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Message from the Outgoing Chair

Edna Sussman

As my term draws to a close it is hard to select which of the past year's activities to highlight and impossible to thank all those who made all the fine work of the Dispute Resolution Section possible. So I will just say a word of thanks to all of those who labored hard on so many committees and projects which were brought to a successful conclusion and to the NYSBA staff for all of their superb support. None of the Section's accomplishments would have been possible without the efforts of so many. Thank you.

In this special issue of the *New York Dispute Resolution Lawyer* we highlight the many ways in which the flexible processes of arbitration, mediation and collaboration can serve to maximize results in many different areas of the law. Each area has its own special needs and circumstances. The ability to tailor the process to meet those needs makes these mechanisms for dispute resolution the optimal choice for many situations. Tools can be adapted to adjudicate, conciliate, or engender a broad based collaborative process to achieve long lasting resolutions, often crafted in ways that could not be achieved by a court applying the law to the facts. We hope our readers will find it informative and useful in helping them recognize and employ where appropriate the adaptable mechanisms available to them.

Promoting New York

The trend that has developed over the last decades, with the law becoming more and more of a business, has swept over to the world of arbitration. Arbitration venues around the world, from Stockholm, Paris and Vienna to Singapore and Hong Kong, are now aggressively marketing themselves as the ideal choice for arbitrations. The UK Ministry of Justice and Ministry of Trade & Investment recently released a Plan for Growth Promoting UK's Legal

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Message from the Co-Editors

Laura A. Kaster

This special issue is the contribution of many members of the NYSBA Dispute Resolution Section under the guidance of Edna Sussman's leadership. The purpose of this effort was to help inform the bar and the public about the availability and the success of multiple forms of dispute resolution. What will be appropriate for any individual matter or client will vary widely. We take no position on whether there is a need for specialist mediators and arbitrators or whether process skills suffice. We do know that each dispute that arises occurs in one arena or another; the advocate and the party will want to know what alternatives are available for that type of dispute and some of the particular pros and cons of available methods for resolution. In addition, it is our hope that the specific information provided here will encourage more thought before disputes arise about drafting dispute resolution provisions in a wider range of documents, including wills and trusts, standard contracts and outsourcing agreements, partnership agreements, and family business arrangements of all types. Mediation need not await the development of a full blown dispute, it can be used as early as deal making or as soon as it is clear that communication needs improvement. Mediation can assist the parties to fashion better relationships and prevent disabling frictions. Arbitration that best meets the expectation of the parties must also be thought out when the documents are drafted. It is our hope to portray alternatives that are worthy of exploration because they have proved to be productive in many cases and often less costly than the alternatives.

The Introduction sets forth information that should be read before diving into any of the specific subjects because it presents the assumptions about the processes and the general benefits that can be attained by use of mediation, collaboration, and arbitration. In addition, there are ideas and insights contained in many of the white papers that could be useful to those facing disputes in other arenas.

David Singer

For example, the white paper on Health Law provides information that suggests that early direct acknowledgment of mistakes along with apology and real efforts to prevent future errors in the confidential setting of a mediation had a calculable impact in reducing costs in the malpractice arena. The Environmental Law white paper provides a model for dispute avoidance in complex multiparty matters that include public issues. Another example is the growth of collaborative law in the arena of family disputes. There is no reason that these concepts cannot be adopted more broadly. We have broken down our white papers into some specific areas with the hope that you and your clients will be able to find useful information that will enable you to better investigate the alternate means of resolving differences. The individual subjects addressed are:

Bankruptcy	Insurance
Construction	Intellectual Property
Coop and Condo	LGBT
Elder	Municipal
Employment Arbitration	Outsourcing
Employment Mediation	Securities
Environmental	Small Business
Family	Trusts and Estates
Health Law	

We hope that even if your dispute does not fall into one of these categories, there will be information that you will find helpful in seeking your appropriate dispute solution.

Laura A. Kaster
David C. Singer

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Services Sector, setting out a host of concrete steps to advance the UK in the provision of legal services to meet the "intensifying worldwide competition." ADR is central to that plan and it is reported that legal services account for 1.8% of the UK's GDP and that 34,000 disputes were resolved in the UK through arbitration or mediation in 2009, almost double the 2007 number. New York, described as a "hub of legal expertise," is, of course, mentioned along with others as one of the competitors. But with the kind of competition that is now the norm around the world, New York cannot be and is not complacent.

With the formation of the NYSBA Task Force on New York Law in International Matters, this bar association took concrete steps to analyze the benefits of N.Y. and to suggest ways to improve and promote N.Y. A comprehensive report was issued that covered many aspects of law, arbitration and the courts. The DR Section's arbitration committee and many members of the Section have been major contributors to the Task Force's efforts. The brochure entitled *Choose New York for International Arbitration*, prepared by our Section explaining the many benefits of selecting New York as the seat of arbitration, has drawn rave reviews not only for it excellent text but also for the absolutely smashing presentation achieved by the NYSBA graphics staff. The special guidelines for the conduct of international arbitrations in New York developed by our Section and adopted by the NYSBA serve to reassure those around the world that we know how to conduct an international arbitration in N.Y. in accordance with international protocols. Our committees continue to work on follow-up projects and look forward to working cooperatively with other NYSBA Sections and New York bar associations to implement the Task Force's recommendations.

DC Doings

The Supreme Court's decision in *AT&T Mobility v. Concepcion* reinvigorated the support for the Arbitration Fairness Act. In the *AT&T* case the court held that California state contract law, which deems class-action waivers in arbitration agreements unenforceable when certain criteria are met, is preempted by the Federal Arbitration Act. Thus California must enforce arbitration agreements even if the agreement requires that consumer complaints be arbitrated individually (instead of on a class-action basis). The Arbitration Fairness Act, introduced on May 12, 2011 in the wake of that decision, would invalidate pre-dispute arbitration agreements for consumers and employees and with respect to civil rights claims. It is intended to and would effectively override the *AT&T* case. In the words of Senator Franken who introduced the bill, "the Arbitration Fairness Act would help rectify the Court's most recent wrong by restoring consumer rights."

The Section has been active in working on the Arbitration Fairness Act. While taking no position on whether pre-dispute arbitration clauses should be invalidated for consumers and employees, the Section sought to ensure that corrections were made to avoid unintended consequences of the bill that might impact on other kinds of disputes, particularly international business disputes. We were gratified to see that this year's bill is quite different and much improved from the bill the Section commented on in 2009. Many of the recommendations made by the Section have been adopted. For example, franchisees have been dropped from the bill and the cornerstone principles of arbitration, competence competence and separability, have been preserved for business disputes.

The future of this kind of legislation may well be influenced by the study called for in the Dodd-Frank Act which directed a newly formed Consumer Financial Protection Bureau to study and provide a report to Congress on the use of agreements providing for arbitration with consumers in connection with consumer financial products or services. How this governmental agency will discharge this Congressional directive remains to be seen. But the study may well influence future Congressional enactments which deal with all consumer arbitration, not limited to the financial sector. Again without taking a position on the optimal treatment for consumers, this Section prepared a lengthy report highlighting the many areas that the newly created Bureau should examine in conducting its mandated study.

Civility and Resolving Disputes

The Dispute Resolution Section of the American Bar Association brought to our attention resolutions that are being proposed at the ABA to foster civility in public discourse in this country. The report accompanying the resolution echoes many of the tenets of our community: dialogue, respectful communication and informed decision making. As the report states, "[D]estructive discourse has negative consequences. It fosters polarization rather than community, enmity and contempt rather than understanding and tolerance, alienation instead of involvement. It limits the potential for problem solving…." The report calls for a collaborative process of public engagement to address issues of public concern.

While the ABA report is focused on larger societal issues, the message rings true for those purely private disputes with which most of us are involved from day to day. By fostering open communication and understanding seemingly intractable disputes can be resolved and businesses and lives can move forward. This is a field that affords us the privilege of truly helping others.

A Footnote on Arbitration

I thought a recent development in the world of arbitration was worthy of comment. We hear that arbitration is perceived, whether rightly or wrongly, as not as fast and cheap as it used to be and should be. The Section is active in taking steps to address that concern and assure expeditious, efficient and fair proceedings with trainings, guidelines and publications. It is interesting to note, however, that in the wake of the uncertain political situation in so many countries in the world today, those who have been in the forefront of urging that arbitration must be cheaper and faster to have value to users recently recommended the development of an arbitration pledge. Pursuant to the pledge corporations would commit to arbitrate all disputes unless the contract provides a different mechanism for dispute resolution. It would operate in a manner similar to the CPR mediation pledge to which over 4,000 corporations have subscribed. Whether such a pledge is developed and whether it would be enforced are questions that will have to be answered another day but the critical role arbitration plays in providing a neutral, rule of law-based forum for cross-border disputes is affirmed by this proposal.

As we move into the next NYSBA year under the capable leadership of Charlie Moxley, our incoming Chair, we invite all of you to get involved. We need your participation, energy and ideas.

Edna Sussman

Note: Edna Sussman's term of office ended on June 1. Charles J. Moxley is the new Section Chair.

The Benefits of Mediation and Arbitration for Dispute Resolution

"Disputes arise across a broad spectrum of relationships and substantive areas of the law. Alternatives to litigation may best serve client needs for resolving many of these disputes. The NYSBA Dispute Resolution Section has prepared a series of White Papers to set forth some of the special advantages of mediation and arbitration in the various contexts in which disputes commonly arise."

Edna Sussman, Immediate Past Chair
NYSBA Dispute Resolution Section

David C. Singer, Chair,
White Paper Subcommittee

Any litigator will attest that although litigation may be necessary when precedent is required, litigation has become a lengthy and expensive proposition As some disputes will inevitably arise, lawyers seeking to best serve their clients must consider whether other forms of dispute resolution could better serve their clients by avoiding much of the delay, expense and disruption of traditional litigation. Mediation and arbitration, respond to party needs in a way that may not be possible in a court proceeding. They are two of the most frequently utilized forms of dispute resolution.

Mediation and arbitration are no longer *alternate* dispute resolution mechanisms, but have become common in the resolution of commercial and non-commercial disputes between and among business entities and / or individuals. Mediation and arbitration are routinely incorporated into contracts as the method of choice for resolving disputes that may arise in the future. They are also routinely used after problems arise and the parties are seeking an appropriate means to resolve their disputes. We review the benefits of mediation and arbitration generally and how they can serve to improve your client's experience in resolving disputes and lead to better outcomes.

I. Mediation

"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, and expenses, and waste of time."

Abraham Lincoln

Mediation is the process in which parties engage a neutral third person to work with them to facilitate the resolution of a dispute. The growth of mediation over the past fifteen years has been exponential, a tribute to the success of the process. User satisfaction is high as parties retain control and tailor their own solution in a less confrontational setting that preserves relationships and can result in a win / win solution. While not every case can be settled, an effort to mediate is appropriate in virtually any subject matter and area of the law. The advantages of mediation include the following:

1. ***Mediation Works.*** Statistics have shown that mediation is a highly effective mechanism for resolving disputes. The rate of success through mediation is very high. For example, the mediation office of the U.S. District Court for the Southern District of New York reports that over 90% of its cases settle in mediation. Most cases in mediation settle long before the traditional "courthouse steps" at significant savings of cost and time for the parties.

2. ***Control by the Parties.*** Each dispute is unique, and the parties have the opportunity to design their own unique approach and structure for each mediation. They can select a mediator of their choice who has the experience and knowledge they require, and, with the help of the experienced mediator, plan how the mediation should proceed and decide what approaches make sense during the mediation itself.

3. ***The Mediator Plays a Crucial Role***. The mediator's goal is to help the parties settle their differences in a manner that meets their needs, and is preferable to the litigation alternative. An experienced mediator can serve as a sounding board, help identify and frame the relevant interests and issues of the parties, help the parties test their case and quantify the risk / reward of pursuing the matter if asked provide a helpful and objective analysis of the merits to each of the parties, foster and even suggest creative solutions, and identify and assist in solving impediments to settlement. This is often accomplished by meeting with parties separately, as well as in a group, so that participants can speak with total candor during the mediation process. The mediator can also provide the persistence that is often necessary to help parties reach a resolution.

4. ***Opportunity to Listen and Be Heard.*** Parties to a mediation have the opportunity to air their views and positions directly, in the presence of their adversaries. The process can thus provide a catharsis for the parties that can engender a willingness to resolve differences between them. Moreover, since they are heard in the presence of a neutral author-

ity figure, the parties often feel that they have had "their day in court."

5. ***Mediation Helps in Complicated Cases***. When the facts and / or legal issues are particularly complicated, it can be difficult to sort them out through direct negotiations, or during trial. In mediation, in contrast, there is an opportunity to break down the facts and issues into smaller components, enabling the parties to separate the matters that they agree upon and those that they do not yet agree upon. The mediator can be indispensable to this process by separating, organizing, simplifying and addressing relevant issues.

6. ***Mediation Can Save an Existing Relationship.*** The litigation process can be very stressful, time consuming, costly and often personally painful. At the end of litigation, the parties are often unable to continue or restart any relationship. In contrast, in mediation, disputes—such as those between an employer and employee or partners in a business—can be resolved in manner that saves a business or personal relationship that, ultimately, the parties would prefer to preserve.

7. ***Expeditious Resolution.*** The mediation can take place at any time. Since mediation can be conducted at the earliest stages of a dispute, the parties avoid the potentially enormous distraction from and disruption of one's business and the upset in one's personal life that commonly results from protracted litigation.

8. ***Reduced Cost.*** By resolving disputes earlier rather than later, the parties can save tremendous amounts in attorney's fees, court costs and other litigation expenses.

9. ***Lessens the Emotional Burden.*** Since mediation can be conducted sooner, more quickly, less expensively and in a less adversarial manner, there typically is much less of an emotional burden on the individuals involved than proceeding in a stressful trial. Furthermore, proceeding through trial may involve publicly reliving a particularly unpleasant experience or exposing an unfavorable business action which gave rise to the dispute. This is avoided in mediation.

10. ***Confidential Process and Result.*** Mediation is conducted in private—only the mediator, the parties and their representatives participate. The mediator is generally bound not to divulge any information disclosed in the mediation. Confidentiality agreements are often entered into to reinforce the confidentiality of the mediation. Moreover, the parties may agree to keep their dispute and the nature of the settlement confidential when the matter is resolved.

11. ***Avoiding the Uncertainty of a Litigated Outcome.*** Resolution during mediation avoids the inherently uncertain outcome of litigation and enables the parties to control the outcome. Recent studies have confirmed the wisdom of mediated solutions, as the predictive abilities of parties and their counsel are unclear at best. Attorney advocates may suffer from "advocacy bias"—they come to believe in and overvalue the strength of their client's case. A mediator without any stake in the outcome or advocacy bias can be effective in helping the parties be realistic as to their likely litigation or arbitration alternative.

    > In an analysis of 2,054 cases that went to trial from 2002 to 2005, plaintiffs realized smaller recoveries than the settlement offered in 61% of cases. While defendants made the wrong decision by proceeding to trial far less often—in 24% of cases—they suffered a greater cost—an average of $1.1 million—when they did make the wrong decision.[1]

12. ***There Are No "Winners" or "Losers."*** In mediation, the mediator has no authority to make or impose any determination on the parties. Any resolution through mediation is solely voluntary and at the discretion of the parties.

13. ***Parties Retain Their Options***. Since resolution during mediation is completely voluntary, the option to proceed thereafter to trial or arbitration is not lost in the event the mediation is not successful in resolving all matters.

14. ***The Pro Se Litigant.*** Mediation can be very helpful when a party does not have an attorney and is therefore representing him / herself *pro se*. Court litigation can be very difficult for the *pro se* litigant who is unable to navigate the complexities of the court process and trial. With the downturn in the economy, studies have shown that fewer parties are represented by counsel and that lack of representation negatively impacted the *pro se* litigant's case.[2] Dealing with a *pro se* litigant in court can also create difficult challenges for the party that is represented by counsel. However, in mediation, the parties can more easily participate in the process and benefit from the involvement of an experienced mediator.

II. Arbitration

"Choice—the opportunity to tailor procedures to business goals and priorities—is the fundamental advantage of arbitration over litigation."[3]

Arbitration is the process in which parties engage a neutral arbitrator or panel of three arbitrators to conduct an evidentiary hearing and render an award in connection with a dispute that has arisen between them. As arbitration is a matter of agreement between the parties, either pre-dispute in a contract as is generally the case, or post-dispute when differences arise, the process can be tailored to meet the needs of the parties. With the ability to design the process and the best practices that have developed, arbitration offers many advantages, including the following:

1. ***Speed and Efficiency***. Arbitration can be a far more expedited process than court litigation. Arbitrations can be commenced and concluded within months, and often in less than a year. Leading dispute resolution providers report that the median time from the filing of the demand to the award is 8 months in domestic cases and 12 months in international cases, compared to a median length for civil jury trials in the U.S. District Court for the Southern District of New York of 28.4 months and through appeals in the federal Second Circuit many months longer.[4]

2. ***Less Expensive.*** The arbitration process can result in substantial savings of attorney's fees, court costs and other litigation expenses because the arbitration process generally does not include time consuming and expensive discovery that is common in courts in the United States (such as taking multiple depositions and extensive e-discovery). Time consuming and expensive motion practice is also much less common.

3. ***More Control and Flexibility.*** In cases where arbitration is required by contract, the parties can prescribe various preferences to meet their needs, such as the number of arbitrators hearing the case, the location of the arbitration and scope of discovery. Once the arbitration is commenced, a party seeking a more streamlined and less expensive process will be better able to achieve that goal than in court where the applicable procedural and evidentiary rules govern. The parties will also have input in scheduling the hearing at a time that is convenient.

4. ***Qualified Neutral Decision Makers.*** The parties can select arbitrators with expertise and experience in the relevant subject matter or that meet other criteria that they desire. Arbitration avoids a trial where the subject matter may not be within the knowledge or experience of the judge or jury.

5. ***Arbitration Is a Private Process***. Arbitrations are conducted in private. Only the arbitrators, the parties, counsel and witnesses attend the arbitration. Confidentiality of the arbitration proceedings, including sensitive testimony and documents, can be agreed to by the parties. In contrast, court proceedings and filings are generally open to the public. In the generally less adversarial context of a private arbitration, ongoing relationships suffer less damage.

6. ***Arbitration Provides Finality.*** In court proceedings, parties have the right to appeal the decision of a judge or the verdict of a jury. In contrast, the grounds for court review of an arbitration award are very limited. The award of an arbitrator is final and binding on the parties.

7. ***Special Considerations for International Arbitrations.*** Party selection of arbitrators ensures that a neutral decision maker rather than the home court of one party decides the case, and allows the parties to select an arbitrator with cross cultural expertise and understanding of the different relevant legal traditions. Of crucial importance is the enforceability of arbitration awards under the New York Convention, in contrast to the much more difficult enforcement of court judgments across borders.

Endnotes

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3. Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the "New Litigation."* 7 De Paul Bus. & Comm. L.J. 3 (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1372291.
4. *Judicial Business of the United States Courts 2009* Table C-5, available at http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2009/tables/C05Mar09.pdf.

Reflections on Mediation in Bankruptcy Matters

By Leslie A. Berkoff

One of the primary goals of Title 11 of the United States Code, commonly referred to as the Bankruptcy Code, is to afford debtors the necessary breathing space from creditors in order to enable debtors to effectively reorganize their assets. Arguably by doing so, debtors maximize the value of these assets and provide creditors with payment on account of their claims. The protection of these competing, often contrary, interests is one of the hardest balancing acts created by the Bankruptcy Code. Throughout the process the debtor must either secure consent from the creditors or establish that creditors are not otherwise harmed by the debtor's actions. Thus, while in some respects the debtor has the ability to control the process and establish the means for the reorganization to take effect, the need to secure the consent of the creditors at various points lends balance to the process. To facilitate the goal of reorganization, the practice of bankruptcy law has evolved into a collaborative process with adverse parties working to harmonize their competing needs. However, this is simply not always possible or viable in all cases.

Bankruptcy is clearly a motion-driven process with the constant need to secure Court approval, even if matters are not contested, and Court intervention if they are contested. The filing of a bankruptcy case is usually commenced with a flurry of motion practice, which can mount quickly into significant fees. The multitude of motions that need to be filed to set the stage for the reorganization process, and the breadth of creditors that these motions can reach and affect, oftentimes leads to voluminous responsive filings and multiple hearings. Additional contested matters are created by the ancillary obligation for debtors and trustees to commence separate "spin off" litigations during the reorganization process to determine the value of collateral, the validity of liens, facilitate the recovery of assets, and/or determine various property rights. In order to reduce mounting legal fees (which will reduce recoveries to creditors or impact the ability of a debtor to successfully reorganize) many bankruptcy courts have turned to mediation as a means to address these issues.

The goal of mediation is, of course, resolution of the issues that have been presented. Mediation can be a useful tool in bankruptcy to encourage warring parties, blinded by emotion, to consider the economic reality of both their position and the impact on the overall reorganization process. While the bankruptcy process is governed by the Bankruptcy Code, the Bankruptcy Code serves merely as the outline for the process and the underlying framework allows room to structure resolution of claims and divergent positions. Mediation can allow an individualized solution, which meets the party's needs and perhaps might not otherwise be in line with that which the Court can facilitate or achieve as a result of the bench ruling or published decision. In this regard, mediation can be a useful tool to allow the parties to customize the settlements of their dispute within the overall process.

Moreover, given the fact that there are oftentimes limited dollars at play, mediation can be a useful way for parties to effectuate a resolution with limited costs involved. Unlike more traditional contract disputes or commercial litigation, in the bankruptcy process even if the underlying dispute is resolved and a claim fixed, or a value ascribed, the overall payment and satisfaction of that debt or obligation is governed by the Bankruptcy Code and it may be that the payment is pennies on the dollar and over time. All of these are considerations that can be taken into account in bankruptcy mediation to determine whether the dispute over the dollar is really a dollar for dollar value or a percentage thereof. The mediator can provide a useful perspective on evaluating such claims and resolutions, especially when not all of the parties are perhaps bankruptcy practitioners by trade.

Furthermore, bankruptcy cases usually involve various other areas of law, and can require the interpretation of underlying documents or agreements between the parties over points of law that have nothing to do with the Bankruptcy Code. The interpretation, resolution and/or determination of these disputes must be in line with the bankruptcy process but can be assisted by a party having knowledge in that specific area. There exist many bankruptcy practitioners who in addition to having knowledge of bankruptcy have an additional specialized knowledge base which they can draw upon, for example health care law, labor law, and the automotive industry, to name a few. The ability to appoint a mediator with relevant experience and/or expertise would greatly decrease the costs and time associated with a discrete issue and can be truly useful to both the parties and the Court in facilitating a resolution of a matter. All of these factors taken together allow for mediation and a mediator to serve as an asset in meeting the goal of the Bankruptcy Code to reorganize the parties in a consensual manner.

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The Benefits of Alternative Dispute Resolution for Resolving Construction Disputes

By John Rusk, Walter Breakell, Esq. and Amy K. Eckman, Esq.

I. Application of Mediation and Arbitration to Construction Disputes

1. Benefits of the Industry Expert

Most cases would settle if the parties shared a uniform understanding of the facts at hand. They don't settle because they don't share the same view of the facts, or even agree on the facts themselves. Their opinions of the dispute also diverge. Arbitration and Mediation offer unique opportunities to the disputants to develop an understanding of the facts of the case through a knowledgeable neutral.

For the most part, arbitrators and mediators practicing in construction are either construction attorneys or "construction professionals." Construction professionals are typically either architects, engineers or contractors. Sometimes referred to as "dirty shoe" construction professionals, their understanding of construction means and methods are often advantageous to the settlement of the matter. The use of this construction expertise varies depending upon whether the matter is being resolved in arbitration or mediation.

In arbitration, the experienced construction neutral requires much less "setting the stage" for the context of the dispute. He or she will understand substantive case law in the area, for instance case law regarding change orders, betterment, "quantum meruit" claims and other specialties of construction law. These concepts will not be "new" to the arbitrator so while time may be spent on describing the application of these laws to the particular case, the arbitrator will not need to be introduced to the concepts.

An experienced construction arbitrator will also have the ability to understand complex construction disputes on a technical level. Construction disputes are usually resolved on the facts and the contract. In cases that haven't settled, there is often a disagreement on the facts and the contract. Was there a material delay by the engineer in approving shop drawings? Were the shop drawings complete? Do the disputed Change Orders actually represent work outside the scope of the contract? Were proper procedures followed during drilling? Does the contract promise payment for unanticipated sub-surface site conditions or not? Experienced arbitrators frequently commiserate that attorneys inexperienced in arbitration often spend their time proving the failings of character or ethics in the participants, while neglecting to address that which every arbitrator cares about, the facts and the contract. Construction cases do not deserve to be settled on emotion, but rather on a matrix of complex facts and contractual responsibilities.

Arbitrators, adjudicating both the facts and law, are charged with evaluating the veracity of testimony, as well as the application of law. Because construction cases may have multiple claims for amounts due, 30 change orders, a liquidated damage cross claim as well as a hundred bills from a completion contractor, arbitrators are frequently handy with a spreadsheet as they organize this complex data. Frequently, there is no clear single culprit in a construction dispute, but rather a series of competing claims and cross claims which must be carefully teased apart and then decisions rendered on each.

Together and in close consultation with their industry knowledgeable clients, counsel and the parties can choose their arbitrator, taking into consideration the unique areas of expertise helpful to understanding the particular issues. For example, it is possible to select an arbitrator for specific knowledge regarding caissons, underpinning, veneer, wood flooring, and hundreds of other specialties. An Arbitrator / Mediator with expertise in the disputed area will be able to quickly cut to the heart of the case. Because of the quasi-judicial powers granted to the arbitrator under the arbitration rules in the parties' contract, the arbitrator can pursue the truth to its reasonable conclusion.

While it may make attorneys uncomfortable, arbitrators commonly ask questions of witnesses independently in an effort to understand the technical realities of the jobsite. Developers and owners, architects, engineers, designers, contractors and subcontractors anticipate a rational decision based on the facts of the case and the applicable law. It is for this reason that a majority of construction disputes are resolved through arbitration and mediation rather than through litigation.

