian negotiators appear a half an hour late to the mediation. Cultures communicate with varying degrees of directness. Culturally sensitive mediators can aid American or Israeli negotiators, *e.g.*, in understanding, accepting and learning to work with, what might appear to be elliptical, non-committal, or fuzzy communications and bargaining by Chinese or Japanese counterparties who come from high context cultures that also have high regard for "face."

In short, behaviors and communications which are natural in culture can be so greatly misunderstood by members of another culture that potential deals can be gutted. Given the chance to enter a process that can make transparent the cultural source of some of these differences and eliminate the misunderstanding, would the rational user prefer a process that preserves ignorance, abreactions, severed relationships and lost opportunities, or one which limits this misunderstanding?

In sum, there are a host of qualitative features of mediation, beyond savings in time and cost, which should be the chief reason for parties to select the mediation option. It is the responsibility of the ADR community, as well as sophisticated counsel, to present these qualities with the clarity required to transform skeptics into users.

IV. MEDIATION AS FORUM FOR THE INTEGRATION OF THE NORMS OF JUSTICE AND HARMONY

A. Examination of Justice

In this piece I would like briefly to introduce an idea that could form the basis of a book. Putting aside the question of time and cost, why choose litigation or mediation as dispute resolution process? As mentioned in Section II,

above, pursuit of justice might be identified as a reason to prefer litigation. In our noble judicial system, or in a well conducted arbitration run by experts in the substantive field at issue, parties, with the help of counsel, present the facts to decision makers in a process designed to subject assertions of fact to the harsh light of cross examination and doubt. The judicial or arbitral decision makers apply what are believed to be community standards, represented by the law or norms and customs of commercial practices, to produce an outcome which that community believes is fair. Indeed, justice theorists like Rawls assert that the very heart of justice is fairness. We seek a fair process and a fair outcome.

This ideal of justice is great and profound. It produces order in society. It unsettles corrupt orders. It saves the weak from oppression and rights wrongs. Fern Bomchill, in her inaugural speech when she assumed her position as President of the Federal Bar Association, aptly said: "justice saves, so we should save justice." Our Judaeo-Christian traditions reinforce our sense of the great importance of justice: "justice, justice shall thou pursue." [FN: Isaiah or Jeremiah] The ideal of justice likewise finds concrete expression in the *shariah* of Islam.

Our justice ideals are imbued with the notion of truth. We seek the "real facts." We seek to apply the correct law. Our system works with this dualism of universal ideal (law, or community value) and particular (fact). This approach has its roots in Plato, Aristotle, and the ancient Greeks. They struggled to define the "good." We have long lived with these and other dualisms: essence and existence, ideal and actual. As we look more closely at the justice system, which is aided by these distinctions, we should keep in mind that exposure of flaws and shortcomings do not require us to throw out the baby with the bath water. Nevertheless, recognition of flaws and shortcomings may open us to another possibility—one which is found in mediation.

What are some of these shortcomings? Joe McLaughlin cites the recent study underscoring the unpredictability of judicial outcomes. Our concept of justice contains the ideal that there is a single right answer to the question of what should be done in any case. Our judges and juries apply the dialectical Aristotelian either/or to judge the truth or falsity of each assertion of fact, to arrive at the correct picture of the material past, to select the proper standard or set of standards to be applied to those facts (and that picture), and properly to apply those standards to produce the correct outcome. We narrow and further narrow down the various possibilities of fact and law to the single right choice, excluding all the rest. This image of the development of justice in a single case is like that of a pyramid, finally reaching the correct apex.

Unfortunately, there are many ways in which we fall short of the ideal. Key facts might be omitted or dismissed from consideration as the result of ignorance, poor memory, lack of witnesses, lack of documentary support,

exclusionary rules of evidence, ineffective presentation by advocates and parties, and even confusion of judge, arbitrator or jury.

Key standards can also be missed. Rife are the instances of appeal for failure of the court to select or properly apply the law. In arbitration, the standards applied by the arbitrators are often unstated or unknown. Both with arbitrators and with juries, it is not always clear whether the decision makers themselves are fully conscious of the values, assumptions and core myths that motivate their decision making process. To the extent that decisions are appealed, who is to say that appellate courts actually get them right?

Beyond this, we can examine the source and nature of standards themselves. An Illinois legislator, who predated Bismarck,[11] observed that there are two procedures it is best not to watch: the making of sausages and legislation. Our laws can reflect compromises between different interest groups that can produce something short of the Platonic ideal. Moreover, the interests of society in forming a given law or rule might not be entirely aligned and appropriate for the parties to a particular dispute. We might need to develop statutes of repose, in light of the tendency of witnesses to forget or disappear and the reliance that forms by parties against whom an otherwise rightful claim might be brought. Nevertheless, there might be instances where, even absent a formal tolling agreement, ongoing discussions or other factors would lead to a conclusion that the more just result is to afford a remedy for the claim. Examination of any body of substantive law—*e.g.*, laws affecting the environment, healthcare, commerce, securities, intellectual property, and the like—will produce instances of seeing greater possibilities for justice in individual cases than the law will permit. Moreover, there are significant instances of parties with competing interests in these cases which, with integrity, might assert that diametrically opposite results are the just and superior outcome.

In this postmodern era, we live with a large dose of doubt. Multiculturalism brings with it recognition that any single culture is limited in its right to make absolute truth claims that can be imposed on all others. Relativism abounds. Yet relativism itself is subject to the critique that its own claim to absoluteness is relative. In a postmodern era, in the wake of Freud, logical positivists, radical empiricists, Wittgenstein,[12] and phenomenologists,[13] we are more skeptical about asserting the existence of ideals, and can see these as human constructs, projections, or, more simply phenomena. Phenomenology recognizes the interplay and mutual dependence of "fact" and mind. We

[11] *See*, http://en.wikiquote.org/wiki/Talk:Otto_von_Bismarck.

[12] The meaning of a word is in its use in the language. Wittgenstain, L., *Philosophical Investigations*, 43.

[13] This includes Husserl, Heidegger, Merleau-Ponty, *et al.*

live in a tangled, interwoven real of subject and object, unable to know the "*ding an sich.*"[14]

Nevertheless, somehow we muddle through. The good news is that postmodernism can produce a refreshed outlook. We are a bit clearer on the limits of knowledge and of truth claims. We are aware of our living embeddedness in actuality. Truth, value and meaning are the waters in which we swim, interpenetrating phenomena. Basically, we can go easy on ourselves and one another. We do our best, living rich meaningful lives permitting, but not being crippled by, doubt.[15] We promote respect for and acceptance of other cultures in a multicultural world. Perhaps we learn better the dignified humility that is a precondition for the arising of truth.

Returning to justice, the judicial system, and the legislative system in which it is, in part, embedded, we observe again, that the purposes of a legal system, while of tremendous importance, are not always consonant with pure justice for individual parties. Tort laws make society a safer place. We need, as a society to send messages that set a standard of care to manufacturers, distributors, retailers, professionals, and Boards. Nevertheless, confidential settlement of individual claims might, in a given instance produce a greater good than the legal outcome in that case. It might keep an otherwise valuable producer of pharmaceuticals out of bankruptcy. It might allow certain businesses to continue supporting the families and charities that would suffer from their collapse. It might produce a business reorganization whereas a judgment in an accounting proceeding might simply kill the goose that lays the golden egg. It might preserve a relationship or set of relationships that would otherwise be severed.

This leads us now to look at another cultural value: that of harmony.

B. Consideration of Harmony

As mentioned in the Introduction, the norm of harmony has been highly valued in different ways in the Taoist and Confucian traditions. Again, while books could be written exploring this topic, here we touch just the tip of this

[14] *Compare* Berkeley's idealism with Kant's *Critique of Pure Reason* expressing the view that we may develop and utilize categories of understanding, but cannot know the thing-in-itself.

[15] 20th Century Protestant and Buddhist theologians have used the phrase "the faith to doubt" to capture this sensibility. *See, e.g.*, Hartshorne, M. Holmes, *The Faith to Doubt—A Protestant Response to Criticisms of Religion* (Prentice-Hall 1963); Tillich, Paul, *The Courage to Be*; Batchelor, S., *The Faith to Doubt—Glimpses of Buddhist Uncertainty* (Parallax Press 1990).

normative iceberg. One simple and direct introduction to this topic may be found in considering the widely recognized *yin-yang* symbol[16] depicted below.

In contradistinction to the Aristotelian "either/or," *yin* and *yang* are depicted as mutually dependent and co-arising, complementary opposites. Each opposite supports the other. Indeed, as depicted above, the seed of *yang* (portrayed as a white circle) is found within *yin* and vice versa. Traditionally, *yin* is seen as representing feminine, receptive, passive, weak, destructive, and negative, while *yang* represents masculine, active, strong, constructive and positive aspects of reality.[17] These opposites are seen linguistically, conceptually and ontologically as having no independent existence, being dependent upon each other and forming a whole. They are constantly in flux, each shifting into the other, and further represent a constantly readjusting function of balance.

[16] Thousands of publications have been written on the *yin-yang* symbol. One very helpful piece, in the context of the comparative study of religion, is a chapter on this symbol in Wilfred Cantwell Smith's book, *The Faith of Other Men* (Harper & Row, 1972). Also illuminating are various descriptions and texts included in Chan, Wing-tsit, *A Source Book in Chinese Philosophy* (Princeton University Press 1969), *e.g.*, Chapter 11, pp. 244 *et seq.*

[17] Chan, *supra*, at 244. Despite the above suggestion that the masculine is procreative or constructive and the feminine is destructive, it should be observed that in a note to his translation of the *Tao te Ching*, which draws heavily on the imagery and theoretical foundation of *yin* and *yang*, the same scholar-translator cites Yu Yueh's description of the feminine, *yin*, "spirit of the valley," is a source of fecundity. *See*, Chan, Wing-tsit, *The Way of Lao Tzu (Tao-te Ching)*(Bobbs-Merrill 1963)(hereinafter "*Tao te Ching*"), Chapter 6, note 1.

A core takeaway is that rather than reject opposites, we need to recognize that all are an interrelated, interdependent part of the whole.[18] We should seek to blend opposing forces. As noted by Joe McLaughin, the Analects of Confucius, recommend harmony in the five social relations.[19] The *Tao te Ching*, perhaps the major classic of the Taoist tradition, expresses a profound appreciation of harmony.[20] The Taoist sage does not compete with others.[21] He sees the world as his body.[22] He, like the Tao, nurtures all things.[23] The sage, like water, a major image in the text, is said to benefit all.[24] He takes the needs and interests of all people as his own. The sage is good to the good and to the bad, in this way the good is accomplished. He trusts the trustworthy and the untrustworthy, in this way is trust developed.[25] The good man is the teacher of the bad and the bad is the charge of the good.[26] The sage does not compete. He does not strive to be ahead, and for this reason is at the forefront.[27] Over and over again, the *Tao te Ching* sends the message of collaboration. We are all in this world together. Rather than isolate and condemn those who do not embody our vision of the ideal, let us

[18] A good example of a listing of complementary opposites and their implications for ethical action can be seen in Chapter 2 of the *Tao te Ching*. ("When all the people of the world know beauty as beauty, There arises the recognition of ugliness. When they all know the good as good, There arises the recognition of evil. Therefore: Being and non-being produce each other; Difficult and easy complete each other; Long and short contrast each other; High and low distinguish each other; Sound and voice harmonize each other; Front and behind accompany each other. Therefore the sage manages affairs without action And spreads doctrines without words. All things arise, and he does not turn away from them. He produces them but does not take possession of them. He acts but does not rely on his own ability. He accomplishes his task but does not claim credit for it. It is precisely because he does not claim credit that his accomplishment remains with him.")

[19] *See* note 2, *supra*, and related text.

[20] *See, e.g.*, Chan, *Tao te Ching*, Chapter 55 ("...his (natural) harmony is perfect. To know harmony means to be in accord with the eternal. To be in accord with the eternal means to be enlightened.").

[21] Chan, *Tao te Ching*, Chapter 8 ("The best (man) is like water. Water is good; it benefits all things and does not compete with them.").

[22] Chan, *Tao te Ching*, Chapter 13 ("What does it mean to regard great trouble as seriously as you regard your body? The reason why I have great trouble is that I have a body (and am attached to it). If I have no body, What trouble could I have? Therefore he who values the world as his body may be entrusted with the empire. He who loves the world as his body may be entrusted with the empire.").

[23] Chan, *Tao te Ching*, Chapter 51.

[24] Chan, *Tao te Ching*, Chapter 8.

[25] Chan, *Tao te Ching*, Chapter 49.

[26] Chan, *Tao te Ching*, Chapter 27.

[27] Chan, *Tao te Ching*, Chapter 7.

find a way to make the best use of their skills and inclinations so that nothing and no one goes to waste.[28] This organic view of an interrelated society expresses early roots of the collectivism found in China over the centuries, up to today.

This spirit of inclusiveness applies not just to ethical relations with other people but to acceptance of circumstances, as well. The *Tao te Ching* and its progeny, such as the *Chuan tzu*, are permeated with a spirit of adjustment and accommodation. The sage is fluid as water, flexible as bamboo, receptive as a valley, rejecting nothing. The Taoist ideal of *wu wei*, or taking no (unnatural) action[29] is a natural extension of this world view.[30] Each being has its place in the whole and moves and adjusts in a dance in harmonious interrelationship with all. This can generate great power, just as a skillful surfer learns to ride the mighty wave. Significantly, *wu wei* means not using force. Non-coercion is a central theme of the *Tao te Ching*.

C. Implications of Justice and Harmony

As noted in the last section, values of accommodation, collaboration and even avoidance of conflict pervade Taoist thought. By contrast, in litigation, as in hardball positional bargaining, a different mode of conflict resolution—competition—comes to the fore. Interestingly, these, along with compromise, consist of the five modes or styles of approaching conflict identified in negotiation literature.[31]

[28] Chan, *Tao te Ching*, Chapter 62 ("Tao is the storehouse of all things. It is the good man's treasure and the bad man's refuge. Fine words can buy honour, And fine deeds can gain respect from others. Even if a man is bad, when has (Tao) rejected him?").

[29] *See, e.g.*, Chan, *Tao te Ching*, Chapters 2 ("the sage manages affairs without action"); 37 ("Tao invariably takes no action, and yet there is nothing left undone."); 38 ("The man of superior virtue takes no action, but has no ulterior motive to do so."); 43 ("The softest things in the world overcome the hardest things in the world. Non-being penetrates that in which there is no space. Through this I know the advantage of taking no action. Few in the world can understand the teaching without words and the advantage of taking no action."); 47, 48; 57; 63 ("Act without action"); 64.

[30] *See, e.g.*, Chan, *Tao te Ching*, Chapter 30 ("He who assists the ruler with Tao does not dominate the world with force. The use of force usually bring requital."); Chapters 38, 55.

[31] *See, e.g.*, the Thomas-Kilmann Conflict Mode Instrument (Tuxedo NY: Xicom, 1974), identifying five conflict modes or styles: competing, compromising, collaborating, avoiding and accommodating.

Beyond their application in negotiation, it is intriguing to see these modes applied in connection with the norms of justice and harmony. Justice makes straight the crooked. With force and the authority of the right, we can take strong action to make the actual conform to the ideal. Harmony, by contrast, involves ones own adjustment, or the group's adjustment, to the actual. The ideal is found in this mode of adjustment, which embodies and actualizes peace, and, perhaps, love.[32]

There can be little doubt that we need a justice norm and the courageous and caring action that expresses it. Without justice, pure accommodation is appeasement, which, when applied to Nazis is, at the very least, controversial. Yet, there are times when it is less than perfectly clear what justice dictates. There are instances, all the more available in cross cultural contexts, when each party is assured that he or it is in the right. And, as noted in subsection "A." above, there are times when the notion of justice dictated by a particular legal system carries out a general societal purpose but does not necessarily create individualized or maximal justice for the actual parties—and in light of the actual circumstances—involved.

Beyond this—and now we may fairly return to the pragmatic considerations initially voiced by Joe McLaughlin—there is a fair degree of unpredictability to the legal outcome of a given case. Moreover, time and expense incurred in pursuit of this goal of legal justice may outweigh the value of the dollars ultimately awarded at the end of the case. This is all the more so when one factors in the opportunity cost of delay, time in depositions, discovery and trial, water cooler gossip, and relationship loss—with loss of future business—between the warring parties. Where the cost of justice exceeds the value of justice received, is that justice?

The norm of harmony has a counterpart within the Judaeo-Christian tradition. Again, recognizing the limits of this paper, we will only point to a couple of them here. Love and forgiveness are major teachings not only in the Christian tradition, but in the Jewish tradition as well. Theologians and religious leaders in each tradition have, for centuries, coupled the norms of justice and mercy. Indeed, Portia's speech on the "quality of mercy"[33] is anti-Semitic to the extent it implies that Shylock represents the core value of his tradition in requiring a pound of flesh, rather than valuing human life

[32] Chan, *Tao te Ching*, Chapter 67 ("I have three treasures. Guard and keep them: The first is *deep love*, The second is frugality, And the third is not to dare to be ahead of the world. Because of deep love, one is courageous. Because of frugality, one is generous. Because of not daring to be ahead of the world, one becomes the leader of the world.").

[33] Shakespeare, W., *The Merchant Of Venice*, Act 4, scene 1, 180-187.

and this superior, unstrained[34] quality of mercy. In the Kabbalistic tradition, Mercy is seen as a higher divine attribute than Justice.[35] As Rabbi Adam Berner points out, *psharah* or compromised, voluntary settlement is preferred over resort to the religious court, the *Bet Din*, as a mode of resolution within the classic Talmudic tradition.[36]

At the very least, making room for harmony does not run contrary to major theistic traditions. More boldly put, harmony and mercy are values that might represent a higher mode of civilization. These values do not make the adverse party into an "other" upon whom one imposes punishment or extracts compensation by use of legal force. Rather, they recognize the humanity of, and affinity with, this other, taking the full person and all his or her circumstances into account—warts and all. When developing dispute resolution processes on the domestic or international front, a process that can foster the application of not only the norm of justice, but also the norms of harmony (or mercy), is a process that maximizes the possibility of richer and greater outcomes. These are outcomes that do not ignore justice, but contemplate multiple views of what is just, and the wide range of values and principles held by the parties. In addition, these outcomes contemplate the person not simply as a subset of a category of particular tortfeasor or contract breacher in a particular legal grid, but as a whole and complete living person with a complex and multivalenced context and series of relationships, limitations, needs, tendencies and obligations.

[34] The notion of being unstrained, or unforced, is notably consistent with *wu wei*.

[35] *See, e.g.*, Scholem, G., *On the Mystical Shape of the Godhead*, (Schocken Books 1991), p. 44, displaying a classic image of the "ten *Sephirot*" or divine emanations of the kabbalistic tradition, with *hesed* or mercy shown as the fourth and *din* or judgment (justice; also called *geburah* or strength) as the fifth. One example of this ordering can be found in the *Tomer Deborah* of R. Moses Cordovero (1522-1570).

[36] Berner, *supra* ("The Torah mandates us "to do that which is right and good in the sight of the Lord."[8] Rashi comments that this refers to *psharah*, looking beyond the letter of the law. In fact, the *halachah* establishes that it is a *mitzvah* to encourage disputing parties to pursue *psharah* over the adjudication and application of *din* (strict law).[9] Capturing the essence of the benefits of mediation, the Talmud states that only *psharah*, not *din*, constitutes the ideal justice of *mishpat shalom* and *mishpat tzedek*—judgment of peace and judgment of righteousness. No modern formulation has so elegantly expressed the uniqueness of mediation, in its ability to provide an integrated justice balancing the values of fairness, peacefulness and compassion.[10]")

D. What Mediation Offers

Values, as ideals, are too large and general to be limited to any particular model, system or process. Similarly, mediation, like life, is far too open a process to be defined by any two values, even ones as great as justice and harmony. Drawing on the *Tao te Ching*, which uses the word "*Tao*" often translated as Way, with overtones of ultimate truth or ultimate reality: "the Tao (Way) that can be "*taoed*" (*i.e.*, "wayed", laid out, expressed, defined) is not the eternal *Tao*."[37] It is important to keep in mind the indeterminate, and open, nature of mediation as a process as we enter the next discussion.