As a construction mediator, this insider's knowledge of construction makes it possible to identify and organize critical information quickly to help the parties understand the cause of the dispute and then to focus on its resolution. Most construction mediators are also working arbitrators and will have the evaluative skills to give reasonable forecasts of the future of the dispute if the matter fails to settle. Industry professionals, particularly, may be very helpful in exploring the facts of the case, often succeeding in bringing an understanding to what happened that wasn't available before. A competent mediator will be able to facilitate communication between the parties and their job site personnel and drill down to the facts, documents and law in a manner that frequently discovers the root cause of the dispute during the mediation. This "ah ha" moment is part of the satisfaction experienced in the practice of mediation.

In each of its niches, construction can involve a number of contractors, subcontractors, material suppliers and design professionals. Mediation with a knowledgeable industry professional can not only resolve the dispute, but resolve the dispute with a consensus regarding the cause of the dispute that allows the parties to accept responsibility for their respective obligations.

This can lead to a resolution of the conflict which helps maintain relationships and allows companies to work together again.

2. Misconceptions of Mediation/Arbitration in Construction Disputes

Attorneys inexperienced in arbitration continue to suspect that engaging in arbitration and mediation can be a delaying tactic. With reference to binding arbitration, it is feared that the result will be a "split the baby" outcome based on equity and not the law. It is feared that restricted ability to challenge the decision through judicial review will result in an injustice to their client.

Realistically, construction law is a specialized field. While there are competent construction law firms throughout the country, not all disputants have at their disposal a firm that specializes in construction law. While firms that practice construction law will almost certainly include attorneys who also serve as arbitrators and mediators, firms in related fields such as real estate, which are more common, may not have attorneys on their staff experienced in arbitration. Arbitration and mediation have particular rules and procedures. Attorneys representing their clients in a construction dispute, who are not completely familiar and comfortable with these rules, may be at a disadvantage when disputes are to be resolved in mediation or arbitration.

According to an American Arbitration Association study,[1] the median time for arbitrations to reach resolution for cases $75,000 to $500,000 is 10 months. According to a U.S. District Court's Report the median time for all cases (not broken down to $75,000 to $500,000), the median time is 23.3 months. Claims that arbitration is a delaying tactic are without merit. Likewise, the claim that mediation is a delaying tactic belies the fact that according to the same U.S. District study,[2] only 1% of cases ever go to trial. Most cases settle.

In addressing the widely held belief that arbitration frequently "splits the baby," a 2007 study by the AAA[3] revealed that only 7% of the studied cases were awarded in the midrange (41-60%) of their filed range, with 4% of their counterclaims filed in the midrange. A 2001 study[4] yielded similar results with 9% of claims "split" or divided near the halfway mark and less than 4.5% of counterclaims. More recent informal surveys appear to confirm similar results.

It is absolutely true that arbitrations are rarely overturned by the courts. This reality frequently results in the expeditious satisfaction of an arbitration award or judgment arising out of arbitration.

3. Mediation in the Construction Industry

Mediation in the construction industry is widely utilized for simple reasons. It is the safest and most expedient way to put the parties back to work and to resolve construction disputes without destroying critical business relationships. Mediation in construction is frequently fact intensive and includes pre-mediation statements that include documentary evidence, photographs and legal arguments providing clear glimpses into the future of the dispute at trial. During construction mediations, there are frequently both fact and expert witnesses, key exhibits and discussion of points of law. So armed, the parties are typically able to resolve their dispute based on critical information unavailable at the inception or development of the dispute. These mediations are typically carried out with principals, representatives, witnesses and a mediator. Many construction disputes are settled in a single day's mediation; many others continue further negotiation using phone and email communication until such progress has been made that it is beneficial to bring the parties together to accomplish the final outcome.

Mediator skill is essential in resolving construction disputes. Mediators frequently use a variety of tools to resolve disputes. Construction mediation is often begun with careful facilitation and even the release of pent-up emotions that have stymied previous settlement efforts. Construction mediators will then often work through a fact intensive joint discussion of the case which has some similarity to an arbitration or court proceeding, and mediators often resolve the case through diplomacy and an evaluation of the case.

Construction mediators typically have extensive experience in arbitration and construction law and frequently also have experience in litigation. It is not uncommon for construction mediators to delve deeply into the facts of the case to settle, while other mediators may work the numbers in more of a facilitated negotiation. Attorneys and their clients have the opportunity to choose a neutral from this continuum that best fits their resolution strategy and the nature of their dispute.

It should be noted, however, that many experienced mediators are adept at adjusting their styles between evaluative, facilitative and transformative and one benefit of mediation is that parties and counsel can discuss the type of mediation they need up front. This is particularly of concern when evaluations are involved. Having an evaluative mediator when the parties did not expect one can derail a mediation. It's a distinct advantage to use the pre-mediation discussions to talk with the mediator about past experiences in mediation and expectations for the one at hand.

4. Arbitration in the Construction Industry

Arbitration continues to be heavily used in the construction industry as a means to resolve complex construction disputes swiftly and fairly. It is not uncommon in arbitration to have dozens of separate claims and counterclaims, all with separate issues of law, fact, and testimony. In litigation where only 1% of all claims (not just construction) make it to trial,[5] there is little to stop parties from being unreasonable in their settlement position knowing full well that a third party decision maker won't be making a decision anytime soon. In arbitration, approximately 36% and 39% of construction and real estate cases filed respectively reach an arbitral decision,[6] so parties who feel the other side is being irrational will be able to swiftly test their theory. A case with 50 separate claims and the supporting evidence and argument to support it is beyond the reasonable capabilities of the court system. It begs for an industry expert who already understands the law, is familiar with construction and is experienced in organizing complex disputes to an orderly conclusion.

For years, the default dispute resolution method for the American Institute of Architects (AIA) was arbitration but this changed in 2007 with the AIA's revised 2007 edition of their standard documents. Without affirmative action by the drafter of the documents, the default method of dispute resolution is now litigation (followed by mediation according to the AAA rules).[7]

Arbitration at the AAA is common in construction disputes and the AAA has separate Construction Industry rules.[8] This includes a "Fast Track" procedure for cases where no claim or counterclaim is more than $75,000. This procedure promises the hearing will be closed within 45 days of the preliminary telephone conference with an award 14 days later and there is no discovery; parties may only exchange documents presented at the hearing. Both the time and the discovery limitations are sometimes modified; however, under AAA Fast Track Construction Rule F-12 there must now be a written memorialization of the reasons for any time extension. The sole arbitrator is also paid at a reduced rate for a one-day hearing.

Cases between $75,000 and $1,000,000 follow the "Regular Track" procedures which, in the interests of speed and justice, allow under AAA Construction Rule R-24 for some limited document production and identification of witnesses, with the arbitrator being authorized to resolve discovery disputes and to allow additional discovery in exceptional cases. These cases are typically also heard by a sole arbitrator. Cases over a $1,000,000 are considered Large Complex Cases (LCC), are generally heard by a panel of three arbitrators, and follow the LCC rules which allow under Rule L-5 for depositions in limited cases in the discretion of the arbitrators.

Arbitrators are typically charged with making decisions on multiple claims and counterclaims. Evidence typically comes through individual witness testimony and exhibits which the arbitrators must use to decide each of the claims. Expert witnesses are often used in larger cases and it is not unusual for experts for both sides to appear at the hearing together so that each may hear the other and then may be led in a discussion of the matter by the arbitration panel.

Site visits are not uncommon, nor are mock-ups of particular technical issues. Because of the technical issues at hand, arbitrators often ask questions during the hearings to better understand the details. As arbitrations are rarely overturned by the courts, most arbitrators feel a great pressure to get it right. As the matter previously failed to settle, there are usually unresolved issues of fact, law or the legitimacy of testimony which must be decided by the arbitrators on the way to their decision.

Awards are typically standard, non-reasoned awards, except in complex cases where under AAA Rule L-6 the arbitrators are to issue a reasoned award unless the parties agree otherwise. Awards are broken down to award specific amounts for each claim made by each side. The claim and counterclaim are then netted out against each other for a final award amount.

5. Arbitration and Mediation Hybrids in the Construction Industry

There are also certain hybrid processes such as Med / Arb (a process generally in which the Mediator becomes the Arbitrator if the Mediation fails), Arb / Med (a process in which generally the Arbitrator in a case mediates the case at some point during the case, and Medaloa (a process in which the Mediator in a case that fails to settle then makes a binding choice between the two last best offers of the parties).

All of these methods have been experimented with in construction disputes but are not widely prevalent. In the case of Med / Arb, many feel that the advantages experienced through time and monetary savings (a single process with a single dispute resolution professional) may outweigh the challenges presented to the core advantages of mediation—namely a neutral who isn't deciding the case and therefore can be told certain unfortunate truths in confidence. Many feel that Med / Arb procedure undermines the mediator's abilities resulting from the resultant lack of candor, thus condemning the mediation to failure. The dispute then moves to Arbitration saddled with a mediator who's been subject to ex parte communication and disclosures of confidential information that may compromise his / her neutrality.

Arb / Med has the advantages of providing the parties with a mediated solution that is less risky and has the potential of drawing the parties back together in ongoing

business relationships, but at a greater cost than simple mediation. It can also put incredible pressure on the mediation as many arbitrators feel that once they've become mediators and spoken to the parties individually and expressed their thoughts on the case, they are no longer able to continue the arbitration. The arbitration must be started again with a new Arbitrator if the mediation fails, putting potentially undue hardship on the party with less deep pockets.

Another hybrid dispute resolution procedure is one where the arbitrator hears all the evidence and writes the award, but rather than publishing it to the parties, the award is kept under seal during which time the parties engage in one final mediation to settle the case themselves, having now heard all the evidence. Mediation under this process, in application to construction disputes, may result in a final outcome several weeks after the last arbitration hearing. This hybrid provides the parties a last chance opportunity to control their own fate before an award is issued. If the parties are able to settle the case on their own after the evidentiary hearing but before publication of the award, then the sealed award is usually destroyed, and no one will ever know what the outcome would have been.

Medaloa gives mediators a place to go after a failed mediation, but a mediator who must decide as an arbitrator must have a far greater command of the facts than a mediator who is there to facilitate agreement. The devil is frequently in the details and while the parties know the details, mediation is more time and cost efficient than arbitration because the mediator does not need to know all.

Mediations sometimes don't settle and when they don't, often the mediator and one of the parties are in agreement on the reasonableness of a settlement offer, and one of the parties doesn't agree. The party who walks away does so because he feels that for whatever reason, the other side and the mediator failed to grasp his point and wants to now prepare more fully and present his case to an arbitrator or a judge who he believes will understand. Med / Arb and Medaloa take away this second chance. Without it, each side must prepare for mediation with full discovery, witness preparation, etc. or risk losing its case when it lands before an uneducated decision maker. In Arb / Med, the parties must use full discovery and witness preparations again, go through the trial or arbitration, and then resort to the "cost efficient method of mediation." Many believe that economic waste alone, aside from other more esoteric issues of ex parte communication, disclosure, etc. is the reason for limited use of these hybrids in construction.

The AAA Construction Industry Arbitration Rules address the possibility of a mediation that occurs after an arbitration has been commenced. Rule 10 of theses Rules states:

> (a) At any stage of the proceedings, the parties may agree to conduct a mediation conference under the AAA Construction Industry Mediation Procedures in order to facilitate settlement. Unless requested by all parties, the mediator shall not be an arbitrator appointed to the case. Should the parties jointly request that the arbitrator serve as a mediator, the arbitrator's consent to do so is also required.
>
> (b) If the case is initially filed for arbitration and the parties subsequently agree to mediate, unless the parties agree otherwise, or in the absence of party agreement, by the decision of the arbitrator, the arbitration process shall not be stayed while the mediation is pending.

Also, Under AAA Construction LCC Rule L-3(d), absent agreement of the parties, the arbitrator shall not have served as the mediator in the mediation phase of the instant proceeding.

6. Standard Form Contracts in the Construction Industry

Because of the multiple parties and relationships involved in a construction project, successful completion of a project requires numerous entities to work cooperatively to achieve a defined goal within a set time frame and within a specified budget. While the majority of construction projects achieve these goals successfully, the industry is rife with the potential for conflict due to the technical complexity of the endeavor and the many parties with differing interests and personalities who need to work as a team.

Therefore, a number of the major trade organizations in the industry have collaborated on drafting certain form contracts that are intended to work together in defining the rights and responsibilities of the various parties involved in a construction project.

There are two major sets of standard form contract documents utilized in the construction industry, both of which issued revisions in 2007: those published by the American Institute of Architects (the "AIA"), and those developed by a consortium of 33 leading construction industry associations with members from many stakeholders in the design and the construction industry, including the Associated General Contractors of America (the "AGC"), called the ConsensusDOCS ("DOCS" being an acronym for designers, owners, contractors, and sureties).

AIA documents, in various forms, have been used extensively over the past century, but now there are two document schemes for the industry to choose from.

Dispute resolution procedures are located in Article 15 of the AIA A201-2007 General Conditions Document and Article 12 of the ConsensusDOCS 200 General Conditions Document. While there are similarities between the two document schemes, there are also differences concerning dispute resolution procedures, outlined below.

AIA A201 General Conditions 2007 Dispute Resolution Procedure

AIA Document A201–2007 is adopted by reference in owner / architect, owner / contractor, and contractor / subcontractor agreements in the Conventional (A201) family of documents; thus, it is often called the "keystone" document. This document, A201–2007, replaces AIA Document A201–1997, which expired May 31, 2009, although there are still many construction disputes as yet unresolved that are based on the earlier documents.

Under the earlier AIA documents, dispute resolution was placed in Article 4, relating to duties of the Architect, who was to be the first entity the parties should look to in the event of a dispute. However, under the 2007 AIA A201 document, dispute resolution has been moved to a new Article 15, regulating "claims." Under this new section, the parties can elect to have all "claims" decided upon by an Initial Decision Maker, commonly referred to as a "neutral." This takes the architect out of the sometimes awkward position of having to resolve initial disputes while being paid by the owner, which could lead to a suspicion of bias. The Architect remains the Initial Decision Maker if the parties do not identify a different Initial Decision Maker. If a party does not agree with the decision of the Initial Decision Maker, the party may demand mediation and then dispute resolution in the forum provided under the contract.

Regarding mediation under the AIA A201-2007, the parties, not the Architect (or Initial Decision Maker) control when parties can demand mediation. Under the 1997 A201, the Architect could state that the Architect's decision would be final and binding if neither party demanded mediation within 30 days of the decision. Under the 2007 A201, within 30 days after the Architect's decision, either the Owner or Contractor can attempt to make the Architect's decision final and binding by serving the other with a notice that the Architect's decision will be final and binding if the other party does not file a demand for mediation within 60 days after the initial decision.

Another significant change to the dispute resolution procedures in the 2007 AIA document is to allow greater up-front flexibility by the parties in determining whether to go to litigation, mediation or arbitration. The new documents allow for selection of ADR forum as a specific election to be made by checking the appropriate box on the form, whether to choose "arbitration," "litigation," or "other". If no box is checked, the default is *litigation*, and not *arbitration*. If the parties choose binding arbitration, the parties may also choose their own provider of arbitration services.

Even in the event the parties, either consciously or simply by failure to make a choice, end up "defaulted" into litigation, the parties can always agree after execution of the contract or when the dispute arises to submit their disputes to arbitration. And, if the parties choose to arbitrate their disputes, the default selection for the arbitration forum remains the American Arbitration Association (the "AAA"). Of course, the parties may agree otherwise in their contract.

The A201-1997 expressly *prevented* a party from joining the Architect as a party in any dispute between the Owner and the Contractor. Many owners objected to these special protections afforded to the Architect. To address these concerns, the A201-2007 allows the Architect, or any other party "whose presence is required if complete relief is to be accorded in arbitration," to be joined in any dispute between the Owner and the Contractor that involves a "common question of fact or law."

Joinder and Consolidation

Because a construction project involves significant interaction among many different parties, it is important to discuss consolidation and joinder in this context.

The 2007 AIA A201 document, in contrast to previous AIA documents, on the topic of consolidation and joinder, now provides as follows:

> § 15.4.4 CONSOLIDATION OR JOINDER
>
> § 15.4.4.1 Either party, at its sole discretion, may consolidate an arbitration conducted under this Agreement with any other arbitration to which it is a party provided that (1) the arbitration agreement governing the other arbitration permits consolidation, (2) the arbitrations to be consolidated substantially involve common questions of law or fact, and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s).
>
> § 15.4.4.2 Either party, at its sole discretion, may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought to be joined consents in writing to such joinder. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of any claim, dispute or other

matter in question not described in the written consent.

§ 15.4.4.3 The Owner and Contractor grant to any person or entity made a party to an arbitration conducted under this Section 15.4, whether by joinder or consolidation, the same rights of joinder and consolidation as the Owner and Contractor under this Agreement.

The AAA Construction Division Rules have a unique procedure (not found in the Commercial Rules), under Rule 7, allowing for a separate arbitrator, one who is not the arbitrator on any of the pending cases, to decide issues relating to consolidation of related arbitrations or joinder of parties. The purpose of this independent consolidation / joinder arbitrator is to avoid any conflict of interest an arbitrator already appointed to a case might have.

As a general proposition, and under the AIA provisions, a person who is not party to an arbitration agreement may not be joined in the arbitration without that party's written consent. However there are some exceptions to this.

In 1995 the Second Circuit Court of Appeals set forth the circumstances in which a non-signatory may be joined to an arbitration, stating:

> Arbitration is contractual by nature...It does not follow, however, that under the [Federal Arbitration] Act an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision. This court has made clear that a non-signatory party may be bound to an arbitration agreement if so dictated by the ordinary principles of contract and agency. *Thomson-CSF, S.A. v. American Arbitration Assoc. and Evans & Sutherland Computer Corp.*, 63 F.3d 773, 766 (1995).

The court identified five principles under which a non-signatory can be bound by an arbitration agreement: Estoppel, Incorporation by Reference, Assumption, Agency, Veil Piercing / Alter Ego. *Id.*

Likewise, in *Meyer v. WMCO-GP L.L.C.*, 211 S.W.3d 302, 305 (Tex. 2006), the Texas Supreme Court concisely explained the doctrine of estoppel and held that any person (including a non-signatory) claiming a benefit from a contract containing an arbitration agreement is equitably estopped from refusing to arbitrate.

As a point of interest, the ConsensusDOCS 200 and 240 explicitly require joinder of all necessary parties:

> The Owner and the Architect / Engineer agree that all parties necessary to resolve a claim shall be parties to the same dispute resolution procedure. Appropriate provisions shall be included in all other contracts relating to the Project to provide for the joinder or consolidation of such dispute resolution procedures.[9]

Without delving into a complete analysis of this topic in this white paper, suffice it to say that there are appropriate circumstances where a non-signatory may be joined in an arbitration notwithstanding his or her failure to have entered into an agreement to arbitrate. This is particularly significant in the context of a construction case where there may be multiple parties whose presence may be required in an arbitration in order to achieve an expedient and fair resolution.

ConsensusDOCS and Dispute Resolution

The ConsensusDOCS now include more than 90 contract agreements and forms that address all major project delivery methods, and publish the industry's first standard integrated project delivery (IPD) agreement and Building Information Modeling (BIM) document.

According to Brian Perlberg, Executive Director and Senior Counsel to ConsensusDOCS:

> Unlike the American Institute of Architects (AIA) standard documents, which, not coincidentally, make the architect the pivotal party of all construction contracts, the ConsensusDOCS require direct party communications and emphasize dispute avoidance. The contracts attempt to build positive relations to resolve problems before they become intractable, rather than force the architect into the middle of the ring as the third-person. In addition, the owner determines if they want to pay a design professional to serve as an "impartial" decision maker and administrative manager. The ConsensusDOCS drafters see an owner not simply as a check-payer, but rather a potentially actively engaged participant, who has the most to gain or lose in the success of a completed project.[10]

Article 12 of the ConsensusDOCS 200 deals with Dispute Resolution. In contrast to AIA Document A201, the ConsensusDOCS does not employ an Initial Decision Maker, but focuses on direct discussions between the Contractor and the Owner. ConsensusDOCS requires the contractor and owner, or their respective representatives, to engage in good faith direct discussions. If the parties cannot resolve the dispute within five (5) days, then the parties' senior executives must meet within five (5) days to attempt to resolve the issue. If the matter remains un-

resolved after fifteen (15) days from the date of the first discussion, then the parties must submit the dispute to "mitigation" or mediation, depending on their selection in the contract.

In mitigation, the parties submit the dispute to either a Project Neutral or a Dispute Review Board. After a dispute is referred to the Project Neutral / Dispute Review Board, it issues nonbinding findings within five (5) business days. If the Project Neutral / Dispute Review Board fails to issue nonbinding findings or if the matter remains unresolved after issuance of the findings, then the parties move on to either binding arbitration or litigation. It is noteworthy that Section 12.3 of ConsensusDOC 200 allows for the mitigation nonbinding finding to be able to be introduced as evidence at a subsequent binding adjudication of the matter.[11]

If the parties are unable to resolve the dispute through direct discussions and have not selected a dispute mitigation procedure, then the dispute is submitted to mediation within thirty (30) business days of the matter first being discussed and must conclude within forty-five (45) days of the matter first being discussed. The mediation should use the current Construction Industry Mediation Rules of the AAA, or the parties may mutually agree to select another set of mediation rules.[12] Should mediation be unsuccessful, then the parties may pursue arbitration or litigation. If arbitration is selected, the AAA rules in effect at the time of the proceedings are used as the procedure for the arbitration.

One important distinction between the AIA and ConsensusDOCS on the topic of arbitration or litigation is worth mentioning: referring to both arbitration and litigation, the ConsensusDOCS 200, Section 12.5.1 states that "[t]he costs of any binding dispute resolution processes shall be borne by the non-prevailing Party, as determined by the adjudicator of the dispute." "Costs" are not expressly defined, but it appears that this provision requires that the loser pay the winner's attorney's fees.[13]

7. Preserving Mechanic's Lien Rights in Arbitration

The ability to file a Mechanic's lien as security for unpaid labor and material utilized on a project is a security mechanism which is unique to the construction industry.

In New York the courts have held that an arbitrator's jurisdiction to adjudicate disputes does not extend to granting of a Mechanic's Lien foreclosure relief. However an Arbitrator's factual and legal award on the underlying facts upon which the Mechanic's Lien is premised, may be found determinative of the facts and law in a Mechanic's Lien Foreclosure Action thus providing for an opportunity to apply for Summary Judgment.

There have also been efforts to issue a Demand to Foreclose a Lien in Supreme Court under the Lien Law in order to preclude a Lienor's ability to utilize the contractual arbitration clause for adjudication of the underlying dispute. New York Courts have allowed Lienors to commence a Lien Foreclosure proceeding as demanded but then institute a stay of proceedings until the arbitration proceedings have been concluded.

8. Expanded Role for Arbitration under 2010 Revised Prompt Pay Act in New York

On September 8, 2009, New York Gov. David Paterson signed into law amendments to the state's Prompt Payment Act (the "Prompt Pay Act") intended to create broader enforcement mechanisms for the benefit of contractors, subcontractors, suppliers and laborers. N.Y. Gen. Bus. Law § 756-a (Consol. 2010). Among other things, the revised Act broadened its applicability by reducing the minimum cost threshold for applicability from an aggregate value of $250,000 to $100,000, and it also changed certain size requirements for applicable construction contracts.

With reference to arbitration, the amendments allow a contractor, subcontractor or supplier to use arbitration as a permissive remedy for nonpayment. Where an owner, contractor or subcontractor does not make a timely payment, the aggrieved contractor, subcontractor or supplier can resort to binding arbitration to resolve the payment dispute. The nonpaying party can be required to participate in binding arbitration under the auspices of the AAA. First, the aggrieved party must provide written notice of nonpayment and attempt to resolve the matter. If a resolution is not reached by the parties within 15 days, the contractor, subcontractor or supplier has the option of mandating expedited and binding arbitration. N.Y. General Business Law Section 756-b (3)(c) et seq.

The parties may not contract to opt out of the arbitration requirement. A provision in the parties' contract providing that arbitration is unavailable to one or both parties is void and unenforceable under N.Y. GBL Section 757(3). Thus, a nonpaying party can now be required by statute to participate in binding arbitration under the auspices of the American Arbitration Association, even though its construction contract does not contain an arbitration provision.

9. New York Arbitration Law, CPLR Article 75

In New York, Article 75 of the Civil Practice Law and Rules governs arbitration, and the New York practitioner should review this statute when involved in arbitrations in that jurisdiction. There are certain procedural limitations contained in Article 75, for example, N.Y. CPLR Sec.7503(c), which states, "An application to stay arbitration must be made by the party served within twenty days after service upon him of the notice or demand, or he shall be so precluded." The practitioner is advised to thoroughly review CPLR Article 75 whenever involved in an applicable proceeding in New York, as there are a number of technical requirements regarding form of service, etc. that should be considered.

Endnotes

1. Timeline in Cases Awarded in 2010 American Arbitration Association.
2. U.S. District Courts report—Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending March 31, 2010.
3. Splitting the Baby, a New AAA Study March 9, 2007 http://www.adr.org/sp.asp?id=32004.
4. Arbitrators Do Not "Split-the-Baby": Empirical Evidence from International Business Arbitrations, Stephanie E. Keer and Richard W. Naimark, June 15, 2001.
5. U.S. District Courts report—Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending March 31, 2010.
6. AAA statistics.
7. AIA Standard form of Agreement between Architect and Contractor for a project of a limited scope A-107 Article 21 and General Conditions for the Contract for Construction A-201 Article 15.
8. Construction Industry Arbitration Rules and Mediation Procedures American Arbitration Association October 1, 2009, http://www.adr.org/sp.asp?id=22004#fast.
9. ConsensusDOCS 200 § 12.6, ConsensusDOCS 240, Section 9.6.
10. *Construction Litigation Reporter,* Volume 30, Number 1, 2009.
11. ConsensusDOCS 200 Section 12.3.
12. ConsensusDOCS 200 Section 12.4.
13. ConsensusDOCS 200 :§ 12.5

    BINDING DISPUTE RESOLUTION If the matter is unresolved after submission of the matter to a mitigation procedure or to mediation, the Parties shall submit the matter to the binding dispute resolution procedure designated herein.

    (Designate only one:) ____ Arbitration using the current Construction Arbitration Rules of the American Arbitration Association or the Parties may mutually agree to select another set of arbitration rules. The administration of the arbitration shall be as mutually agreed by the Parties.

    —Litigation in either the state or federal court having jurisdiction of the matter in the location of the Project.

    § 12.5.1 The costs of any binding dispute resolution procedures shall be borne by the non-prevailing Party, as determined by the adjudicator of the dispute.

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Successful Resolution of Cooperative, Condominium and Homeowners Association Disputes

By Gail R. Davis and Walter Goldsmith

Arbitration and mediation are so widely used that they should no longer be thought of as "alternative" We review the benefits of mediation and arbitration generally and how they can serve to improve your client's experience in resolving disputes in the field of Cooperatives, Condominiums and Homeowners Associations and lead to a better outcome.[1]

Although arbitration is used in a variety of commercial disputes, it has not been a first choice in disputes involving cooperatives and condominiums.[2] Among other obstacles, the parties are often reluctant to give up their day in court. Boards, in particular, may not wish to broaden the limited grounds permitted for challenging their decisions, pursuant to the "business judgment" rule.[3]

Mediation, on the other hand, has broad potential for effective use. Unlike commercial disputes, which are often (but not always) centered on money, cooperative and condominium conflicts can span a broad spectrum of legal and non-legal issues. Controversies may involve powers and duties of Boards, contents of bylaws, cooperative proprietary leases and condominium declarations, responsibilities of managing agents, contractors, suppliers and professionals, and law and regulation regarding use and division of space, etc. Also, powerful emotions may be involved, notably those of owners, whose spaces are used as homes for the owners and their families, who each may believe that "my home is my castle," and may not consider the impact of behavior on a neighbor.

1. ***Disputes among Owners.***[4] Disputes among owners such as those concerning smoking, noise, cleanliness, use of apartments or other annoyances, are some that frequently arise and are particularly well-suited to mediation. Each party would have an opportunity to express his / her point of view, and to hear and understand the other's concerns. Also, the parties would retain control of the process and craft a solution which would fit their lifestyles, interests and concerns.

   An example of a dispute between owners resolved in mediation involves cigar-smoking on the terrace by an owner which affected the owner of the identical unit with a terrace in the same line directly above. The owner above had asthmatic children who were badly affected by the smoke rising from the lower unit. Prior attempts to talk with each other had resulted in shouting matches and insults. In mediation, the parties expressed their anger and were able to hear each other's concerns. The mediator quickly helped resolve the issue, with the smoker agreeing to smoke only at designated times on weekends, when the other family was generally away. and establishing a procedure to communicate with each other should future difficulties arise.

2. ***Disputes between Owners and Boards.*** Mediations often involve multiple parties, such as owners, managing agents, boards and insurance companies. In a dispute involving a shareholder and the Board, workers hired by the Board left a tarp off the roof during roof repair. The roof flooded and caused major leaking into the shareholder's apartment. Dampness and mold spread through the apartment, which was confirmed by the Board's tester. Ultimately, the mold was abated, which required that the shareholder move out of her apartment and live in a hotel. The parties negotiated a restoration / repair schedule. Thereafter, a second dispute occurred—who was responsible for repair to faulty windows—and the parties reached an impasse. The Board sued the shareholder for eviction in New York City Civil Court based on nonpayment of maintenance which had been withheld since shortly after the roof flood. During the court dispute and negotiations, the Bank agreed to pay the shareholder's maintenance and to suspend foreclosure since the parties were attempting resolution, which relieved pressure for both the shareholder and the Board. With the effective help of the mediator and the commitment of the parties, the parties settled the case. The mediator was skilled at discerning each party's points, finding areas of compromise, and facilitating performance by the parties of work needed to resolve the problem. After these important details were resolved, the parties and lawyers finished negotiating the agreement and the case settled.

   Another dispute between the Board and an owner involved a small condominium in which one owner used the unit as a short-term boarding house or hotel, allowing unscreened, unsupervised people to stay for short periods of time. This caused serious safety, noise and wear and tear issues as well as potential problems with laws regarding occupancy for the condominium. The Board sued the owner. The owner counterclaimed alleging that the Board failed to make necessary repairs and properly maintain the common areas and refused to provide required financial reports, making the apartment difficult to sell. In mediation, the persistent guidance of the mediator helped the parties craft a solution satisfac-

tory to both parties in which the owner decided to put the unit on the market and to abide by some restrictions until it sold, and the Board agreed to make basic repairs and furnish reports to the unit owners. The dispute was successfully resolved, and the litigation was settled.

3. ***Disputes among the Board, Contractors and Third Parties.*** These most often are connected with construction and repairs of units or common areas. Leaks are frequent culprits. In a recent case spanning five years, the owner of a penthouse unit constructed a "greenhouse" in his unit. The greenhouse consisted of enclosure by the unit owner of terrace space already appurtenant to the apartment. The construction was done with the consent of the Board, conditioned on the provisions of an "Alteration Agreement" between the Board and the owner, which contained various rules and limitations regarding the work. A leak occurred, allegedly emanating from the greenhouse into the apartment of the owners on the floor below. The leak caused substantial damage to the apartment, including falling plaster in a bedroom intended for the owners' new born child. The owners of the apartment below sued the Board, the penthouse owner, the managing agent, the contractors, architects and engineers hired by the Board to correct the problem. The penthouse owner also sued, alleging damage to his unit resulting from failure to cure the leak. Of course, multiple insurers were also involved. Obviously, mediation of these matters is complex and difficult. Favorable results, however, can often be obtained by joint negotiations with the insurers. The insurers must be induced to agree on their respective liabilities regarding the loss so as to generate funds required to resolve the case. In cases where global settlement cannot be accomplished, separate settlements may be reached with individual parties. Obviously the process may be protracted, and requires considerable skill and persistence of the mediator.

Conclusion

Joint ownership / living arrangements, such as cooperatives, condominiums and homeowners associations, are fertile fields for knotty disputes that may disrupt orderly administration, impose debilitating costs upon owners and reduce the value of units. Resolution of disputes by means other than litigation is economical, efficient and avoids bitterness that can arise from long term, virulent feuds. Mediation gives parties an opportunity to be heard in a confidential setting, and to participate in crafting solutions fitted to their interests and lifestyles. The mediation process enables the parties to maintain and perhaps enhance their relationships promoting peaceful co-existence in the community. Mediation affords a powerful tool, thus far under utilized, to promote efficient and harmonious operation, and add to the quality of life of owners.

Endnotes

1. The Cooperative & Condominium Committee of the New York City Bar has developed a Model Mediation Provision for adoption by Boards as a House Rule of a Co-op or Rule and Regulation of a Condominium which will be posted on its website which states: "It is Board policy that all disputes between or among residential unit owners or occupants be submitted to non-binding mediation. Parties are encouraged to speak with their respective insurance companies and may engage legal counsel. All parties are required to act in good faith including attendance by an individual with full settlement authority at the initial session of mediation for up to one full business day. Any written agreement entered into between or among the parties shall be enforceable in accordance with its terms provided it does not conflict with the proprietary lease or condominium by-laws." The committee also endorses the use of mediation in other appropriate disputes such as those involving owners, boards and third parties. See www.nycbar.org and click on Media & Publications—Real Estate Forms.
2. Much of the following applies to homeowner association disputes. However, unlike cooperatives and condominiums, homeowner associations consist of individually owned homes, with owners sharing the expenses of maintaining common areas, such as roads and recreational facilities. Despite compartmentalized ownership of units, association by-laws may contain restrictive provisions regarding such items as the nature, composition and color of exteriors of homes; detailed requirements regarding use of recreational facilities; and use and maintenance of lawns, porches and other areas appurtenant or adjacent to homes. These arrangements introduce a panoply of potential disputes, including those connected with permitted uses of homes and common areas by owners and boards; displays of holiday decorations, religious articles and even American Flags in and around exteriors of homes; issues arising from subleasing; respective rights and obligations of Boards and owners, notably those involving structural items such as roofs and unit exteriors; and remedies available to boards where owners violate governing documents or rules and regulations of the association. As with disputes within cooperatives and condominiums, mediation is of potential use, bearing in mind differing emphasis and dynamics arising from restrictions and limitations placed by associations on rights and prerogatives traditionally associated with ownership of real property.
3. The "business judgment" rule (*Matter of Levandusky v. One Fifth Ave., Apt. Corp.*, 75 N.Y.2d 530 [1990]) applicable to the board of directors of cooperative and condominium corporations, limits a court's inquiry "to whether the board acted within the scope of its authority under the bylaws (a necessary threshold inquiry) and whether the action was taken in good faith to further a legitimate interest of the condominium. Absent a showing of fraud, self-dealing or unconscionability, the court's inquiry is so limited and it will not inquire as to the wisdom or soundness of the business decision." *Schoninger v. Yardarm Beach Homeowners' Assn., Inc.*, 134 A.D. 2d 1, 9 (1987).
4. Some of these examples of Disputes among Owners and Disputes Between Owners and Boards are taken from disputes heard and resolved in mediation through the New York City Bar Association's Coop / Condo Mediation Project. See www.nycbar.org / pdf / mediate.pdf.

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Benefits of the Use of Mediation in Elder Law Related Disputes

By Mark J. Bunim, Barbara Mentz, Leona Beane and Clare A. Piro

Sibling Disputes Concerning Care of a Parent

By Mark J. Bunim

These are the facts of a case I recently mediated. A brother and sister were involved in a long-running dispute concerning the care of their elderly mother. The brother and sister are in their 60s and the mother in her mid-90s. The mother lives in New York, the brother in Seattle and the sister in rural Pennsylvania. The mother's faculties are fading fast and the sister has always been much closer to the mother and wants the mother to come live with her.

The brother is a wealthy business executive and the sister has very little money. Neither is married although they have live-in companions. It is safe to assume that in addition to the brother and sister truly disliking each other, the companions do as well. The sister owes the brother about $1 million for loans he has made to her over time. The brother is financially savvy but the sister has a lot of trouble dealing with money and budgets.

The mother needs 24/7 care. The sister wants to be paid a salary to take care of the mother [they now have full time aides]. The aides are paid by the mother's assets which will run dry if the mother lives more than another year. The mother's only non-liquidating asset is her large home in suburban New York City. If the mother moves to live with the sister, they could sell the house but that would also dissipate the mother's estate. The brother will not agree to pay the sister anything for caring for the mother and he wants her to stay in her New York home.

The sister runs the mother's business which involves the management and collection of royalties from the mother's career. She wants to continue doing that and to receive a stipend for her hours.

The mother's will divides everything 50/50, but there are, by subsequent agreements, set-offs in favor of the brother for sums owed to him. The brother also holds the second mortgage on the sister's house.

The sister comes to New York every two-three weeks to see the mother, supervise her care and work with the aides. She wants to be reimbursed for her travel from the mother's "pot." The brother comes to visit about twice per year.

The sister is seeking a reduction in her loan balance [from her 50% of the estate] for her "care-giving time," in addition to the dispute concerning the location of their mother's residence going forward and decision making authority regarding the mother's finances and health care.

The brother was threatening to go to court to have a guardian appointed for the mother unless the sister agreed to his plan of action. Realistically the sister did not have the funds to fight the brother in court.

Clearly this situation cried out for mediation. It is not atypical of a sibling dispute over the care of an elderly parent. While each case has its own nuances, the pent-up emotions of years of rivalry come to the fore in these types of disputes. In sibling disputes concerning a parent the emotional levels and complexities that are routine in stranger-based civil litigation only escalate. To promote a dialogue that will result in a resolution, the formalities and strictures of an adversary proceeding in a court are certainly against the best interest of the parties.

Family disputes are rarely black and white. They are inherently filled with gray and thus solution creativity that mediation can bring about is appropriate. On top of this, mediation is quick, certainty results and participants' own input results in formulating the outcome. Most mediations take months, not years. A mediator will devote as much time as needed to helping the parties achieve an Agreement that will be beneficial. Good mediators are persistent and creative and do not give up until a settlement is reached.

Benefits of Using Mediation to Resolve End-of-Life Disputes

By Barbara Mentz

As lawyers, we are always seeking to provide our clients with a win. But, what does it mean to "win" for a client in an end-of life dispute and how can mediation by a well-trained neutral mediator qualified to mediate end-of-life disputes be of benefit to lawyers representing a client in such disputes?

The benefit of early mediation by a qualified neutral mediator in an end-of-life dispute is perhaps best illustrated by the infamous debacle of over six years of litigation involving Terri Schiavo, who was in a persistent vegetative state being kept alive by a feeding tube. Although Terri Schiavo was a young woman, the issue involved whether to remove the feeding tube, which would result in her death, an issue that also arises in end-of–life disputes involving elderly patients. The lengthy and protracted litigation in the Schiavo case involved, among other things, the Florida State Courts, petitions to the United States Supreme Court, a stay by the governor

of Florida overriding a Florida court's order to remove the feeding tube, intense media scrutiny, intervention by interest groups and, worst of all, seven years of agony and tearing apart family relationships.

End-of-life disputes involving the elderly can arise in situations such as the Schiavo situation, or its mirror image, whether to insert a feeding tube to sustain life as well as whether to have a life-saving operation or whether to engage in a course of treatment such as radiation or chemotherapy.

Those embroiled in end-of-life disputes in addition to the patient, whose interest is paramount, can include family members, guardians, friends, hospitals, hospital ethics committees, doctors, caregivers and political, religious and other organizations. These emotionally charged and complex disputes may pit any combination of parties against each other, each with his, her or its own agenda involving conscious and subconscious interests, feelings and concerns. The benefits of mediation in end-of-life disputes make mediation a most appropriate method to resolve these disputes.

Mediation offers the parties the opportunity at the earliest stages of an end-of-life dispute, where time is truly of the essence, before litigation begins and the parties are entrenched in their positions, to come to a timely resolution that is in the best interest of the patient.

The mediation process can afford the parties the necessary privacy, rather than having a case proceed under public scrutiny through the court system, in a protracted adversarial proceeding, often at significant financial costs and fractured family relationships.

A skilled and well-trained neutral mediator, qualified to mediate end-of life-disputes, who should be trained in bioethics, encourages the parties, including a competent patient, to identify the feelings, interests and concerns that really underlie their positions. These may involve anger or frustration, feelings of guilt, fear of loss, differing ideas about death with dignity, different interpretations of a non competent patient's actions, exhaustion of a caregiver, religious beliefs, moral values, ethical issues, financial costs of life sustaining treatment, cultural differences between generations of family members or between family members and physicians or hospitals, a misunderstanding of the medical condition, treatment or prognosis, a mistrust of physicians or hospitals, a hospital or physician's concerns over liability, sibling rivalries, or a combination of these and many other feelings or concerns.

Most courts and family members support a competent patient's right of autonomy and self-determination to choose. Where disputes arise, whether because of family members or a doctor who declines to undertake life sustaining procedures or declines to withdraw life sustaining procedures, the mediation process can provide a competent patient with the opportunity for autonomy and self determination short of litigation. Absent mediation, the patient may never express his or her true feelings that the choice being made is out of fear of being a burden to others, financial concerns over treatment or costs, mistrust of the medical profession, a misunderstanding of the medical prognosis or life sustaining treatment or other reasons.

When a patient is not competent, the mediation process allows the parties to the dispute to focus on the patient's best interest. The mediation process affords the parties the opportunity to express and discuss their emotions, interests, values and concerns in a considerably less contentious atmosphere than a litigation setting. A mediator, having heard the participants and observed their personalities and attitudes, can facilitate the parties' understanding of each other's interests and concerns, including ethical and moral issues and religious beliefs, facilitate the parties understanding of the medical information and remove mistrust.

Because the mediation process encourages the parties to discuss with each other their concerns and feelings, it allows the parties to feel that they have been heard and their positions acknowledged. This process can facilitate the parties achieving a resolution that is best for the patient while alleviating some of their own fears, concerns and feelings. These candid and open discussions can also aid the grieving process which may well have begun before the patient dies.

Not all mediations involving end-of-life disputes will be resolved through the mediation process, and compromises on ethical and legal issues involving laws, rules or regulations cannot always be made. Even if there is no resolution short of litigation, having engaged in the mediation can provide a win for your client. The result of having first utilized the mediation process may be a shortened, less adversarial litigation. More importantly, mediation can serve as an effective method for all participants to work through their feelings, interests and concerns, to focus on the patient's needs, desires and autonomy and to deal with the grieving process.

Guardianship Disputes

By Leona Beane

A guardianship proceeding pursuant to Article 81 of the Mental Hygiene Law can become extremely contentious as it is an adversarial proceeding; the extensive litigation can get out of hand, requiring the parties to pay excessive fees as part of the litigation. The tool of mediation should be considered to assist in the resolution of a litigated guardianship proceeding.

A court is limited to statutory solutions—should a guardian be appointed; what powers should be granted pursuant to article 81 of the MHL. Mediation focuses on

solving the problem, and allows the persons involved to search for more creative responses. Before appointing a guardian, the court must determine if the appointment is necessary to provide for the personal needs and/or to manage the property and financial affairs of the "alleged incapacitated person" (AIP), and in addition, that the AIP agrees, or that the AIP is "incapacitated." The determination of "incapacity" is based on clear and convincing evidence that the AIP is likely to suffer harm because the AIP is unable to provide for his or her own personal needs and/or property management and cannot adequately understand and appreciate the nature and consequences of such inability. To prove by clear and convincing evidence is a very high standard. In many situations the guardianship proceeding can become embroiled in convoluted contentious litigation. Sometimes the ward (AIP) really needs a guardian, but because of the extensive litigation, the petitioner was not able to meet that standard, and thus a guardian was not appointed, when perhaps it would have been beneficial to have a guardian who would provide assistance to the ward.

The issue of incapacity itself should not be decided by mediation, because this is a legal issue requiring a decision by a judge. Thus, there must be a court determination of incapacity before a guardian is appointed. But, if all the other issues are resolved by a mediated agreement, any necessary hearing should proceed quite smoothly.

With the use of mediation, there may be additional alternatives for the court, such as a very limited guardianship, authorized to provide whatever is needed to assist the AIP, and nothing further, and there does not have to be a determination of "incapacity."

Sometimes there is a "power struggle" among members of a dysfunctional family seeking to acquire control over the elderly or disabled person. Quite frequently there are many ongoing disputes among family members. The legal issues presented in court are usually not the underlying issues causing the family turmoil. Sometimes there are no contested legal issues, but there are still family disputes or concerns that need to be addressed.

In a family situation, even though there may be many disputes between the siblings or other relatives (nieces, nephews, cousins, etc), they may still prefer to keep it "private"—they don't want to air all their family disputes in a courtroom in a litigated court proceeding. Many of these individuals have never been involved in any court proceeding, and this is their first encounter—involving guardianship for their mother. In such situations, mediation may provide the necessary tool to address the concerns of all the family members.

Guardianship proceedings are quite different from other proceedings in court. In most other proceedings, once a decision (court Order or Judgment) is rendered, the court is finished with that case, but not so with guardianships. A guardian is required to file an annual report each year (which might create controversy over expenditures); any major expenditure of the guardian may require a further hearing, such as, e.g., purchase of a house, sale of a house, purchase of major equipment for the ward; changes in the living conditions if at a specific nursing home, and for many other proceedings within the guardianship. Each of these proceedings seeking further court permission may entail further litigation between the relatives. Also, at the termination of the guardianship, the guardian must file a final report and account with notice to interested parties. That proceeding many times entails further litigation, regarding the expenditures that were or were not made, the investments, and everything else.

Mediation can be extremely useful whenever any of those proceedings are instituted with contentious litigation.

Many times courts appoint co-guardians. Sometimes there is contention between the co-guardians that could provide for litigation. Mediation can be very useful in this situation as well, if it is provided that the co-guardians are required to proceed with mediation first before making any application to the court.

Many guardianships are commenced for improper motives. I was once involved in a proceeding wherein the elderly lady had 4 children—the 4 children were arguing over the mother's estate plan. When one side was very unhappy, the son commenced a guardianship proceeding against his mother. That proceeding entailed very large amounts being unnecessarily expended. The dispute was really a pre-probate dispute among the children. But, the guardianship proceeding unnecessarily brought the mother into the dispute, causing her great grief, and causing everyone to expend large sums of money. That proceeding was very suitable for mediation.

Benefits of Mediation in Elder Care Law—Hearing the Voice of the Elder Person

By Clare A. Piro

Other parts of this article address the benefits of mediation in guardianships, meeting end-of-life decisions and in resolving disputes as to care of the elder person among family members. They all have in common the fact that the process of mediation insures that the family actually hears the voice of the elder person.

How many of us have had meetings with our clients and their children where the children completely take over the session, speaking for, and even over, their parent, often as if the elder person is not even present? Mediation takes the exact opposite approach and emphasizes that the client is the elder person who has a voice which deserves to be heard and respected.

First, the mediator needs to address the issue of the elder person's ability to make decisions, keeping in mind that not all decisions should be treated the same. Just because a person may not be competent to make financial decisions or live independently, he or she still has valid opinions as to where to live, with whom to live and who should be appointed to care for them. These opinions deserve to be heard and respected even if they are not determinative.

Second, the mediator will conduct the mediation in the manner in which it is most advantageous to the elder person. This means that the mediation needs to be scheduled in a place where the elder person would feel most comfortable, such as the home or nursing home, so as to minimize confusion. The mediation must also be scheduled at the time of day when the elder person is most cognitive and alert, typically morning. Finally, the mediator should ask the elder person if he or she wants a person there who will be there to offer support. Not surprisingly, that person is often a paid caregiver with whom the elder person has developed a relationship as opposed to a child or other relative.

Finally, since elder care mediations are usually multiparty sessions consisting of the elder person, a support person, children and possibly the children's spouses, you can imagine it is difficult to hear the voice of anyone except the most aggressive person in the group. That is why the mediator employs a policy of checking in with the elder person. The mediator always remains aware of the elder person's reactions, and if the mediator feels that the elder person is not hearing what is being said (both literally and figuratively), the mediator checks in with him or her and uses the mediation skills of reframing and restating what has been said to insure that the speaker's meaning is understood by all parties. Thus, the mediator is there to support each party's deliberation and efforts to understand the other's perspective without encouraging any party to adopt any particular point of view or resolution but always insuring that the elder person is part of the conversation. Given the number of participants, it is common that elder care mediation will be facilitated by co-mediators.

If you are familiar with mediation in general, elder care mediation may be very different from what you might expect. For instance, in divorce mediation, there are terms which need to be discussed and resolved in order for the parties to enter into a separation agreement, and the focus of the mediation typically is on reaching agreement. In elder care mediation, however, a primary focus is on the communication between the parties and the empowerment of the elder person. This will ultimately lead to the elder person's willingness to accept an outcome in which he or she participated in the decision making process while the other family members are able to actually hear and respect the wishes of the elder person. Thus, mediation provided more than just a resolution in that it gave the elder person a voice and respect that he or she may not have achieved in an adversarial process.

Financial Transactions Between the Parent and Children

By Leona Beane

There are many situations where disputes arise when there are financial transactions, between a parent and children, and later there is a dispute as to whether the financial transaction was a "gift" with no expectation of its return, or whether it was a "loan," where there was an expectation of repayment with interest.

Many of these transactions are entered into without the advice of counsel and without any supporting documents to determine whether there was a "loan" or a "gift."

Mediation would be extremely useful in these situations.

Quite frequently, these types of transactions come to the surface in a guardianship proceeding. Sometimes these types of transactions also come to the surface via use of a power of attorney—questions being, did the agent under the power of attorney make proper disbursements, or was there breach of a fiduciary duty?

All of these situations are ripe for mediation because they involve interpersonal disputes with extreme emotional conflict. The courts really can't handle such disputes in ways that will be beneficial to all. With mediation, quite frequently the end result is beneficial to all because creative solutions are being considered.

There are additional areas of Elder Law that lend themselves very well to mediation, such as disputes involving senior housing, neighbor disputes, assisted living issues, grandparents and grandchildren, elder abuse, insurance issues, etc. Many of these are being mediated by community-based free mediation centers, such as the one in Dutchess County.

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The Benefits of Employment Arbitration in Employment Law

By Evan J. Spelfogel

Employment litigation has grown at a rate many times greater than litigation in general. Twenty-five times more employment discrimination cases were filed last year than in 1970, an increase almost 100% greater than all other types of civil litigation combined. There is currently a backlog of over 50,000 employment discrimination cases at the United States Equal Employment Opportunity Commission ("EEOC") and thousands more at state and local governmental agencies. New cases of discrimination are being filed at a rate 25% greater than last year alone. Discrimination claims under the Americans with Disabilities Act[1] and other protective workplace laws are only beginning to impact these statistics. The EEOC is under tremendous congressional pressure to reduce its budget and to cut back on investigators and support staff needed to handle the influx of new cases.

Currently, there are over 25,000 wrongful discharge and discrimination cases pending in state and federal courts nationwide. Nearly all of these cases involve jury trials with lengthy delays and unpredictable results. Studies indicate that plaintiffs win nearly 70% of these cases and that the average jury award for a wrongfully fired employee is now approximately $700,000 (with many in the millions of dollars), but that it takes three to five years before the case goes to a jury and many jury verdicts are reduced or set aside by the courts.

Class and Collective wage and overtime cases are inundating the courts. There are now even more such cases pending in the federal courts nationwide than discrimination cases.

Alternative dispute resolution presents the only proven alternative to litigation of employment and workplace cases. Voluntary arbitration, at the option of an employee after a dispute has arisen, is non-controversial and of some benefit. Unfortunately, many times after a dispute has arisen, the parties become less flexible, gird for battle, and are less inclined to step back from judicial confrontation. Employee-plaintiffs seek jury vindication; defendant-employers look to the technical rules of evidence, protracted discovery, and judicial scrutiny of technical legal arguments to win the day. The opportunity for the parties to agree to ADR and binding arbitration, available long before a dispute has arisen, has been squandered. Drafting an ADR policy that assures fundamental due process and has proper checks and balances will protect the rights of both parties on a speedy, cost-effective basis and will reduce the burden on our judicial system.