Consistent with the inclusive model of *yin* and *yang*, mediation offers an open forum in which not only the value of harmony but also the value of justice (and other values)[38] may play themselves out in the parties' negotiations. We see the justice norm at work when parties and counsel begin opening statements with projections of legal outcome, when offers are coupled with messages of case strengths, and when parties and counsel engage with the mediator in risk and transaction cost analysis. We see harmony operating as parties consider their relationship with one another. We see it in accommodations that take into consideration not only legal outcomes but also the ability to pay, the value of ongoing business relationships, industry realities and challenges, the feasibility of particular deal terms or proposals, and even another party's need for recognition, appreciation, or acknowledgment in the form of an apology.

We further see harmony or, even more broadly, the applicability of teachings from the *Tao te Ching*, in the conduct of the mediator him (or her) self. Mediators are at their finest when they can be deeply receptive; when they listen profoundly; when they demonstrate flexibility; when, like water, they benefit all; when they build trust by showing trust; when they do not coerce, but instead act with *wu wei*. They are at their best when they do not compete and when they take the needs and interests of all parties, without discrimination, as their own. They come to the forefront by being background players, understanding that their role is to facilitate the parties' negotiation, not to run or steer it to the mediator's preconceptions of what is good, right, true, just

[37] Chan, *Tao te Ching*, Chapter 1 ("The Tao that can be told of is not the eternal Tao; The name that can be named is not the eternal name.").

[38] There is a wide range of values that can be considered and influence decision making in mediation, including: efficiency, economy, closure, appropriateness, feasibility, consideration, compassion, diligence, duty, loyalty, practicality, etc. All of these can be made transparent and treated with sensitivity, clarity, impartiality, and respect in this process.

or even harmonious. Indeed, while harmony is a beautiful thing, the mediation process includes the openness to present discordant feelings, views, goals and expressions. In this way, the discordant, when expressed, accepted and explored, can transform into resolution. This is a way of harmony.

The interplay of justice and harmony in mediation is doubly beautiful. Justice seeks to change and harmony adjusts—it is like watching the interplay of active and passive, *yang* and *yin*. Beyond this justice within a mediation forum is not limited to predicting the court outcome. As discussed above, each of the parties might have views of fairness based on principles and expectations that could differ from the way a legal analysis might run. Working flexibly with the parties to meet their needs and provide a process that they find satisfying (itself an adjustment by the mediator consistent with the fluid quality of harmony), includes fostering clarifying and constructive discussion that identifies, develops, and explores principles and values the parties might choose as most applicable in providing guidance for the resolution of their issues. For example, in a family estate matter, all siblings might choose the principle of equal distribution as a governing family value. Alternatively, they might conclude that the *kibbutznik* norm of "from each according to his abilities, to each according to his needs" represents their family value and cultures, and should be adopted in this matter.

Whether considering possible legal outcomes or independent principles and values, one characteristic of this mediation process is that the parties act out of freedom. They are not coerced by the mediator. No outcome is imposed upon them. The process itself can be adjusted to reflect their identities, values, goals, inclinations, concerns and leanings. Choosing one's brand of justice, rather than fighting and have it imposed by a third party, raises the quality of the interaction in mediation to a higher, more humane, more mature phase in the development of civilization. Consistent with this advance is the parties willingness to explore values and recognize that each merits respectful, sensitive attention. Bringing in the postmodern perspective, mediation permits exploration and adoption of many values that result in freely adopted individualized justice tailored to the parties.

The discussion of harmony in Section IV.B. notes the coupling of justice with mercy in the Judaeo-Christian traditions. Along with the freedom to choose what seems most just for all parties comes the freedom to forgive. Much has been written on forgiveness[39] and the value of

[39] *See, e.g.*, Sandlin, J.W., *Forgiving in Mediation: What Role?* (Advanced Solutions Mediation & Conflict Management Services, Charleston, South Carolina 29402) http://www.apmec.unisa.edu.au/apmf/2003/papers/sandlin.pdf; Braskov, S. & Neumann, A., *On Guilt, Reconciliation And Forgiveness—A Case Story About*

apologies[40] in mediation. This too is a way of restoring harmony between parties.

In sum, mediation is a wonderful process, full of rich potential, and based in party freedom and creativity. It permits parties to work out their disputes in a manner that balances property, rights, principle and obligation based norms of justice with relational norms of harmony, developing a life affirming mutual adjustment of the ideal and the actual, and of the individual and the collective. These qualities commend its use at home and abroad.

Mediation, Dilemmas And Interventions In A Conflict Among Colleagues (Lipscomb University Institute for Conflict Management), http://www.mediate.com/articles/BraskovNeumann1.cfm; Schmidt, J.P., *Mediation and the Healing Journey Toward Forgiveness*, Conciliation Quarterly, 14:3 (Summer 1995), pp. 2-4; Della Noce, D.J., *Communication Insight*, ConflictInzicht, Issue 1, February 2009; Luskin, F, Forgive for Good: A Proven Prescription for Health and Happiness (HarperCollins 2002), used in trainings on forgiveness in mediation, *see, e.g., http://danacurtismediation.com/dcm/forgivenessyrslater.html*; and Waldman, E. & Luskin, F., *Unforgiven: Anger and Forgiveness*, The Negotiator's Fieldbook: The Desk Reference for the Experienced Negotiator (Kupfer Schneider, A., and Honeyman, C. editors, ABA Section of Dispute Resolution 2006)(hereinafter "Negotiator's Fieldbook") pp. 435-443.

[40] *See, e.g.*, Gerarda Brown, J. & Robbennolt, J.K., *Apology in Negotiation*, Negotiator's Fieldbook, pp. 425-434; Schneider, C.D., *"I'm Sorry": The Power of Apology in Mediation*, (Association for Conflict Resolution Oct. 1999), http://www.mediate.com/articles/apology.cfm; Kichaven, J., *Apology in Mediation: Sorry To Say, It's Much Overrated*, (International Risk Management Institute Sept. 2005), http://www.mediate.com/articles/kichavenJ2.cfm; *and also see*, Garzilli, J.B., Bibliography of articles on apology in mediation, http://www.garzillimediation.com/pg247.cfm.

Mediation—Alchemical Crucible for Transforming Conflict to Resolution

By Simeon H. Baum

Mediation in Context—Negotiation and Dialogue

Day in and day out, we encounter one another, make deals and resolve disputes. Whether it is setting a bedtime with a recalcitrant five-year-old, making dinner plans with a narcissistic couple, setting up a distributorship, breaking a lease, working out credits and offsets in a requirements contract, accounting for changes and delays in a construction job, or the host of issues that might make their way into court if not otherwise resolved—we negotiate. Negotiation is so common, we barely notice it. We are like fish not noticing the water in which we swim. We communicate with others, offering trades where needed, to obtain the cooperation of the other to achieve satisfaction of our needs and interests. Cooperation might come in the form of offering goods, land, information, intellectual property, services, cash, securities, some other form of property, right, permission, or agreement of non-interference or cessation of offending activity,

Sometimes, all that is sought is understanding and acknowledgement. Beyond the trades of negotiation, there are times when, at home or at work, we meet one another in the depth of our humanity, sharing time together in a manner that breaks the mold of social expectations or joint projects, celebrating the wonder of life and mutual existence. Conversely, there are times when we cannot recognize one another, when all we can see is the bundle of needs and obligations that lie upon us. The "other" is an impediment, failing to assist in the achievement of our ends. Or, the other reads us this way, ignoring our humanity. There is a crisis in our relationship, and with it, as said by the Captain of Road Prison 36 to Paul Newman's character in *Cool Hand Luke*: "What we got here is a failure to communicate."

Escalation to Agents and Authorities

When there is a snag in negotiations or in communications, one option is to seek the help of others. We turn to agents to negotiate or intercede on our behalf, including lawyers. We turn to authority figures to help us—such as the boss or HR department in an employment setting or, G-d forbid, a mother-in-law for help at home. And, of course, when we get nowhere, and the problem merits the financial outlay, time, disruption, negative impact on our relationship with the other, and reputational risk, we, or our counsel, turn to the Courts, or to arbitrators, to render a decision that will resolve the dispute and bear with it the force of law.

Mediation Defined by a Developing Profession

Even before reaching the courthouse, there is another time-honored practice: turning to a trusted, neutral third party to help us in our negotiation. In its simplest form, mediation is a negotiation, or dialogue,[1] facilitated by a neutral third party. As early as medieval Japan, one Zen master acted as intermediary bringing about peace between warring lords. Mediation has been used informally in many contexts and many lands. Today, with substantial growth in the U.S. over the last two decades, mediation is used as a dispute resolution process both through court-annexed panels and through private mediation providers. Mediation has increasingly become professionalized. There are associations of mediators,[2] rules of ethics, like the Model Standards of Conduct for Mediators prepared jointly by the AAA, ABA, and SPIDR during the early 1990s and revised in 2005; mediator training programs, like the three-day Commercial Mediation training offered through NYSBA's Dispute Resolution Section last Spring; mediation practice reflection groups; and legislative initiatives, like the effort to enact in New York the Uniform Mediation Act to provide for a mediation privilege adopted by eleven other states.

Mediation, as a confidential, facilitated negotiation, unlike its dispute resolution cousins arbitration and litigation, does not involve a neutral third party's making a determination, award, verdict or judgment that is binding on the parties. Rather than evaluate or tell the parties what to do, the mediator facilitates the parties' own communication and decision making. Mediation is binding only to the same extent that any negotiation is binding: when a deal is struck and memorialized in writing, that becomes a binding agreement. As with the settlement of any matter, the agreement can have bells and whistles—requiring the filing a stipulation of dismissal or discontinuance, papers attendant to a security agreement, including an affidavit of confession of judgment, if appropriate, notes, liens, mortgages, or any other document that the parties and their counsel might require to complete or enforce the agreement transaction.

Evaluation and Facilitation Considered

Mediation has also been distinguished from neutral evaluation. In the latter process, parties, typically with counsel, present a preview to the mediator of what their case might be like at trial. The neutral evaluator, after discussion that can include caucus, gives the parties a preview of the judicial outcome. This is a predictive exercise in which it is best that the evaluator draw on meaningful expertise. The parties can then use that prediction

to clarify the "shadow of the law" under which they are bargaining and, in its light, strike a deal. In former Magistrate Judge Wayne Brazil's model, before sharing the prediction, the evaluator advises the parties that he or she has written it down and offers, before delivering the message, to facilitate their negotiation of a settlement, essentially shifting to the role of mediator. If the parties reach an impasse, at that point, the evaluation can be shared, and the mediation can continue.

During the 1990s there was significant debate in the mediation field on whether it is ever appropriate for a mediator to provide the parties with an evaluation. This debate was prompted by a seminal article by Professor Len Riskin,[3] which presents a "grid" for classifying mediator orientations, types and strategies. Riskin's grid identifies two major spectrums: broad/narrow focus, and evaluative and directive/facilitative approach. A narrowly focused mediator might attend only to the legal question, ignoring, discarding, or directing discussions away from "irrelevant" emotions, values, business considerations, or even broader societal concerns—all of which are recognized as meaningful by those who maintain a broad focus. The other spectrum distinction shows some mediators as being more evaluative and directive—sharing with parties their own views on the merits of a case, or even, where broadly focused, their views on the moral, just, fair, economically sound, or appropriate thing to do and urging the parties to take a particular course of action. Other mediators, Riskin found, tended to refrain from sharing their view or telling the parties what to do. Their function was primarily to facilitate the parties' own reflection and analysis, decision making and communication. Responding to Riskin's article, Professors Kimberly Kovach and Lela Love published a piece calling "evaluative mediation" an oxymoron.[4] Their view was that the mediator's role is to help the parties with their own problem solving, facilitating their own thinking and communication, but not to drive them to the mediator's solution or, especially, to act as a private judge.

Adding Transformation and Understanding to the Mix

This debate was enriched by the transformative mediation and understanding-based mediation schools. The transformatives urge that the mediator's role was not even to be a problem solver or to get a settlement. Rather the mediator's purpose is twofold, fostering empowerment and recognition.[5] Transformative mediators take a micro focus, following the parties with reflective feedback wherever their discussion leads, and, as they proceed, noting opportunities along the way to make choices (empowerment) or for understanding and acknowledging the other. Transformative theory sees disputing parties as feeling embattled, weakened, and even "ugly," and as uncomfortable with the condition of dispute. Disputes are crises in relationship affecting the quality of the parties' communication. The theory is that when parties begin seeing opportunities to make choices, they feel more empowered. As empowerment increases, parties can shift from defensiveness to recognition of the other. The growth of empathy is the "transformation" for which this school bears its name. As this occurs, relationship and communication are enhanced and disputes tend to resolve themselves. This approach has particularly taken hold for use in family, neighbor, and embedded employment disputes—where there are obvious continuing relationships.

The understanding-based model emphasizes that parties are in conflict together and can resolve it together, by a growth in understanding.[6] The most controversial aspect of this approach is Himmelstein's and Friedman's insistence on using joint session only in mediation, eschewing caucus. Caucuses are confidential meetings of fewer than all participants in a mediation. Himmelstein's and Friedman's concern is that caucus takes parties away from jointly resolving their conflict and makes the mediator the bearer of critical information unknown to one or more of the parties. A caucus process might produce a "fix" with a settlement. But it risks being one imposed from without, maintaining the barriers between the parties. It might not resolve their fundamental conflict in the way that occurs with mutual decisionmaking as a result of deepened understanding, which produces a shift in the parties' understanding of their "own" reality. Critics of Himmelstein and Friedman observe that disputing parties might prefer to express certain views independently or to maintain separateness for the sake of reflection and decision making. Moreover, caucus enables the mediator to give feedback in a manner that does not put the recipient of the mediator's comments in an awkward spot. In caucus, mediator and party can metaphorically sit on the same side of the table and wonder together about possible outcomes of a case or possible deal packages—all of this without putting that party on the spot.

The 360-Degree Mediator

Many providers today consider themselves 360 degree[7] mediators, maintaining a broad focus, utilizing facilitative skills, raising opportunities for empowerment and recognition, facilitating the parties' own evaluation, even giving evaluative feedback when appropriate, and utilizing both joint sessions and caucus.

Case and Mediator Selection as Guided by an Understanding of Mediation

Understanding the debate and divergences in mediation theory and practice, and the opportunities available in mediation, enables counsel to make sophisticated choices in designing mediation clauses for contracts, selecting a mediator, determining if and when a matter is appropriate and ripe for mediation, and in effectively rep-

resenting parties in the mediation process. If the matter is an embedded employment dispute, primarily involving an ongoing relationship with significant communication problems and low economic stakes, transformative mediation might be the best way to go. In these circumstances the form of the settlement might matter far less than healing the relationship and improving the parties' communication. The United States Postal Service set up a program to handle Equal Employment Opportunity complaints using transformative mediation.[8] In other matters where ongoing relationship is important and where both parties are willing to invest in the greater time that a joint-session-only approach might take, counsel might opt for the Himmelstein Friedman understanding-based model. In a scenario where a partnership dispute has devolved into a costly accounting proceeding that threatens to kill the goose that lays the golden egg, restructuring of their business relationship might be the most effective path to resolution. Wise counsel might then seek a mediator who will have a broad enough focus to shift from legal to business considerations, put on a "business head," and activate the parties to develop creative options. If two commercial parties—with little emotional investment in the dispute by party representatives and counsel alike, and ample capacity to bear the cost of litigation—have a *bona fide* difference of opinion on how a point of law affects their respective rights, it might make sense to select a mediator with capacity and credibility to facilitate the parties' analysis of this legal point, or, when and if appropriate, add some reliable evaluative feedback.

Disputes are complex social animals. At times parties might believe they are stuck on a point of law when, in fact, it is a point of pride. For this reason, it is often wise to seek a mediator with "360" capacity, who can make insightful assessments on all fronts, work with the participants to design an appropriate process, and adapt as the mediation process and circumstances require. It is not a bad idea for counsel to determine the mediator's background or orientation through talk with others who have used that mediator or an initial, frank discussion with the mediator at time of selection or in the initial pre-mediation conference.

What Mediators Can Do for You

Mediators may play many functions to lubricate the wheels of a negotiation or to fine-tune the channel of dialogue. Whether it is a hard-core commercial dispute or a family or employment relationship matter, parties—and even counsel—might have strong feelings about the matter or their counterparties. Mediators are trained to facilitate difficult discussions and to use "active listening" skills—validating, empathizing, clarifying, summarizing and reflecting back statements by the participants. Good listening engenders satisfaction in the speaker, a sense of being heard, acknowledged and understood. From a utilitarian standpoint, permitting emotional expression enables people to get past feelings of frustration, disappointment, anger and despair and engage constructively in problem solving to get a dispute resolved. From a non-utilitarian standpoint, good listening creates opportunities for realizing meaning and humane regard for one another. Either way, where emotions are drivers in a dispute, mediation is the process of choice—a richer forum for expression than the witness chair under cross-examination, with objections on relevance and materiality, motions to strike, and directions to limit the answer to just the question that was asked.

Mediators can also assist the parties with a joint problem solving, mutual gains approach—the "win/win" popularized by Fisher & Ury's book "Getting to Yes." Also known as integrative bargaining, this approach seeks to expand the pie by identifying the issues, the needs and interests of *all* parties, and then seeking options that will meet as many of those needs and interests as fully as possible, thus resolving the issues in dispute. Options proposed during this process can be judged and supported by identifying or developing standards—principles with which all parties can agree and which take the matter away from a subjective battle. Standards can include fairness, legality, doability, equity, empathy, durability or whatever principle the parties can adopt. Good communication and cooperation enables parties to learn about one another's needs and interests and be effective in brainstorming and generating options, Thus, Fisher and Ury recommend separating the people from the problem, being "soft" on the people and hard (focused and analytic) on the issues. Counsel might seek mediators who are effective in facilitating this problem solving.

Another Fisher and Ury concept is the BATNA, the best alternative to a negotiated agreement. Considering what might happen if a party does not take a proposed deal is a good way to judge whether the deal is worth taking. In the legal context, the litigation alternative can also be analyzed with a focus on risk and transaction cost. Here, effective mediators might gather information in advance of the mediation session, through phone conferences with counsel and review of pre-mediation statements laying out key facts, any critical law, settlement history and proposals, and annexing useful documents. These pre-mediation communications can also address process issues, making sure the right people with full authority attend, and learning about inter-party dynamics to be sure the process is designed to maximize its effectiveness. Thus, finding a mediator who can be adept at gathering the key information, facilitating a good analysis of the case at the mediation, and helping the parties assess risk and transaction costs (fees for lawyers and witnesses and related costs) can be key. At times, where one's own client, or the other party, is having difficulty hearing tough news about litigation prospects from its legal champion, "reality testing" by a mediator might open the client's eyes to legitimate case risks and prompt more realistic settlement discussions.

Benefits and Promise of Mediation

Properly conducted, mediation offers parties a host of benefits. It can dramatically cut the cost of litigation. This confidential process can reduce some litigation side effects, such as reputational damage through the play of the press and media, and the more localized disruption of griping at the water cooler or removing key employees from work to answer discovery demands, undergo witness preparation, and appear to testify or observe in depositions or trial. It provides a forum for much richer communications, and for addressing a host of feelings, issues, principles and concerns that could never directly be considered or respectfully and humanely given their due at trial. It provides opportunities to improve or restore relationships. Moreover, mediation, like negotiation, permits parties to design their own creative solutions, taking into consideration economic and other factors, to arrive at more doable, durable and mutually acceptable resolutions than a judgment that cannot be collected due to evasion or the lack of funds.