The Legal Framework

The issue of the enforceability of pre-dispute agreements to arbitrate statutory employment claims was addressed by the U.S. Supreme Court in two seminal cases: (i) *Alexander v. Gardner-Denver Co.*[2] and (ii) *Gilmer v. Interstate/Johnson Lane Corp.*[3]

In 1974, the Supreme Court held in *Alexander* that an employee could sue in federal court under Title VII for race discrimination notwithstanding an agreement to arbitrate contained in his union's collective bargaining agreement. The union, the Court said, could not waive the employee's statutory rights.

In 1991, the Supreme Court held in *Gilmer* that courts may compel employees to honor pre-dispute arbitration agreements and to arbitrate age discrimination claims. The arbitration agreement in *Gilmer* was part of an industry-wide application that persons who wished to work as brokers or registered representatives in the securities industry were required to sign ("U-4" forms). In barring Gilmer from suing the company in court for age discrimination, the Supreme Court expressly held that the unequal bargaining power as between the employer and the employee was irrelevant;[4] and the agreement to arbitrate could not be set aside unless the employee could (a) prove "fraud in the inducement," or (b) show that he was not aware of the existence of the arbitration language in the agreement and, therefore, did not "knowingly or voluntarily" enter into the arbitration agreement.[5]

During the 1990s, with the exception of the Ninth Circuit, *Gilmer* was applied by every U.S. Court of Appeals to have considered the issue, to require arbitration of all forms of statutory discrimination. Binding arbitration agreements could be contained in handbooks, manuals, and employers' personnel policies and practices. In addition, there were numerous lower federal and state court decisions across the country to the same effect, including the New York State Court of Appeals' decision in *Fletcher v. Kidder Peabody & Co.*[6]

In mid-1998, the Ninth Circuit ruled in *Duffield v. Robertson Stevens & Co.*,[7] that the 1991 amendments to the Civil Rights Act of 1964 evidenced a congressional intention to bar arbitration of statutory discrimination disputes. A district court judge in Boston agreed with the Ninth Circuit, but the First Circuit rejected the district judge's rationale criticizing the Ninth Circuit's *Duffield* decision.[8] In *Seus v. John Nuveen Co., Inc.*,[9] the Third Circuit rejected the *Duffield* view, stating that analysis of the legislative history of the 1991 Civil Rights Act

amendments not only did not show a congressional intention to bar arbitration, but, rather, clearly indicated a congressional favoring of arbitration. A California intermediate appeals court ruled that the Ninth Circuit's *Duffield* decision applied only to federal discrimination claims within the Circuit, and not to California state law claims of discrimination.[10]

Arguably, *Duffield* could be distinguished on the basis that it concerned only a "captive" securities industry arbitration panel and not an extra-industry private panel such as the American Arbitration Association or JAMS / Endispute. As described below, *Duffield* was ultimately overruled by the Ninth Circuit in its 2003 decision in *EEOC v. Luce Forward, Hamilton & Scripps*,[11] and was superseded by a clarifying decision of the U.S. Supreme Court.

In 1998 the National Association of Securities Dealers (NASD) and the New York Stock Exchange (NYSE) modified their rules, effective Jan. 1, 1999, so that registered employees were no longer required to submit statutory employment discrimination claims to arbitration based solely on U-4 Agreements. However, individual securities industry companies were allowed to develop their own ADR programs, including pre-dispute mandatory arbitration agreements. An unresolved question was whether these individual member employer arbitration programs required both statutory and nonstatutory related disputes to be submitted to a single private arbitration tribunal so that the parties would not be faced with bifurcation of such issues.

While the overwhelming majority of courts to have considered the issue during the ten years since *Gilmer* upheld and enforced pre-dispute agreements to submit statutory employment discrimination claims to mandatory arbitration, there were a handful of "backlash" decisions across the country that were instructive and presaged the need for further Supreme Court clarification. Several courts refused to enforce "opinionless" arbitration awards.[12] The Michigan Supreme Court refused to enforce an arbitration provision in a handbook because the employee never signed anything indicating an intent to be bound, and the employer reserved to itself the right not to be bound.[13]

Even before *Duffield*, the Ninth Circuit had held in *Prudential Ins. of Am. v. Lai*[14] that an employee did not "knowingly and voluntarily" enter into an arbitration agreement where the relevant language was "buried" in a lengthy legal document, was not called to the employee's attention during the negotiations for the agreement, and was never mentioned at any time before the dispute arose months later.[15] Several courts refused to enforce arbitration clauses because they were not precise enough and did not expressly reference statutory claims.[16]

The conflict between *Duffield* in the Ninth Circuit and cases like *Rosenberg*, *Cole*, and *Seus* in the First, D.C., and Third circuits respectively, one would think, suggested early resolution of the split in the circuits by the U.S. Supreme Court. The Court, however, declined the opportunity when it denied certiorari in *Duffield*.[17]

Similarly, the Supreme Court avoided an opportunity to clarify the reach of *Gilmer*, the continued viability of *Alexander*, and the application of the 1991 Civil Rights Act amendments in its 1998 decision in *Wright v. Universal Maritime Service Corp.*[18] There, the Court ruled, an agreement to arbitrate found in a union collective bargaining agreement could not bar a federal court Title VII suit, absent a "clear and unmistakable" waiver. Writing for a unanimous bench, Justice Antonin Scalia stated that the Court did not have to reach the more significant questions as to whether *Alexander* had been overturned by *Gilmer* and whether a union could waive an individual member's right to go to court on a statutory Title VII claim, because the agreement at issue did not expressly reference the statute or its substantive coverage.

In the meantime, the National Labor Relations Board and the EEOC continued to oppose any mandatory arbitration policy that barred an employee from filing administrative complaints with those agencies. The Second Circuit in *EEOC v. Kidder Peabody & Co.*,[19] and a Michigan District Court in *EEOC v. Frank's Nursery & Crafts, Inc.*,[20] ruled, however, that while the EEOC might have authority to investigate discrimination charges brought by an individual employee and to seek injunctive relief with respect thereto, the EEOC may not seek individual relief, including monetary compensation of any kind, for an individual who had signed an arbitration agreement. Both courts reasoned that the Federal Arbitration Act ("FAA")[21] expressed strong congressional preference in favor of enforcing valid arbitration agreements freely entered into by contracting parties. Moreover, they noted, the Supreme Court had held that precluding individual suits based on arbitration agreements was not inconsistent with the remedial purposes underlying the ADEA. The EEOC may continue to investigate and remedy pattern, practice, and collective claims against the employer, but that as to individual employees who have signed arbitration agreements, the EEOC stands in the shoes of the affected employee.[22] On the other hand, the Ninth Circuit held *in Kraft v. Campbell Soup Co.*[23] that agreements to arbitrate employment disputes fell within an exception in Section 1 of the FAA and, thus, could not be enforced under that statute.

The "backlash" cases referenced above, generally, taught that carefully structured arbitration programs that merely substituted an arbitral forum for a judicial forum and that carefully protected all of an employee's substantive rights and remedies, should not be objectionable.

In *Circuit City Stores v. Adams*,[24] a landmark 5-4 decision, the United States Supreme Court ended the debate and ruled that employers could require most employees to resolve their employment related disputes, including statutory discrimination claims, through arbitration. As a result of *Circuit City*, the vast majority of employees and employers are free to enter into binding arbitration agreement pursuant to the FAA.

Left unresolved by the Supreme Court in its decisions in *Gilmer, Wright* and *Circuit City* was the continued viability of *Alexander* and whether an employer and a union might agree in a collective bargaining agreement that employee discrimination claims (as contrasted with contract interpretation issues) would be subject to binding arbitration.

In mid-2009, the Supreme Court resolved this issue in the affirmative in *14 Penn Plaza LLC v. Steven Pyett*.[25] In its split decision, the Supreme Court held enforceable a provision in a collective bargaining agreement that clearly and unmistakenly required covered employees to arbitrate federal age discrimination claims.

In view of *14 Penn Plaza*, *Circuit City* and *Gilmer*, it is now clear that as a legal matter, properly and carefully crafted and administered pre-dispute mandatory arbitration policies will be upheld and will bar employees from suing in court and obtaining jury verdicts on statutory discrimination claims—provided that the policies are fair, afford due process and merely substitute an arbitral forum for a judicial forum, while preserving to employees all the rights and remedies they would have been entitled to in a court.

Drafting the Arbitration Program

In view of the current legal landscape, an employer may now draft and implement a carefully worded mandatory arbitration program that at a minimum provides for the following: (i) the neutral be an experienced labor/employment arbitrator familiar with discrimination laws; (ii) there be a fair, simple discovery method for employees to obtain information necessary to prepare for the arbitration hearing and protect their claims; (iii) the employer pay the entire arbitrator and arbitration tribunal fees (although the employee may be required to pay the equivalent of a federal court filing fee); (iv) the employee have the right to be represented by counsel; (v) the arbitrator have the same authority to award the same range of remedies available in court under applicable law; (vi) the arbitrator issue a written opinion explaining the award in detail; and (vii) the arbitrator's opinion and award be subject to review under the FAA or similar state law. Needless to say, the employee should be allowed to participate in the arbitrator selection process; time limits should be comparable to applicable statutes of limitations; there should be no retaliation for an employee's using the ADR program; and there should be fundamental due process.

Clearly, the arbitration policy should be bilateral, i.e., the employer should be equally bound to arbitrate any claims it might have against the employee.[26] Moreover, references to the arbitration policy should be highlighted in bold, oversized print on job applications, in employee handbooks, and in periodic reminders and distributions to employees. Further, the policy or program should expressly list, either by statute or by description of its substantive coverage, the statutory claims that must be submitted to arbitration.

The arbitration policy should be republished at least annually (and preferably semi-annually), and should be discussed frequently at employee meetings. Employees should sign a separate page agreeing to be bound by the arbitration policy and should sign attendance sheets at discussion meetings as evidence they were aware of and knew of the policy. Finally, the program should be carefully prepared, announced, marketed, and implemented as the benefit to employees that it is, rather than suggesting any limitation on employee rights.

Other Advantages and Disadvantages of Arbitration

In recent years, many well-known employers have set up mandatory arbitration programs covering millions of employees. These include J.C. Penney, LensCrafters, Phillip Morris, Chrysler Corporation, Credit Suisse Bank, Bear Stearns, and Salomon Smith Barney. The benefits of an arbitration program are clear. A survey of employee attitudes with respect to the use of arbitration in employment disputes shows that 83% of American workers favor the use of arbitration instead of courts to settle disputes with management.[27] Most employees surveyed felt that arbitration would make it easier for ordinary workers to obtain a speedy and fair hearing, that it would be far less costly than hiring a lawyer and going into court, and that it was a meaningful substitute under federal civil rights laws.

From management's point of view, a mandatory arbitration program speeds up the dispute resolution process, minimizes the expense of discovery, reduces internal and legal costs, ensures the preservation of confidentiality (thereby minimizing the risks of adverse publicity), and avoids the possibility of runaway jury verdicts. Disadvantages include the fact that arbitrators are not as inclined as courts to preserve the technical rules of evidence, and that the parties mutually give up their right to judicial review and appeal.

The U.S. Supreme Court's decisions in *Burlington Industries, Inc. v. Ellerth*,[28] and *Farragher v. City of Boca Raton*[29] provide even more incentive for an employer to

initiate an ADR program. These decisions indicate that an employee's claims of sexual harassment and hostile work environment may be defeated by the employee's failure to take advantage of an available and effective employer provided grievance / arbitration program.

Moreover, aside from mandatory pre-dispute agreements to arbitrate statutory discrimination claims, many other nonstatutory forms of employment disputes may also be required to be arbitrated. These include, for example, contract and tort claims such as wrongful discharge, assault and battery, defamation, negligent hiring, retention or supervision, and intentional infliction of emotional distress. These are all claims that plaintiffs' lawyers typically join with statutory claims to avoid the 1991 Civil Rights Act's $300,000 cap on compensatory and punitive damages in certain discrimination cases.

Conclusion

In conclusion, compulsory arbitration of statutory employment disputes offers many advantages over litigation. These include speed, efficiency, informality, reduced costs, confidentiality and the potential for preserving an amicable relationship between the parties, not to mention the unclogging of court and administrative agency backlogs. Considering all of the alternatives, employers are urged to give serious consideration to promulgating pre-dispute mandatory arbitration programs. While active opposition and unanswered questions remain, the advantages of arbitration substantially outweigh any countervailing considerations.

Endnotes

1. 42 U.S.C. §§ 12201-12213.
2. 415 U.S. 36 (1974).
3. 500 U.S. 20 (1991).
4. *Gilmer*, 500 U.S. at 32.
5. *Id.* at 33.
6. 81 N.Y.2d 623, 601 N.Y.S.2d 686 (1993).
7. 144 F.3d 1182 (9th Cir. 1998).
8. *Rosenberg v. Merrill Lynch*, 995 F. Supp. 190 (D. Mass. 1998); *affirmed on other grounds*, 167 F.3d 361 (1st Cir. 1998).
9. 146 F.3d 175 (3d Cir. 1998). *See in accord Koveleskie v. SVC Capital Markets*, 199 WL 50226, (7th Cir. Feb. 4, 1999*); Cole v. Burns Int'l Soc. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997); *Paladino v. Avnet Computer Techs., Inc.* 134 F.3d 1054, 1062 (11th Cir. 1998); *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1130 (7th Cir. 1997); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837 (8th Cir. 1997); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 882 (4th Cir. 1996); *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1487 (10th Cir. 1994); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 308, 312 (6th Cir. 1991); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 340 (5th Cir. 1991).
10. *24 Hour Fitness, Inc. v. Superior Court of Sonoma Cty.*, 66 Cal. App. 4th 1199 (1998).
11. 345 F.3d 742 (9th Cir. 2003).
12. *See, for example, Halligan v. Piper Jaffrey*, 148 F.3d 197 (2d Cir. 1998); *Montes v. Shearson Lehman Bros., Inc,*. 128 F.3d 1456 (11th Cir. 1997).
13. *Heurtebise v. Reliable Business Computers, Inc.*, 452 Mich. 405, 550 N.W.2d 243 (1996).
14. 42 F.3d 1299 (9th Cir. 1994).
15. *Id.* at 1305.
16. *See, for example, Renteria v. Prudential Ins. Co.*, 113 F.3d 1104 (9th Cir. 1997) (arbitration clause that did not list, specifically, the statutes covered could not constitute a "knowing waiver").
17. 525 U.S. 982 (1998).
18. 119 S. Ct. 391 (1998).
19. 156 F.3d 298 (2d Cir. 1998). Arguably overturned by *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279 (2002).
20. 966 F. Sup. 500 (E.D. Mich. 1997), *reversed*, 177 F. 3d 448 (6th Cir. 1999).
21. 9 U.S.C. Sections 1-16 (1994).
22. *Supra*, note 4.
23. 161 F.3d 1199 (9th Cir. 1998).
24. 532 U.S. 105 (2001).
25. 129 S. Ct. 1456 (2009).
26. Typically, employers exclude from arbitration their claims for injunctive relief to prevent breaches of covenants not to compete and confidentiality agreements. Typically, employee claims under state workers' compensation and unemployment compensation statutes are also excluded from arbitration. We do not see such exclusions as indicating a lack of mutuality or one-sidedness, as suggested by one court in *Gonzalez v. Hughes Aircraft Federal Credit Union*, 1999 Cal. App. Lexis 151 (Ct. App. Cal. 2nd App. Div. Feb. 23, 1999).
27. *See* PRINCETON SURVEY RESEARCH ASSOCIATES, WORKER REPRESENTATION AND PARTICIPATION SURVEY Focus GROUP REPORT (April 1994).
28. 118 S. Ct. 2257 (1998).
29. 118 S. Ct. 2275 (1998).

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Mediation to Resolve Workplace Disputes: A User's Guide

By Ruth D. Raisfeld, with input from Margaret L. Shaw, Carol Wittenberg and Susan T. Mackenzie

The use of mediation and arbitration to resolve disputes between private or public employees and their employers has become increasingly important as the courts and clients struggle with the expense and uncertainty of litigating the myriad of statutory and civil claims that arise out of workplace disputes.

Any lawyer asked to handle an employment dispute—whether on the plaintiff's side or employer's side—should consider the alternative of mediation and should also be aware of the possible existence of an agreement requiring mediation or arbitration of a particular dispute. This paper will outline the main alternative dispute resolution issues counsel should be aware of when advising a client involved in an employment dispute.

Mediation

To illustrate how mediation can be used to resolve workplace disputes, consider this common workplace scenario:

> ACME Insurance Agency fires Sheila Smith "for performance related reasons" after several years of employment. Although the company had an employee manual requiring progressive discipline, the supervisor, Rob Rawlins, did not document the reasons for the termination, but simply concluded, "Enough is enough. We have to fire this person." Rawlins calls the employee into his office on a Friday afternoon and says, "We have no job for you anymore. Don't come in on Monday." Sheila had no chance to meet with a human resources manager or any higher-level manager to offer her view of the situation. Sheila decided to contact a lawyer. Sheila provides the lawyer with her pay stubs, the employee handbook, a positive performance review, and copies of some e-mails she received from Rawlins that contained very offensive language. She also reveals that she has overheard supervisors engage in raunchy conversation and says Rawlins frequently displayed disdain and disgust whenever he had to deal with her. She and the lawyer discuss her belief that she was fired because of her gender and because she wouldn't go along with the harassment she observed and experienced at work. The lawyer sends a letter to ACME that states that the termination may be unlawful and asks for an opportunity to negotiate a reinstatement or at least a severance package before the employee commences a lawsuit or files a charge with the Equal Employment Opportunity Commission.

This scenario represents a workplace-related dispute that is appropriate for resolution through mediation. While the employer's lawyer may take a hard-line and say, "my client did nothing wrong. Your client was incompetent," such a response may result in the filing of a charge of discrimination with the EEOC, New York State Division of Human Rights, New York City Commission on Human Rights, or a discrimination case in state court. Any one of these proceedings has the potential to result in significant time and expense, even in the initial stages, that far exceed the cost of a severance agreement reached through negotiations. Employers may also opt to resolve these disputes by using ADR.

First, some large employers have policies requiring employees and former employees to submit their concerns and grievances to mediation prior to instituting arbitration or litigation. Therefore, lawyers would be well-advised to review any employment agreement, job application, employee handbook, or other policy statement that describes whether the employer has an internal dispute resolution process that an employee will be required to exhaust before commencing litigation.

Second, some employers will respond to employee claims with an invitation to mediate or will respond affirmatively to an employee's request to mediate.

Third, the federal courts in New York and the Supreme Court of New York, in various counties, have court-annexed mediation programs that provide a panel of mediators to whom a case can be referred by a judge or voluntarily selected by counsel. This process can be initiated at any stage of litigation. Similarly, parties before the EEOC may also request mediation conducted by EEOC mediators.

What is it about mediation that makes it a particularly effective dispute resolution tool for workplace disputes? In mediation, the employer and employee can sit down with each other and their lawyers, and with the help of a neutral third party, review the facts that led to the challenged employment decision and reach a resolution before either side incurs unnecessary legal fees, additional emotional wear-and-tear, and disruption of normal business activities. The unique character of employment disputes, as well as the historical model of third-party in-

tervention in workplace disputes, results in mediation's high success rate for resolution of employment disputes.

Employment Disputes Typically Involve Both Economic and Emotional Issues

Employment disputes typically involve one or more claims under federal, state or New York City anti-discrimination laws, challenging a discharge or other employment decision. Job loss causes not only economic injury but undermines the former employee's self-esteem and the perceptions of others about the employee's ability to succeed at work. Similarly, employer representatives often feel they have done everything possible to motivate the employee to provide the required job performance, so decision-makers at the company will also have emotional reasons to support their belief that the employee was treated "fairly."

A negotiation between lawyers over the phone or outside a courtroom deprives the parties to the dispute—the employer and employee—of the emotional catharsis that is available when both sides can sit down, review what led to the challenged employment decision, the impact on the people involved, and turn toward devising a resolution that will allow both sides to progress toward the future. From the employee's standpoint, the ability to explain his or her side of the story and the economic and emotional impact that the challenged employment decision has had is a turning point that may enable him/her to accept the reality of an employment decision and allow the employee to move on with life. From the employer's standpoint, the mediation gives the employer an opportunity to learn something about the employee, the supervisor, and the workplace that they were not aware of previously, or that they knew of but had not completely or properly addressed. Here is an example of how this works:

> After several hours of mediation, the aggrieved employee asked if a one-on-one meeting with the mediator was possible and counsel agreed. After telling the mediator that she reminded her of a former boss who had been an important mentor, the plaintiff talked about how upset the case had made her. She also talked about how the attorneys' negotiations over dollars were leaving her feeling disassociated from the process and from what she was personally looking to accomplish. The mediator was able to help the plaintiff identify her feelings, think through what she really wanted out of a resolution, and work within the process to accomplish that result. The case settled shortly after their caucus.

In Employment Disputes, the Damages Recoverable May Be Exceeded by the Attorneys' Fees and Costs of Litigation, Making Early Resolution More Desirable

A unique feature of employment litigation is that the costs of litigation and attorneys' fees often exceed the damages that can be obtained in court even if the employee is successful. Damages in the form of back-pay and front-pay are a function of the employee's compensation; however, the costs of litigation are the same whether the employee was a low earner or high earner. In addition, in employment litigation there are fee-shifting statutes that enable the prevailing party plaintiff to shift responsibility for the plaintiff's attorneys' fees and costs to the employer. Thus, an employer has the risk of footing its own legal fees and the costs and attorneys' fees of the employee should the employee prevail. Some employers have employment practice liability insurance where defense costs and damages awards are covered. However, faced with the prospect of paying the costs and attorneys' fees for both sides, the opportunity to settle in mediation before fees and expenses climb is an important benefit unique to employment litigation. By the same token, mediation gives the employer an opportunity to convey to the plaintiff, that should the plaintiff lose or receive less in a lawsuit than the employer offers in an "offer of judgment," the employer may recover its costs of defense… an eventuality that may convince an employee to take a settlement even though it is less than the employee hoped he/she would recover in litigation.

A Mediator Can Offer a Fresh Perspective on the Facts and Law

Quite often, employment counsel and the client get so involved in the minutiae of moving through discovery toward the ubiquitous summary judgment motion that they "lose the forest for the trees." Counsel may dread the call from a client wanting an update on the status of a case filed long ago; the client may become dissatisfied with counsel's view of the case, which has migrated from "optimistic" to "doubtful." In such cases, a mediator can provide a "reality check" about the prospects for success at trial that counsel may have difficulty communicating to the client or that the client is having difficulty hearing. A mediator who has employment law experience and is aware of relevant legal developments in the area can help counsel and clients assess and communicate about the strengths and weaknesses of a case. Further, the mediator does not have the same emotional investment in "winning" that the counsel and parties have and is able to provide a dispassionate viewpoint that can move the parties away from a stalemate. Here is an example of how this works:

> A sales representative who had worked for a company for many years was laid-

off after a change-in-control. The new company required sales representatives to do a lot more marketing and promoting than they were used to before the buy-out. The sales representative was unfamiliar with power-point and had never felt comfortable using Microsoft Outlook to file contacts, preferring his own "rolodex" method. He was eventually targeted for a lay-off since he was rated "least flexible" among employees in his classification. He maintained he was terminated due to his age and while his lawyer had uncovered some unexplained statistical disparities in the ages of the employees selected for lay-off, he was having difficulty explaining to his client the perils of proceeding with an age discrimination claim in federal court. In mediation, the mediator used a large flip chart to illustrate the life cycle of an age discrimination case, the complexity of continued discovery and depositions, the time it takes to get to trial, and the limited nature of his potential economic recovery. The mediator let the employee offer alternative scenarios, which the mediator drew on the flip chart in different colors. After the mediator left to caucus with the employer's side, the employee focused for the first time on the risks and rewards of continued litigation. Ultimately, he opted to accept a settlement. The plaintiff's lawyer later remarked that he had not been able to get his client to understand the uncertainties of litigation until the mediator literally "drew a roadmap" for his client.

Parties Can Obtain in a Mediation Remedies That May Not Be Awarded in Litigation

Mediation is an effective dispute resolution mechanism in employment cases because the parties can fashion remedies that may not be available through litigation. The most common of these remedies are transfers and reassignments, letters of reference, assistance with outplacement, provision of health insurance, or provision of training. Mediation can also provide an opportunity for apologies that would never be available in litigation. Similarly, in disputes over unpaid wages, commissions, or bonuses, mediation provides an opportunity for both sides to "work through the numbers" without spending inordinate time battling over depositions or expert opinions. So, for example, how did the mediation between the sales representative and the former employer described above end up?

The sales representative achieved an enhanced severance package, the employer contributed to his attorneys' fee, he received some money toward outplacement, and the employer gave him a letter recognizing his contributions to the business that led to the merger.

Mediation Provides Confidentiality and Avoids Publicity

The privacy afforded by mediation processes is a key factor contributing to the success of mediation in resolving employment disputes. Both employers and employees may wish to avoid the glare of public attention and scrutiny that often accompanies employment litigation. The most recent obvious examples of negative publicity surrounding employment litigation include the Anouka Brown verdict against Madison Square Garden, the sexual harassment case against Bill O'Reilly, the sex discrimination case against Morgan Stanley, and the class actions against Wal-Mart and Starbucks.

Airing employment disputes in the press and before a judge or jury may affect personal relationships of the parties and the reputation of witnesses, interfere with the conduct of daily business transactions, and even impact the plaintiff's ability to secure new employment without fear of retaliation. In employment mediation, the mediator and counsel can provide the employee and employer with an opportunity for a private face-to-face confidential conversation that they never had prior to or at the time of termination; that way "unfinished business" can be conducted outside the presence of counsel, a court-reporter, or a judge or jury. Very often, these intimate conversations about issues that only the employer and employee can truly understand pave the way to resolution outside of litigation. The confidentiality provided in the mediation process encourages candor, problem-solving, and creativity in resolving employment-related disputes while avoiding the destructive impact of negative publicity. An example follows:

Donald, an Executive Vice-President of a Fortune 500 company, had a brief romantic dalliance after a Christmas party, with Jane, a much younger sales assistant. They returned to her apartment after the party where they had sexual relations. They met several times thereafter in bars near the office. When Jane was terminated by another supervisor for poor performance, Jane raised the issue of sexual harassment for the first time in her exit interview. Upon investigation, Donald admitted the conduct, said it was consensual, but asked the Company to resolve the matter so that his wife and children would not find out. The case

settled in one day in mediation, both parties acknowledging that the situation was unfortunate but that they needed to put the incident behind them.

Mediation Is More Predictable than Litigation

No lawyer can ethically or practically guarantee a client a particular result in court. Litigation is unpredictable: a document can surface that no one remembers; a witness can crumble on the stand; a jury may not appreciate the nuances of an argument. Particularly in employment litigation, memories fail, the emotional significance of an employment decision fades, and the witnesses may have dispersed to other jobs. In mediation, without rules of evidence or procedure, the parties can use less structured means to convey the heart of a problem to the mediator and the other side which may facilitate settlement discussions, concluding the matter without suffering through the vagaries of litigation.

Impediments and Shortcomings in the Mediation Process

Mediation is not a panacea for all hotly contested employment cases; there will be those extremely emotional current or former employees who won't back down and those cases where employers won't settle unless a court order is entered against them. Some employers are concerned that the availability of mediation will encourage frivolous complaints. Others are concerned that mediation simply adds a layer of time and expense when a case does not settle. Other attorneys have also expressed the concern that mediation is often used as a form of discovery or an attempt by insurance companies to tease out an adversary's "bottom-line" from which new negotiations will later proceed.

Lawyer's Role in Making Mediation an Effective ADR Mechanism

Prepared for both the pros and cons of mediation, attorneys can address the following issues in order to maximize the effectiveness of mediation of employment disputes.

Factors to consider in deciding whether to use mediation

In pending litigations or administrative proceedings, the tribunal may order the parties to court or agency-annexed mediation either after an initial scheduling conference, at a pre-hearing conference, settlement conference or upon request of the parties. In other circumstances, counsel for one or both parties may elect to raise the possibility of mediation at some stage of the litigation.

It is a matter of professional judgment whether to raise the idea of mediation and at what stage of the litigation. Factors to consider include: budget, ability of counsel or the parties to negotiate settlement directly, stamina of the parties for litigation, timing (e.g., time to trial, degree of complexity of discovery, expense of motions), and desirability for confidentiality. Some lawyers are "mediation-friendly" and will suggest mediation as a matter of course even at the "demand letter" stage. Others believe that mediation is most useful following exchange of pleadings, after at least preliminary discovery, when motions are pending, or after summary judgment has been denied. Lawyers should dispense with the notion that raising mediation as an option to explore settlement is a sign of weakness. Mediation has become such a favored ADR procedure in employment litigation that lawyers should consider mediation in order to save their clients fees and expenses in the first instance.

Process of selecting mediators and criteria used in selection process

At present in New York, other than criteria to serve on court-annexed mediation panels or the panels of private dispute resolution providers, there are no governmental credentialing entities for mediators and no licensing requirements for mediators. Many mediators are lawyers, but others are certified social workers, college professors, or have worked as dispute resolution professionals for the government or private industry. The federal and state courts have panels of mediators who must have a minimum number of years of practice and must complete government-sponsored training programs or their equivalent. In addition, the American Arbitration Association, JAMS, The International Institute for Conflict Prevention and Resolution (CPR) Martindale-Hubbell, Mediate.com, Federal Mediation and Conciliation Service, and other provider-organizations have neutral panels, entry to which depends on experience, training, and reference requirements. Still other mediators practice privately. Thus, mediator selection is very much an "ad hoc" process based on who the lawyers know and "word of mouth."

Lawyers should consider the mediator's neutrality when selecting mediators. While the mediator does not make a binding decision, potential for bias, or conflicts of interest, could compromise the mediator's appearance of neutrality and interfere with the mediator's effectiveness. Thus, counsel and the mediator should explore any such issues and disclose them during the selection process so there is no surprise at the mediation session.

Lawyers embarking upon the process of mediator selection should also be aware that mediator styles vary widely. Some adopt an "evaluative" approach, where the mediator shares with the parties his/her opinion as to likely outcomes and uses persuasive powers to cajole the parties to a settlement zone. Former judges and mediators with a specialized substantive expertise tend to practice the "evaluative" style. Other mediators, often with a social work or more psychological orientation, use a "facilitative" approach which avoids any evaluative assess-

ment and limits the mediator's role to helping the parties communicate effectively. Most experienced mediators will use a combination of "evaluative" and "facilitative" approaches as the mediation progresses.

Mediation agreements

Parties should not embark upon the process of mediation without a written mediation agreement. As noted above, there is no uniform mediation law in New York, so the parties must provide the ground-rules for the mediation themselves. Courts and agencies with mediation programs provide form mediation agreements. Private mediation agreements should at a minimum provide for: name of the parties; the mediator's name; the place, date, time; the mediator's compensation rate and fee structure; the confidentiality provisions; mediator immunity from serving as a witness in subsequent proceedings; document retention; etc.

Most mediators will provide a basic mediation agreement. Lawyers should review these agreements with their clients in advance of the mediation especially to underscore the confidentiality aspects of the mediation. Mediators generally review the mediation agreement again with all attendees at the beginning of the mediation session.

Pre-Mediation communications

Unlike judicial proceedings, ex parte contacts are permissible in the process of mediation. The better practice is to advise the parties in advance that the mediator may speak to both parties separately and privately before the mediation. The mediator will have these pre-mediation discussions in order to prepare for the mediation session and also as a way to encourage the counsel and the parties to prepare for the mediation. Some counsel come to a mediation session with the same expectations that they have when they come to a deposition or oral argument on a motion. However, this type of litigation-stance may not be useful in mediation: the goal is not to convince the mediator of the merits of a position in litigation, but to consider how to advance settlement discussions. Thus, counsel should be prepared to share with the mediator their view of the main issues in the case, obstacles to settlement, who will attend the mediation, whether there is personal animosity between counsel or between parties and witnesses, and any personality issues that may arise during the course of the session. The mediator will also encourage the parties to come to the table with full settlement authority, or at the least, the ability to contact the source of settlement authority during the session.

In most court and agency-annexed mediation programs, the parties are required to provide the mediator with the pleadings and a brief position statement prior to the mediation. This practice should also be used in private mediations. This presents an opportunity to prepare for both the mediator and counsel. Counsel should share with the mediator essential information and case-law, as well as any pivotal documents that would assist the mediator with preparing for the mediation and brainstorming settlement options. It is a matter of professional judgment whether to provide settlement offers in this submission. Generally, the pre-mediation submissions are not exchanged with adversaries, but again this is a matter of professional judgment.

Attendance of party, witnesses, experts, "significant others"

In preparing for the mediation, counsel should also seriously consider who should attend the mediation in order to make the session most effective. Certainly, the party or party representative with settlement authority should be present or available. Mediations do not succeed when just counsel for a party attends, and most mediators require a party or party representative to be present. When emotions are involved, the presence of certain party representatives can be obtrusive and counsel should consider whether their presence will foster or present an obstacle to settlement.

In addition, some attorneys believe that the presence of an "expert" or a party representative with unique knowledge of a particular issue involved in the case can contribute to the progress of the mediation. For example, if lost income is an issue, a labor economist who may advise the parties on job market trends, data on income replacement, and wage and salary data, may be an appropriate attendee. Similarly, if stock valuation is an issue, an accountant or stock options specialist might help to advance the discussion. These "experts" may provide critical objective standards to assist the parties in entering a settlement zone. In addition, if one side brings such an expert, it may give the other side an idea of the nature of the case that will be needed if the litigation proceeds.

The mediation session

Most mediations proceed in the following way:

(1) **Initial Joint Sessions**—The mediator will introduce himself / herself to the parties and counsel and general introductions will be made. The mediator will review the procedure for the session, review the confidentiality agreement, and ask for initial presentations. A skilled mediator will assess the mood and make whatever opening remarks are necessary to foster a settlement climate. Some mediators will also address at the initial session whether the participants will have a break for lunch, and whether any of the participants have time constraints. Mediation is usually a lengthy process, so counsel and their clients ought to be prepared to give as much time as is necessary to facilitate a successful mediation.

(2) **Opening Statements**—In mediation, it is perfectly appropriate for counsel to abdicate their role of making "opening statements" to their clients. Sometimes, depend-

ing on the case, clients are their own best advocates and an articulate and well-planned opening statement can be very effective. Counsel should prepare their clients to avoid interrupting adversaries' opening statements and to appear attentive and courteous, regardless of the tenor of the litigation to date.

(3) **Caucuses: Separate and Joint—What Goes on in the Other Room?**—Following initial opening statements, the mediator may conduct questioning of both sides in the presence of both sides. There may be some additional fact-gathering and issue exploration that can proceed with all parties in the room. However, it is also common for the mediator to speak with the parties and counsel in "separate caucuses" where the real work of determining additional facts, relevant law, and the "interests" of the parties behind their "positions" can take place. It is not unusual for the mediator to spend significantly more time with one side than the other, depending on the issues involved. These separate caucuses also provide an opportunity for counsel to work on their client's settlement range, expectations with regard to probability of success, and other case preparation issues. Caucuses also present a continuing opportunity to review the file and do critical fact-gathering.

(4) **Negotiating the Price of Settlement**—At some point, the tough work of negotiating the economic (and non-economic) terms of a potential settlement will start. Counsel should consider in advance their reaction to initial "extreme" offers and counter-offers. Before the mediation, counsel should have some idea of whether their adversary will be a "hard-bargainer" or a more "reasonable" negotiator. "While parties expect a 'reasonable amount of unreasonableness' in the other side's opening proposal, they react badly to what they perceive to be an extreme position." D. Golann, "Insulting First Offers, and How to Deal with Them," *JAMS Dispute Resolution Alert*, Vol. 2, Number 3 (Jan./Feb. 2002), at 1. The work of the mediator is to keep the parties engaged in the negotiation even where the parties appear hopelessly far apart. The mediator will continue to question the parties about the facts, relevant law, interests, and will attempt to get the parties thinking about the strengths and weaknesses of their case as well as their adversaries' case. Some mediators will use a "decision-tree" which maps out the costs and expenses of continuing with the litigation and the numeric risks associated with each stage of the process, together with an analysis of likely outcomes. Mediators will ask one side how they think the other side will respond to a particular proposal: will they counter, will they "walk"? Counsel should not be surprised, and should prepare their client for any of the following comments: "I'm not bargaining against myself!" "We're leaving!" "I don't think they really want to settle." "This is a waste of time." Mediators are experienced with these declarations and will continue with the process of going back and forth with offers and demands, until the gap shrinks. When this does happen, the "miracle" of mediation is experienced and the parties should turn to the process of memorializing a settlement.

(5) **Concluding the Mediation**—Even after spending many long hours negotiating a settlement, counsel should be reluctant to leave mediation without at least a handwritten summary of the terms agreed upon signed by all parties. Many lawyers come to mediation with a draft of a settlement agreement and fill in the terms if there is an agreement. It is a matter of professional judgment whether to make the draft subject to final form or whether the document generated at the mediation will be enforceable.

If the mediation does not result in an agreement, most mediators try to attempt some closure at the end of a session and will ask the parties if it would be useful to schedule another session or phone call to continue the hard work of hammering out a settlement. Again, this is a matter of mediator style and will depend on the judgment of the parties. Even in the absence of a settlement, the mediation agreement survives the process and the confidentiality provisions and any record retention provisions should be complied with in accordance with their terms.

Conclusion

In sum, counsel in employment cases should recognize that there are alternatives to traditional litigation as a means to resolve such disputes. Indeed, counsel can often save a client significant time and money by first determining whether there is a mandatory mediation agreement or policy in place before commencing litigation. Even in the absence of a pre-dispute mediation procedure, counsel is well-advised to consider using mediation in advance of, or during the course of, pending litigation.

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The Benefits of Alternative Dispute Resolution for Resolving Environmental Disputes

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Since the 1970s, various alternative dispute resolution methodologies have been utilized to resolve a variety of environmental and public policy disputes. These disputes involve disagreements over access, use, allocation and control of public lands and resources; development related matters (including housing, transportation, or other siting and permitting decisions); protection of air, water and other natural resources; hazardous and solid waste management; conservation and management of wildlife, public and private lands; energy and water supply as well as many other matters. Environmental disputes are usually complex, involving one or more layers of government. In addition to the government, parties (stakeholders with an interest in the outcome) also usually include: members of the public, environmental organizations, industry, adjoining landowners, and private sector interests. There are often great disparities in resources among these various interests. Environmental disputes also often involve multiple forums for decision making. In addition to multiple parties and multiple forums, environmental disputes tend to have multiple issues. These issues tend to be technical and complex and quite often have a political dimension. When environmental disputes are litigated, parties on all sides of the issues can incur substantial delay and expenses.

This white paper provides an overview of the use of alternative dispute resolution techniques for resolving environmental disputes. Section I describes the process of collaborative decision making and its potential for use in environmental cases including cases involving climate change. Section II highlights the role of the mediator in resolving environmental and natural resource cases. Section III provides the federal perspective on the benefit of using dispute resolution techniques in environmental enforcement cases. Section IV discusses the effectiveness of dispute resolution in public construction projects. Finally, Sections V and VI address, in a very general way, other uses of alternative dispute resolution in environmental and land use cases, respectively.

I. Stakeholder Engagement and Collaborative Decision Making

Mediation and arbitration have been utilized to resolve a number of environmental disputes. However, mediation and arbitration are not the only alternative dispute resolution processes used in environmental matters. Due to the complexity of many environmental issues, parties often decide to negotiate with the assistance of a neutral facilitator in advance of a dispute. In such cases, the neutral is not aiding the parties in dispute resolution, but is instead helping them to *avoid* disputes through collaborative efforts. Facilitation of complex environmental and natural resource matters is one of the fastest growing uses of neutrals in the environmental field. The U.S. Institute for Environmental Conflict Resolution reported that, in Fiscal Year 2009, thirty-three percent of federal agency environmental matters using neutrals involved "upstream" actions such as planning and policy development.[1]

Facilitated collaborative processes are often superior to traditional processes for matters involving complex public policy with multiple stakeholders, particularly where shared learning and creative problem solving are seen as important attributes of the decision making. Stakeholders involved in collaborative processes typically feel a sense of ownership and empowerment with respect to the decision and are less likely to resort to time-consuming and resource-intensive litigation.

Collaborative decision making is often used in instances where the government has authority to make a decision using traditional notice and comment rulemaking, but decides to expand the public's role in the decision making process. For example, when issuing a new air pollution regulation, the government might be required to hold a public hearing and publish notice of the hearing, but decides instead to engage citizens groups, industry, and other stakeholders in a more collaborative manner. There is a spectrum of collaborative processes that goes beyond the typical public notice and other outreach approaches familiar to interested parties.[2] This spectrum of collaborative processes involves increasing levels of collaboration, stakeholder interaction, opportunities for creativity and sharing of government decision making authority. The spectrum of processes moves from information exchange, to recommendations, to agreements, and finally to stakeholder action.

In an information exchange process, the government shares information with and seeks individual input from stakeholders. Sometimes the government decides to empower a group of stakeholders to make a collective recommendation to the government. A classic example of a recommendation process is an environmental federal advisory committee established pursuant to the Federal Advisory Committee Act (FACA).[3] Sometimes the government is willing to share its decision making authority with stakeholders in an agreement-seeking process, for example, in negotiated rulemaking. The Negotiated Rulemaking Act provides authority for an agency to use the services of neutral conveners and facilitators to assist a federally established committee of government and stakeholder representatives.[4] The goal of a negotiated rulemaking proceeding is to achieve committee consensus on the text of a proposed rule. There are also processes in which the government, rather than making a decision itself,

empowers stakeholders to arrive at their own collective decision with the assistance of technical and financial support from the government.

The pressing issue of climate change has led to an uptick in the use of stakeholder engagement and collaborative decision making. Given the huge diversity of interests affected by climate change, it is hard to imagine an issue more ripe for dispute avoidance through facilitated dialogue.

Roughly two-thirds of the states have finalized or are currently developing climate change action plans to address both the emissions of greenhouse gases (GHGs) and the need to adapt to climate change impacts. These states have largely used stakeholder-driven facilitated processes to develop their action plans. Many local governments are also using collaborative processes to develop climate change action plans.

The federal government has also begun to use collaborative decision making to address climate change.[5] For example, EPA engaged in a robust information exchange process in developing both its GHG Reporting Rule under the Clean Air Act and geologic sequestration rule under the Safe Drinking Water Act. The Agency also established a Clean Air Act FACA subcommittee to make recommendations on permitting large industrial sources of GHGs. President Obama brought together diverse stakeholders, including state government, automobile manufacturers, federal agencies, labor unions, and environmental groups to reach an agreement that led to the first-ever GHG standards for motor vehicles. And all levels of government are using collaborative processes with diverse stakeholders to develop adaptation plans. While there is now widespread application of collaborative decision making to climate change issues, these processes have been used for many years, and continue to be used, in other contexts such as natural resource planning, water management, and species protection, among others.

II. The Role of the Mediator in Environmental Protection and Natural Resource Cases

Some years ago, a former Secretary of Interior was addressing a group of corporate counsel and their lawyers. He made the observation that he loved the Endangered Species Act. It had such draconian remedies that he could use it as a hammer to force recalcitrant adversaries into a room to work out their differences to resolve contested natural resources disputes. The mere threat that the Secretary of Interior would exact a severe penalty that could greatly disadvantage one or more of the participants and the uncertainty of what he would do created great leverage and momentum to reach a consensual deal.

On its face this seemed like the wise exercise of federal executive power. However, closer scrutiny reveals that the federal government was abdicating its responsibility to make difficult and possibly unpopular decisions that protected the public interest. The Secretary's comments spoke more about the failure of representative democracy in the United States to make these tough decisions than it did about the virtues of consensual and collaborative decision making for hotly contested natural resource issues.

The harsh reality is that the collaborative and frequently mediated resolutions of natural resource disputes may be the only way to reach practical, durable and enforceable agreements. As anyone who practices water or natural resources law knows, fights over scarce water resources of natural resources last decades if not longer. Trials are mere skirmishes in a longer war that pits users with different needs against each other. No court judgment over water is ever a permanent resolution of rights and obligations. For example, in *Wisconsin v. Illinois*, Wisconsin joined by its sister Great Lakes States sued Illinois over the illegal diversion of water through the Chicago River in the early 1900s in the Supreme Court.[6] The case returned to the Supreme Court approximately every ten to fifteen years thereafter. Each time the Justices ruled that Illinois was in violation of its prior decree. In 1995, the plaintiffs, led by the State of Michigan, were ready to petition the Supreme Court yet again to force Illinois' compliance with the Court's prior decrees when they decided to try mediation. Similarly, environmental clean-ups and fights over fisheries may go on for decades. The legal system and our system of representative democracy and agency action in an increasingly partisan environment do not produce finality.

Because courts and the state and federal governments fail to make durable decisions regarding water, fisheries or other natural resource, the task often falls to mediators, who make difficult process decisions that affect public participation and may affect the outcome of these disputes.

The most obvious characteristic of natural resource disputes and many statutory environmental disputes is a multitude of parties. It is not uncommon to have thirty or more parties with a direct interest in a major water rights dispute. As in any mediation, the first step for the mediator is to educate herself about the case. One accepted technique is for the mediator to meet with and interview all of the key parties and then reflect what she has learned in writing back to the party. This technique accomplishes several tasks. First, the mediator learns about the party's positions, interests and settlement dynamics. Second, by "telling its story" the party may feel heard. Until parties believe that their story has been heard and understood, they will usually find it difficult to brainstorm or discuss compromises. Third, by listening and allowing the party to be heard, the mediator may begin to develop a measure of trust. Only after hearing from all interested parties should the mediator work with the parties to define the process.

Designing the process is a complicated task, especially when attempting to define the role of the public. In public policy disputes there may be a tension among the parties with the greatest financial interest or political influence and those parties that "represent" the public's interest. For example, in water rights disputes, the "public interest" may represent sport fishermen interested in maintaining trout runs, river rafters who want certain minimum flow levels, or others who may want to protect endangered species. The public interest is not so easily defined or represented. The government is not always an adequate representative of the public. Different agencies of federal, state and local governments may have different missions that may cause them to favor one interest over another. Moreover, those parties with more political or financial clout may find it difficult to work with some public interest groups, especially if the moving parties are seeking a change in the status quo and the public interest groups are seeking no change. High visibility disputes may also provide fundraising opportunities for some public interest groups, making it difficult for them to show flexibility or participate in compromises.

And, there will usually be several dimensions to a complex natural resources dispute. Here are examples of the types of issues that may be present:

> The underlying legal merits—it may be the easiest issue for inexperienced mediators to grasp, but it is usually just the tip of the iceberg of what must be understood by the mediator to be successful. Also, the merits will be set against the applicable law and numerous prior legal decisions. One cannot grasp the current dispute without understanding the context of the legal rules that apply;
>
> Data and science that justifies a party's position may heavily influence the negotiations. In water rights especially, historical data is relied upon to predict the probabilities of future events. However, history may be an imperfect guide if the climate is changing. Agreed upon science or data is rare. There is no such thing as a neutral expert!
>
> The political relationship between the parties and their history impact the negotiations. The key actors will have constituencies to whom they are beholden. Some may be elected County Commissioners. Others may run an irrigation district whose members depend on a reliable source of water with which to farm. Lawyers may represent commercial interests that have economic needs that must be met. Some may represent the citizens of a major metropolitan area and report to a board that is appointed by an elected official. Deals can be struck only if the political needs of the participants are met. One of the challenges of the mediator may be to demonstrate how those needs are better met through compromise;
>
> History also informs the process. A major dispute did not just arise from nowhere. It has roots, usually very deep, in the past skirmishes. Indeed, institutional distrust may have been built up over decades and may be so pervasive that it permeates the thought process and behavior of participants in the mediation;
>
> The "plumbing"—that is, the actual facts on the ground of how the systems work. In water disputes, such plumbing issues include the engineering and operations of the delivery systems and whether parties can "exchange" water from one place to meet obligations elsewhere. The plumbing may define the universe of possible solutions. In environmental disputes the strategies for cleaning up a site are well known and may also define the possible outcomes.

Education must be the first phase of any complex, multi-party public policy dispute. Only after the mediator understands all of the parties and the dimensions of a dispute is it advisable to work with the parties in designing a process for the negotiations. Process design has many elements but the first major hurdle will be who gets a seat at the table and, even more importantly, who doesn't. A source of some debate in the field is how strong a role the mediator should have in answering this question. The better answer may be for the parties to set the process but for the mediator to remain the honest broker for *all* parties. The parties that convene the process will get to decide who participates directly in their negotiations but the mediator, with the permission of the parties, may continue to have a dialogue with those interest groups that are absent. In this way and by pointing out the consequences of excluding interest groups, the mediator may convince the parties of the advantages of having the absent parties attend meetings as observers or otherwise have input into the process.

In large group processes, major concessions are rarely made in large meetings. It would be great if upon hearing a particularly strong argument by an opposing party that a negotiator would stand up, slap her forehead and say, "Now I see where I've been wrong. Where do I sign?" That does not happen. Instead, progress is made in small groups and individual conversations. Ideas are floated quietly, often as trades—"We might be able to do this, if you would do that. What do you think?" But, big meetings do serve a purpose. Meetings often set a deadline by

which parties must make decisions. Also, meetings bring key actors together and allow for impromptu small meetings. Meetings provide an ancillary but perhaps critical purpose. The actors get to know each other as people. Institutional distrust is broken down—"I may not trust your organization, but I trust you."

Trust is the "coin" of negotiations. Because of the complexity of many of these disputes, parties must have a measure of trust in the parties with whom they are negotiating so that they believe they are not being deceived and that the goals and interests are being met. Moreover, while transforming relationships is not the goal of public policy environmental disputes, parties that trust each other in the negotiations will be able to resolve the inevitable disputes that arise after an agreement has been signed.

The sequence of negotiations is at least fourfold. First, parties have to successfully articulate their needs, interests and goals. (Quite often the parties have to engage in intramural negotiations among themselves first to establish their priorities. This may not be a simple task.) Then, parties must educate each other about the reasons why these needs, interests and goals are important, valid and reasonable. Brainstorming about alternatives will often take place afterwards. There may be multiple solutions to achieve what is being sought. It is in this phase of the negotiations that data and operations are reviewed and evaluated. With effort, the parties reach a conceptual agreement. However, the last stage of reducing the conceptual agreement to a binding final agreement will reveal yet more issues that must be resolved and test the ability of the parties to accommodate each other's needs.

In every successful case, there is a tipping point where the negotiators become committed to making a deal happen and the likelihood of a deal surpasses the likelihood of failure. The negotiators make the compromises necessary to reach an agreement. However, it is not a straight line. In most cases, there may also be one or more crises where the parties' ability to continue to work together is severely challenged. The mediator plays a crucial role in reminding parties of the advantages of continuing with the process and finishing an agreement as compared to giving up and facing the uncertainty of no deal. With patience, persistence, creativity and trust, the mediator helps get parties in these complex disputes to the finish line.

III. ADR in Environmental Enforcement and Compliance from a Federal Perspective

Enforcement of federal environmental laws and regulations provides a wide variety of opportunities to use ADR techniques to resolve enforcement disputes. A vast and complex assortment of statutes and regulations establish environmental standards for the American economy. Noncompliance and ensuing enforcement activity by federal agencies provide ample opportunity for the use of ADR techniques to resolve enforcement-related disputes.

Enforcement and compliance programs differs across agencies, but most agencies identify noncompliance through required self disclosure by permit or license holders, independent inspection of regulated facility sites and records and information and complaints from members of the public.