"It [mediation] supports compassion, creativity and realism as parties work together to understand each other and their needs, constraints, and context."

Ultimately, mediation, which has at its core the principle of party self-determination, wrests decision making from third parties—judge, jury, arbitrator—and restores it to the parties. Indeed, while lawyers can still play a very significant role in mediation—as process guides, counselors, and even advocates in opening session or later in laying out the litigation risk to the other side—parties do not live or die on competence of counsel, witnesses, or other agents in presenting a case; again, power lies with the parties in the mediation outcome.

Mediation offers a depth of possibility and sensitivity to truth and values consistent with the philosophical resources and developments in our history of ideas. An underlying humanism puts people, not external systems or things, in the driver's seat. With a valuing of people comes recognition of all aspects of the person, not just that which is legally relevant. Yet, to quote Frank Sander and Robert Mnookin, we bargain in the shadow of the law. The mediation sphere is a place where the norms of both justice and harmony can work themselves out in a manner that fits the actual parties and their circumstances. With recognition of the significance of all parties' perceptions, the philosophical advances of phenomenology come into play. The individual, business and circumstantial focus bears with it the influence of pragmatism. Business considerations embrace our theories of economics. Ultimately, by affirming the parties' joint decision making, mediation celebrates our freedom and our interdependence and our relatedness. It supports compassion, creativity and realism as parties work together to understand each another and their needs, constraints, and context. It offers the possibility of holistic solutions. Fundamentally non-coercive and fostering party responsibility, mediation offers participants a chance to be their best selves and to arrive at superior resolutions.

Endnotes

1. As discussed *infra*, proponents of transformative mediation do not see the mediator's role as assisting in problem solving or in settlement of a dispute. Rather, the role is to foster empowerment and recognition. Similarly in Himmelstein and Friedman's model, understanding is the key. Accordingly, for those schools, non-utilitarian "dialogue," as an encounter of persons, might be a better description of the mode of communication that is facilitated by the mediator. A rich description of dialogue is found in the writings of Martin Buber, such as "I and Thou." *See, e.g.*, Martin Buber: The Life of Dialogue by Maurice S. Friedman (The University of Chicago Press, 1955, reprinted 1960 by Harpers, N.Y. as a First Harper Torchbook edition, and available online at: http://www.religion-online.org/showbook.asp?title=459).
2. E.g., The Association for Conflict Resolution (ACR), a merged entity of SPIDR, CreNet and ACR.
3. Riskin, L., *Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed*, Harvard Negotiation L. Rev., vol. 1:7, Spring 1996, available online at: http://www.mediate.com/pdf/riskinL2_Cfm.pdf. An earlier version of this piece was published by Riskin, L., *Mediators' Orientations, Strategies and Techniques*, Alternatives to the High Cost of Litigation, at 111, September 1994.
4. Kovach, K. K. and Love, L. P., *"Evaluative" Mediation is an Oxymoron*, CPR Institute for Dispute Resolution, Alternatives, Vol. 1, no. 3, at 31 et seq., March 1996.
5. The transformative mediation manifesto is "The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition," by Bush, R. A. B. and Folger (J. P., Jossey-Bass, Inc. 1994).
6. *See*, Friedman, G. and Himmelstein, J., Challenging Conflict: Mediation Through Understanding (ABA 2008).
7. I first heard this term used by Lori Matles.
8. The USPS program is known as REDRESS (Resolve Employment Disputes Reach Equitable Solutions Swiftly). Instituted over a decade ago when the Postal Service had nearly a million employees, this program significantly reduced costs of administering EEO claims, and produced settlement of the vast majority of claims with a very high user satisfaction rate and enhancement of employee morale.

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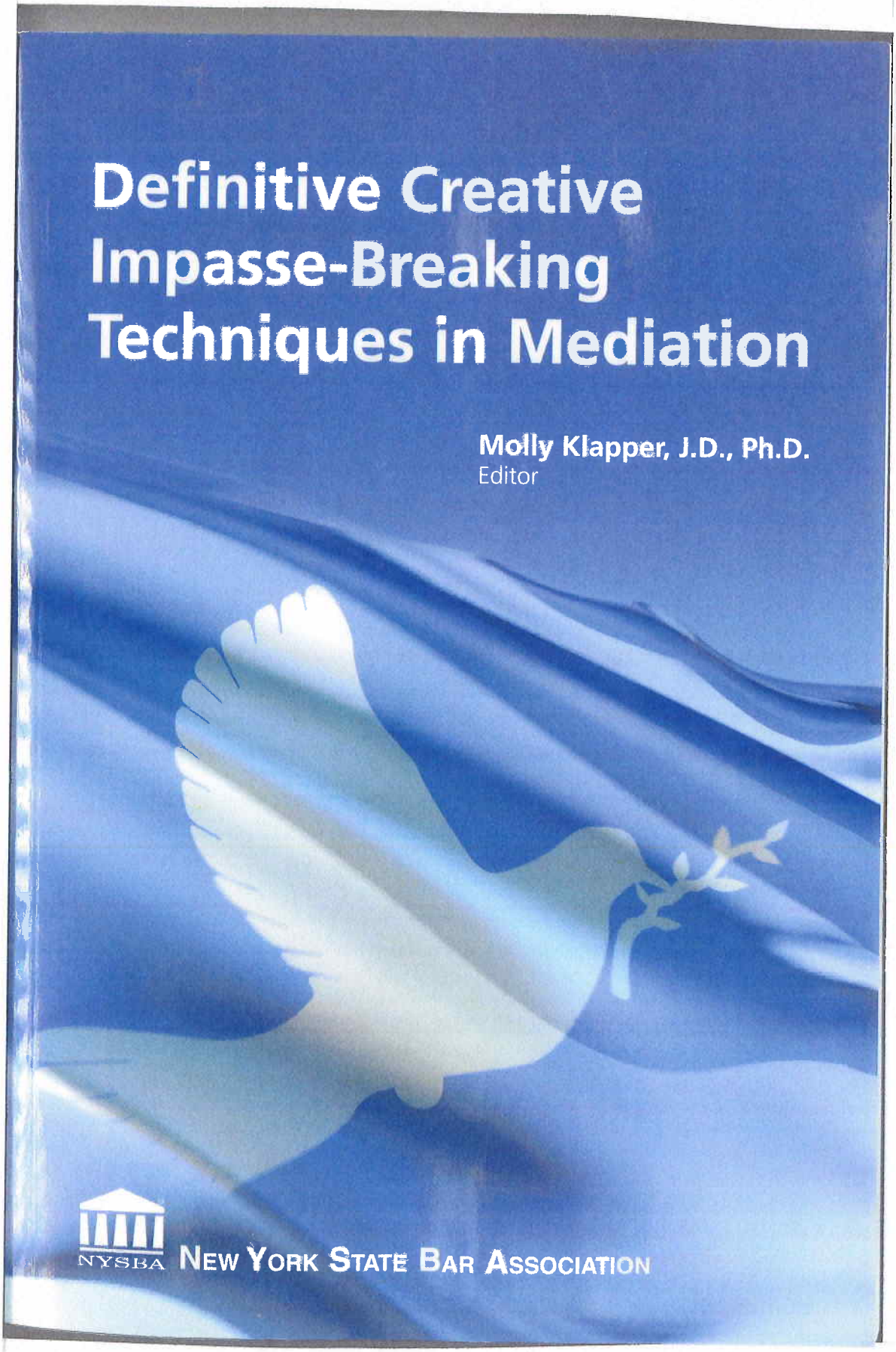
Definitive Creative Impasse-Breaking Techniques in Mediation
Molly Klapper, J.D., Ph.D.
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[15.0] I. MULTI-PARTY MEDIATIONS

One of a mediator's great joys, challenges and justifications can be found in the multi-party matter. Multi-party conflicts or disputes arise in every conceivable dimension of society. Take, for example, a school board's decision in renewing a teachers' union contract. Each board member can have diverse views and interests; within the union there might be different views, interest groups and political factions; school administrators have different views and interests; and the public itself—parents, students, and taxpayers affected by the decision—consists of multiple and divergent stakeholders. Zoning board decisions, end-of-life decisions involving large families (perhaps with second marriages), plant closings, any union negotiation, environmental resource use decisions—all involve multiple parties. Indeed, moving from business into municipal, state, national or international arenas, the set of multi-party disputes casts a wide net.

The broad array of multi-party disputes produces a wide range of issues, many of which fall outside the focus of this chapter but bear mention. These include the basic problem of convening. Identifying interest groups, selecting their representatives in what would otherwise be an impossibly unwieldy discussion, and managing intraparty communication are just a few of the threshold challenges in mediating these matters. As environmental mediators know all too well, it can even be a challenge to find a common legal framework that creates a shared sense of risk. Upstream users of water in Vermont might affect the availability or condition of water in downstream states and might eventually have an impact on the environment and users of natural resources as far south as the Chesapeake Bay. Local authorities in the downstream states might have no authority to regulate upstate users. Environmental Protection Agency regulators have, at times, convened sessions of stakeholders for negotiated rulemaking ("reg/neg") to address these problems.[1]

1 These observations were raised by David Batson of the EPA and others at an all-day conference, "Changing Times, Changing Legal Practice: Effective Legal Strategies to Resolve New Environmental Disputes," held at The University Club in New York City, Nov. 17, 2009. The conference, presented by Pace Law School's Kheel Center on the Resolution of Environmental Interest Disputes, included Lowenstein Sandler PC, Leyland Alliance and Wilson Elser Moskowitz Edelman & Dicker LLP as co-sponsors, and had a good number of participating sponsors, including the Federal Bar Association's Alternative Dispute Resolution Section and its Environment, Energy, and Natural Resources Section; the American Bar Association Section of Environment, Energy, and Resources; the Environmental Law Institute; the New York City Bar Environmental Law Committee; Pace Law School Center for Environmental Legal Studies; and the New York State Bar Association's Dispute Resolution Section.

Several years ago, the Conflict Prevention and Resolution Institute's (CPR) annual meeting featured an exercise in facilitated multi-party negotiation, drawing on the hypothetical of rebuilding the World Trade Center (WTC). It was an excellent display of the unique features of multi-party negotiations and the ways in which they benefit from a neutral facilitator.[2] In that post-9/11 scenario, five divergent groups struggled to arrive at a mutually acceptable solution to questions of how the WTC site will be used (memorial or commercial), who will pay for the rebuilding, and who will get credit for posterity. This negotiation was held in the shadow of media coverage. Three of the five stakeholders (victims' families, state, and city, as well as insurers and developer) involved numerous members. In view of the pressure applied by constituents "outside the room," it was important to be able to structure a constructive discussion in which all could strive for consensus.

This WTC scenario underscores the value a neutral party might bring. The neutral can help develop a good structure for talks, identify interests and issues, help in setting and revising the agenda, conduct caucuses, deal with the formation of independent cabals, assist in brainstorming, help with reality testing, and maintain constructive focus as the terms of this multi-factorial deal are hammered out. One enhanced challenge for the mediator in this type of negotiation is working the balance between remaining a background player—a facilitator, drawing out the parties' interests and thoughts for resolution—while exerting sufficient influence to maintain a structured and progressive discussion. There is a tangible risk that relations and communications will fray where each group excessively asserts its own interest and stalls consensus-seeking talks by fili-

2 Rebuilding the World Trade Center Site: An Exercise in Multi-Party Negotiation, presented by Professor Lawrence Susskind of the Harvard Law School Program on Negotiation, draws on taped segments of a 90-minute exercise used by participants in the January 2007 Annual Meeting of CPR (now the International Institute for Conflict Prevention and Resolution). Each of the multiple groups consisted of six participants, representing (1) the families of those who died as a result of the collapse of the World Trade Center buildings on Sept. 11, 2001; (2) the Port Authority of New York and New Jersey, representing the owner of that land; (3) the City of New York: (4) the Silverstein group, which had a long-term lease on the site and was responsible for rental payments and rebuilding; (5) the insurer of the collapsed buildings; and (6) a facilitator charged with fostering a constructive negotiation. The tape and associated materials can be purchased at http://www.pon.org/catalog/product_info.php?products_id=417. This author was part of a CPR working group that developed the initial problem, under the guidance of Peter Phillips of CPR. The raw material for that program was reworked and refined by Professor Susskind and his students prior to the January 2007 CPR Annual Meeting. An obvious takeaway from this role-playing is that—with divergent interest groups under public scrutiny, the tendency to form caucuses among fewer than all participants, and the need for consensus—the participants benefited greatly from having a facilitator manage the discussion.

bustering, table pounding, or withdrawal. The mediator brings value here by developing a transparent process while preserving the ability to caucus and, fundamentally, by keeping people at the table. With all of this activity, the artful mediator is challenged to keep the "less is more" philosophy of neutral intervention close at hand.

Shifting from the host of public and community disputes and deal making, we now turn to the realm of civil litigation. Perhaps first in mind for litigators is the multi-defendant case—for example, construction cases, or third-party liability matters—where multiple defendants and third- or fourth-party defendants have been added to the fracas. Often, insurers are involved. Similarly, there is the class action or its variant, the multi-plaintiff case. Beyond these, the areas where multiple parties and interest groups are involved in litigation are legion.

[15.1] II. THE CONSENSUS-BASED RISK ALLOCATION MODEL

Civil litigators are all too familiar with one phenomenon in the multi-defendant case: mutual finger-pointing. When asked who bears responsibility for a particular occurrence or loss, defendants have a tendency to direct attention away from themselves and seek to shift the burden of payment onto one or more of the other defendants. In construction-related cases, or the third-party insurance world in general, this is a frequent occurrence. Often, counsel or claims adjusters will enter a negotiation with a predetermined percentage they believe their company should bear relative to the other defendants. Moreover, they have set views on the percentage responsibility the other parties should bear as well—particularly party X, whom they deem to be the chief target, or party Y, who was in a position similar to their own. This can generate feelings among professionals not unlike sibling rivalry.

Over the course of several mediations in which this common phenomenon arose, I developed and refined an approach that has proven to be consistently effective in extricating multiple defendants from the quagmire caused by mutual finger-pointing. This approach can be termed a "consensus-based-risk-allocation model." It can be seen as an effort to garner information from the parties themselves and to have the solution to their imbroglio emerge from their own thought processes, rather than have it independently developed and pronounced by the mediator. Because it involves an amalgamation of their collective thoughts, it is seen as consensus based. It is termed a "risk allocation" model because it involves the thought processes of all defendants (including counsel and insurance

representatives) in calculating how risk of loss at trial should be assessed and allocated among all of the defendants.

Before describing this process, one social-psychological phenomenon bears noting: Defendants can get hung up on relative percentages and looking over their shoulders at what the other defendants are contributing. Dealing with hard dollars can help disengage defendants from this inter-party struggle. The consensus-based risk allocation model is designed to shift parties' focus from percentages to hard dollars and to focus each defendant on its own pot rather than the other defendants'. This helps parties move from stalemate to progress.

The procedure is fairly straightforward. First comes preparation and diagnosis. I typically hold an initial joint session with all parties and one or more caucuses (private, confidential meetings with fewer than all parties). Because multi-defendant negotiations are cumbersome, plaintiffs often are surprisingly willing to share their more or less realistic desired settlement number earlier on in the process, to enable the mediator to be effective. This is essential to the method's success. During the initial caucuses—first with the entire group of defendants and then with subgroups of defendants—the mutual finger-pointing becomes apparent, producing its diagnosis. To address this problem, I hold a series of caucuses with each of the defendants. In each caucus I ask the same set of questions:

1. What is the likelihood the plaintiff will win at trial and, if so, how much?

2. What percentage liability will be allocated to each defendant?

3. How much will it cost to try this case?

Answers to these questions are recorded on an Excel spreadsheet, with a horizontal row for each defendant's answer and a vertical column for each defendant discussed. Examples of these spreadsheet templates are presented in tables 1, 2, and 3.[3] Question 1 is developed a bit further, to account for any comparative share allocated to a successful plaintiff. A final row is added to take the averages of the input from all defendants.

By the time this approach is used, there has been back-and-forth, in joint session and via initial caucuses, on all parties' views of the strengths and weaknesses of the case, addressing both liability and damages. Risk

3 See tables 1, 2 and 3 in the appendix at the end of this chapter.

analysis, if needed to develop greater realism, can be performed before or in conjunction with the discussions in these caucuses. My general observation is that by the time we have gathered answers to the above three questions, the parties have reached a certain degree of realism and have developed some trust in the process and the mediator.

When the interviews have been completed, I develop three different types of "pots," or economic scenarios.

[15.2] A. Trial Outcome and Transaction Costs

Using the trial-outcome predictions recorded on the Excel spreadsheet, I calculate the average of the amount the plaintiff is predicted to win. Thus, for example, if there are ten defendants, there will be ten educated guesses of damages at trial, which can be averaged. By luck of the draw, in most instances where I have used this method, there has been minimal doubt that the plaintiff would win, but exuberant disagreement on the allocation of responsibility among defendants. Therefore, in these scenarios, there is little need to apply a total loss risk factor to the averaged damages number. See, for example, the results reflected in table 4.[4]

In table 4, 1 is assigned to the "Plaintiff Wins" column, serving as a 100% type of multiple against the damages and any plaintiff's comparative liability share. If, however, there were a strongly perceived risk that the plaintiff would have an outright loss, that risk factor column can also be completed and averaged. The resultant average can be applied to the average damages number to produce the defendants' collective view on case value. An example of this additional calculation is displayed in table 5.[5]

The net result, with either set of expectations on the plaintiff's likelihood of winning at trial, is the defendants' collective assessment of case value. By itself, this could be used as a framework for negotiations.

Beyond this, the predicted defense costs can also be calculated as in table 6.[6]

Significantly, one might make the common observation that collective transaction costs outweigh the risk of loss at trial. These costs are properly cumulated rather than averaged. When combined with trial outcome,

4 See table 4 in the appendix at the end of this chapter.

5 See table 5 in the appendix at the end of this chapter.

6 See table 6 in the appendix at the end of this chapter.

they give us the collective sense of the combined exposure to damages and transaction costs. An example is shown in table 7,[7] positing the simplified case of all the defendants' recognizing that the plaintiff will win something at trial. Figures for this table are drawn from tables 4 and 6.

If there is any doubt about the candor of the various defendants' own cost estimates, the costs can be averaged for use when discussing likely costs with a particular defendant (see table 6). There is also the more cumbersome approach of including costs for every defendant in the third question during the initial interviews of each defendant and using those figures. This is typically unnecessary but can be used to produce the numbers to fill in the Costs Through Trial column of table 7.

With the development of the above-noted numbers, the mediator is in a better position for discussing risk analysis and transaction cost analysis with any defendant.

[15.3] B. Probable Settlement Number

It also pays to make note of the amount the plaintiff needs to settle the case. The first set of numbers, on case outcome and transaction costs, can now be used to reassess the realism of the plaintiff's probable settlement number. Before holding further discussions with the defendants, I might reengage the plaintiff in an exploratory caucus to get a better sense of what is needed to settle the case. Of course, it is important to be careful not to disclose to the plaintiff confidential information gathered in the defendant caucuses. Nevertheless, all of the information supports the development of an educated guess at a probable settlement number. For purposes of our examples, let us assume that the plaintiff would settle the case for $1.5 million.[8]

7 See table 7 in the appendix at the end of this chapter.

8 While this is just a hypothetical, given the assumptions in tables 4–6, this is not an unrealistic number. $1.5 million is 75% of the average projected case outcome where the plaintiff wins every time ($2 million, per table 4), and is a lesser discount off the projection where the plaintiff is seen as having some risk of outright loss (approximately $1.65 million, per table 5). There are benefits in having present use of funds, as opposed to waiting for trial (although this is somewhat offset by New York's 9% judgment interest rate). There are also benefits to the plaintiff's counsel, who often operates on a contingent fee, in spending less time on the case, avoiding outlay of expenses on experts and other litigation-related costs, and in trading an uncertain win after trial and possible appeal for the certainty of a settlement. Of course, we are assuming that the entire group of defendants has not radically underestimated realistic damages at trial. Use of risk analysis in the caucuses where this information is gathered can help with quality control for these figures.