Environmental noncompliance disputes can be difficult to resolve because of a number of factors, many of which are unique to the government, including:

- Perceived or real imbalance of power and resources between parties;
- It is generally not possible to negotiate with governmental decision makers;
- Parties often have inflexible negotiating postures;
- Historic animosity between parties or perceived or real inequities in past actions;
- Often involve complex technical and factual issues;
- Personality and communication problems among participants;
- Underlying dispute may involve unsettled legal issues;
- Compliance issues may only have a few issues in dispute;
- Outcome may have public / political ramifications; and
- Possible ongoing regulatory relationships between agencies and the regulated entity.

ADR techniques can help to overcome these barriers by providing a flexible range of techniques to address the challenges and enable the parties to generate more and better information about each other and the issues in dispute. ADR techniques can assist parties to resolve difficult communications problems; provide a reality check on litigation risks and technical issues; and assist parties to exchange information without incurring the risk that such exchanges will be used against them in subsequent litigation. It is no wonder that the use of ADR techniques to settle environmental enforcement disputes is an expanding practice.

All federal agencies, pursuant to Administrative Dispute Act of 1996,[7] have established policies to support the use of ADR, including enforcement and compliance issues.[8]

The U.S. Environmental Protection Agency was one of the first agencies to issue guidance for the use of ADR in enforcement actions, in 1987. This guidance and agency support of ADR in enforcement was reaffirmed in agency-wide ADR policy promulgated in 2000.[9] The Attorney General issued guidance in 1996 promoting the use of ADR in federal litigation.[10] ADR programs and court

rules, pursuant to the Alternative Dispute Resolution Act of 1998,[11] support the use of ADR techniques to settle litigation in the federal courts. Administrative tribunals in many federal agencies have also established programs for the use of ADR techniques to settle administrative litigation.[12] These policies and agency guidance regarding the use of ADR techniques led to the resolution of a wide variety of federal enforcement and compliance actions over the past nearly twenty years.

A 2009 report about the use of ADR by federal agency environmental programs[13] shows that close to a third of all ADR in those programs was for enforcement and compliance activities.[14] At EPA 84% of all ADR use was related to enforcement and compliance efforts. Other agencies that utilized ADR for enforcement matters include the Federal Energy Regulatory Commission, the Department of Interior, the Department of Defense, and the U.S. Forestry Service, all of which reported extensive use of ADR in enforcement cases.

Though a variety of ADR techniques have been used to assist settlement of environmental enforcement matters, mediation is by far the technique most often used. Agencies have increasingly[15] utilized the services of a convening neutral to help parties identify and reach agreement about the selection of the mediator or other ADR professional.

Federal District Courts ADR programs all provide for the use of mediation, and many also offer some form of case evaluation, such as summary jury trials and early neutral evaluation.[16] Arbitration is rarely used for resolution of environmental enforcement and compliance matters, primarily due to the reluctance of agencies to authorize the issuance of binding decisions to a private arbitrator, especially when many environmental cases involve significant public policy issues.

As shown in the chart below, ADR provides a wide range of short- and long-term benefits for both government regulators and the regulated industry in enforcement and compliance cases.[17]

Savings Realized and Benefits Accrued from Use of Environmental Conflict Resolution

	Tangible----------Less Tangible		
Longer-term----------Short-term	Saved on *direct process costs* (e.g., the process costs to mediate were less than litigation)	Avoided inflaming relations and escalating the conflict with litigation or unattended conflict	Avoided or reduced negative on-the-ground impacts (e.g., environmental, social, economic)
	Likely reduced or avoided the *direct cost of appeals* (e.g., the solution is less likely to be contested)	Better outcomes were crafted (e.g., less costly settlements, timely project progression, innovative solutions, reduced monitoring)	Improved stakeholder commitment to the agreement and its implementation
	Created efficiencies that reduce future *indirect process costs* (e.g., field staff time dealing with conflict)	Case used as a prototype for resolving other similar problems or conflicts	Created the potential for stakeholders to work together productively on related issues in the future

IV. Effectiveness of Dispute Resolution in Public Construction Projects[18]

The use of ADR is a well-established policy and priority of the federal government. Under the first Administrative Dispute Resolution Act in 1990 ("Act"),[19] every executive agency was required to adopt a policy that addresses the use of alternative means of dispute resolution, to designate a senior official to be the dispute resolution specialist of the agency, to provide for training on a regular basis, and to review each of its standard agreements for contracts, grants and other assistance to encourage the use of alternative means of dispute resolution. Six years later, Congress amended and strengthened the Act, providing, among other things, that if the government agrees to participate in binding arbitration the resulting award will be final in accordance with the Act, as amended, and that the Freedom of Information Act no longer provides access to documents that are exchanged privately between a party and a mediator.[20]

For transportation matters, in 1998, Congress passed the Transportation Equity Act for the 21st Century (TEA-21, P.L. 105-178), and included certain "Environmental Streamlining" provisions, requiring transportation agencies to work together with natural, cultural and historic resource agencies to establish realistic time frames for the environmental review of transportation projects. These

agencies are meant to work cooperatively to adhere to those time frames, while they are protecting and enhancing the environment. There is an excellent summary of this program posted on the Federal Highway Administration (FHWA) website.[21]

There are a number of Presidential directives promoting ADR in the federal government. In 1991, President Bush issued an Executive Order requiring that government attorneys be trained in ADR.[22] In 1996, President Clinton promulgated an Executive Order that required government attorneys to propose the use of ADR in appropriate cases.[23] This was followed by a Presidential memorandum by President Clinton stating: "I have determined that each Federal agency must take steps to promote greater use of mediation, arbitration, early neutral evaluation, agency ombuds, and other alternative dispute resolution techniques…."[24] The Interagency Alternative Dispute Resolution Working Group (adr.gov/index.html) is an organization of chief legal officers from more than a dozen executive agencies, which issues guidance for the entire government on federal ADR policy.[25] There have been two reports to the President on ADR in the federal government.[26]

The most important federal agency for facilitating the resolution of environmental disputes is the U.S. Institute for Environmental Conflict Resolution, (the U.S. Institute).[27] The U.S. Institute's mission is to help resolve environmental disputes that involve the federal government by providing mediation, training and related services. The U.S. Institute has worked on a wide range of federal issues including federal highways, natural resources and public lands, ecosystem restoration, NEPA, water, energy, and consultation with Indian tribes. Agencies involved in these projects have included the FHWA, the Department of the Interior and its bureaus, the EPA, the DOD, including the Corps of Engineers, Navy and Air Force, the Department of Agriculture Forest Service, and the National Oceanic and Atmospheric Administration. The U.S. Institute hosts bi-annual conferences on environmental conflict resolution, and promotes collaborative dialogues within the federal government and across federal, tribal, state and local governments. The U.S. Institute also maintains a roster of over 300 qualified conflict resolution professionals located all across the country.[28] In the environmental arena, there also exists a cadre of experienced mediators and facilitators across the country that have mediated or facilitated environmental issues and disputes related to major public projects. Examples include negotiating pollution issues, water resource policies, water codes, community impact, cultural values and claims in the context of project siting and development of major infrastructure projects.

A very large, but often hidden, cost of federal, state and local government in the environmental area is the failure to anticipate conflicts and to devise processes to address them before they become more intractable and costly. In fact, it would not be an overstatement to argue that the failure to anticipate environmental challenges and to devise effective collaborative processes to address them costs taxpayers hundreds of millions to billions of dollars each year. The propensity to attempt to solve problems through litigation, which is typically very time intensive and costly, is a particular problem.

The federal government spends tens of millions of dollars each year litigating thousands of cases. But resolving environmental issues through litigation is rarely cost-effective and typically does not solve all the issues or apply to all the affected interests. The U.S. Institute works to facilitate collaborative problem-solving involving all affected interests; this reduces litigation and other costs of conflict, including project delays and poorly informed decisions, and maximizes the benefits of collaboration, such as timely cost-effective solutions, innovation, improved working relationships, as well as commitment by the parties to shared solutions. The benefits to the taxpayer of using collaborative approaches to avoid or resolve even a small fraction of potential or actual litigation cases are significant.

The need for alternative dispute resolution and intergovernmental collaboration continues to increase. In U.S. District courts nationally, annual filings of new cases rose from about 35,000 to more than 250,000 in the 60 years prior to 2004 (a sevenfold increase, though the population only doubled). In the appellate courts, annual case filings grew from 2,800 to more than 57,000 over a 50-year period, a twenty-fold increase. Federal agencies are parties in nearly one-third of these cases. When cases settle, the government not only saves the costs of litigation—it also saves the costs of courtrooms, judges, administrative hearing officers and other court expenses.[29] Additionally, the government benefits from expedited work on projects, innovative solutions, cost-effective solutions, and improved working relationships among stakeholders that help solve issues now and manage issues in the future.

The U.S. Department of Justice has reported that the use of mediation saved the DOJ $6.4 million in out-of-pocket litigation and discovery expenses (including expert witnesses, depositions and investigation costs), plus more than 55,000 hours of attorney and staff time, in 2007 and 2008, compared with mediation costs of about $2.4 million. These figures do not include the savings of staff time and dollars by other federal agencies represented by DOJ in those cases, or the other parties involved in the lawsuits.[30]

Another important agency in the field is the Center for Environmental Excellence, established by the American Association of State Highway and Transportation Officials (AASHTO) and developed in cooperation with the FHWA to promote environmental stewardship and to encourage innovative ways to streamline the transportation delivery process. The Center is designed to serve as a resource for transportation professionals seeking technical assistance, training, information exchange, partnership-

building opportunities and quick and easy access to environmental tools (environment.transportation.org/ /).

ADR tools, including mediation, are consistent with established government policy and have proven capabilities to deal with the environmental disputes among stakeholders that typically arise at the inception of the planning and design phase of a public construction project. ADR techniques can help manage costs and have proven that they contribute to the strategic management of government resources. A focused effort should be made to insure that these techniques are used for all major projects planned in the future.

V. Other Uses of Alternative Dispute Resolution in Environmental Matters

Alternative dispute resolution is especially useful to address potential soil or groundwater contamination under such statutes as the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund) as well as the various state counterparts. In these cases, multiple potentially responsible parties (PRPs) are sued by governments or private parties seeking recovery of cleanup costs. To avoid the costs and risks of such litigation, PRPs have used ADR to allocate costs and liability. The basic issue in Superfund allocation disputes is how to allocate responsibility for cleanup among the various PRPs or among a particular class of PRPs (e.g., generators, transporters, owners/operators). ADR can facilitate agreement among the disputing parties concerning their liability in a manner that is less expensive and time consuming than litigation.

The principal ADR methods which have been used in CERCLA allocations include mediation, binding arbitration, early neutral evaluation and a "hybrid" form of nonbinding arbitration combining mediation and arbitration. This hybrid process for allocation is generally considered to be faster, cheaper, and more private than litigation. The length of the allocation process can vary depending on the complexity of the case. It is not unusual for the allocation process to last from six months to several years.

A typical mediation of an allocation dispute involves voluntary disclosure of information by the parties describing the involvement with the site, the exchange of confidential position papers, preparation of a confidential allocation proposal by the mediator, and mediated negotiations among the parties. The purpose of the allocation mediation is to negotiate a settlement between parties and not to determine specific issues of fact and law.

ADR may also be used to address environmental problems stemming from industrial operations such as odors, oil and petroleum spills, water and air emissions or noise issues. It may also be used to address issues related to climate change. Mediation or other forms of ADR have been used in such cases to allow all parties to the dispute to participate in a process to identify the source of the odor, noise or emission, gather needed information on technical solutions, develop a plan for reduction or elimination of the offending matter, and establish a timetable for accomplishing such tasks.

VI. Application of ADR in Land Use Matters

Dispute resolution may also be used in connection with local land use review processes to enable parties representing diverse interests to negotiate a consensus on some or all of the controversial aspects of a proposed application prior to the decision of a town board, planning board, architectural review board or zoning board of appeals. It may also be used to prevent or settle a lawsuit after a board's decision, or in connection with town planning initiatives.

The process, and especially the public hearing, is often emotionally charged and adversarial. The format of the hearing, which is based on a courtroom model, affords no opportunity for meaningful dialogue among the interested parties and therefore does not lend itself to collaborative problem solving. Often, a board must sift through reams of written comments and testimony, which may contain conflicting scientific and technical data.

After the hearing, the board must then decide whether to grant, deny or conditionally grant the application before it. It often does not have the latitude to devise creative solutions beyond the scope of the specific application upon which it is deliberating in order to respond to certain legitimate concerns that may be raised by the public. Dissatisfaction with the outcome of the process often results in the filing of lawsuits challenging the decision of the board.

Unlike the traditional litigation process in which there are typically winners and losers, ADR can often achieve a "win-win" resolution for all of the interested parties. In the context of land-use decision making, mediation is the most commonly used form of ADR, although other forms of ADR, such as collaborative decision making or consensus building, may also be utilized. In this process, a neutral facilitator assists parties to develop a collaborative framework for reaching consensus on a particular path or strategy, such as in connection with the development of a comprehensive plan or proposed regulation.

Mediation provides an atmosphere in which representatives of all interested parties, experts and planners can communicate more effectively and collaborate on issues of concern. A mediated process encourages brainstorming and the creation of solutions that can satisfy the interests of most, if not all, participants in the mediation. Because of the opportunity for improved communications, mediation often has the added benefit of streamlining the review process, especially where it is utilized at an early stage in the planning.

Most types of land use matters are appropriate for ADR. Examples include applications for site plan or subdivision approvals, special use/conditional permits, rezonings, subdivision plats, floating zones, and planned

unit developments. It may also be used to facilitate the preparation or update of comprehensive plans or zoning ordinances. Some land use professionals have argued that ADR should not be used in connection with non-discretionary decisions, such as for use variances, which require application of specific legal criteria. It is uniformly agreed, however, that if a use variance is granted, ADR may be used to impose conditions on the variance, which are discretionary in nature.

The New York State Legislative Commission on Rural Resources previously published a model local law providing for the use of voluntary mediation in the prevention or resolution of municipal planning, zoning and land use disputes. The model contemplates the use of existing voluntary mediation programs (e.g., County Dispute Resolution Centers) to accomplish the mediation.

Conclusion

Although the preceding discussion focused largely on federal initiatives and processes relating to environmental dispute resolution, it is still instructive for the way in which state and local disputes might be handled. The New York State Department of Environmental Conservation's Office of Hearings and Mediation Services is one of the few state environmental agencies to offer ADR services to resolve environmental disputes. The prospect for wider use of dispute resolution techniques to resolve environmental and land use conflicts is strong on both the federal and state level.

Endnotes

1. Environmental Conflict Resolution in the Federal Government (July 15, 2010), available at http://www.ecr.gov/files/ECRinthe-FederalGovernmentFY2009(071510).pdf.
2. The spectrum is used by U.S. EPA and other agencies and was initially developed by the International Association for Public Participation, IAP2 Spectrum of Public Participation, http://www.iap2.org/.
3. Federal Advisory Committee Act, 5 U.S.C. app. §§ 1-16 (2000).
4. Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4975 (1990) (codified as amended at 5 U.S.C. §§561-580 (2000)).
5. For more information on federal government collaboration on climate change, see Joseph A. Siegel, Collaborative Decision Making on Climate Change in the Federal Government, 27 Pace Envt'l L. Rev. 257 (2009).
6. 278 U.S. 367 (1929).
7. *Administrative Dispute Resolution Act of 1990*, 5 U.S.C. §§ 571-584 (1994) (amended 1996).
8. *Administrative Dispute Resolution Act of 1996*, 5 U.S.C. §§ 571-584 (1994 & Supp. 1998).
9. *See* environment.fhwa.dot.gov/strmlng/index.asp.
10. Exec. Order No. 12,778, 56 Fed. Reg. 55,195, 55,196 (Oct. 23, 1991).
11. Exec. Order No. 12,988, 61 Fed. Reg. 4729 (Feb. 5, 1996).
12. Memorandum from the President of the United States to the Heads of Executive Departments and Agencies, May 1, 1998 (gov-info.library.unt.edu/npr/library/direct/memos/dispute.html).
13. *See, e.g., Core Principles for Federal Non-Binding Workplace ADR Programs: Developing Guidance for Binding Arbitration—A Handbook for Federal Agencies*, 65 Fed. Reg. 50,005 (Aug. 16, 2000).
14. "Rep. of the Interagency Alternative Disp. Resol. Working Group to the President of the U.S." (2000), available at financenet.gov/financenet/fed/iadrwg/pres-report.htm, "Report for the President on the Use and Results of Alternative Dispute Resolution in the Executive Branch of the Federal Government," April 2007, available at adr.gov/pdf/iadrsc_press_report_final.pdf.
15. *See* http://www.ecr.gov.
16. ADR and Settlement in the Federal District Courts—A Sourcebook for Judges & lawyers, Joint Project of CPR Institute for Dispute Resolution & Federal Judicial Center, available at http://www.fjc.gov/public/pdf.nsf/lookup/adrsrcbk.pdf/$File/adrsrcbk.pdf.
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18. This is adopted from an article by the author entitled *Environmental Disputes Mediation: Public Construction Projects*, which appeared in the NYSBA New York Dispute Resolution Lawyer, Spring 2010, Vol. 3, No. 1.
19. Administrative Dispute Resolution Act of 1990, 5 U.S.C. §§ 571-584 (1994) (amended 1996).
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White Paper on Family Law

By Charles M. Newman, Clare A. Piro, Jacqueline W. Silbermann and Andrea Vacca

ADR processes have particular applicability in the field of divorce and family law. As one might guess, non-litigation resolutions are ideally suited for disputes that are so thoroughly interwoven with emotions and deeply personal histories. The ability of the parties to receive professional guidance from a mediator and counsel so that they can agree on their own arrangements—based on the unique story, needs and goals of their own family—is one of several reasons why mediation and collaborative law have received such great and growing acceptance by couples and family lawyers alike.

Collaborative Law

This article will discuss all the modes of ADR in divorce and family law. Most methods of ADR are similar across many areas of law. A relatively new form of ADR, collaborative law, could be applied in many areas of dispute or conflict, but by far its greatest development has been in the divorce and family area. Because of that overwhelming focus in divorce and family matters, collaborative law has not been highlighted in other articles of this publication. We describe it in some detail here so that it can also be included in the other sections of this article.

Collaborative law is a process that helps parties arrive at a mutually agreed upon, negotiated settlement without the threat of court. Collaborative law is based on three main principles:

1. The parties agree in writing with each other and with their attorneys that those attorneys will not go to court.
2. Both parties commit to an honest and open exchange of documents and information.
3. Each option for settlement takes into account the highest interests and goals of both parties and their children.

In collaborative law, each client has an attorney by their side throughout the negotiations, but those negotiations focus on interests and solutions rather than on positions and demands. The goal is to improve the parties' ability to communicate and understand each other during the collaborative process and, hopefully, after the matter is resolved as well.

Collaborative law is client-focused. The divorcing or separating couple remains in control of the process and of the issues to be resolved. Because the clients agree with their attorneys that those lawyers will not go to court for the clients, the process is less adversarial and more flexible to explore options and find solutions.

From the beginning of the process, a commitment is made to keep conflict to a minimum. This not only helps assure that the collaborative process will move forward as smoothly and effectively as possible, but also that a foundation may be built, allowing the parties and their children to move on positively with their lives after the divorce.

In the collaborative divorce process, each of the parties retains his and her own independent, collaboratively trained attorney. Each lawyer will gather information, provide the client with information about their rights, responsibilities and options, and help negotiate and advocate on behalf of the client.

All negotiations are conducted in highly structured, face-to-face meetings among the couple and their attorneys. Each meeting normally has a pre-agreed agenda and is followed up with minutes that reflect key discussions, items that the parties agreed upon, and tasks that need to be completed before the next meeting.

Ultimately, negotiations in the collaborative process will address all of the issues that need to be resolved, including finances, property, child custody, child support, spousal support and any other issue that is important to that particular family. If the parties are ultimately unable to arrive at an agreement on all of the issues, the collaborative attorneys will withdraw from the process and litigation attorneys can be retained to seek a resolution in the court system.

Many times, collaborative lawyers find that bringing in other collaboratively trained professionals can help the couple arrive at an agreement that best meets the immediate and long term needs of the family.

These other collaborative professionals include:

- Divorce coaches who will assist the parties to develop better communication tools so that they can better understand the spouse and be better understood when expressing their own interests and needs. Coaches also help the parties manage all of the difficult emotions that arise in the midst of divorce.
- Child specialists who give the children a "voice" in the process and work with parents to create a parenting plan that meets the children's best interests.
- Financial specialists who will collect and analyze financial information and assist the clients to make informed decisions about financial matters.

Collaborative law is not the right process for everyone. Just because clients say they want to avoid court doesn't mean they are good candidates for the collaborative process. Clients should not be encouraged to choose collaborative law because it's a cheap alternative. It isn't. While no alternative dispute resolution process will reach the expense of a full-blown litigation, collaborative law can still end up costing the parties significant sums of money. This is particularly true for high conflict couples who are unable or unwilling to stay on track and move forward in an efficient way.

Parties engaging in the collaborative process need to understand that their matter will move at the pace of the slowest party. If one person wants to delay meetings, or doesn't follow through on agreed-upon tasks, it will slow down the entire process. Because there is no judge imposing deadlines, collaborative law may not be the right process if both parties are not self-motivated to move toward resolution.

The collaborative process requires clients and attorneys who respect the premises, requirements and implications of their contract to collaborate. If trust is simply not possible or one party is not willing to be transparent, the collaborative process will fail.

The withdrawal provision, which requires both parties to retain other counsel for litigation if the collaborative process fails, can also be a concern. While any interim agreements may continue after the collaborative process ends, and while all of the financial documents gathered can easily be turned over to litigation counsel, the fact is that it can be expensive to bring a new attorney into a matter.

However, with proper screening at the beginning of the attorney-client relationship, many of these potential problems can be identified and avoided.

Difference and Similarities Within ADR Methods

Arbitration, while available in divorce and family matters, is mostly used to resolve subsidiary issues, not normally to address divorce itself or its larger aspects. Thus, it is not included in this comparison of different dispute resolution approaches.

Confidentiality

One of the first advantages of ADR that many people think of is confidentiality. It is often extremely important to people going through divorce or other family problems, particularly when children are involved.

Mediation sessions and collaborative law sessions are held in private offices. Of course, this can also be true in direct negotiations among counsel and / or the parties in a pending or contemplated divorce action, but only for so long as both sides feel that negotiations are progressing satisfactorily. In ADR, no judges, court attorneys, clerks, stenographers or other court personnel are present.

A great many couples are comforted to know that with ADR, they can pursue a resolution of their family disputes privately, without the great weight of the State watching over their shoulders every step of the way and without fear that their troubles will become grist for the fascination of others.

Speed and Duration of the Process

Obviously, all estimates of time frames are just that and are dependent upon the parties, their level of conflict, their motivation to settle, the complexity of the issues and the like. However, in general, a mediation or a collaborative process will be completed by the parties in the shortest period of time.

In a typical attorney-negotiated matter, the parties are dependent upon their attorneys to keep the matter moving along. In turn, their attorneys will move matters along according to the amount of time each has to devote to responding to correspondence and settlement proposals. Given the time constraints of an average matrimonial practice, the matter typically will take longer to settle than in mediation or collaborative practice.

In litigation, the time frame is dependent upon the Court's calendar, the need for discovery or pendente lite motions, the motivation of the parties and their attorneys to move the case along, and the point at which the matter settles. For the most part, however, litigation can be the lengthiest process to conclude.

Cost of the Process

Clearly, the exact cost of the process depends upon the fees of the professionals and the amount of time it takes to resolve the matter. In general, the cost, from least costly to most expensive, would be mediation, collaborative process, attorney-negotiated process, and lastly, litigation. Within that framework, the cost to the parties in each modality is dependent upon their commitment to the process, the complexity of the matter and their level of conflict.

The reason the fees in mediation are normally low is that clients generally choose to pay primarily for the fee of only one professional, the mediator, with review attorneys limiting their time to the review of proposals or settlements. Therefore, time with the consulting or review attorneys is reduced compared with an attorney-negotiated case. A collaborative process tends to be more expensive than mediation because, at the very least, the parties are paying for the intensive time of two attorneys (rather than one mediator) during the collaborative sessions. If it is a team or interdisciplinary collaboration, there are also fees for coaches, a financial neutral, a child specialist, etc.

The fees in attorney-negotiated matters and litigation will tend to be higher because the parties are paying for individual attorneys, and the adversarial nature of the process will result in more time spent in arguing a party's case, to say nothing of the time spent in preparation for conferences, court appearances, examinations before trial, and the like.

Voluntariness

A hallmark of mediation is that it is entirely voluntary from start to finish. (A slight exception is court-annexed mediation, where the parties may be ordered to at least start a mediation process. They are never ordered to resolve the case in mediation.) There is no mediation unless both parties want it and there is no resolution unless both parties want it. Mediation requires the consent of the parties even as to the manner of proceeding. One of the fascinating things about mediation is the way parties come to see, even as discussions can become difficult, that it is in the party's own self-interest to continue in mediation, and to work toward a resolution. When it works best, mediation is nothing more than helping both sides focus on finding "win-win" solutions, so that at every step, the parties find a resolution that *each side* sees as a good result.

In collaborative divorce and family law, the start of the process is entirely voluntary, and the collaborative professionals make a strong point of insuring that the parties clearly understand the implications of a process that, by agreement, will not end in litigation with the same lawyers. Because of the time and fees that are invested with lawyers who cannot litigate for them, the parties know that terminating the collaborative process to hire litigation counsel can be a very expensive and wrenching choice. They always retain that choice, but as time passes, there is an implicit financial pressure to remain with their initial preference.

Of course, negotiation is voluntary. Outside realities or other pressures may sometimes make it feel as though negotiation is a necessity, but normally parties and their lawyers expect that even in the most hotly contested divorce and family disputes, negotiation will go on.

To a large extent, the difference between discussing resolutions ("settling") by negotiation in a contested matter, as opposed to a mediated or collaborative case, is one of intention, attitude and approach. In the context of a contested matter, negotiations normally proceed in the context of each side wanting to maximize his or her position. Side A might want to understand what is important to side B, but only for the purpose of framing a proposal in a way designed to get the most of what side A wants. Side A feels that every concession to B is a loss to A. To reach the "best" result in negotiation, parties and counsel sometimes feel that it enhances their chances of success if they withhold as much information as possible, or at least they withhold what they consider to be strategic information, including factual information or insights into that party's true desires and preferences.