[15.4] C. Graduated, Lesser Offer Pot (GLOP)

The goal of the overall exercise is to arrive at a proposal that might work for all parties, and that will be perceived by the defendants as credible and savvy. The alternative dispute resolution community is well acquainted with the concepts of integrative bargaining and principled negotiation. Fisher, Ury, and the Harvard Negotiation School have alerted us to the drawbacks of positional, as opposed to interest-based, bargaining.[9] Nevertheless, it is typical of negotiations for cases of this sort to occur in stages, with a pattern of alternating decreasing demands and increasing offers. Thus, it is wise for the mediator to develop two or more smaller numbers, one smaller than the next, that can be used as initial and subsequent offers to the plaintiff on behalf of all defendants. Developing these numbers will enhance the mediator's overall credibility with the defendants. For purposes of our example, where $1.5 million is the projected settlement pot, let us call the smallest GLOP $1 million and the next GLOP $1.25 million.[10]

Next it is time to develop each defendant's share of the settlement pot. Using the information gathered on the Excel spreadsheet, the mediator now derives the average of all the defendants' views concerning each defendant's relative liability. An example of this approach can be seen in table 8.[11]

The average for each defendant is shown in the bottom row. The right-hand column may be used as a check, to be sure that the percentages are correct. The total of all percentages should be 100%, shown as "1" in that column. Any comparative share for the plaintiff has already been worked into the trial outcome, projected settlement pot and GLOP numbers.

9 *See, e.g.*, Roger Fisher & William Ury, Getting to YES (2d ed., Penguin 1991).

10 As with the observations in note 8, *supra*, associated with the probable settlement number, one might keep in mind that GLOPs of $1 million and $1.25 million are made in the context of a $2 million projected trial outcome (table 4, where the plaintiff always wins something) or a $1.65 million projected trial outcome (table 5, where the plaintiff is assumed to have some risk of outright loss). These GLOPs represent, at the low end, 50% of the table 4 risk and a lesser discount off the table 5 risk. They nevertheless provide encouragement to the plaintiff with a seven-figure starting offer. As comfort to the defendants, they still represent about only 25% of the defendants' combined case exposure ($4 million, per table 7). It is interesting to observe how factoring in transaction costs widens the zone of savings realized by the defendants and theoretically should encourage them to sweeten the pot for the plaintiff, coming closer to the plaintiff's projected trial outcome. Steve Hochman refers to this effect as the "win-win range."

11 See table 8 in the appendix at the end of this chapter.

As mentioned above, it is important to move the defendants away from thinking in terms of percentages to thinking in terms of their own dollars. Thus, once each defendant's percentage has been obtained, the mediator can create different charts on the Excel spreadsheet for each of the three sets of numbers[12] described above. Let us look, for example, at a chart applying each defendant's percentage to the trial outcome number. We can posit a trial outcome of $2 million and ten defendants collectively assessed to bear the proportionate shares reflected in the averages in table 8; that is, 25%, 20%, 15%, 10%, 10%, 5%, 5%, 5%, 2.5%, and 2.5%. In that scenario, the dollar allocations would be as shown in table 9.[13]

Application of a defendant-specific transaction cost figure would add that defendant's acknowledged defense costs to that defendant's trial outcome number. So, for example, a defendant with a $500,000 trial outcome allocation and a projected $250,000 transaction cost would be assigned a combined projected risk and transaction cost figure of $750,000. Applying the allocation percentages shown in table 8 to the costs recorded in table 6 and the presumed trial outcome quantified in dollars in table 9 produces the total per-defendant case exposure figures shown in table 10.[14]

Again, if the defendant's acknowledged defense cost seems off, an adjacent column could display the sum of that defendant's projected share of trial outcome and average defense costs. Thus, if average defense costs were $400,000, the number for Party A, above, would be $900,000.

There is no need at this stage to add general risk factors. Any meaningful risk factor for the plaintiff should have been worked into the calculation of the plaintiff's projected trial outcome. Risk factors relating to a given defendant's liability already should have been worked into the derivation of that defendant's percentage share. There is a separate question on "spin." What does the mediator do with the old-fashioned hardball negotiator, the consummate low-profile liability ducker, the outright spinmeister? The mediator has some choices here. One is simply to let the numbers do their magic. The greater the number of defendants, the lower the impact of one defendant's outrageous denial of obvious risk. Take, for example, a defendant with an objective risk of 25% liability—let us call that defendant HN, for hardball negotiator. If there are 20 defendants and each assesses HN's liability at 25%, but HN assesses its own liability at

12 The three sets of numbers are trial outcome, projected settlement, and GLOP.

13 See table 9 in the appendix at the end of this chapter.

14 See table 10 in the appendix at the end of this chapter.

5%, the average of the 20 estimates would be 24%, a modest adjustment (see table 11[15]).

Of course, if there were just ten defendants, the average would permit somewhat greater skew. Nevertheless, even with ten defendants, the variance would be just two percentage points, with an average of 23% (see table 12[16]).

At a certain point—say, with five defendants, where the average would be 21% (see table 13[17])—the variance might grow intolerable.

This leads to the question of whether the mediator might make a separate "spinmeister" adjustment. An adjustment of this sort raises all sorts of ethical questions, of course.[18] But before making any such adjustment, it pays to be aware of other social phenomena. First, there is the age-old observation that force begets counterforce. Sometimes, precisely because of his hardball tactics, the hardball negotiator incurs the suspicion and ire of other defendants. This might be reflected in their assessment of that defendant's risk. Of course, if this goes overboard, there is the question of whether a countervailing adjustment is needed. In addition, there is a host of different negotiator personalities involved in any multi-defendant case. There might be one defendant's representative who understands that it objectively bears the lion's share of the risk. This defendant might be eager to resolve the matter. As a consequence, it might be willing to take on even a modest increase in its own portion to be sure that the case settles. That defendant's representative, and others, might be well aware of the hardball curmudgeon and be openly willing to adjust rather than let HN gum up the works. It is helpful to keep in mind throughout these reflections the difference between the trial outcome share and the share that includes transaction costs. There is typically a good amount of fat created by the combined share, which can help justify either an adjustment or failure to make an adjustment.

It grows clear that the issue of whether and, if so, how, to make adjustments is a tricky one. The ideal approach is to make no adjustments or to engage in adjustments as much as possible at the front end, in the initial

15 See table 11 in the appendix at the end of this chapter.

16 See table 12 in the appendix at the end of this chapter.

17 See table 13 in the appendix at the end of this chapter.

18 These questions, relating to candor, transparency, quality of the process, long-term impact on repeat users of the mediator and on the mediator himself or herself, the mediator's role, inter-party fairness, and other issues may be reserved for another article or for a forum discussion.

caucus with each defendant. If adjustments are made, I would feel an obligation to disclose that adjustments of that kind were made when explaining the consensus-based risk allocation model and its results to all defendants.[19]

Returning to our numbers, just as percentages are applied to the trial outcome numbers, so too percentages are applied to the other two sets of numbers—the proposed settlement number and the GLOP. Typically, we copy and paste the first chart and then substitute the alternative assumption—proposed settlement number or GLOP—which, thanks to the magic of Excel, changes the balance of the numbers for each defendant's share. The results are displayed in table 14.[20]

[15.5] III. THE JOINT DEFENDANTS' CONFERENCE CALL

Once all numbers are worked out,[21] I typically hold a joint conference call with all defense counsel. I explain what I did and ask whether the defendants would like to hear the outcome of this experiment. Invariably, all are eager to hear the results. It is important to explain that the settlement assessment and each of the proposed defendants' shares are the result of a collective effort. With their agreement, I let defendants know what the collective proposed settlement pot is, as well as what two or more lesser pots (the GLOP) would be. I then give them the dollar share (not percentage) for each defendant contributing to the pot in question. One variation of this approach is simply to present the lowest pot and explain that while this is not expected to settle the case, it seems like a good start. In all instances, where there is no "spinmeister adjustment," it is important to emphasize that the numbers are entirely a passthrough of the defendant's best estimates. Any adjustment would pose a test of the mediator's tact to communicate this without upsetting the applecart. Defendants can be told that this is essentially the result of their estimates, but that the mediator might have made a "tweak" here or there in order to obtain a workable

19 To the extent a mediator thinks of making adjustments, a result-oriented approach might include the pragmatic consideration of whether the dollar figures for each of the defendants can be obtained from that defendant. This can integrate financial capacity, intransigence, bargaining style, and all sorts of realpolitik factors. Again, it would be ideal to make no adjustment in order to maintain the purity of the model and lessen the predictable gamesmanship that might ensue after the necessary disclosure of the mediator's methodology.

20 See table 14 in the appendix at the end of this chapter.

21 Depending on the circumstances, parties and the numbers involved, "working out the numbers" might also involve making caucus calls to specific defendants to test the waters on the numbers that will be appearing for that defendant in the proposed settlement number and GLOP charts.

package. This balance of transparency and obscurity is an art that actually generates approval and greater acceptance of the result.

Seeking permission is key to obtaining the defendants' buy-in. Beyond this, it is required because the proposed numbers will be presented as the collective result of confidential caucuses and, thus, are based upon confidential information. Not surprisingly, the defendants will have consistently expressed unanimous interest in the outcome.

Typically, defense counsel return to their carriers or clients with a report on this unusual conference call. I will follow up with each of them by phone caucuses or might simply get an email approving of a defendant's share. More often than not, the vast majority of defendants return with approval. At times, there might be a need for further adjustment of one or more shares. This can involve some telephone caucusing and, perhaps, some horse trading with the help of one or more parties who, for one reason or another,[22] have some additional flexibility.

In sum, I deliver to the defendants three packages for presentation to the plaintiff—an initial, a subsequent, and a final pot—identifying, by dollar figure only, each defendant's contribution to each of these three pots. A doable settlement path appears in place of what had been a field of warring soldiers. Through channeling the defendants' own information into reasonable grids, the consensus-based risk allocation model can create productive order out of the chaos of multi-party bargaining sessions.

22 Reasons for flexibility could include that they have assessed their risk as worse than the collective number would suggest, that their combined risk and transaction cost well exceed the proposed number, that they have greater distance and recognize one or more recalcitrant parties as potentially holding up a good settlement or as possibly having even less risk than has been assessed for them.

APPENDIX

Table 1

	% Chance Plaintiff Wins	Damages	Plaintiff's Comparative Share	Resulting Case Value
Party A				
Party B				
Party C				
Party D				
Party E				
Party F				
Party G				
Party H				
Party I				
Party J				
Average				

Table 2

	Percentage Allocations									
	Party A	Party B	Party C	Party D	Party E	Party F	Party G	Party H	Party I	Party J
Party A										
Party B										
Party C										
Party D										
Party E										
Party F										
Party G										
Party H										
Party I										
Party J										
Average										

Table 3

	Costs Through Trial
Party A	
Party B	
Party C	
Party D	
Party E	
Party F	
Party G	
Party H	
Party I	
Party J	
Average	

Table 4

Assumption: Plaintiff Wins Every Time				
	Plaintiff Wins	Damages	Plaintiff Share	Resulting Case Value
Party A	1	$ 2,800,000.00	0.333333333	$ 1,866,666.67
Party B	1	$ 2,300,000.00	0.25	$ 1,725,000.00
Party C	1	$ 2,775,000.00	0.2	$ 2,220,000.00
Party D	1	$ 2,500,000.00	0.25	$ 1,875,000.00
Party E	1	$ 2,250,000.00	0.33	$ 1,507,500.00
Party F	1	$ 2,300,000.00	0.25	$ 1,725,000.00
Party G	1	$ 3,250,000.00	0.333333333	$ 2,166,666.67
Party H	1	$ 3,750,000.00	0.25	$ 2,812,500.00
Party I	1	$ 2,000,000.00	0.5	$ 1,000,000.00
Party J	1	$ 3,100,000.00	0	$ 3,100,000.00
Averages	1	$ 2,702,500.00	0.269666667	$ 1,999,833.33
			Case Value Rounded Up	$ 2,000,000.00

Table 5

Assumption: Varying Views of Plaintiff's Likelihood of Getting Any Damages/ Winning Anything				
	Plaintiff Wins	Damages	Plaintiff's Share	Resulting Case Value
Party A	0.75	$ 2,800,000.00	0.333333333	$ 1,400,000.00
Party B	0.8	$ 2,300,000.00	0.25	$ 1,380,000.00
Party C	0.9	$ 2,775,000.00	0.2	$ 1,998,000.00
Party D	1	$ 2,500,000.00	0.25	$ 1,875,000.00
Party E	1	$ 2,250,000.00	0.33	$ 1,507,500.00
Party F	0.66	$ 2,300,000.00	0.25	$ 1,138,500.00
Party G	0.5	$ 3,250,000.00	0.333333333	$ 1,083,333.33
Party H	1	$ 3,750,000.00	0.25	$ 2,812,500.00
Party I	0.5	$ 2,000,000.00	0.5	$ 500,000.00
Party J	0.9	$ 3,100,000.00	0	$ 2,790,000.00
Averages	0.801	$ 2,702,500.00	0.269666667	$ 1,648,483.33

Table 6

	Costs Through Trial
Party A	$ 250,000.00
Party B	$ 200,000.00
Party C	$ 250,000.00
Party D	$ 200,000.00
Party E	$ 150,000.00
Party F	$ 175,000.00
Party G	$ 250,000.00
Party H	$ 250,000.00
Party I	$ 75,000.00
Party J	$ 250,000.00
Average	$ 205,000.00
Rounded Average:	$ 200,000.00

Table 7

Assumption: Plaintiff Wins Every Time			
	Trial Outcome	Costs Through Trial	Combined Case Exposure
Party A	$ 1,866,666.67	$ 250,000.00	$ 2,116,666.67
Party B	$ 1,725,000.00	$ 200,000.00	$ 1,925,000.00
Party C	$ 2,220,000.00	$ 250,000.00	$ 2,470,000.00
Party D	$ 1,875,000.00	$ 200,000.00	$ 2,075,000.00
Party E	$ 1,507,500.00	$ 150,000.00	$ 1,657,500.00
Party F	$ 1,725,000.00	$ 175,000.00	$ 1,900,000.00
Party G	$ 2,166,666.67	$ 250,000.00	$ 2,416,666.67
Party H	$ 2,812,500.00	$ 250,000.00	$ 3,062,500.00
Party I	$ 1,000,000.00	$ 75,000.00	$ 1,075,000.00
Party J	$ 3,100,000.00	$ 250,000.00	$ 3,350,000.00
Av/Total	$ 1,999,833.33	$ 2,050,000.00	$ 4,049,833.33

Table 8

	Percentage Allocations										
	Party A	Party B	Party C	Party D	Party E	Party F	Party G	Party H	Party I	Party J	Total Percentage
Party A	0.2	0.25	0.15	0.1	0.1	0.05	0.05	0.05	0.025	0.025	1
Party B	0.3	0.15	0.2	0.1	0.1	0.05	0.025	0.05	0	0.025	1
Party C	0.35	0.25	0.1	0.075	0.1	0	0.05	0.025	0.025	0.025	1
Party D	0.2	0.2	0.15	0.1	0.1	0.1	0.05	0.05	0.025	0.025	1
Party E	0.2	0.15	0.2	0.125	0.1	0.05	0.075	0.075	0.025	0	1
Party F	0.25	0.2	0.15	0.1	0.1	0.05	0.05	0.05	0.025	0.025	1
Party G	0.25	0.25	0.1	0.125	0.075	0.05	0.025	0.05	0.025	0.05	1
Party H	0.2	0.15	0.2	0.075	0.125	0.05	0.075	0.05	0.05	0.025	1
Party I	0.3	0.2	0.1	0.1	0.1	0.05	0.05	0.05	0	0.05	1
Party J	0.25	0.2	0.15	0.1	0.1	0.05	0.05	0.05	0.05	0	1
Average	0.25	0.2	0.15	0.1	0.1	0.05	0.05	0.05	0.025	0.025	1

Table 9

	Trial Outcome
Party A	$ 500,000.00
Party B	$ 400,000.00
Party C	$ 300,000.00
Party D	$ 200,000.00
Party E	$ 200,000.00
Party F	$ 100,000.00
Party G	$ 100,000.00
Party H	$ 100,000.00
Party I	$ 50,000.00
Party J	$ 50,000.00
TOTALS:	$ 2,000,000.00

Table 10

	Trial Outcome & Costs
Party A	$ 750,000.00
Party B	$ 600,000.00
Party C	$ 550,000.00
Party D	$ 400,000.00
Party E	$ 350,000.00
Party F	$ 275,000.00
Party G	$ 350,000.00
Party H	$ 350,000.00
Party I	$ 125,000.00
Party J	$ 300,000.00
TOTALS:	$ 4,050,000.00

Table 11

	Percentage Allocations
	HN
Party A (HN)	0.05
Party B	0.25
Party C	0.25
Party D	0.25
Party E	0.25
Party F	0.25
Party G	0.25
Party H	0.25
Party I	0.25
Party J	0.25
Party K	0.25
Party L	0.25
Party M	0.25
Party N	0.25
Party O	0.25
Party P	0.25
Party Q	0.25
Party R	0.25
Party S	0.25
Party T	0.25
Average	0.24

Table 12

	Percentage Allocations
	HN
Party A (HN)	0.05
Party B	0.25
Party C	0.25
Party D	0.25
Party E	0.25
Party F	0.25
Party G	0.25
Party H	0.25
Party I	0.25
Party J	0.25
Average	0.23

Table 13

	Percentage Allocations
	HN
Party A (HN)	0.05
Party B	0.25
Party C	0.25
Party D	0.25
Party E	0.25
Average	0.21

Table 14

	Trial Outcome	Trial Outcome & Costs	Projected Settlement	Smallest GLOP	Largest GLOP
Party A	$ 500,000.00	$ 750,000.00	$ 375,000.00	$ 250,000.00	$ 312,500.00
Party B	$ 400,000.00	$ 600,000.00	$ 300,000.00	$ 200,000.00	$ 250,000.00
Party C	$ 300,000.00	$ 550,000.00	$ 255,000.00	$ 150,000.00	$ 187,500.00
Party D	$ 200,000.00	$ 400,000.00	$ 150,000.00	$ 100,000.00	$ 125,000.00
Party E	$ 200,000.00	$ 350,000.00	$ 150,000.00	$ 100,000.00	$ 125,000.00
Party F	$ 100,000.00	$ 275,000.00	$ 75,000.00	$ 50,000.00	$ 62,500.00
Party G	$ 100,000.00	$ 350,000.00	$ 75,000.00	$ 50,000.00	$ 62,500.00
Party H	$ 100,000.00	$ 350,000.00	$ 75,000.00	$ 50,000.00	$ 62,500.00
Party I	$ 50,000.00	$ 125,000.00	$ 37,500.00	$ 25,000.00	$ 31,250.00
Party J	$ 50,000.00	$ 300,000.00	$ 37,500.00	$ 25,000.00	$ 31,250.00
TOTALS:	$ 2,000,000.00	$ 4,050,000.00	$ 1,500,000.00	$ 1,000,000.00	$ 1,250,000.00

Dispute Resolution Section Profile

Learn to swim in the deep end of mediation—but if you prefer wading, that's fine too

By Simeon H. Baum

As we enter the 10th year of NYSBA's Dispute Resolution Section's existence, it is gratifying to see how our field has grown. We see growth in the use of alternative processes—mediation, neutral evaluation, and arbitration. We witness greater sophistication even in the use of that granddaddy of dispute resolution processes—negotiation.