In mediation or collaborative law, on the other hand, the approach is quite different. Parties are encouraged to share as much relevant information as possible, to be as candid as possible about what is important to them, and to be open to ideas other than their own. Their goal is to mutually assess facts and to consider options together, hoping to build solutions that work best for both spouses and their children.

Parties' Control of the Process

Sometimes an experienced lawyer forgets that the only reason the processes and mechanics of a divorce or Family Court case seem to make any sense at all is that the lawyer has been handling them for years. For the parties and their children, who are already in a stressful situation, the impenetrability of what is going on in litigation (in or out of the courtroom) can range from confusing at best to bewildering to downright frightening.

A key element of ADR, and especially mediation, is that the processes and mechanics are included among the things about which the parties will agree. At the outset of mediation, for example, the mediator normally asks for the parties' expectations and desires about how to proceed. At each step of the way, the mediator will ask for agreement about how the process is working and whether the parties want to change the process.

Collaborative law can be a little more structured than mediation, especially since there tend to be several professionals supporting the parties each step of the way. There might be more of a pre-conceived structure in collaborative law than in mediation, but still, the parties are often asked if adjustments to the process might be beneficial for them.

One hopes that in attorney-negotiation cases, honesty and civility will prevail. Other than that, when lawyers negotiate, there are no rules. The negotiations take on a life of their own, often without the need for any articulated rules. It is important to note, however, that when lawyers negotiate, that process is handled between the lawyers. There is precious little opportunity for the parties to directly express their needs, preferences and desires in a way that the other party and lawyer can hear or respond to.

In litigation, of course, neither the parties nor the lawyers control the process. The processes and mechanics are governed by statutes, court rules, judges' rules, local practices, and a full panoply of traps for the unwary. Lawyers who keep at it long enough learn all the processes. Parties, on the other hand, simply have to live with the processes' demands and consequences, no matter how peculiar they seem, no matter how much needless pres-

sure they apply, and no matter how much they stand in the way of a resolution of the case that the parties would find satisfactory.

A final thought about the parties taking control and responsibility of family disputes may actually be one of the most important. When children are involved, it has enormous benefits for them to see and know that even in the face of severe discord, their parents chose not to draw swords in court, but chose instead to behave civilly and respectfully. Parental modeling of taking responsibility, continuing to care about a spouse, and keeping the children's well-being primary, is a priceless gift to children of divorce.

Parties' Control of the Outcome

In the broadest sense, it is easiest to state the level of control over the outcome of a case in one phrase: in mediation and collaborative law, if the parties don't come to an agreement with each other, there is no outcome. The parties are in complete control, and that is the antithesis of litigation. In litigation, neither party gets to decide, so both parties have lost the ultimate "control" of the outcome.

There is a flip-side to the fact that both parties have to agree to a mediated or collaborative result. Effectively, each party holds a veto. Indeed, if it is clear at the outset that one or both parties is likely to be willfully intransigent or inflexible, that family may not a good candidate for mediation or collaborative law at all. But if parties enter willingly into mediation or collaborative law and after hard work they learn that they just will not be able to come to an agreement, either party may at any time end mediation or collaborative law and submit to the normal court processes for an outcome. In the sense that either party may choose to end mediation or a collaborative process, each party retains control over the outcome *of that process* by having the power to end it at any time.

Control over the outcome of a dispute is probably one of the main reasons most people choose mediation or collaborative law rather than litigation. The responsibility for their own futures is a powerful motivator of, and powerfully contributes to, both spouses. The taking and exercising of responsibility and control tend to yield successful, sustainable results.

Drafting a Parenting Plan

No matter the process, a parenting plan must always be based upon the best interests of the children. However, mediation and collaborative law, by their very nature, tend to permit the parties to discuss a parenting plan in a manner most conducive to finding an arrangement that works best for their children and them.

In mediation and collaborative law, the basic premise is that the parents know what is best for their children, so those dispute resolution modalities are particularly well-suited to designing a plan that will work best for their family. If the parties need help beyond what the mediator or their collaborative attorneys can provide, they may seek the input of a child specialist who can help them devise a plan based upon their children's specific needs and wishes. This is done in a cooperative setting in which the parties and all professionals have as a priority to do as little harm to the children as possible. All seek to maximize each parent's relationship with the children without a concomitant cost to the other parent. The children tend to suffer the least, both during and after the divorce.

Unfortunately, the same approach is not typically used in an attorney-negotiated case, and it is even less likely to be used in full-blown litigation. Confrontational negotiation or divorce, as we know, can cause pronounced and long-term suffering in children. In an adversarial process in which the parties seek to win at all costs, the parties are much less likely to acknowledge the other spouse's good parenting. Moreover, in a setting where "winning" is the ultimate goal, the parents may refuse to even consider a parenting plan in which the parent gets "less" than what his or her attorney said was "standard," or which the parent feels is the societal norm. In that toxic atmosphere, a parenting plan is unlikely to be the best it can be, and the children are likely to witness a high level of animosity during the divorce and as the parenting plan is implemented (or not) into the future.

Balance of Power

Power imbalances exist to a greater or lesser degree in every corner of every relationship, and consequently in every divorce. These can be of minor importance, such as when the wife is more familiar with paying the bills while the husband knows more about the heavy chores. Or the imbalance can be of major importance that reaches the level of a party's inability to advocate for herself or himself.

Although a mediator does not advocate on behalf of a party, a skilled mediator can level the playing field by empowering the party who may be deemed to be less powerful in a particular discussion area, or overall in the relationship. By impartially addressing both parties as to their needs and interests and encouraging the participation of both even if one party tries or tends to dominate, the mediator helps a reticent party find his or her voice. A mediator can also ask a party who is not as financially adept as the other if he or she wants the help of a financial professional to work on a budget, or of a divorce coach if the person seems blocked in the process. Of course, a mediator can also ask the parties if it would be helpful if the financial person, coach or lawyers come to the mediation sessions themselves.

On the other hand, power imbalances may be so serious that they cannot be overcome in mediation. In such cases, collaborative law, attorney-negotiation or litiga-

tion are preferable to mediation. These can be instances where the power imbalance is due to domestic violence, substance abuse, withholding of financial resources or a refusal to participate with full disclosure.

In collaborative law, power imbalance is not as much of an issue since the attorneys advocate for their clients in the collaborative meetings. In the collaborative team approach, coaches and financial neutrals can help the party who may be less familiar with money issues to gain enough power to successfully advocate for himself or herself.

In certain cases, the parties have no choice but litigation if an Order of Protection is necessary or if the other party refuses to fully disclose financial information, pay support or pay legal fees.

A Durable Agreement

It is often said that in mediation and collaborative law, the settlement agreement is durable because the parties devised the terms themselves. The parties strive to reach an overall agreement that works well for both of them and their children. Much care is taken by the mediator and the collaborative attorneys to insure that the clients are comfortable with every aspect of the settlement; that the agreement is mutual in the sense that a benefit to one party does not necessarily need to be at the cost of the other; that the effects of the agreement are practical; and that the requirements of the agreement can be fulfilled.

Since attorney-negotiated matters and litigation are adversarial in nature, the attorneys' role is normally to seek the best possible outcome for their respective clients. This is a very different focus and tends to result in a less mutual agreement. In the event that the determination is made by a judge, it may be even more likely that one party is given a benefit at a cost to the other. Thus, the party who did not achieve the most favorable outcome may be less likely to abide by the terms of the agreement, resulting either in enforcement issues or possible future actions to try to set aside a settlement agreement.

The Role of the Attorney

Clients are drawn to divorce mediation and collaborative law as a way to resolve their divorce in a speedy, economical fashion and in a non-adversarial manner. What do you do if you are a matrimonial lawyer who does not practice mediation or collaborative law?

The fact that a client has decided to engage in mediation does not mean that his or her lawyer will be losing a client. To the contrary, a party's attorney plays a vital role in the resolution of a matrimonial matter through mediation.

Typically, the attorney's role in mediation is referred to as a "review attorney" or a "consulting attorney." Review attorneys begin their jobs at the conclusion of a mediation, after a memorandum of understanding or draft Separation Agreement is prepared. On behalf of his or her client, the attorney reviews the memo or draft agreement, consults with the client, and gives the client the kind of legal advice that a mediator is not permitted to give. Should the review and consultation result in the suggestion of any changes to the agreement, be it substantive or not, the attorney may bring up these points to the other party's attorney or to the mediator. Or, the client can return to mediation with the proposed amendments, or the client can negotiate these amendments with the spouse directly. As with all facets of mediation, the manner in which any proposed changes are addressed rests with the parties.

Consulting attorneys usually get involved earlier, well before there is a memorandum of understanding or draft Separation Agreement. In fact, it is not unusual for clients to consult with an attorney prior to beginning the mediation. Many referrals to mediation come from matrimonial attorneys who believe mediation may be an effective way for a particular couple to resolve their matrimonial issues. Or, some clients just prefer not to begin the mediation until they have a full understanding of their rights and obligations under the law, as explained by his or her own lawyer.

Furthermore, when clients come to the mediation with the knowledge of both the favorable and the unfavorable application of the law, the mediator is not placed in the position of making one party happy at the cost of the other. As set forth in other parts of this article, the parties are free to consider the application of the law as but one of the avenues toward a resolution. If parties know that a strict application of the law may not be in their favor, they can speak more in terms of why a different outcome would work best for the family.

When a spouse participating in mediation consults with his or her attorney during the mediation process, it can serve to make the mediation sessions much more productive. For example, a client may not know what he or she can propose as a possible resolution in a mediation, and the attorney can work with the client to propose a unique and creative resolution that may not be readily apparent to either the other attorney or the mediator. This frees a matrimonial attorney—who is otherwise normally constrained by the confines of the law—to propose a resolution that may not necessarily be well received in a litigation but which may be best for this couple and their children.

Mediators may also recommend that a party have a consultation with an attorney during the mediation process to clarify a misconception that the client may have as to how the law is applied, or to insure that a party is

knowingly waiving a right that he or she may have under the law. It makes much more sense to have the input of an attorney during the process if it appears that the client is agreeing to something that cannot withstand scrutiny, as opposed to waiting until the end of the process for the parties to become aware of the problem.

In certain circumstances, clients may want their attorneys to attend a mediation session. This is especially so where the issues are more complex or where a party may not feel comfortable. Having an attorney in a mediation session, albeit adding to the expense, is vital for someone who feels very uncomfortable about something or believes he or she cannot properly advocate his or her position.

Since this type of representation may not be something familiar to a litigator, it is important to understand how an attorney can effectively advocate for a client while maintaining the client's wish to resolve his or her matter through the non-adversarial process of mediation. The attorney is and remains an advocate for the client and must act according to the Rules of Professional Conduct. That said, the lawyer must also "abide by a client's decisions concerning the objectives of representation...," as set forth in Rule 1.2. In a mediation, the client's objectives are to resolve the matrimonial matter through mediation in a non-adversarial manner and to achieve a mutually beneficial agreement that works for both parties and their children. The attorney can and should advise the client of the law and the likely result in Court, as well as the length of time such a result will take, the uncertainty involved, and the monetary and emotional cost of such a course of action. However, the attorney must respect the client's wishes if the client does not necessarily want the most he or she could possibly get under the law. The role of the attorney in a mediation is not to advocate for the best possible resolution, but to provide information and advice, to listen to the client, and to respect that the client chose a process that gives husband and wife the power to determine the outcome.

The collaborative lawyer is an advocate for his or her client, but will not be advocating in an adversarial way. Advocacy in the collaborative process first means helping the client to understand and then state his or her own needs and concerns. If the client is not willing or able to communicate directly on a particular issue, the attorney can communicate for him or her. This concept can be very challenging for attorneys as they make the shift from the traditional notion of adversarial advocacy in the courtroom to collaborative advocacy in the conference room.

The collaborative lawyer attends every team meeting with the parties. Afterwards, the lawyer discusses it privately with the client. Between meetings, the collaborative lawyer speaks with the client, gathering and disseminating information, keeping the client on track with regard to tasks, and speaks with other members of the collaborative team.

The Role of Law

Surely, "the law" has a central place in resolving divorce and other family law issues. After all, marriage is a contract. The State takes a great interest in the contract, even requiring parties to be licensed to enter into it. We have all heard, before the first kiss, that a marriage is solemnized by someone "with the power vested in me by the State of...." By extensive statutes, rules and a vast, bewildering array of case law, the State stands ready to regulate, in great detail, the consequences of ending the contract, for the parties and for any children they have had. Even without divorce, many family issues, such as support and childrearing, may be litigated *if the parties can't agree themselves on how to resolve them*.

The law will provide answers to family disputes based on a set of principles that lawmakers and judges think should apply in most cases as a general rule. In that way, the law tries to provide a default answer. If parties cannot together agree on what is best for them and their children, the law will cut the knot with an all-purpose answer, no matter how appropriate it is (or is not) for that particular family.

When most participants to a dispute, any dispute, consider how they want to resolve it, they will think about how the law would resolve it. We all live under a social compact that says we trust the law to provide answers for us when we cannot arrive at our own. The law is usually a pretty good gauge of how most of society would resolve a dispute if the parties cannot do so themselves.

Yet many of us know instinctively or by our own experience that sometimes people can come up with their own resolutions to disputes; and if they do so, it frequently is better *for them* than whatever "the law" would impose as a generalized norm. Naturally, we hope judges will be able to apply general principles wisely to the facts of the cases before them. But, of course, judges have busy dockets, and no judge could possibly understand the parties' situation, needs and desires the way the parties do.

Does that mean that in mediation, the parties ignore the law and do whatever they want? Do they throw out the rule book and make it up as they go along? On the contrary. Most often in divorce and family mediations, the parties want to have a sense of "what would the law do?" An important part of the mediator's job is to be an "agent of reality." One of the most important realities facing a divorcing couple is what would happen if they could not agree and their disputes were resolved by a judge. Elsewhere in this article, we mention some of the drawbacks of the expense, delay and angst of going to trial. But it is always true that if the parties do not make their own

agreement, a court will be ready to do so, and the court will apply "the law" as best it can. When both parties can hear a knowledgeable, neutral person and both spouses' lawyers opine about the range of what "the law" would provide, both spouses gain a more realistic expectation of how their disputes might be resolved. Being aware of what the law might do, and choosing how much weight to give to that information, frees couples in mediation to more naturally focus on mutually beneficial outcomes, rather than on the fights and barriers that have come between them.

Mediation uses "the law" as one of the things the parties should consider in crafting arrangements that are best for the two of them. In some cases, the law may tell them what they are not permitted to do, such as to shirk a duty of parental support. In some cases, the law, skillfully explained by counsel during or after mediation but before any agreement is finalized, will serve as an important rubric on which the parties rely. In some cases, the parties will seek to learn enough of the law to agree to do exactly "what a court would do," to the extent anyone can ever predict that with certainty. In all those cases, the advantage is that well-informed disputants will know what the range of likely outcomes would be under a strict application of "the law," and they will be free to follow just exactly as much of it as best suits the two of them.

The law permits a great deal of flexibility in family disputes, but it does not always require or even encourage a judge to be flexible. Many times, for example, parties with professional guidance are able to take advantage of tax planning opportunities by agreement that might not be obvious or even available to a judge. Parties may be extremely creative in their solutions—for example, by making an education trust for their children—that no court could be expected to order them to do.

Deciding on the role of law is especially important in resolving divorce and family disputes, for the simple reason (among others) that in this field, "the law" is not exactly the world's most reliable determinant. Consider spousal support and equitable distribution, only two of the many things a divorce court has to determine. There are dozens of statutory factors a court must consider. Some factors even refer to other factors, so a confusing self-referential loop can be created. And one of the factors is always for the judge to do what he or she thinks is best and most appropriate under the circumstances. Experienced divorce and family practitioners know all too well that even for them, figuring out "the law" is a moving target. Figuring out how the judge in their case might see "the law" adds another layer of uncertainty. The best anyone can hope for is to understand that there is a wide range of possible outcomes if a judge tries the case, understands all the facts perfectly, and applies "the law" without error.

In the collaborative process, the law is openly discussed. For example, as in any divorce, the parties will be advised with regard to the child support and temporary maintenance statutes. Equitable distribution will be explained and the clients will be advised that custody and parenting decisions should focus on the best interests of the children. Sometimes, the attorneys may not agree on what the law would say about the clients' particular situation. In those cases, the attorneys explain to the clients the legal issues which they agree upon, and the ones upon which they differ. In the end, it is up to the parties to choose how to apply the law to their particular matter.

This section on the role of law in divorce / family mediation started with the proposition that courts are available to parties who can't themselves agree on a beneficial way to resolve disputes and conflicts. The point of mediation and other non-litigation dispute resolution methods is to help the parties come to those agreements by themselves, so they can avoid litigation. The law and lawyers are central contributors to that search.

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The Benefits of Mediation and Arbitration for Dispute Resolution in Health Law

By Linda Martin and Chris Stern Hyman

Healthcare providers, insurers and suppliers rely to a large extent on professional relationships to fulfill their missions and advance their business models. When disputes arise, confidentiality and the preservation of the underlying relationship are often critical to the parties. The goal of this paper is to help the Health Law practitioner improve the client's experience in resolving disputes, produce better outcomes for the client and preserve critical relationships and partnerships in the process.

Arbitration has become very common in the resolution of commercial disputes and is routinely incorporated into healthcare contracts, including employment contracts, supply chain contracts, and managed care participation agreements, as a method of choice for avoiding litigation. Arbitration is a matter of agreement between the parties. Even if the underlying contract is silent on arbitration, parties are always free to agree to arbitrate. An agreement to arbitrate is usually a very simple document to draft. More efficient than litigation, arbitration is a formal, evidentiary process that results in a final, binding award by the arbitrator.

Mediation, on the other hand, is a less-formal process and is particularly well suited for situations where it is desirable and/or necessary to preserve confidentiality and the underlying relationship of the parties. In addition to the generic benefits associated with Alternate Dispute Resolution (ADR) many healthcare disputes may be particularly well suited for mediation. Parties to mediation have the opportunity to air their views and positions directly, in the presence of the other party. The process can thus provide a catharsis for the parties that can engender a willingness to resolve differences between them. Moreover, since they are heard in the presence of a neutral authority figure, the parties often feel that they have been heard, similar to having had "their day in court." For highly charged situations, or those with emotional overtones, including credentialing disputes or malpractice threats, this can be a critical factor in resolving a dispute at an early stage.

Health Law Context 1: Complicated Cases: When the facts and/or legal issues are particularly complicated, as is often the case in Health Law, it can be difficult to sort them out through direct negotiations, or during trial. By using one or more methods of ARD, there is an opportunity to break down the facts and issues into smaller components, enabling the parties to separate the matters that they agree upon and those that they do not yet agree upon. Even if the case doesn't settle, the process might eliminate certain issues, and simplify the remaining issues for either arbitration or litigation on the merits.

Health Law Context 2: Saving Mission-Critical Relationships: The litigation process is very stressful, time consuming, costly and often personally painful. At the end of litigation, the parties are often unable to continue or restart any relationship. By contrast, with ADR, disputes such as those between a hospital and physician, physicians and their clinical departments, or more traditional business partnerships can be resolved in a way that preserves the relationship.

Healthcare Business Transactions—Arbitration Provides A Fast and Final Result[1]

Healthcare entities are parties to important and often long-standing contractual relationships that are critical to fulfilling their missions and successful operation. Aside from garden-variety commercial relationships, such as supply chain and service contracts, and equipment purchases and leasing, examples of critical relationships are those between insurers and providers, insurers and members, hospitals and physicians, and multi-provider affiliations.

Inevitably, disputes arise in these contractual relationships, often regarding matters such as reimbursement, the setting or modification of fee and rate schedules, levels of required performance and the circumstances of renewals and termination. Such disputes are well suited for arbitration because of the unique characteristics of the relationships and the fact that parties wish to continue doing business with each other notwithstanding the particular dispute. Because of this, the parties are often psychologically suited for early resolution instead of bitter and damaging combat.

Timing is especially important in these situations. The sooner the dispute is resolved, the sooner the relationship can continue on an even keel. Arbitration has the distinct advantage over litigation of a much faster track, less expense and finality of the decision. Confidentiality is another advantage, as the parties often are eager to resolve their disputes outside the glare of the public view. And in this era of financial stress on healthcare institutions and providers, the cost savings of arbitration can be of enormous benefit.

The proliferation of dedicated panels of experienced healthcare neutrals is another factor that is increasing the confidence in, and preference for, arbitration of contractual and business disputes. Among the types of healthcare business disputes routinely resolved through binding arbitration today are:

1. Managed care contract disputes between providers, payors and consumers, involving contract interpretation, risk sharing, insurance and / or reimbursement issues;
2. Disputes involving disease management and other managed care administrative issues;
3. Employment contract disputes between physicians and their employers including covenants not to compete;
4. Medical staff and peer review issues including disputes involving medical staff departments;
5. Shareholder disputes within physician practices or other disputes within medical practices including sale or dissolution of a medical practice;
6. Disputes involving healthcare joint ventures and other multi-party disputes;
7. Medical necessity disputes;
8. National and international contract disputes involving pharmaceutical companies, research and clinical trials of new drugs.

Privileges, Credentialing and Other Sensitive Areas—Mediation Can Save Time, Money and Reputations

Of particular sensitivity to healthcare institutions, individual providers, physician groups and insurers are participation agreements and the granting, renewal, suspension and / or termination of privileges. These are fundamental to the provision of quality healthcare and the protection of the public. At the same time, these can be vital to the reputation, professional careers and viability of providers.

Disputes in this area cry out for the avoidance of expensive, lengthy and public proceedings. For example, with patient accessibility to healthcare as well as the careers of providers often hanging in the balance, an expeditious resolution of these issues can be of overarching importance. Although utilizing the Public Health Council ("PHC") may be a required step in addressing hospital privileging decisions, the use of mediation at various stages can provide a faster and better outcome. Decisions regarding privileges also can be of a sensitive nature and involve high degrees of emotion. The private setting of a mediation provides important confidentiality and may "lower the temperature" among counsel and the parties in a manner that enhances the presentation of the issues. Moreover, the use of skilled mediators drawn from specialty panels with knowledge of the credentialing process and pertinent issues not only will enhance the efficiency of the process, but also the level of confidence that the matter will be handled in a proper and practical fashion.

Hospitals and other healthcare institutions that are interested in including alternative dispute resolution methods, including mediation, in their process for resolving credentialing disputes should amend their medical staff bylaws, rules and regulations, and / or hospital bylaws (as appropriate) to specifically permit these mechanisms for dispute resolution.

Mediating Medical Malpractice Lawsuits[2]—A Trend Benefiting Plaintiff, Defendant and Insurer

Typically when something goes wrong in the treatment or care of a patient, the response of the physician and other healthcare providers is guarded—the result of a longstanding belief that to say as little as possible to the patient and family members is the best protection against litigation.

In fact, research suggests just the opposite: litigation is more likely if patients and their families do not get answers to their questions as to what happened and why.[3] The ideal time to give patients and their families information about what has happened is soon after the event has occurred. Those conversations are referred to as "disclosure conversations." Disclosure policies in health care facilities vary as to who should be present and who conducts the conversations. In hospitals typically a physician, accompanied by a risk manager or other hospital representative, conducts these conversations. Recent research suggests that effective disclosure conversations may reduce the number of medical malpractice claims filed.[4]

In an effort to increase understanding of mediation and its benefits, two studies to evaluate the use of interest-based mediation to resolve medical malpractice lawsuits were conducted by C.S. Hyman and C.B. Leibman.[5] Both studies were conducted under the auspices of Columbia Law School and required the approval of Columbia University's Institutional Review Board. The first involved mediating medical malpractice lawsuits pending against the New York City Health and Hospitals Corporation (the "HHC study") and the second, larger study involved medical malpractice lawsuits pending against 11 New York City hospitals (the "MeSH study").

Two Empirical Studies Mediating Medical Malpractice Lawsuits

- **Study #1—NYC municipal hospitals 2004**
  29 cases referred
  19 mediated, 13 settled
  mean amt. of time in mediation 2.34 hrs.
- **Study #2—NYC private, non-profit hospitals 2006-07**
  67 cases referred
  31 mediated, 21 settled
  mean amt. of time in mediation 3.7 hrs.

In both studies after a case was assigned, co-mediators held a conference call with the plaintiff and defense

attorneys to discuss the importance of plaintiff's participation, as inadequate communication appears to be driving much of the litigation.

In the HHC study the same lawyer from the New York City Law Department represented the City in all 19 cases and became knowledgeable about mediation advocacy. In the MeSH study, the defense lawyers were primarily outside litigation counsel for the hospitals and in some instances appeared to be more resistant to mediation. However, there are also other factors that explained the lower number of cases mediated, such as successful settlement negotiations that were already under way and cases being withdrawn from the study for a variety of reasons.

The mean amount of time spent in mediation in both studies, approximately 2½ and 3½ hours respectively, appears to confirm the efficiency of the process as compared to litigation. In both studies there were cases that were mediated and settled with no or minimal discovery completed. This seems to indicate an additional area of potential savings, both financial and emotional.

There was a high level of plaintiff participation in both studies, but no physician participation in either. As discussed below, this may have limited the value of apologies offered and desire to benefit patient safety, as articulated by the plaintiff.

Plaintiff Participation in Mediations	
Study #1	**Study #2**
16 of 19 cases	**25 of 31 cases**
84%	**80%**

Attorney and plaintiff satisfaction with the process was also measured and the rates were quite high.

Plaintiff Satisfaction (Mean)	
Study #1	**Study #2**
2.2	**1.98**

Scale: 1 (very satisfied) to 5 (very dissatisfied)

Attorney Satisfaction (Mean)	
1.95	**1.9**

Scale: 1 (very satisfied) to 5 (very dissatisfied)

This level of satisfaction might be surprising. An interest-based mediation style was used for both studies despite knowing that medical malpractice lawyers were less likely to be at ease with this style, preferring the evaluative, settlement-conference style in which the mediator presides over a position-based negotiation focused on compensation. A few attorneys were critical of the mediators' reluctance to value the cases.