In arenas ranging from corporate to family matters, both parties and counsel demonstrate knowledgeable application of principles of cooperative, mutual gains, joint problem-solving approaches to negotiation promoted nationwide in law schools and CLEs, and through such bestsellers as Fisher & Ury's "Getting to Yes" and "Getting Past No."

While many make good use of mediation, there remains a range of opportunities in mediation that counsel are invited to explore. Mediation is a deep lake layered with varied zones for meaningful engagement and reflection.

Facilitated negotiation

Mediation is most commonly seen as a confidential, facilitated negotiation. Unlike its dispute resolution cousins, arbitration and litigation, mediation does not involve a neutral third party's making a determination, award, verdict or judgment that is binding on the parties. Rather than evaluate or tell the parties what to do, the mediator facilitates the parties' own communication and decision-making.

The mediator is a special type of neutral party. He or she is a deep, compassionate listener; less on no one's side, and more on everyone's side. The mediator models active listening (validating, empathizing, clarifying and summarizing) and helps reframe communications in a constructive direction.

Mediators, under this model, serve parties by greasing the wheels of negotiation. From this vantage point, the mediator conversant with contemporary negotiation theory can support parties and lead them through a problem-solving approach to resolving their dispute.

Counsel representing parties in this process also benefit from a sophisticated understanding of negotiation theory and skills.

Win-win negotiations & deal-making

Fisher, Ury and other contemporary proponents of negotiation theory and skills offer excellent advice to negotiators and users of the mediation process. They posit that parties are driven by interests. Like the Italian economist Pareto, who defined the optimal deal as that which most satisfies the interests of all parties, contemporary theorists urge negotiators to seek to design deals along these lines.

As Fisher and Ury taught, we discover interests through productive discussions. Being "soft on the people" by constructive communication; avoiding *ad homina*, threats, gamesmanship and dirty tricks; and building trust are more likely to induce ones counterpart to reveal interests that can be the building blocks of a deal. Being analytically "hard" on the issues—learning what stands in the way of satisfying parties' interests—reveals clues that enable parties to fashion options meeting the parties' interests.

Negotiations are kept on track if parties consciously identify standards that everyone can accept. Parties are further aided in deal-making by considering where they would be left by not taking the deal on the table. Fisher and Ury termed this concept the "BATNA," i.e., the best alternative to a negotiated agreement.

'Mediation exemplifies humanism,'

— Simeon H. Baum

The BATNA and evaluation

As parties in mediation assess whether a proposed deal makes sense, they might consider whether other deals are possible or whether the gains offered in a proposal on the table equal or exceed their condition should they reject a deal altogether. When parties are in litigation, a primary alternative they might consider is litigation itself.

Mediators can be very effective in helping parties and counsel engage in dialogue and contemplative reflection concerning the risks and transaction costs associated with litigation. This can be cultivated in joint sessions, with all parties around the table, or in private sessions—known as caucuses—where the mediator can help parties reflect on case risks and costs without the need to save face or display strength and commitment level to maintain strategic leverage.

Depending on their orientation, different mediators might be more inclined to have parties arrive at case and transaction cost assessment by facilitating their own communications and reflection or by sharing the mediator's own prediction or evaluation.

Empowerment and recognition

While problem-solving and deal-making, aided by the parties' analysis of risks and transaction costs, are valuable indeed, mediation may have more to offer. Surprising though it might seem, Baruch Bush, Joseph Folger and other proponents of "Transformative Mediation" see the mediator's purpose not as settling cases or solving problems, but as fostering party empowerment and recognition.

Transformative mediators are pure facilitators. They follow the parties, reflecting back their communications with a "micro-focus" that takes its cues, meanings and directions from where each party is.

Understanding in mediation

Jack Himmelstein, Gary Friedman and their colleagues have spent over two decades developing an approach that sees deepening understanding as the heart of mediation. As parties move beneath the "v" in *Jones v. Smith*, they come better to understand themselves, each other, and their contexts—legal, economic, relational, hierarchical, and more. This growth of understanding is seen as the most fundamental opportunity offered by mediation, and as the source of real resolution.

To avoid reinforcing the divide embodied in the parties' dispute, Himmelstein and Friedman urge a transparent approach in mediation that maintains joint session throughout, dispensing with separate, private caucuses. Parties to mediation in this model "contract" to stay together and seek to understand, despite the emotions this might stir and the frustration this might engender.

Mediators in this model listen and communicate with a loop of understanding, embracing and reflecting back the speaker's meaning until the speaker acknowledges that he or she has been fully understood.

Navigating mediation's waters

Mediation can be seen and used in many ways. Practitioners and counsel might, e.g., think of using a Transformative Mediation approach for a family matter or an embedded employment dispute. Perhaps, counsel or parties might seek an understanding-based practitioner for a partnership matter, where a continuing relationship is desired. In a complex commercial dispute, counsel might seek out a mediator who is skilled at enabling parties to encounter and assess the risk and transaction cost associated with litigation. Or, in a distributorship dispute, perhaps a mediator skilled in problem solving approaches would be ideal. These examples are not prescriptive. Different counsel might seek different mediator styles and orientations for the same matter.

Mediated matters need not fit neatly into one theoretical box. Mediator Lori Matles coined the term "360-degree mediator" for one who draws on a range of theories, and applies a variety of skills and techniques, as is needed and appropriate in a given set of circumstances.

Take the plunge

There are many ways of understanding the rich potential of mediation. As parties search for fairness and grapple with the actualities of imperfect human behavior and the limitations of circumstances, we may recognize mediation as a forum for the working out of the norms of justice and harmony.

As people struggle to make choices and be heard—and as we build understanding and acceptance of ourselves, each other, and circumstances—we may see mediation as a gateway of freedom and compassion.

There are times when mediating parties achieve moments of deep insight, appreciation, truth and acceptance. And there are times when people leave the table irked, but with a deal.

However it is used, mediation has much to offer. The waters of mediation beckon us to bring parties for a swim, and see where the current leads. ◆

Simeon H. Baum, litigator and president of Resolve Mediation Services, Inc., (www.mediators.com), has successfully mediated more than 1,000 disputes. He is the founding chair of NYSBA's Dispute Resolution Section.

NYSBA

Virtual Lawyering:

A Practical Guide

Editor
Mark A. Berman, Esq.

NEW YORK STATE BAR ASSOCIATION 189

CHAPTER 10 VIRTUAL ALTERNATIVE DISPUTE RESOLUTION

Part A Online Mediation in a Time of Coronavirus
Simeon H. Baum, Esq.

CHAPTER TEN

VIRTUAL ALTERNATIVE DISPUTE RESOLUTION

PART A

ONLINE MEDIATION IN A TIME OF CORONAVIRUS

Simeon H. Baum*

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[10.0] I. NECESSITY IS THE MOTHER OF INVENTION

We are living in strange times. COVID-19 has locked down the world, bringing unthinkable harm—the death of loved ones, colleagues and community members; disease; unemployment; and disaster for many businesses. Yet just as the plagues in Egypt were a harbinger of liberation for the Hebrews, today's coronavirus homestay has combined with other social forces to offer a boom time for mediation.

A year prior to coronavirus, Chief Judge DiFiore commissioned a Task Force on increasing use of ADR processes in the New York State Court System. Incorporating the Task Force recommendations in her State of the Judiciary and subsequent orders, Chief Judge DiFiore called for a significant increase in ADR use throughout the state court system. Administrative Judges were charged with creating ADR plans by September 2019. Since then, new ADR Coordinators have been hired, mediation and other dispute resolution trainings have ramped up, and an extensive increase in the use of a variety of creative dispute resolution processes—with a spotlight on mediation—is upon us.

Then came the coronavirus. With courts shut down, many litigators were having tea and biscuits at home, with little else to do. Many of their business clients were facing major losses, with stores closed and a dramatically reduced workforce. Both commercial landlords and tenants have been suffering. With ensuing cash shortages, plaintiffs have even greater needs for immediate recoveries; and parties on both sides of the adversarial equation would prefer not to spend a fortune on litigation.

At least at its inception—prior to the deeply unfortunate and nation-rending events of recent weeks in the wake of the George Floyd tragedy—COVID-19 was a unifying force. We were all in this disaster together. From the standpoint of case resolution, we were seeing the Christmas spirit on steroids. The time has been overripe for mediation.

The fundamental question facing mediators when lockdown began was whether it is possible to continue mediation while we are all at a social distance. Mediation, at core, is a process of bringing people together in a manner that enables us to recognize and address one another in our wholeness, as complete persons. It offers a confidential session where empathy, recognition, attention to body language, enhanced communication, the communal meal (whether coffee and Danish, or the later lunch) work their magic. Through interpersonal interbeing (to steal a phrase from

Thich Nhat Hanh),[1] we are enabled to cut through positional bargaining and adversarial postures, to enhance understanding, augment free exercise of choices on many levels, and engage in productive deal making. We mediators work to create an environment where safe disclosures may occur. Even for complex business matters this is a zone of possible intimacy, where personal touch and insight matter.

The question we have faced is how this can be done when we are stuck at home. And then came Zoom.[2] Although many of us are technosaurs, we soon found ourselves functioning like the sage of the *Tao te Ching*:

> Without leaving his door
> He knows everything under heaven.
> Without looking out of his window
> He knows all the ways of heaven.
> For the further one travels
> The less one knows.
> Therefore the Sage arrives without going,
> Sees all without looking,
> Does nothing, yet achieves everything.[3]

While contrary to the essential and calmly contemplative message of this passage, the reality of the past months has been nearly frenetic interactivity with the world while we conduct full lives remotely from a computer desk at home. We have linked into our office computers with TeamViewer or the like; had Zoom cocktails and dinners with family and friends; ordered all personal household needs via Amazon, Fresh Direct, or other providers; and generally lived with tremendous interactivity while staying at home.

1 *See, e.g.*, Thich Nhat Hanh, *Interbeing* (1987); later republished as *Interbeing – Fourteen Guidelines for Engaged Buddhism* (1993).

2 This author's experience with online video-conferenced mediation has been with Zoom. Accordingly this article focuses on Zoom as a means of videoconferencing. In years past, we have used Skype to bring parties from Italy, Germany, and a number of other locations into the mediation conference room. We have not, however, conducted mediations with all parties appearing at first instance through the virtual platform until the onset of Coronavirus. These have been conducted with the benefit of Zoom's fairly stable platform, its flexible breakout rooms offering the capacity to caucus. Focusing on Zoom is simply a reflection of this author's experience and not a statement against any other videoconferencing applications or services. Thus, this is not intended to be a Zoom infomercial.

3 Arthur Waley, trans., The Way and Its Power: Lao Tzu's Tao Te Ching and Its Place in Chinese Thought, Chapter 47 (1934).

Similarly, thanks to online videoconferencing technology, over the last few months there has been a dramatic shift to online mediation. This author's office alone, for instance, during the first month and a half of homestay, conducted 13 online mediations.

In this piece, we will consider online mediation, with a focus on Zoom in particular. In order to assess the utility or effectiveness of this medium, we must consider what it is we are seeking to accomplish. Thus we will first take a brief look at mediation itself to flesh out the sensibility used to assess the use of this modality. We will then turn to a nuts and bolts review of key Zoom features as used in mediation. Then follows a consideration of broader issues with the Zoom platform as they relate to mediation: confidentiality, security and the management of parties in a manner consistent with one's mediation orientation. Having addressed core features of Zoom *sub specie mediationis*, we then consider how to integrate Zoom into our mediation practice. This starts with introducing Zoom to parties and counsel, to aid in their shift to this modality. It then moves to practical considerations of Zoom use at various stages of the mediation process. Then, based on this user's experience and reports from other mediators and users, we will offer practice tips, and reflect on new opportunities and challenges with Zoom. Finally, we will look to the future with questions of how this will impact the practice of mediation once we all return to our offices and are free again to hold mediation sessions in person.

[10.1] II. IF THE MEDIUM IS THE MESSAGE, WHAT QUESTION DOES IT ANSWER?

As we consider whether Zoom or other versions of online mediation are effective for mediation, we might keep in mind that our understanding of mediation and its potential determines the answer to the question of the utility of this modality. We enter the Zoom zone now after decades of experience with mediation. We have seen how in-person mediation sessions function, had dialogue in the mediation field on a variety of orientations and approaches to mediation, and are aware of the promise of mediation and its potential. We take this awareness with us into online mediation as critique and aspiration for this new mode. Beyond this, ideally, we might keep our eyes open to new possibilities.

Use of technology itself generates choice points from which we encounter our choices and are given an opportunity to question what, in fact, we are seeking, which reveals something about our orientation. It offers us reflective opportunities to assess how those choices and capaci-

ties impact, influence, and serve participants (parties and representatives); and whether there are new possibilities from this modality which have value.

As we make these choices, we are also called upon to keep in mind the deepest potential of mediation, and to seek ways to maximize this potential. Let us now briefly review expressions of this potential.

[10.2] III. CORE MEDIATION ORIENTATIONS: WHO DO THE VOODOO THAT YOU DO SO WELL?

In a piece of this kind, we will make just summary observations about major expressions of mediation orientation.

[10.3] A. Facilitated Problem Solving or Evaluative Process?

Since the emergence of Riskin's Grid for the Perplexed,[4] the mediation field has been sensitive to the question of whether mediators offer parties evaluations of their case strengths and weaknesses, the benefit or detriment of a deal or even broader considerations of the appropriateness of process moves, past behavior, community impact or potential outcomes.[5] Do mediators tell parties what to do? Or are mediators fundamentally facilitators of the parties' own dialogue, negotiation and reflection?

Centrists in the field train using insights from *Getting to Yes*,[6] viewing the role of mediator as a facilitator—one who helps the parties help themselves in working through a process characterized by joint, mutual gains, cooperative problem solving. Mediators grease the wheels of the parties' own negotiation, guided by the Fisher Ury model. Negotiators are encouraged to be soft on the parties and hard on the issues. We use active listening—validating, empathizing, clarifying, and summarizing—to enable parties to feel heard and to encourage productive disclosure of information that can serve as the medium of exchange in the negotiation process. We help parties shift from rigid positional bargaining to uncovering and disclosing their interests, and cultivate development of options to meet the

4 Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 Harv. Negot. L. Rev. 7 (1996).

5 Kimberlee K. Kovach, Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, Harvard Negotiation Law Review, (Vol. 3, No. 71, 1998).

6 Roger Fisher, William Ury, and 2d Edition with Bruce Patton, Getting to Yes: Negotiating Agreement Without Giving In (1st ed., Houghton Mifflin 1981).

parties' needs and interests. We use standards to move the talk away from a battle of wills to constructive consideration of jointly held principles or criteria that might help with distribution of assets, assessing values in transactions, or determination of appropriate outcomes. And we use the "BATNA"—the best alternative to a negotiated agreement—to consider where the existing or potential in the parties' life context suggest that it is better to walk away than take the deal proposal on the table.

As a process, mediations guided by this model are confidential sessions in which the parties typically hold talks jointly and also break out into private meetings, or "caucuses," with the mediator. Caucuses offer a good opportunity to develop rapport; hear and express empathy for stories that might be difficult to express in the presence of the other parties who are perceived as adversaries; uncover interests that might otherwise be withheld for reasons of strategy or simply lack of reflection; gain understanding of perspectives from the other room without the risk of strategic loss through acknowledgment or loss of "face"; encounter case or deal risks; brainstorm to develop options for deal proposals; and assess proposals made by the other parties.

[10.4] B. Understanding-Based Model

For roughly 40 years, Jack Himmelstein and Gary Friedman, through their Center for Understanding in Conflict, have promoted an approach to mediation that sees Understanding as its foundation and goal. As people in conflict gain a better sense of themselves and the others, digging beneath the "v" in *Jones v. Smith*, they come to recognize commonality, appreciate differences, recognize that we are all in this world together, and work through their common situation to a deeper understanding and acceptance of the life reality that is and embraces them.

The mediator and others engaged in this process employ a mode of listening that Himmelstein and Friedman coin as "looping." This is an iterative process in which the listener, with a genuine intent of encouraging full expression and gaining understanding, feeds back to the speaker reflective expression of what has been said, with openness to adjustment, correction, modification, and amplification, until the speaker—feeling more deeply understood—expresses, in effect, with satisfaction, that the looping listener has got it.

Parties engaged in this mode of mediation have gone through a process of contracting and convening, where they buy into the notion that looping and the entire mediation process will be conducted openly, in joint ses-

sion. The view is that the mediator brings peace into the room and does not reinforce barriers between the parties by use of caucus. The mediator here is not a power person, toting messages and deal proposals from room to room. Rather, understanding is cultivated through transparent looping in the view that, as all are mirrored, collective understanding and acceptance will deepen and resolution will ensue.

[10.5] C. Transformative Mediation

In 1994, Bush and Folger published *The Promise of Mediation,*[7] a clarion call for the school known as transformative mediation. Emerging from their experience with community mediation—of matters found in New York's Community Dispute Resolution Centers (CDRCs), such as landlord tenant, neighbor/neighbor, family, and minor criminal court matters—Bush and Folger made a stunning pronouncement. The purpose of the mediator is not to settle the matter. Nor is it to cultivate joint, mutual gains problem solving. Rather, the purpose of the mediator is twofold: fostering party empowerment and recognition.

This is rooted in the transformative theory of conflict as a crisis in the parties' relationship, as manifested in their mode of communication. A transformative insight is that parties in conflict are deeply uncomfortable with this condition. They are hunkered down. The conflict feels ugly. The parties' feel at risk and are defensively enmeshed in self-concern. This limits the capacity to recognize the other party's reality: feelings, perspective, needs, interests, or legitimacy. Through raising up opportunities for parties to make choices at the mediation table, the mediator fosters party empowerment. As a party recognizes the capacity to make process choices, to speak or not to speak, what to say, to make proposals or not, how to respond to expressions or proposals by the other party, what deal to accept—in short, a host of possible choices—the party gains a greater sense of freedom and control. This party empowerment enables parties to feel more secure, to relax a bit, and for the first time to find the freedom to look beyond their ambit of self-concern to recognize the other. This ensuing growth in empathy is the moral transformation from which the transformative mediation school derives its name.

The mediator's attitude in the transformative model is that of pure facilitation. The parties drive the car of the process. The mediator sits in the back seat raising up opportunities for empowerment and recognition.

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[7] Robert A. Baruch Bush and Joseph P. Folger, The Promise of Mediation – Responding to Conflict Through Empowerment and Recognition (Jossey-Bass 1994).

The mediator has no macro criteria, such as interests, options, standards and BATNA, to ring bells to be captured as communication ensue. Rather, the mediator listens with a microfocus, with plain reflection back of immediate party expression in the moment.

Transformative mediation accommodates caucuses as well as joint session.

[10.6] D. Protean Shape Shifters: The 360-Degree Mediator

For many mediators and users, the above problem solving facilitation, understanding based, and transformative models of mediation might serve as ideal types offering guidance and a sense of rich potential in mediation, while not limiting the approach taken in a given mediation. Rather one might take the approach recommended by Peter Adler in his piece on *Protean Negotiation*,[8] and do what is appropriate under the circumstances.

As a set of general observations, characteristics of mediation can include creating a forum where parties can express themselves with authenticity and find potential for empathy. It is a zone where mediators work to bridge the trust deficit found in disputes, and engage all present in a collective effort towards enhanced communication and resolution. Your current author tends to turn to the *Tao te Ching*, of Lao Tzu, as a bible for mediators, as it were, encouraging deep listening, relatedness, receptivity, participation, flexibility, and waiting in patience and humility to let the process happen and enable parties to work things out.[9] It can be seen as a forum for the integration of the norms of justice and harmony.[10]

At core for this author, after 30 years laboring at the mediation vines, parties gain productive guidance in seeing mediation as flexible process, accommodating any configuration of groups, in an effort at building understanding and deal-making.

8 Peter S. Adler, *Protean Negotiation,* from The Negotiator's Field Book: The Desk Reference for the Experienced Negotiator, Andrea Kupfer Schneider and Christopher Honeyman, eds. (American Bar Association, 2007*).*

9 *See, e.g.,* Simeon H. Baum, *The Technique Of No Technique: A Paean To The Tao-Te Ching And Penultimate Word On Breaking Impasse*, Ch. 19 in Definitive Creative Impasse-Breaking Techniques in Mediation, Molly Klapper, ed. (NYSBA 2011).

10 *See, e.g.*, Simeon H. Baum, *Hawking Our Wares in the Marketplace of Values? Sell Quality Not Cost When Promoting Mediation; the Interplay of Global Norms of Justice and Harmony in the Mediation Forum*, from Contemporary Issues in International Arbitration and Mediation—The Fordham Papers (2011).

[10.7] IV. NOW TO ZOOM IN ON ZOOM

With the forgoing questions and sense of mediation's scope, depth and potential in mind, let us take a closer look at online, videoconferenced mediation. Prior to the onset of coronavirus, over the years, this office has had experience bringing parties to the table using Skype or other video-conferencing platforms. Typically, though, this was occasioned by the difficulty of bringing a particular party over from Germany, Italy or some other foreign or distant venue. The absent party would take a seat at the conference table, by laptop or on a videoscreen, where the rest of us were gathered in person. Following coronavirus homestay, however, all parties and the mediator have been gathering together on the two dimensional format of the laptop's screen. This author's experience has been in using the Zoom platform. For this reason, and with no intended denigration of other applications and platforms, this piece will focus on Zoom.

[10.8] A. Nuts and Bolts of Zoom Features of Use in Mediation

Zoom presents a fairly stable online platform offering a handful of key features that are very useful in mediation. Zoom currently offers a free Basic plan that permits one to set up meetings subject to a 40-minute time limit. For mediators, the Zoom Pro plan makes sense. This plan permits meetings of up to 24 hours for groups of up to 100 participants. The Zoom account holder who sets up the meetings is known as the Host.

[10.9] 1. Invitations and Settings

Zoom enables the Host to schedule meetings and to manage the meeting environment in advance through the Settings feature. Once scheduled, the Host can copy a hyperlink and password for the meeting, and transmit it to the invited guests. Links can be streamlined to embed passwords for a single click feature for use by the invited guests, although security is heightened by requiring separate entry of the password. Further enhancing security and control, the Host is given the option of having guests wait in a "Waiting Room" prior to entering the meeting, until they are "admitted" by the Host.

[10.10] 2. Basic Video and Audio Display

Parties are able to speak together on a single screen. Their video images appear in boxes, with their names at the bottom. Parties may click the "rename" option offered through the ellipsis displayed on their image

in order to change the name shown under their video image. The Host also has the power to rename parties shown on screen.

Where users lack video camera capacity, they are also able to call into the Zoom meeting and join in solely audio form.[11]

[10.11] 3. Audio and Video "Muting"

Using two of various icons that appear typically at the bottom of the user's screen, participants have the power to mute themselves and to shut their video cameras, at which point a screen appears displaying that participant's name. The Zoom Host (typically the mediator who has set up this Zoom meeting) also has the power to mute or stop the video of any party. The Host can also unmute the parties whom the Host has muted, but must ask permission to return to video from any party whose video the Host has stopped.

[10.12] 4. Participants Screen

A "Participants" screen is available to all participants, showing the number of participants and the names of all participants in the Zoom meeting room. Depending on the features selected by the Host in Settings, this can also display polling features (with "yes" or "no" choices) a raise hand function (also to gain views on a given question from a large group), and certain other features. The Host's Participants window offers other features, including the notorious "Mute All" button. More on that later.

[10.13] 5. Speaker or Gallery Display

Each user can choose whether to display just the "Speaker" on screen, by selecting the "Speaker" button typically seen at the top right of the screen, or to display equally sized images of all participants by choosing the Gallery setting, instead.

[10.14] 6. The Magic of Breakout Rooms

Of notable significance to mediations, the Zoom Host is also able to create and assign parties to breakout rooms ("Breakout Rooms") for private discussions. The Host may assign users to these Breakout Rooms automatically, simply by creating a set number and specifying the number of participants per room. The Host can also assign participants manu-

11 A useful workaround, if there are problems with sound, includes the ability of a user both to attend by video (and mute one's computer sound) and also attend by phone.

ally—more appropriately for mediation—and may rename the rooms from "Breakout Room 1" to, e.g., "Smith Breakout Room." A party can be assigned to only one room at a time. Once the assignments are set, when it is time to move to caucus, the Host "Opens" the Breakout Rooms, automatically sending an invitation to join the specified Breakout Room to each assigned party. Once the party accepts the invitation, Zoom sends that party to his or her Breakout Room. At any time, parties are free to click "Leave Breakout Room" on the bottom right of the screen and Return to Main Session. From that point forward, unless Breakout Rooms are recreated, users may shuttle back and forth from Main Session to Breakout Room simply by clearing the Breakout Room box-shaped icon at the bottom righthand section of their screen.

The Host has the magical power of being able to move to and from any Breakout Room or the Main Session in less than a second at any time. Should users within a given Breakout Room seek to speak with the Host (mediator) or need assistance, they may click the "Help" icon displayed in their Breakout Room. This sends a message to the Host, which the Host may accept—taking him or her to the Breakout Room requesting Help—or decline at the moment by selecting "Later."

As a general practice, it is wise for mediators to create extra Breakout Rooms. This enables the Mediator to create special caucus formations, say, principals speaking with principals, or attorney only meetings, or any other form of mix and match.

The Host has the capacity at any time to invite parties back from the Breakout Rooms to rejoin the Main Session. The Host also has the power simply to click "Close Breakout Rooms." This sends a notification to all participants in all Breakout Rooms to return to the Main Session. Should they fail to do so, in 59 seconds the Breakout Rooms automatically close, bringing all parties back to the Main Session. This directive process move, like exercising the Mute or Mute All feature, raises transformative and pure facilitative questions worthy of further consideration.

[10.15] 7. Documents, Whiteboards and Chat Features

In both the main session (the mediation's joint session) and in the Breakout Room (the mediation's caucus), participants can share documents, pull up a Whiteboard to capture information, and send text messages to other participants through the "Chat" feature. Documents, Whiteboard displays, and Chats that are shared in a Breakout Room are private; they cannot be accessed by users outside that Breakout Room.

Documents and the Whiteboard are accessed through the green "Share Screen" icon at the bottom of one's screen. In order to be shared, a document or any file—such as an image, expert's report, deposition or hearing transcript, pleading, decision, motion papers, contract, email or other correspondence, insurance policy, spreadsheet, PowerPoint presentation, or even video or film clip—must first be open on the user's computer screen.[12] Even if the document is not yet open at the time it is needed, the user is free moderately to exit the "full screen" mode; click another icon usually found at the bottom of one's screen (e.g., the file folder, Outlook, Google Chrome, Word, or other usual icons); and then open the needed document or file. Once selecting "Share Screen" one can see all open files—including a Whiteboard option—on one's screen, select the desired file, and share it.

The Host has control in Settings of whether parties other than the Host may share their screens. While barring sharing is a security guard against unwanted Zoom bombers who are fabled to share pornography in public meetings or High School gatherings, it is wise for mediations, which involve a limited number of specially invited participants, to enable all users to share their screens. Typically, through Settings, the Host will gain primacy, being the first to share, and retaining the power to take down documents or files shared by other participants, when needed.

It is good to keep in mind that parties in Breakout Rooms may make good use of the Share Screen feature privately to consider materials that they prefer not to share with other parties, or which they would like to analyze in private. Mediators entering party Breakout Rooms may opt to signal ahead of time that they are coming, in order not to surprise parties who are sharing documents in confidence.

As suggested by the enumeration of possible documents or files above, the Share Screen's uses in mediation are myriad. It can be very helpful enabling parties to focus on information in common during a joint session (Main Meeting). The Whiteboard feature, or a blank Word document, can be used to capture the terms of a deal proposal. Similarly, parties or the mediator can post a form Memorandum of Understanding, Settlement Agreement, or Letter of Intent, and use it as a working Camp David accord type document to nail down, clarify, or modify the open terms in a nascent deal.

12 If the user has a second monitor, Zoom allows the user to choose the monitor screen the user wishes to share.

More than even in-person mediations, documents or files displayed through the Share Screen feature are up close and personal. One can really drive home a point, or foster genuine and contemplative analysis, by displaying a blown up paragraph of a tricky contractual provision, complex damages or financial spreadsheet, or errant email for all to see. It is much sharper, and equally available to all eyes on the screen than any document viewed over the shoulders while crowding around one seated party at an in-person mediation session—however much secondary bonding value there might be in the experience of that shared viewing effort. For those interested in decision tree based risk analysis, a common chart or tree could be considered by all on screen.

Of course, in addition to documents shared on screen, nothing stops parties and counsel from simultaneously emailing documents for consideration during the Zoom session. It is amazing how much can be done contemporaneously and remotely.

The Chat feature can be useful, as well. It is accessed by clicking the "Chat" icon at the bottom of one's screen. This then brings up a template with that user's prior Chat history towards the top, and a label for "Everyone" at the bottom. In a Main Session, e.g., one may share comments with all present, by clicking the "Everyone" button, entering the text message below, and then transmitting it. One can also send messages privately by first clicking on the "Everyone" tab, which, in turn, displays the names of all others present in that meeting room. One should be sure that the intended name is selected so that the private message gets delivered to the intended recipient. By planning ahead, users can anticipate sending messages to one another in this manner. For instance, counsel could Chat with the client: "stop talking. That mediator's a fool. Do not give away the ship." Or something to that effect.

Rest assured. From what this author has gleaned, even the Host has no access to private Chats between parties, whether held in the Main Session or in their Breakout Room. Should this be otherwise, we invite comments by the vigilant reader.

[10.16] 8. Confidentiality

The Host has the power to record meetings and can set up a feature enabling other users to record as well, after first seeking and receiving permission to record from the Host. A simple approach to ensuring the confidentiality of the mediation session is for the Host to select the Settings feature that eliminates the recording option by anyone, including the

Host. Leaving open the option of recording by a party only after the Host's permission makes the issue more likely to arise.

This approach exemplifies a choice that triggers considerations affected by one's mediation philosophy. To the extent one is transformative, there is an open question whether even process design effected through a Settings selection should be a conscious party choice rather than an implied decision by the mediator. A similar question might arise applying the Understanding-based school's philosophy of transparency, which might call for this issue to be raised at the phase of contracting and convening. It would be interesting to learn the views of Messrs. Himmelstein and Friedman on this issue.

[10.17] B. Echoes of *Marathon Man*: Is It Safe? Zoom Security

With the advent of coronavirus lockdown, Zoom use proliferated. Not long after, concerns about Zoom security hit the blogosphere, and certain law firms and other users shied away. The chief expressed concerns were Zoom bombing, where random participants share unwanted materials on screen during Zoom meetings. As mentioned above one Security feature of Settings can prevent this: blocking Screen Share by anyone other than the Host.

Since the initial bomber scare, Zoom has ramped up its Security features. There is now a Security icon at the bottom of the Host's screen. It enables the Host to lock the meeting and to enable the Waiting Room. It also permits the Host to grant or deny to other users the following powers: Share Screen, Chat, Rename themselves and Unmute themselves.

Where mediations are not widely publicized and invitations tend to go only to a few select parties, there is little risk of Zoom bombing. Use of an individualized link and password can also enhance security. Having users first go to a Waiting Room before they are admitted to the meeting by the Host further enhances security. Blocking the Rename feature impedes imposters. And to enhance control over the mediation session, where needed, Screen Sharing and Unmuting can be denied.

Overall, in this mediator's limited experience over the past three months, there has been no known intrusion or Security challenge. Now that the NYSBA House of Delegates has passed a recommendation that one Cybersecurity credit be part of the four required Ethics credits for

biennial registration, we hope that future instruction on this issue with shed greater light on this area of concern.

[10.18] C. Integrating Zoom Mediation into One's Mediation Practice: Practical Tips and Considerations

At least during the foreseeable future, in the midst of continuing Coronavirus concerns, Zoom mediations are a growing part of the dispute resolution landscape. Mediation practitioners would be wise to seize this opportunity to bring more matters into mediation, to gain competency in Zoom, and to grow sensitized to the subtleties of this medium.

Following are some practical tips and observations stemming from this practitioner's experience with Zoom mediations, and informed by some of the questions and views on the nature of mediation raised at the outset of this piece.

[10.19] 1. Easing Parties and Counsel into the Virtual Mediation Environment

As with any new modality, many of us are change averse. Mediators should give thought to ways to describe the Zoom platform and its functions so that parties and counsel can see the ways in which it flexibly mirrors the in person mediation process. Initially, during March and April, this office made a practice of preparing a Zoom meeting invitation to accompany our initial joint pre-mediation conference call. We would then invite counsel during that call to shift to a Zoom meeting for the balance of that initial conference. This offered the opportunity to show counsel how to use the Share Screen and Chat features, to get familiar with icons and other functions, such as Mute/Unmute; Stop Video; and Rename, to mention a few, and to take a test run of the Breakout Rooms.

As a result counsel grew more secure. One new development as a result of the use of Zoom is increased meetings with counsel and one party in advance of the mediation session, again in order to acquaint them with Zoom and assuage concerns. This is a wonderful opportunity for developing trust and rapport in advance of the first mediation session. It can also open up opportunities for pre-mediation caucuses on substantive and significant procedural considerations.

Now that Zoom has taken further hold of the scene, the initial joint pre-mediation conferences are being scheduled as Zoom meetings from the outset. Again, this offers the mediator an opportunity to help counsel feel

secure, and enhance their Zoom competence, again building trust and rapport.

Holding and publicizing Zoom mediation webinars, and spreading articles on Zoom mediation can further encourage the transition of counsel and parties into use of the modality.

In addition, success stories can help. One story came from an early foray into Zoom mediation. It involved a complex, high-stakes class action with parties and counsel having planned to fly in for a mediation in our offices in the Fox News building in New York City from various states across the U.S. This would have generated substantial travel costs for airfare, meals, and hotels, and a definite commitment of at least one or two business days in New York.

During the initial joint session, the mediator inquired whether these experienced, professional and highly sophisticated counsel would be interested in discussing damages together. As a result of that conversation, counsel realized that there was a significant divergence in their views. This produced a need for private breakouts, where the bargaining teams could huddle. It took only seconds to place them in their Breakout Rooms. In the rooms, counsel and their clients were able to review documents via the Share Screen feature and identify a zone where further investigation was merited. As a result, the participants and the mediator next reconvened in a joint session, and determined to reschedule the mediation for a time when further study and assessment of the damages picture would be completed.

The entire mediation session took less than a half an hour. Throughout the process, perhaps not only because of their professionalism, but also because they had not incurred the sunk cost of travel from all across country to New York, counsel and parties were remarkably nonplussed by this development. Perhaps it was also a result of being able to see everyone's face equally facing forward together on the screen, knowing that one was being seen, and also having the screen as a mirror of one's own appearance and behavior. In short, rather than spend a day in New York and substantial funds on the trip, the parties efficiently cut their losses and moved forward admirably in problem-solving mode.

This clearly highlights some advantages that stem uniquely from this Zoom mode of mediation.

[10.20] 2. Preparation for Zoom Mediation

In many respects, preparing for Zoom mediations is similar to preparation for in person mediations. There continues to be a need for pre-mediation statements. As always, it is important to extract a commitment that parties with full authority to resolve the matter will be present and available throughout the mediation session until the matter is resolved. It is helpful to be sure that one is available to conduct pre-mediation conferences to the extent they can be helpful in preparing the mediator and the parties for a fully productive mediation session.

The chief differences are that these initial pre-mediation conferences can now be conducted via Zoom.

[10.21] 3. Avatars and Appearance

One tip that mediators can share with counsel and parties is to consider how they will present themselves in the Zoom environment. While we are conducting conferences by Zoom, participants have varying awareness of the way they might appear in the Zoom environment. As we have all been working from home, there has grown an increased tolerance for variations in presentation. During the pre-COVID days, counsel, and many parties, would appear at mediations in business attire. These days, however, we see a wide variety in appearance. During the class action mediation, male attire ranged from a jacket and tie, to collared shirt and sports jacket to a lawyer from Florida dressed in shorts and a hoodie. In one insurance coverage mediation, some party representatives participated from their office, others from impressive home scenes, and another from his home basement.

To adjust for environmental differences, some participants take advantage of Zoom's Virtual background. This enables one to select from a library of backgrounds or from photo images available from one's own photo files or from databases online. For many who lack a "green screen" or newer computers, these backgrounds appear more like hallucinogenic imagery, in which the subject blends and disappears into the virtual background. It would be wise for users to acquaint themselves with the availability and effectiveness of these virtual backgrounds to create the image with which they are comfortable before entering the Zoom mediation. Nevertheless, these variations, including the presence of spouses, children and pets parading across the background actually have a humanizing effect as we all adopt to the new reality of working from home.

[10.22] 4. Wait, Wait . . . Don't Tell Me!

One question for mediators is whether to hold parties in the waiting room until all are present before bringing folks into the initial joint session, in the Meeting Room. Another option is to admit participants as they arrive, and engage in small talk until all are assembled. Yet another option is to move parties into their assigned Breakout Rooms, permitting them to prepare until all parties have arrived and are ready for the opening joint session.

Depending upon one's mediation orientation, the choices here might differ. Where we seek to offset the loss of the personal touch afforded by in person mediations, this office has been permitting parties and counsel to enter as soon as they arrive, and engage in small talk, unless there have been reasons to move parties directly into caucuses. These choices present opportunities for sensitive mediators to reflect on their practice style, principles, and orientation.

[10.23] 5. Overcoming Depersonalization

Regardless of their orientation and style, most mediators find ways to express empathy and cultivate trust and rapport with parties and counsel. Gathering on a two dimensional computer screen presents the risk that parties will operate at a distance from one another and that the humanizing magic of mediation, which affirms the whole person, might be lost.

As we increase the use of Zoom for mediations, mediators will be on the lookout for ways to continue catching and reflecting back party emotions and perceptions. We will continue to find ways to engage in effective active listening—validating, empathizing, clarifying, and summarizing party expressions. Mediators should be alert to these challenges and seek ways to bridge the gap to restore or find different ways to acknowledge the personal dimension and humanistic orientation of mediation.

Good listening includes attention to body language. How can mediators and parties attend to body language when we are made flat by the screen? This should be an ongoing question prodding mediators to a higher degree of attention. Interestingly, with everyone equally displayed in Gallery view, Zoom at times offers an even greater sense of parties' reactions with all faces front and center.

Many of us these days have a second monitor, which has us face away from the camera eye. Mediators must be careful to make virtual eye con-

tact and show interactivity even while we might be taking notes or consulting a mediation statement displayed on screen number two. It might even be wise to let the parties know that one is shuttling between screens during the mediation session, so that actually attention not be taken as disengagement as a consequence of turning towards the second monitor.

[10.24] 6. Opening Statements in Joint Session

Over the last several years, there has been a growing tendency initiated on the West coast to move away from significant communications in joint session. Counsel have expressed the concern that substantive opening statements will mimic openings as trial, freeze parties into hard and fast positions, and create negative reactions in response to openings by adversaries. Adherents of the Understanding-based orientation towards mediation are not alone in the sense that something important is being lost with the vanishing joint session.

For Zoom, as with in-person mediation sessions, representatives might be guided by the twin goals of building understanding and deal making. If one's presentation in the joint session is made in a manner that enhances understanding rather than shutting it down, and keeps people at the bargaining table rather than pushing them away, one is advancing the process goals and moving towards maximizing the potential of mediation.

An ideal for representatives or parties in mediation is the dual image of the open hand and the iron fist in the velvet glove. With open hand, one communicates that one is at the bargaining table in the hope of sharing information and welcoming information from the other party, all in the hope of arriving at a better understanding and a deal. The iron fist in the velvet glove suggests the ability to communicate one's strengths—the legal, deal and life BATNA—in a manner not designed to provoke reactivity, but rather in a way that still shows consideration for the other party and a disposition to make peace, if possible.

With all this in mind, one might observe, nevertheless, a tendency in Zoom mediations that seems to pull harder away from protracted joint sessions. It is not clear what is at the root of this, but it is worth keeping tabs on this development.

[10.25] D. New Opportunities and Patterns in Zoom Mediation

With people not needing to travel, attendance on Zoom is actually easier than ever. There seems to be an increasing pattern of mediations continuing for several sessions over a number of days. It is easier to start and stop Zoom sessions. Conversely, it is easy to leave the Zoom screen open while the mediator is in caucus with the other parties, and move onto other productive work. Then, when the mediator returns, the parties are already on screen and ready to recommence. One tip for Zoom mediation practitioners is to be sure to get cellphone numbers for all participants. That way, if there is a technical difficulty, or if someone is kicked off the session, there is a lifeline to bring them back.

It is possible to schedule Zoom caucuses through emails over a period of days. In pre-COVID mediations, it was not unusual to follow up with parties by telephone after the first in person mediation session. Often, matters were resolved through telephonic shuttle diplomacy.

Today, Zoom offers the chance for what would have been telephone follow up to be conducted with videoconferencing. This offers major advantages in enhanced capacity to read party body language, direct participation of the principals, and in continuing development of rapport.

One matter this office handled during coronavirus lockdown involved two substantial family businesses. Repeated Zoom caucuses, conducted over a period of several weeks, were effective in bringing this significant commercial matter to closure. Thanks to Zoom, rather than follow-up calls with counsel, each successive Zoom conference was attended not only by outside counsel but also by the principals, their business colleagues, and their in-house counsel. Zoom enabled the mediator to read facial expressions and body language throughout these discussions. It produced a deepening sense of rapport as family members remained involved —and direct access to the ultimate decision makers. It also enabled parties, counsel, and the mediator to develop and review through document sharing spreadsheets on sales and other financial information that were pertinent to assessing risk, deal value and leading to resolution.

One additional observation applies. With everyone together on screen, the impressions of everyone in the group could be read at once. This produces a much better sense of collective reaction than might be possible even in a common room, where people face in a number of directions at any time.

[10.26] E. Zoom Challenges

Having considered some advantages, we may now take a look at some challenges of Zoom mediation.

Where previously the mediator would walk from caucus room to caucus room gathering one's thoughts, now one is able to fly between caucus rooms in the space of seconds. After a while, this can get exhausting. Of course, there is a natural impulse to get to the next caucus room as soon as possible to maintain momentum and address the building frustration of parties who have been waiting for the mediator to return. Nevertheless, mediators are human. We need a break and the opportunity to gather our thoughts and impressions and let them settle and integrate into a solid sense of the next appropriate development. Mediators will need to learn to take breaks—returning to the main session or to a separate Breakout Room—in order to stay fully effective.

Similarly parties, too, can burn out. We all must be attentive to this phenomenon. Burnout is made more likely when parties are required nonstop to stare straight ahead at a screen, as opposed to the freedom of looking at various angles around a three dimensional room. Mediators must be alert to the need to give parties a break.

In person sessions have Oslo accord moments with the morning Danish or the afternoon lunch or dinner. Mediators now need to be on the lookout for ways to substitute other humanizing activities to compensate for the deficits of solo interactions from each party's own home. At the very least, when lunchtime rolls around, it is wise for the mediator to attend to natural party needs by recommending that everyone hit the kitchen and return with some sustenance. Whether through unstructured opening small talk on how everyone is faring in this homestay time; or introduction of parties to the house cat that crosses one's screen; or other opportunities for "free play," we mediators should look for chances to rehumanize the participants to offset the distancing impact of indirect communication.

Further challenges include hyperactivity and distraction, and challenges to spontaneity. Mediators can make creative use of silence. There is an open question on whether Zoom permits the same use of silence, or whether, on the screen, people tend to jump in sooner to fill the void, before the creative impact of silence can have its effect.

[10.27] F. Zoom: A New Party at the Bargaining Table

One thing today is clear. There is a new party at the mediation table today. When parties and counsel are working out technical kinks, when audio fails to kick in, Zoom itself has become a topic of discussion. Beyond Marshall McLuhan's insight that the medium is the message, Zoom has taken another seat at the bargaining table. As with many realities, we make greater headway recognizing this than ignoring it. Participants and mediators can use the Zoom topic to develop a sense of commonality, as we all struggle with our shared plight.

Technology has us talking. It has us increasingly reflective about the process by which we negotiate and mediate. It presents us with a range of choices that raise questions about our mediation orientation. It challenges us to break through the I-It described by Martin Buber in his groundbreaking *I and Thou* and struggle to maintain a sense of interpersonal dialogue and encounter. Remembering Marshall MacLuhan, Zoom challenges us to question the extent to which it is a tool, and the extent to which it controls the message.

We are left, like the futurist MacLuhan himself, wondering whether, once we return to our offices, mediation will return to old ways or to what extent our field will be forever altered.

A Refreshed Way to Deliver the Mediator's Proposal*

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I. The Mediator's Proposal in Classic Mediation Training

A. Classic mediation training teaches the mediator's proposal as an impasse-breaking technique of last resort after the mediator has exhausted all other impasse-breaking techniques.

B. Reasons:

1. A mediator's proposal encroaches upon party self-determination. *See* Model Standards of Conduct for Mediators (2005), Standard I.; Model Standards of Practice for Family and Divorce Mediations (2001), Standard I.

2. Delivering a mediator's proposal compromises mediator impartiality. *See* Model Standards of Conduct for Mediators (2005), Standard II.; Model Standards of Practice for Family and Divorce Mediations (2001), Standard IV.

C. The mediator's proposal is traditionally delivered orally by the mediator to each of the parties, separately in caucus.

D. The parties are usually given a short amount of time to respond; they oftentimes mutually agree to respond on the spot.

* This outline is a work-in-progress of a workshop project being developed by Harold Coleman, Jr. and the author. We hope to be able to flesh out our thoughts in a longer article in the near future.

II. The Refreshed Delivery Method

A. The mediator obtains the consent of the parties to deliver the proposal in a writing, separately to each party.

B. The writing comprises four parts. The first section is the same for each party and comprises the basic parameters of a mediator's proposal, including:

1. Defining a mediator's proposal as a settlement proposal that the mediator makes to all parties;

2. The proposal must either be accepted or rejected on the exact terms proposed, without any modifications, in a confidential communication to the mediator;

3. The mediator is not allowed to disclose the responses that s/he receives unless both responses are "yes," and, if so, the proposal becomes the settlement between the parties;

4. Thus, for example, if one party says "yes," and the other party says "no," the one who said "yes" will not be prejudiced if settlement negotiations (or subsequent mediations) occur at a later stage of the litigation;

5. The mediator's proposal is not an evaluation of what the case might be worth;

6. Rather, it is the proposal that the mediator believes, based only upon the information s/he has reviewed and learned to date, has the best chance of being accepted by all parties and result in a resolution of the dispute at this time; and

7. Any new information or developments that were not shared with the mediator during the mediation process, or that may subsequently come to light – for example, during the discovery process – would likely affect the proposal in some way.

C. The second section of the writing is also the same for each party and contains the material terms and conditions of the mediator's proposal for resolving the dispute.

D. The third section of the writing carefully marries the specific interests and concerns of each party to the proposal.

1. Unlike the first two sections of the writing, which are identical for each party, this section is tailored specifically to each party.

2. Thus, in totality, each party receives a customized writing containing the exact same proposal.

3. The difference is that the mediator will, through the writing, make the pitch that the party should accept the proposal.

E. The fourth and final section of the writing is the same for each party and embodies the parties' agreement as to how long they may each consider the proposal and deliver a confidential response – "yes" or "no" – to the mediator.

III. Advantages/Benefits of the Refreshed Delivery Method

A. The refreshed delivery method helps better preserve party self-determination.

1. The method leverages the power of the written word.

a. It ensures that the parties see/hear the entirety of the proposal.

b. It minimizes anchoring and confirmation bias, which arise when proposals are delivered orally.

2. The method also provides parties with something they can refer to repeatedly, thereby encouraging them to take the proposal more seriously.

3. The method further ethically obligates attorneys to deliver the proposal to the client.

a. *See* ABA Model Rules of Prof'l Conduct, Rule 1.4(a)(1) ("A lawyer shall . . . promptly inform the client of any decision or

circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules.").

i. *See id*., Rule 1.0(e) ("'Informed consent'" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.").

ii. *See* N.Y. Rules of Prof'l Conduct, Rule 1.4(a)(1)(iii) ("A lawyer shall . . . promptly inform the client of . . . material developments in the matter including settlement or plea offers.").

b. *See* ABA Model Rules of Prof'l Conduct, Rule 1.4(a)(3) ("A lawyer shall . . . keep the client reasonably informed about the status of the matter.").

B. <u>The refreshed delivery method does not compromise mediator neutrality</u>.

1. The mediator continues to earn the parties' trust because the proposal demonstrates a true understanding and appreciation of each party's interests and concerns.

2. Even when the proposal is not accepted, it can lead to further negotiations around the terms and conditions of the proposal.

3. That is, the mediator's proposal often serves as a jumping off point for further bargaining and negotiations.

IV. <u>Cautionary Notes About, and Limitations of, the Refreshed Delivery Method</u>

A. In the first instance, the mediator must feel comfortable enough that s/he has adequate information so as to be able to be in a position to arrive at a mediator's proposal before deciding to undertake this method.

B. That is, the mediator must be firmly convinced that s/he has sufficiently learned/uncovered the parties' respective underlying interests and concerns so as

to be able to craft a proposal that meets, as best as possible, those interests and concerns.

C. The mediator also must first disclose the entire method to the parties and obtain informed consent from them to undertake this method. Failing to do so likely compromises the parties' right to self-determination.

D. This method works best in situations where negotiations or bargaining are not distributive in nature (*i.e.*, not uni-dimensional), but, rather, integrative.

E. This method also works better in situations where the amount or stakes in controversy are comparatively larger so as to justify the cost of the mediator undertaking to set forth the proposal in writing.

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New York Law Journal

Nonsignatories and Arbitration: What You Should Know

When will courts allow a nonsignatory to compel a signatory to arbitrate under an arbitration agreement? When will courts allow a signatory to compel a nonsignatory to arbitrate under an arbitration agreement? What doctrines have the courts recognized as applying to nonsignatories and arbitration? This article will focus on these questions and offers an overview of possible routes to nonsignatory arbitration.

By **Jay G. Safer** | August 06, 2021

Binding arbitration is familiar to parties who sign any contract containing an arbitration agreement. But when will courts allow a nonsignatory to compel a signatory to arbitrate under an arbitration agreement? When will courts allow a signatory to compel a nonsignatory to arbitrate under an arbitration agreement? What doctrines have the courts recognized as applying to nonsignatories and arbitration? This article will focus on these questions and offers an overview of possible routes to nonsignatory arbitration.

There are a variety of doctrines rooted in state law by which nonsignatories can compel a signatory to an arbitration agreement to arbitrate, or alternatively, be compelled to arbitrate with a signatory to an arbitration agreement. These include (1) incorporation by reference; (2) assignment, assumption, and waiver;

(3) principles of agency; (4) third-party beneficiary status; (5) piercing the corporate veil and alter ego; and (6) equitable estoppel.

The U.S. Supreme Court stated in *GE Energy Power Conversion SAS v. Outokumpu Stainless USA, 140 S. Ct. 1637 (2020)*, that "Chapter 1 of the Federal Arbitration Act (FAA) permits courts to apply state-law doctrines related to the enforcement of arbitration agreements" and that "[t]he 'traditional principles of state law' that apply under Chapter 1 include doctrines that authorize the enforcement of a contract by a nonsignatory." Id. at 1643. The court cited the doctrines of "assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel." Id. at 1643-44 (quoting *Arthur Andersen v. Carlisle*, 556 U.S. 624, 631 (2009)). The court held the New York Convention did not conflict with domestic equitable doctrines that permit the enforcement of arbitration agreements by nonsignatories. Notably, these same doctrines can permit a signatory to enforce an arbitration agreement against a nonsignatory as the cases cited below illustrate.

Incorporation by Reference

In some cases, an arbitration agreement is incorporated into another contract to which the nonsignatory did agree. See, e.g., *Alstom Brasil Energia e Transporte Ltda. v. Mitsui Sumitomo Seguros S.A.*, 2016 U.S. Dist. LEXIS 80151, at *6-17 (S.D.N.Y. June 20, 2016) (insurer was bound to arbitration agreement in contract between subrogee and the defendant and arbitrability issue was first to be decided by the court); see also *Continental U.K., Ltd. v. Anagel Confidence Compania Naviera, S.A.*, 658 F. Supp. 809, 812-13 (S.D.N.Y. 1987); *Keystone Shipping Co. v. Texport Oil Co.*, 782 F. Supp 28, 31 (S.D.N.Y. 1992).

Assignment, Assumption and Waiver

In other cases, a nonsignatory is assigned the rights and obligations of a contract which contains an arbitration clause, and courts generally find the nonsignatory to be bound by the arbitration agreement as a result. See, e.g., *Tanbro Fabrics v. Deering Milliken*, 35 A.D.2d 469, 471 (1st Dep't 1971), aff'd, 29 N.Y.2d 690, 692 (1971) ("[T]he assignee of a contract acquires the assignor's rights therein and assumes its obligations including an agreement to arbitrate ... ."). Nonsignatories can also assume the obligation to arbitrate and accordingly waive any objection to arbitration through sufficient voluntary participation in an arbitration. See, e.g., *Gvozdenovic v. United Air Lines*, 933 F.2d 1100, 1105 (2d Cir. 1991) (holding that plaintiffs were bound by arbitral award because they voluntarily and actively participated in arbitration); *Variblend Dual Dispensing Systems, v. Siedel GmbH & Co., KG*, 970 F. Supp. 2d 157 (S.D.N.Y. 2013), rev'd on other grounds, No. 2:13-cv-2597-GHW, 2014 WL 12935841 (S.D.N.Y. Sept. 10, 2014).

Agency

An agency relationship with a signatory may also permit a nonsignatory principal to enforce an arbitration agreement or, alternatively, bind a nonsignatory principal. For example, a nonsignatory principal may enforce an arbitration clause made by its agent for its own benefit, even when the identity of the principal was not disclosed to the counterparty. See *Interbras Cayman Co. v. Orient Victory Shipping Co., S.A.*, 663 F.2d 4, 6 (2d Cir. 1981); but see *Merrill Lynch Inv. Managers v. Optibase, Ltd.*, 337 F.3d 125, 130-33 (2d Cir. 2003) (party seeking arbitration did not adduce facts to support agency theory).

Third-Party Beneficiary

When the language of a contract makes clear that a nonsignatory is a beneficiary of the agreement, third-party beneficiaries may be bound to or even be able to enforce a contained arbitration agreement. See *Zurich Ins. Co. v. Crowley Latin Am. Servs.*, 2016 U.S. Dist. LEXIS 175872, at *9 (S.D.N.Y. Dec. 20, 2016); *John Hancock Life Ins. Co. v. Wilson*, 254 F.3d 48, 59-60 (2d Cir. 2001); *Spear, Leeds & Kellogg v. Central Life Assur. Co.*, 85 F.3d 21 (2d Cir. 1996); but see *Republic of Iraq v. ABB AG*, 769 F. Supp. 2d 605 (S.D.N.Y. 2011).

Successor Liability

Doctrines of successor liability supplied by state law, where courts "pierce the veil" of corporate separateness, permit enforcement of agreements to arbitrate against nonsignatories when they are an "alter ego" of a signatory and abused the corporate form to injure the plaintiff. See, e.g., *Freeman v. Complex Computing Co.*, 119 F.3d 1044, 1052 (2d Cir. 1997) (holding that nonsignatory stockholder will be bound to arbitrate if he used complete control over signatory to commit a fraud or other wrong resulting in an unjust harm to plaintiff); but see *Golub v. Kidder, Peabody & Co.*, No. 89 Civ. 5903 (CSH), 2000 U.S. Dist. LEXIS 10268, at *6-12 (S.D.N.Y. July 24, 2000).

Equitable Estoppel

Courts will sometimes "estop" a signatory or nonsignatory from avoiding the arbitration provisions of a contract. *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 779 (2d Cir. 1995). However, equitable estoppel in its application to nonsignatories and arbitration will vary from state to state depending upon state law and the factors and standards recognized. Courts look especially closely at applying the doctrine of equitable estoppel, as some courts have emphasized that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit" and seek to apply estoppel based on contract and agency principles. *Thomson-CSF*, 64 F.3d at 776 (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)); see also id. at 779 (additional discussion of contract and agency principles). Thus, some decisions will seek to reconcile the principle of consent to arbitrate with equitable estoppel applying to nonsignatories. See, e.g., *GE Energy Power*, 140 S. Ct. at 1648-49 (Sotomayor, J., concurring).

Some cases have adopted the direct benefits theory of estoppel. When a signatory seeks to compel arbitration with a nonsignatory, courts have required a showing that the nonsignatory "'knowingly exploits' the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement" when signatories seek to compel a nonsignatory to arbitrate. *Belzberg v. Verus Invs. Holdings*, 21 N.Y.3d 626, 631 (N.Y. 2013) (discussing and citing cases on the direct benefits theory of estoppel).

Two key limits are at play in this standard. First, there must be actual knowledge of the contract containing the arbitration clause to show that the party *knowingly* exploited its other provisions. Second, the benefits to the nonsignatory cannot be indirect. In *Thomson-CSF*, an exclusive dealing agreement between two signatories containing an arbitration agreement was deemed to benefit only *indirectly* a nonsignatory, which acquired one of the signatories, in that the agreement reduced competition. 64 F.3d at 778-79. However, this benefit flowed from the acquisition agreement, not the exclusive dealing contract containing the arbitration agreement. Id.

Nonsignatories can also compel a signatory to arbitrate through equitable estoppel. A nonsignatory invoking equitable estoppel has been required to show "(i) there is a close relationship between the parties and controversies involved and (ii) the signatory's claims against the non-signatory are 'intimately founded in and intertwined with the underlying' agreement containing the arbitration clause.'" *Birmingham Assocs. Ltd. v. Abbott Lab'ys*, 547 F. Supp. 2d 295, 301 (S.D.N.Y. 2008); *Ostrolenk Faber v. Lagassey*, No. 18-CV-1533 (RA), 2020 WL 30350, at *5-7 (S.D.N.Y. Jan. 2, 2020).

In *Doe v. Trump Corporation*, 453 F. Supp. 3d 634, 637-40 (S.D.N.Y. 2020), the nonsignatory defendants sought to arbitrate based on equitable estoppel. Plaintiffs alleged the nonsignatory defendants made untrue statements concerning agreements containing the arbitration clause with a company defendants had promoted. Id. The court found that the "intertwined-ness" prong was met because the plaintiffs' claims arose from the subject-matter of those same agreements. Id. at 640-41. The court found that, however, the second "relatedness" prong was not satisfied. The defendants "held themselves out as offering an independent endorsement of [the company]," and the signatory plaintiffs "had no reason to know that Defendants were

affiliated with [the company] in [] such a way that it would be unfair to allow Plaintiffs to avoid arbitration with Defendants ... ." Id. at 641-42; see also id. at 643-45 (examining agency and waiver theories). The motion to compel arbitration was denied.

In sum, cases on nonsignatories and arbitration may involve a variety of theories, offering several routes to enforcing an agreement to arbitrate, but each requires a case-by-case approach as to which doctrine may apply.

Jay G. Safer *is a litigation partner at Wollmuth Maher & Deutsch in New York City and an arbitrator on the roster of neutrals of the AAA and the ICDR.*

Is Your Mediation Confidential?

New York Law Journal (Online)

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New York Law Journal

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Body

A keystone to the ***mediation*** process is the assumption that all that takes place will be held ***confidential***. This means that communications between each party and the mediator, respectively, will not be shared with the other side without permission of the disclosing party. Confidentiality encourages full candor in disclosures to the mediator, including in written submissions. Then if the ***mediation*** fails, the parties are assured that none of their disclosures can be used against them in ongoing litigation.

But what about third parties? Does confidentiality in a ***mediation*** protect against required disclosures to a third party? No doubt, many participants in a ***mediation*** presume that a confidentiality agreement that is entered into before the ***mediation*** will protect against all disclosures, to participants and to non-participants alike. Over the last few years, at least one well-reasoned decision by *Magistrate Judge Gabriel W. Gorenstein in the Southern District of New York, Rocky Aspen Management 204 v. Hanford Holdings, 394 F. Supp. 3d 461 (S.D.N.Y. 2019)*, has raised questions whether such disclosures will be protected against non-parties if the ***mediation*** is other than court-ordered. A subsequent decision in the same district by District Court Judge Jesse Furman, Accent Delight International v. Sotheby's (S.D.N.Y. December 2020), rejected this narrow approach and ruled that the standard set out by the *U.S. Court of Appeals for the Second Circuit in In re Teligent, 640 F.3d 53 (2d Cir. 2011)*, should apply to privately convened ***mediations*** as well.

This judicial disagreement, combined with the absence of a standardized ***mediation*** provision regarding confidentiality across multiple jurisdictions, raises an important concern for those participating in privately convened ***mediations***. How good are confidentiality protections and what further steps can be taken to assure confidentiality, especially as against third parties? The critical point to underscore is that in the absence of national rulemaking, participants in ***mediations*** must be aware of the risk of non-confidentiality.

To outline the scope of the problem, it is helpful to discuss the differences between ***mediation*** in existing court proceedings and private ***mediations***, not court-ordered. In the former, ***mediations*** are accorded confidentiality by court order, by *Rule 408, Federal Rules of Evidence*, and in state cases often by state rule, e.g., in New York by *CPLR 4547*. As of March 2021, there are 13 jurisdictions that have adopted the Uniform ***Mediation*** Act, which also creates a ***mediation*** privilege for confidentiality of all ***mediation*** proceedings (with a few appropriate exceptions, e.g. "intentionally used to plan a crime, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity."). These jurisdictions are Hawaii, Idaho, South Dakota, Vermont, Utah, Ohio, Washington, New Jersey, Iowa, Illinois, Nebraska, the District of Columbia and Georgia.

An important distinction must be made between discovery of information about a ***mediation*** and the attempt to use such information in a court proceeding. The Federal Rules and many state rules prohibit the introduction into evidence of ***mediation*** proceedings. They do not necessarily prohibit discovery into such matters. However, discovery requests of ***confidential mediations*** will be subjected to the three-part "heightened standard of need" test announced in In re Teligent: A party seeking disclosure of ***mediation*** information concerning others must show: (1) a special need for the ***confidential*** material; (2) resulting unfairness from a lack of discovery; and (3) the need for the evidence outweighs the interest in maintaining confidentiality." See Accent Delight, supra.

In the case of private ***mediations***, absent state or federal rule, there is no available assurance of confidentiality against discovery requests of third parties, even if the ***mediation*** was conducted under a confidentiality agreement. It is in this situation that Magistrate Judge Gorenstein ruled there was no protection, and District Judge Furman ruled that the Telligent protections are available. Not addressed by either of these decisions is whether the confidentiality agreement in a private ***mediation*** will bar discovery of a settlement agreement that results from the ***mediation***.

So, the question presents itself, "what should the conscientious professional or party do to deal with this situation?"

The simplest answer would be to make sure that there is an existing litigation to conduct the ***mediation*** and thereby to assure that it is under the protection of court order. The parties should make sure that the ***mediation*** is conducted under confidentiality terms "so-ordered" by the court.

However, to undertake ***mediation*** only in existing litigation would undercut the real practical and societal benefit of conducting ***mediation*** before litigation ensues. After all, if parties are forced to commence litigation, there are associated real costs in legal and filing fees, the strains of hardened positions and excessive claims, as well as the threat of publicity about the claims. Pre-

litigation ***mediations*** are sensible, practical, frequently the option of sophisticated potential litigants, and should be encouraged.

It follows that any private ***mediation*** should be conducted under as careful and thorough a ***mediation*** agreement as possible. There should be stringent confidentiality protections for all submissions and a requirement that all documents, including digital copies, be discarded at the conclusion of the ***mediation***. This may not provide full protection against a discovery request made by a third party after the ***mediation*** has concluded, but it will at least minimize the information available for discovery.

Parties also should consider in advance of making submissions to the mediator how likely is it that a third party will be interested in what transpires. If the dispute is a single breach of contract situation where meaning, intent or damages are at issue, it is unlikely that the ***mediation*** submission will be a target for future discovery. By contrast, if the issues concern policies of one party, e.g., in the employment arena, there may be a greater likelihood that a third party will seek discovery of ***mediation*** materials sometime in the future. In this situation, the party should exercise care in deciding how much information, what type of information, and the format of any proposed communication it chooses to share with the mediator.

Similarly, care should be exercised in the use of summary or illustrative exhibits specifically prepared for the ***mediation***. In the same vein, whether expert reports or narratives will be presented must be carefully evaluated against the risk that such information will be the subject of future discovery in an unrelated proceeding.

But whatever caution is employed in the ***mediation*** process, a participant must not lose sight of this critical consideration: If a ***mediation*** will succeed, each participant must be able to share with the mediator a candid assessment of the strengths and weaknesses of its position and of its flexibility to negotiate a settlement. In short, the private ***mediation*** should not be driven by the concern that information disclosed during the process will create future risks in unrelated matters.

There remains the issue of confidentiality of a settlement agreement reached in a ***mediation***. It is commonplace for such agreements to provide a confidentiality provision against disclosure to third parties. Once again, such agreements are not immune from discovery requests in third party litigation. As made clear in In re Teligent and its progeny, requests for production of ***confidential*** settlement agreements will be subjected to the three-prong test generally required for ***mediation*** materials. The uncertainty as to whether the heightened standard will be applied to settlements reached in a private ***mediation*** cannot be ignored. Perhaps the best approach in such situations is to avoid recitals or admissions in the settlement agreement and to minimize the provisions included, or alternatively to make the recitals so specific that they cannot be of value to others in unrelated matters.

The Uniform ***Mediation*** Act embodies a thoughtful balancing of competing interests in confidentiality and the circumstances where there should be exceptions to confidentiality. Adoption of the Act by a majority of jurisdictions, or federal legislation, would further the ***mediation*** process and thereby further the interests of our dispute resolution systems.

Robert J. Jossen , the principal of Robert Jossen, PC, is a mediator and arbitrator with FedArb and a seasoned trial lawyer with experience in many different types of disputes.

Load-Date: November 22, 2021

End of Document

HIGHLY CONFIDENTIAL – MEDIATOR "EYES ONLY" AND NOT TO BE SHARED OR DISCLOSED WITH ANY OTHER PARTY

Pre-Mediation Statement of PLAINTIFF

March 1, 2016

INSERT CASE (Sup. Ct. Nassau County)

1. The name and title, if any, of the client or authorized representative who will be attending the conference with counsel.

Client: INSERT CLIENT NAME, Plaintiff and Counterclaim-Defendant in the above-referenced Supreme Court action.

Counsel for Plaintiff: Elan E. Weinreb, Esq., of The Weinreb Law Firm, PLLC

Defendant is pro se.

2. A brief statement of the key factual and legal issues involved in the litigation.

Plaintiff contends (and has more than sufficient proof to support her contentions) that personal property at issue is effectively being "held hostage" by Defendant, especially in light of the latter's prior refusal to obey a court order to permit Plaintiff to retrieve her property. Plaintiff also has admissions from Defendant (and who has admitted in pleadings as well) that he intended to marry her and would pay her back for direct or indirect loans in the approximate amount of $30,000.00 made or extended to him on account of Plaintiff's assumption of some of his financial obligations.

3. The main "sticking points" preventing settlement.

Defendant has simply refused to give Plaintiff what is hers and what he promised to repay to her, regardless of his intent to marry her (which he did have). He is rather entrenched, largely because he maintains an erroneous belief that any

personal property in his domain automatically becomes his, notwithstanding that he did not purchase such property.

In addition, Defendant is perceived to be resentful of Plaintiff on account of the fact that Plaintiff has a pending parallel New Jersey family court proceeding and a soon-to-be-commenced New York child support proceeding that both involve Defendant. The general facts and circumstances of these proceedings will not be discussed here, insofar as they are not directly relevant to the commercial litigation that is the primary focus of mediation (i.e., the above-referenced action).

Defendant's current and short-term-future financial status/condition—he claims not to have any money available to compensate Plaintiff such that in his mind, he is judgment-proof—may also be a sticking point.

4. *A description of any important rulings made or pending motions in the case which may affect settlement.*

Defendant's initial Answer was stricken for failure to comply with CPLR pleading requirements. He revised his Answer and interposed four counterclaims. Two of those—the Third and Fourth Counterclaims for defamation per se and prima facie tort—have been challenged in a motion to dismiss currently pending before the Court. As Defendant did not submit opposition to this motion and has unequivocally defaulted on a stipulation that extended his time to submit opposition, it is expected that these two counterclaims will eventually be dismissed. The Court has adjourned the return date of the motion to dismiss to April 1, 2016.

5. *The status of settlement negotiations, including the last settlement proposal made by you and to you.*

No proposals have been discussed. Plaintiff is willing to engage in good-faith settlement negotiations.

6. *A settlement proposal that you would be willing to make in order to conclude the matter and stop the expense and turmoil of litigation.*

A) Plaintiff requests the return of the following personal property:

- Plastic Stratosphere cups still in the plastic cover under the kitchen sink to the right inner corner.
- Nikon D7100 24.1 MP DX-Format CMOS Digital SLR Camera, accompanying 18-140mmf/3.5-5.6G ED VR AF-S DX "NIKKOR" Zoom Lens, and Nikon WU-1a Wireless Mobile Adapter
- Ipod
- Dyson Hand Vac (or money to buy a replacement)
- Canon Photo Printer
- 3 "App Controlled" Light Bulbs (special light bulbs that can be controlled from a computer or smartphone)
- Power Washer (stored in garage) (or money to buy a replacement)
- Ladder (or money to buy a replacement)
- Leaf Blower (or money to buy a replacement)
- 2 Black Chairs (stored in basement)

B) Plaintiff requests compensation or restitution for:

- PC Richard & Son Items (See Exhibit 2 to the Complaint)
- 27-Inch Apple "IMAC" Computer and Keyboard
- Apple TV and Remote Control (The subscription associated with this item is still under Plaintiff's name, and the item is still situated in Defendant's residence)
- Defendant's Tuition and Other Education-Related Expenses that she undertook to pay (and did end up paying)

C) Finally, Plaintiff also requests Defendant to sign baby passport papers so that JEFFREY [NOT REAL NAME] can receive a passport.

While this settlement proposal sacrifices much when compared to the relief sought in the Complaint, Plaintiff does not want to lose more time from work than she already has dealing with litigation and does not want to have to expend the resources that further steps in the litigation process would entail. She also realizes that in light of JEFFREY being Defendant's son, she (and eventually JEFFREY) will have to have a relationship with Defendant on some level going forward such that even a "cold truce" between the parties would be welcome.

7. Key documents, outstanding liens, and legal concepts necessary for the mediator to understand and analyze the case.

Pleadings, receipts, text messages, and credit card and bank statements. Plaintiff's counsel has already provided a copy of the pleadings. The remaining documents referenced here may or may not be disclosed at one or more mediation sessions, depending upon Defendant's willingness to proceed with the mediation process in good faith.

8. Briefly state why you should prevail in this case and by how much money.

Given the facts of this case, the law is on Plaintiff's side. Specifically, Plaintiff has written admissions from the Defendant--some under oath--of the amount and validity of the debt owed by Defendant in this case, and even if no such proof existed, equitable considerations based upon unjust enrichment support the Plaintiff's position. [CITE ONE OR TWO CASES AND/OR STATUTES IF DESIRED].

On balance, Plaintiff should prevail on its claims to recover 75% of the amount-in-controversy, which is estimated to be about $55,000. Thus, Plaintiff anticipates a base recovery of $41,250, plus costs, attorney's fees, and prejudgment interest.

9. Briefly state why the other side should prevail in this case and by how much money.

There are one or two claims of Plaintiff that Defendant may be able to challenge by invoking certain defenses such as equitable estoppel and the Statute of Frauds. [CITE ONE OR TWO CASES AND/OR STATUTES IF DESIRED]. Thus, Defendant may be able to chip away at the total recovery but probably by no more than 25% of $55,000, which is $13,750.

MEDIATION AGREEMENT

This is an Agreement between , hereinafter "participants," and Nelson E. Timken, J.D., LL.M, hereinafter "mediator," to enter into mediation with the intent of resolving issues related to: the matter of et al., Index No. , pending in New York Supreme Court.

The participants and the mediator understand and agree as follows:

1. Nature of Mediation

The participants hereby appoint Nelson E. Timken, J.D., LL.M as mediator for their negotiations. The parties understand that Nelson E. Timken, J.D. is an attorney, but will in this mediation not serve as any party's nor all parties' legal counsel. The participants understand that mediation is an agreement-reaching process in which the mediator assists participants to reach agreement in a collaborative, consensual and informed manner. It is understood that the mediator has no power to decide disputed issues for the participants. The participants understand that mediation is not a substitute for independent legal advice. The parties agree that the mediator is not acting as an attorney or providing legal advice on behalf of any party. During mediation, the parties are each encouraged to consult with or be represented by an independent attorney at any time, and agree to do so before any agreement is signed. At the request of either party, the mediator can be available to speak with the attorneys. The participants are strongly advised to obtain independent legal review of any mediated agreement before signing that agreement. The participants understand that the mediator's objective is to facilitate the participants themselves reaching their most constructive and fairest agreement. The participants also understand that the mediator has an obligation to work on behalf of each party equally and that the mediator cannot render individual legal advice to any party and will not render therapy within the mediation. During the session, the mediator may have joint and separate meetings with the parties and their counsel. If a party informs the mediator that information is being conveyed to the mediator in confidence, the mediator will not disclose the information.

Other advisors, such as accountants or appraisers, may also be valuable during mediation and the mediator will recommend this when it seems appropriate. The parties will make the actual selection of advisors and payment for their services.

2. Scope of Mediation

The participants understand that it is for the participants, with the mediator's concurrence, to determine the scope of the mediation and this will be accomplished early in the mediation process.

3. Mediation Is Voluntary

All participants herein state their good faith intention to complete their mediation by an agreement. It is, however, understood that any party may withdraw from or suspend the mediation at any time, for any reason, by giving notice to the mediator and the other parties. The parties will continue to be bound by the confidentiality provisions of this Agreement and will also continue to be bound by their agreement to pay for those services rendered up to the point of that party's withdrawal.

The participants also understand that the mediator may suspend or terminate the mediation if s/he feels that the mediation will lead to an unjust or unreasonable result, if the mediator feels that an impasse has been reached, or if the mediator determines that s/he can no longer effectively perform his facilitative role.

4. Confidentiality

It is understood between the participants and the mediator that the mediation will be strictly confidential. As such, all mediation discussions, including all written, oral and digital communications with both participants and their advisors, any draft resolutions, and any unsigned mediated agreements shall not be admissible in any court proceeding. The mediation is considered by the participants and the mediator as settlement negotiations, are made without prejudice to any party's legal position, and are inadmissible for any purpose in any legal proceeding. Any offers, promises, conduct and statements will not be disclosed to third parties, except persons associated with the participants in the process, are privileged and inadmissible for any purposes, including impeachment. Only a mediated agreement, signed by the participants, may be so admissible. The participants further agree to not call the mediator to testify concerning the mediation or to provide any materials from the mediation in any court proceeding between the participants. The participants understand the mediator has an ethical responsibility to break confidentiality if s/he suspects a party or another person may be in danger of physical harm.

5. Full Disclosure

Each party agrees to fully and honestly disclose all relevant information and writings as requested by the mediator and all information requested by any other party of the mediation if the mediator determines that the disclosure is relevant to the mediation discussions.

The mediator confirms that s/he or she has disclosed any past or present relationship or other information that a reasonable person would believe could influence the mediator's impartiality, and that no conflict of interest or appearance of a conflict of interest exists.

6. Mediator Impartiality

The participants understand that the mediator must remain impartial throughout and after the mediation process. Thus, the mediator shall not champion the interests of any party over another in the mediation or in any court or other proceeding. The participants agree that the mediator may discuss the participants' mediation process with any attorney any party may retain as individual counsel. Such discussions will not include any negotiations, as all mediation negotiations must involve all participants directly. The mediator will provide copies of correspondence, draft agreements, and written documentation to independent legal counsel at a party's request. The mediator may communicate separately with an individual mediating party, in which case such "caucus" shall be confidential between the mediator and the individual mediating party unless they agree otherwise.

7. Maintain Status Quo During Mediation

The participants agree to refrain from pre-emptive maneuvers and adversarial legal proceedings (except in the case of an emergency necessitating such action), while actively engaged in the mediation process. While mediation is ongoing, the parties also agree (1) not to sell, transfer, conceal or dispose of any property that may be the subject of this mediation, except in the ordinary course of business, (2) make any changes in insurance, or (3) make any significant changes in the status quo, without first discussing the issues in mediation so that both parties can have input into how any such changes would be made.

8. Exclusion of Liability

Each party agrees to make no attempt to compel the mediator's testimony. Each party agrees to make no attempt to compel the mediator to produce any document provided or created by the mediator or provided by the other party to the mediator. The parties agree to defend the mediator from any subpoenas from outside parties arising out of this Agreement or mediation. Should the mediator be required to respond to a subpoena from any party involved in this mediation, that party will be billed for time and expenses incurred in connection with such a response. The parties agree that the mediator is not a necessary party in any arbitral or judicial proceeding relating to the mediation or to the subject matter of the mediation. Neither the mediator nor his employees or agents shall be liable to any party for any act or omission in connection with any mediation conducted under this Agreement. Any documents provided to the mediator by the parties will be destroyed 30 days after the conclusion of the mediation, unless the mediator is otherwise instructed by the parties.

9. Mediation Fees

The participants and the mediator agree that the fee for the mediator shall be $400.00 per hour for time spent with the participants and for time required to study documents, research issues, correspond, telephone call, prepare draft and final agreements, and do such other things as may be reasonably necessary to facilitate the participants' reaching full agreement. The participants further understand that copying, postage and long-distance phone calls will be billed to them. The mediator shall be reimbursed for all expenses incurred as a part of the mediation process. A deposit payment of $800.00 toward the mediator's fees and expenses shall be paid to the mediator along with the signing of this Agreement. Any unearned amount of this deposit fee will be refunded to the participants. The participants shall be jointly and severally liable for the mediator's fees and expenses.

The participants will be provided with a monthly accounting of fees and expenses by the mediator. Payment of such fees and expenses is due to the mediator no later than 15 days following the date of such billing, unless otherwise agreed in writing.

Should payment not be timely made, the mediator may, at his sole discretion, stop all work on behalf of the participants, including the drafting and/or distribution of the participants' agreement, and withdraw from the mediation.

The parties acknowledge that they have read and understood and discussed the above terms and agree to participate in the mediation on the basis of the mediation process outlined above.

Dated: , 2023

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Attorney for Plaintiff

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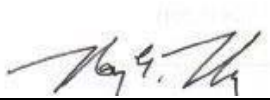
Attorney for Defts.



Nelson E. Timken, J.D., Mediator