An apology is a response that patients and their families expect after a medical error or adverse event and one that many physicians wish to give but feel constrained because of fear of an admission of legal liability.[6] Mediation with its confidentiality provides a process in which apologies can be given without fear of retribution and the mediator, experienced in communication skills, can coach both parties to ensure a productive dialogue.

Apologies in Mediations	
Study #1	**Study #2**
11 in 19 cases mediated	**9 in 31 cases mediated**

In the first study the experience gained by the defense attorney, who mediated all 19 cases, may have led to an increased comfort and expertise in offering apologies in contrast to the second study in which many of the defense attorneys appeared less comfortable with apologizing. Litigators unfamiliar with apologizing to plaintiffs may inadvertently offer apologies that sound hollow and are not heard as genuine.

By contrast, two wrongful death medical malpractice lawsuits in Pennsylvania were mediated as part of a demonstration project funded by the Pew Charitable Trusts ("Pew Demonstration").[7] In both cases the chief of medicine participated along with other hospital representatives. In one case, the patient with end-stage pulmonary disease died after a resident inserted a subclavian central line and nicked the patient's lung. At the mediation, the patient's widow told the hospital representatives how she had been abandoned after being told of her husband's death, left standing alone in the hall outside her husband's room. She also explained that no one had explained to her what had happened. The chief of medicine and the director of patient safety were upset at how the widow had been treated. In addition, during the mediation the physician explained what the options were for placement of the central line and why the lung had been nicked. He apologized for the outcome and explained why the placement of the central line was not negligent, but that it might have been better to have inserted the line in the patient's neck. As a result of this case, the department of medicine adopted a new decision tree for the placement of central lines to avoid this harm in the future. The settlement agreement included a monetary component and a commitment to conduct on-going staff training on how to respond to family members grieving as a result of the death of a loved one in the hospital.

The second case involved an elderly man on Coumadin, a blood thinner used to prevent and treat clots, who was admitted to the emergency room the morning after a fall. Contrary to hospital policy, the wife was not allowed to be with her husband for his final hours. The patient was initially misdiagnosed with an infection rather than internal bleeding. At the mediation, the chief of medicine listened to the widow and responded to her rage with an

apology that acknowledged the hospital's responsibility for the misdiagnosis. He explained what treatments had been administered. In the course of the mediation, the widow moved from rage to sadness and ultimately expressed gratitude for the physician's apology. The hospital changed its procedures so that a patient on Coumadin who has fallen and enters the hospital through the emergency room is seen by a trauma surgeon.

The HHC, MeSH and Pew Demonstration studies all show the tangible and intangible benefits of mediation, as well as the potential patient safety case for mediation that reaches beyond the business case. In addition, they provide a convincing starting point for healthcare providers, their attorneys and insurers to begin utilizing mediation to resolve medical malpractice and negligence claims.

Mediation in the Long Term Care Setting

The New York Public Health Law[8] confers a private right on nursing home residents (or their legal representatives) to sue for the "deprivation of any right or benefit" created by contract, statute, rule or regulation.[9] Compensatory and punitive damages are available as well as injunctive and declaratory relief. As an incentive to counteract the historically low values of claims brought by old, disabled claimants, class actions are authorized and attorney fees for prevailing plaintiff are also available.[10]

As a result of multi-million dollar actions using similar laws in Florida and other states, an explosion of litigation against New York nursing homes began around 2003. The prospect of cumulative damage calculations has been used successfully to establish a higher value for claims in the long term care setting. However, the avalanche of claims and detailed discovery needed to support deprivation of rights claims has also created huge burdens for both plaintiffs and defendants, slowing the development and resolutions of these claims.

Although the use of arbitration is disfavored in most situations involving claims of nursing home residents, and is specifically prohibited in nursing home Admission Agreements, mediation has proven to be an effective mechanism for resolving such claims. Mediation can assist the parties in becoming more realistic about their positions and can counteract the "advocacy bias" that often results from the zealous prosecution and defense of these claims. Lastly, but perhaps most importantly, mediation can reduce the emotional burden created by the protracted litigation and motion practice that is associated with these cases.

In addition to the benefits demonstrated by the HHC, MeSH and Pew Demonstration studies, mediation in the long term care setting can be effective in resolving disputes involving negligence, quality of care, billing or deprivation of rights claim. In addition, disputes involving admission agreement issues (e.g. disputed charges; etc.) healthcare decision-making and appointment of surrogates among eligible relatives,[11] and family disagreements over end-of-life care (i.e., treatment that is seen as too aggressive or not aggressive enough) are all well-suited for mediation.

Practice Implications

Parties to complex healthcare disputes seek out lawyers trained and experienced in ARD methods who are also knowledgeable about the myriad of state and federal regulations and industry practices. Government reimbursement, managed care, pharmaceutical development and healthcare contract disputes are often so complicated that the subject matter of the case simply cannot be learned in the course of litigation. As in many fields, ADR is increasingly successful where the neutral assists the parties in reaching creative and practical solutions to the problems presented. This demands familiarity with the business objectives, operations and multiple regulatory schemes applicable to payors, providers, insurers and other entities within the healthcare industry.

Providers, payors, suppliers and liability insurers should each consider ways to increase incentives and / or remove disincentives associated with the use of ADR.

For More Information

For more information on mediation and arbitration, please visit the Dispute Resolution Section's homepage at www.nysba.org / drs.

Endnotes

1. This section is based on a prior article: K. Benesch, "The Increasing Use of Arbitration and Mediation in Adjudicating Healthcare Cases," *New Jersey Lawyer*, April 2007.
2. This section is based on a prior article: C.S. Hyman & C.B. Liebman, "Mediating Medical Malpractice Lawsuits: The Need for Plaintiff and Physician Participation," Dispute Resolution Magazine vol.16, no.3 (Spring 2010): 6-9.
3. G.B. Hickson et al., "Factors that Prompted Families to File Medical Malpractice Claims Following Perinatal Injuries," JAMA vol. 267, no. 10 (1992):1359-1363.
4. A. Kachalia et al., "Liability Claims and Costs Before and After Implementation of a Medical Error Disclosure Program," Annals of Internal Medicine vol.153, no.4 (2010):213-221.
5. Articles reporting these studies are: C.S. Hyman & C.B. Schechter, "Mediating Medical Malpractice Lawsuits Against Hospitals: New York City's Pilot Project," Health Affairs vol. 25, no. 5 (2006) and C.S. Hyman, C.B. Liebman, C.B. Schechter, & W.M. Sage, "Interest-Based Mediation of Medical Malpractice Lawsuits: A Route to Improved Patient Safety?" Journal of Health Politics, Policy and Law vol. 35, no. 5 (Oct. 2010) 797-828.
6. T.H.Gallagher et al., "Patients' and Physicians' Attitudes Regarding the Disclosure of Medical Errors" JAMA vol.289, no.8 (2003): 1001–1007.
7. C.B. Liebman & C.S. Hyman, "Medical Error Disclosure, Mediation Skills, and Malpractice Litigation: A Demonstration Project in Pennsylvania," (2005), www.pewtrusts.org / our_work_report_detail.aspx?id=24398.
8. See NY PHL 2801 d *et seq*.

9. See NY PHL 2801d(2); and NY PHL 2801d(3).
10. See NY PHL 2801d(6).
11. See Chapter 8, Laws of 2010, N.Y. Public Health Law Article 29-CC ("The Family Health Care Decisions Act").

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Albert Appel, Esq., contributed to this article.

Arbitration of Joint Ventures, Managed Care, Pharmaceutical and Reimbursement Disputes*

Healthcare disputes are worldwide, and often involve millions of dollars. Arbitration and mediation of disputes among healthcare stakeholders extend far beyond traditional cases involving patients and physicians. ADR is particularly well-suited to the resolution of healthcare issues, and ADR procedures have become the method of choice to resolve commercial disputes of all sizes between healthcare providers, payors, managed care plans, pharmaceutical and other for-profit and not-for-profit companies in the healthcare industry.

Many healthcare providers and business corporations have binding arbitration clauses in all of their contracts because they prefer the privacy of ADR, as well as the opportunity to select the arbitrator, over the hurly-burly of the courtroom. Also, the proliferation of dedicated panels of experienced healthcare neutrals is seen by the parties to be preferable to adjudication by a member of the judiciary who may not be familiar with the intricate facts, jargon and complexities of state and federal healthcare regulation and reimbursement rules.

Among the types of healthcare business disputes that are routinely decided in arbitration or mediation today are:

1. Managed care contract disputes between providers, payors and consumers, involving contract interpretation, risk sharing, insurance and/or reimbursement issues;
2. Disputes involving disease management and other managed care administrative issues;
3. Employment contract disputes between physicians and their employers;
4. Covenants not to compete involving physician employees or contractors;
5. Medical staff, credentialing and peer review disputes;
6. Shareholder disputes within physician practices;
7. Disputes involving healthcare joint ventures;
8. Contract disputes within medical practices;
9. Contract disputes involving vendors to healthcare facilities;
10. Disputes involving the dissolution of medical practices;
11. Disputes involving medical staff departments;
12. Disputes involving management services companies and other third party vendors;
13. Disputes between and among healthcare providers, government agencies and communities;
14. Contested guardianship disputes;
15. Medical necessity disputes;
16. Long term quality of care and billing issues;
17. National and international contract disputes involving pharmaceutical companies, research and clinical trials of new drugs.

Large and small healthcare disputes of all types increasingly are being resolved through arbitration and mediation. Parties seek the services of lawyers trained and experienced in arbitration and mediation, who are also knowledgeable about state and federal healthcare and insurance regulation, litigation, reimbursement and industry practices. This is because the issues in large reimbursement, managed care, pharmaceutical or healthcare contract disputes are often so convoluted that the subject matter of the case cannot be learned on the job. As in many fields, arbitration and mediation often are successful in healthcare where the neutral assists the parties in reaching a creative solution to the problems. This cannot be done without familiarity with the operations, functioning and multiple regulatory schemes applicable to payors, providers and other multi-faceted entities within the healthcare industry.

***This section is based on a prior article: K. Benesch, "The Increasing Use of Arbitration and Mediation in Adjudicating Healthcare Cases," *New Jersey Lawyer*, April 2007.**

Insurance/Reinsurance Arbitration and Mediation

By Charles Platto, Peter A. Scarpato and Simeon H. Baum

At the heart of the insurance business is the resolution of claims. Insurers routinely adjust claims and provide for indemnity and defense. Accordingly, some have said that the business of insurers is litigation. In fact, it is more accurate to say that the business of insurers is dispute resolution: including negotiation, mediation, neutral evaluation, and arbitration, as well as litigation.

Where insurers and reinsurers find themselves consistently involved in matters that are heading towards or involved in litigation, it is no surprise that the industry currently makes extensive use of a variety of dispute resolution processes. In this paper, our focus will be on mediation and arbitration in handling: (1) insurers with an obligation to defend / indemnify the insured, (2) subrogation matters, (3) insurance coverage disputes between insurer and insured, (4) disputes between insurers, and (5) reinsurance disputes.

As with other areas covered by this series of White Papers, the mediation and arbitration processes offer a wide range of benefits to the insurance industry, providing effective and efficient processes for the resolution of disputes. We will consider both benefits and special uses of alternative dispute resolution processes in these various scenarios. In all areas of insurance it pays to apply the questions of "who, what, when, where, and why": who should or will be attending the dispute resolution process; what process should be selected; the ideal timing of the use of that dispute resolution process; the forum or venue for the procedure—court-annexed or otherwise; and the reasons for selecting one process over another—keeping in mind the players, goals, opportunities and circumstances.

1. Insurance Defense and Indemnity—Third Party Claims

The typical liability policy requires the insurer to defend and indemnify the insured against claims asserted by one or more persons. These are known as "third party claims" because the persons asserting the claim against the insured are not parties to the insurance agreement. By contrast, first party claims are those presented by the insured party to its insurer under policies that cover the insured against risk of harm or loss to its own person or property. In this section, we will focus on the use of alternative dispute resolution processes for third party claims. Third party coverage is offered in a wide range of areas, including, *inter alia:* automobile, homeowners, commercial general liability, professional liability (also known as Error & Omissions), Directors & Officers, employment practices liability, and products liability insurance.

Arbitration is used in a number of arenas for the resolution of third party claims, including automobile no-fault cases, small claims and civil court matters, and for certain Worker's Compensation[1] claims. Arbitration, for these and commercial matters, can be an effective means of obtaining a decision from a neutral without going through a trial. Mediation is frequently used across the board for third party claims, both privately and through court-annexed panels. Mediation vests control in the parties, offering an informal, flexible and inexpensive process, with resolutions tailored for and by the parties. Mediation's popularity is reinforced by the benefit derived from a neutral who can keep parties and counsel engaged in constructive dialogue, and from the fact that there tend to be no pre-dispute arbitration clauses running between third party claimants and the insured.

There has been much discussion on "when"—the ideal timing for holding a mediation. As a general rule, the sooner one mediates the better. This enables the insurer to take funds that would otherwise be used in the defense of a claim and instead contribute them to the settlement pot. The sooner a dispute is resolved, the less parties will harden in their positions, and the less there will be a build up of emotion and resentment (not only by parties but also by counsel). Early resolution lessens the sunk cost phenomenon, in which parties and counsel who have invested time and expense hold out for a better return on investment—making it harder to settle a case. Another consideration that impacts timing is the need to develop information. Parties might feel a need to conduct an Independent Medical Examination, do destructive testing, nail down certain testimony in a deposition, test legal theories with a motion to dismiss or for summary judgment, or obtain an expert's report. At each juncture there is a balancing test of whether the information to be gained will offset the benefit of settling before the outcome is known. Conversely, its pursuit might, hydra-like, simply lead to additional questions, uncertainty, cost, and hardening of positions. Certain parties observe that "the heat of the trial melts the gold," and prefer to wait until they are at the courthouse steps—or even with an appeal pending—before conducting a mediation. Frankly, mediation can be useful at any stage. It is our view, however, that the earlier done, the better. In all instances, good judgment dictates giving serious consideration to the timing question.

In order most effectively to utilize the mediation or arbitration process where an insurer is involved, perhaps the most significant of our questions is "*who* is involved and what role should the insurer play?" It is critical to be sure that the proper parties are engaged in deciding

to enter mediation, preparing for the mediation, and attending the mediation session. Whether it is an adjuster with responsibility for monitoring the case,[2] or a lawyer or other official of the claims department, the person involved should have a full appreciation of the way mediation or arbitration can be used effectively, full authority to resolve the matter, and sufficient knowledge of the case and the issues to be appropriately involved in the process and make a reasoned decision. This means that the claims department should be actively engaged in evaluating the matter and reassessing reserves, and the person with full authority, ideally, should attend the mediation session. When dealing with a corporate claimant, it also means bringing the person with full settlement authority. If that claimant is an individual, say, with a personal injury claim, it might mean seeing that certain family members are also involved or, at least, on board. It pays for claims adjusters and counsel on both sides to educate themselves well on negotiation strategy and techniques and on the nature and role of the mediator, so that they can take full advantage of the opportunities presented by using the mediation process. In addition to persons with authority, experts or persons familiar with certain facts may be helpful to have present at a mediation. Of course, a mediation is not a hearing, but the presence of these people might aid the parties in coming to a common understanding of the facts and adjust their assessment of the matter. In all instances, the best prepared attendees should be cautioned to maintain an open mind so that they get the full benefit of the mediation process, including the capacity to learn and make adjustments in accordance with reality.

The "what" and "why" of mediation include using a neutral party to help all involved conduct a constructive dialogue, getting past many of the snags that arise with traditional positional bargaining. The mediator can help cut through posturing and can keep people on course. When a large demand or tiny offer threatens to end negotiations, the mediator is the glue keeping people in the process, encouraging them to stick with it and reach the goal of resolution. The mediator can help counsel and parties understand legal risks that "advocacy bias" might blind them to, help them develop information that is key to assessing and resolving the matter, and help them as they make their bargaining moves. While some cases involve claims for damages which one party believes can best and most favorably be resolved by a jury and others involve a legal issue which call for a judicial resolution, the vast majority of claims and litigations, particularly involving insured matters, are ultimately resolved by settlement. A mediation can fast forward the camera, truncating procedures and shrinking costs, by bringing about the inevitable settlement much sooner. Claims adjusters, risk managers, and counsel are well advised to consider the myriad benefits of mediation listed in the general introduction—the "why"—at the commencement of a matter, so that they can make an informed choice of process—the "what"—initially and reevaluate process choices throughout the course of handling the claim.

Development of information needed for an informed settlement decision can, in fact, be expedited through the use of mediation in the third party claim context. Rather than awaiting depositions or extensive document production, parties can use mediation to conduct truncated disclosure—getting the information that is most essential to the resolution decision. Good use and development of information is critical to taking full advantage of mediation in the insurance context. Prior to the mediation session, it is good practice for the insurer's team to assess damages and liability and develop a good sense of the reserve for the case. This can include obtaining expert reports, appraisals, photographs or other key information. Pre-mediation conference calls can facilitate interparty disclosures that will provide parties with information needed to prepare or to conduct a meaningful discussion when they arrive at the mediation session. It is also valuable to help the mediator get current with information in the form of pre-mediation conference calls and written submissions, with exhibits. Further useful disclosures for the benefit of the parties can occur in the confidential mediation session, enabling parties to adjust their views and assessment of damages and liability. Even if the matter does not settle at the first mediation session, information can be further developed thereafter, bringing the matter to resolution.

Additional points to keep in mind include the potential for conflicts or different interests or priorities between the insured and the primary and excess carriers and reinsurers. Also, insurance policies historically placed the burden of a complete defense on the primary carrier regardless of limits. While this is still the case in an automobile policy or an occurrence-based commercial general liability policy, a variety of claims made and specialized policies may provide for defense costs to be deducted from and be subject to the limits of coverage. Additionally, the claim may exceed the limits of primary coverage and impact excess coverage and / or the primary coverage may be typically reinsured in whole or in part. These may be important practical factors to keep in mind in evaluating the "who, what, when, where and why" of mediations and arbitrations in insured matters.

In sum, the insurer, parties, and counsel should be proactive in addressing our journalist's questions—and in developing, exchanging, and analyzing information—so that a mediation can be held at an appropriately early stage—and indeed, if not initially resolved, in pursuing further mediation as the case evolves.

Case Study: The Multi-Party Subrogation Claim

Have you ever participated in a negotiation or mediation involving multiple defendants, each pointing the finger at another? In the third party insurance world, this is a frequent occurrence. Often, counsel or claims adjusters

will enter a negotiation with a predetermined percentage which 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 insured's. The latter scenario can generate feelings among professionals not unlike sibling rivalry.

In one case involving a construction site with twelve defendants, the mediator used an approach he calls the *consensus based risk allocation model*. This approach was undertaken with the recognition that, sometimes, shifting from percentages to hard dollars, and getting people to focus on their own pot rather than the other defendants', is a good way to move from stalemate to progress. First the mediator conducted an initial joint session and one or more caucuses (private, confidential meetings with fewer than all parties) in which he got a good sense of what the plaintiff would need to settle the case. Then he held some caucuses with the entire group of defendants and subgroups of defendants in which the mutual finger pointing became apparent. To address this problem, the mediator held a series of caucuses with each of the defendants. In each caucus he asked the same set of questions: do you think plaintiff will win at trial, and, if so, how much? What percentage liability do you think will be allocated to each defendant? How much will it cost to try this case? Answers to these questions were recorded on an Excel spreadsheet, with a line for each defendant's answer, including columns for each defendant discussed.

When the interviews were completed, the mediator created different economic scenarios: (1) the average of the amount the plaintiff was predicted to win, with and without applying predicted defense costs, (2) the amount the mediator guessed the plaintiff would need to settle the case (the realism of which was assessed in light of the first set of numbers), and (3) amounts smaller than the projected settlement number which might serve as initial pots in making proposals to the plaintiff. The mediator then applied the average of all defendants' views of each defendant's relative liability to these economic scenarios. The result was a listing of dollar numbers allocated to each defendant for each economic scenario. The mediator then held a joint conference call with all defense counsel. He explained what he had done and inquired whether they would like to hear the outcome of this experiment. Not surprisingly, all asked to hear the outcome and agreed to share with one another this information that had been derived from their private, confidential caucuses.

Essentially, the mediator presented 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. As a result, a doable settlement path appeared in place of what had been a field of warring soldiers. Defendants got their approvals to each pot—one pot at a time—and the case settled. This is just one way mediation can help create productive order out of multi-party bargaining sessions in third party liability cases.

2. Subrogation

Another area that has lately benefited from the use of mediation is subrogation. In subrogation matters, an insurer that has already paid a first party claim for a loss suffered by its insured stands in the shoes of that insured and seeks recovery of damages for that loss from third parties who caused the loss. Over the last decade or two, subrogation has risen in the insurance industry's regard as one of the three chief ways in which insurers gain funds, along with premiums and return on investments.

The same considerations that apply to the mediation of all third party claims apply here. Unique features include that plaintiff is a professional insurer, and, typically, insurers are involved on the defense side, as well. As a consequence, some of the emotional issues that might be generated by parties seeking recovery of damage or loss to their own personal property are diminished. Negotiations can proceed on a steady course. Yet, special challenges also arise when professionals engage in strategic bargaining. *See*, for example, the multi-party finger pointing discussed in the inset above. Some certainty on the size and nature of the loss is gained where the claim has already been adjusted by the subrogated insurer, but other issues take center stage: if the insurer paid replacement value, should the defendants' exposure instead be limited to actual, depreciated value of the property? Were payments made for improvements, rather than losses? And, of course, questions on liability, causation and allocation among multiple parties remain. Mediators can be quite helpful in organizing these discussions, developing information, assisting in assessments of exposure, and helping multiple parties stay on track to reach a conclusion. Sometimes, the mediator's phone follow up after a first mediation session is the key to keeping the attention of multiple parties, with many other distracting obligations, focused on the settlement ball.

3. Insurance Coverage Disputes Between Insurer and Insured

Disputes can arise between the insurer and the insured in either the first party (*e.g.*, property) or third party (*e.g.*, liability) context. Such disputes can be particularly complicated in the third party context where the insurer owes a duty to defend if there is any possibility of coverage for one or more claims even if the carrier has potential unresolved coverage defenses. In all events, the carrier owes a duty of good faith and fair dealing to the insured and may have to consider settlement offers within policy limits in third party claims even if coverage issues are unresolved. Similarly, in the first party context, although the

defense obligation may not be present, the carrier does have an obligation to process claims in a fair and efficient manner.

Notwithstanding these complications and obligations, the carrier does have the right to deny coverage if it believes that the policy does not cover or excludes a claim, or the carrier may defend under a reservation of rights if it believes there is a possibility of coverage, especially if that possibility is dependent on the outcome of the underlying claim, *e.g.*, was the conduct that gave rise to the claim intentional (not covered) or negligent (covered).

A typical way of raising and resolving insurer/insured coverage disputes (after the carrier sets forth its initial coverage position generally by letter) is by a declaratory judgment action. Such an action may be brought by the insurer or the insured. In some states, *e.g.*, New Hampshire, a declaratory judgment action is required as a condition of denying coverage or requesting a denial.

As with all other disputes, insurance coverage disputes can be effectively resolved by mediation or arbitration (whether provided for in certain complex sophisticated insurance policies or voluntarily).

Mediation or arbitration is especially attractive in the first party context where the question of timing and amount of payment, if any, may turn on a prompt and efficient resolution of the insurance coverage dispute. While at first blush, it might appear that the insurer has an advantage or disincentive in this regard to the extent it could benefit from a delay in payments, there have been significant developments throughout the country, including in New York (in the *Bi-Economy* and *Panasia* cases, 10 N.Y.3d 187,200 (NY 2008)), adopting a tort of first part bad faith or other analysis or remedies which protect the insured in first party insurance coverage disputes and give the insurer an incentive to resolve such disputes.

In the third party claim context, the timing and coordination of any insurance coverage dispute and the resolution thereof is particularly sensitive. Simply put, if the underlying case is resolved by settlement or otherwise before the coverage dispute is resolved, the opportunity to resolve the coverage dispute in an effective fashion may be lost to the carrier or the insured. The parties may, therefore, have a genuine interest in resolving the coverage issues in coordination with the underlying claims in one way or the other. Mediation, or arbitration, involving some or all parties and some or all claims may be effective in this regard.

Case Study—Mediating the Dream within the Dream

In one mediation of a multi-party third party property damage case, one of the defendants had a coverage issue arise between its primary and excess insurer. The mediator called a "time out" and conducted a separate, abbreviated mediation of that coverage dispute by phone caucuses. The coverage issue was resolved and the parties then moved on to resolve the original third party claim.

Apart from these complexities, the same who, what, when, and why consideration noted above apply. In endeavoring to coordinate an underlying claim proceeding with an insurance coverage dispute, the when of any mediation and the who is involved amongst the parties and their representatives become critical. On the insurer side, for example, there is typically and appropriately a separation between the adjusters or claims representatives handling the defense of the underlying litigation, and those responsible for the coverage dispute. This is where they need to coordinate. The why includes the potential benefit of resolving the coverage issue which may impede resolution of the underlying claim and/or resolving the underlying claim which may be impacting the resolution of the coverage dispute. The what may involve a mechanism to bring together in a single forum, *e.g.*, before a mediator, parties involved in different proceedings or aspects thereof.

Finally, a word about the need for subject matter expertise in mediators or arbitrators. In arbitration, expertise is what is often sought in a decision maker, although some have argued that non-experts might approach a case with a more open mind. In mediation, maintaining an open mind is essential in the mediator, and process skills are of paramount importance. Nevertheless, users of these processes in insurance coverage matters find it helpful if their mediators or arbitrators are conversant with insurance policy interpretation and implementation.

4. Insurer v. Insurer Disputes

Another area where mediation or arbitration may be particularly effective is in insurer v. insurer disputes.

Because of the complexity of the world we live in, it is not uncommon to encounter situations where multiple carriers and policies may respond to one or more potentially covered claims. This may give rise to disputes among carriers under "other" insurance clauses which seek to prioritize coverage obligations between carriers, or pursuant to subrogation rights, or where primary and excess carriers are involved, or there are additional insured claims, etc.

Disputes between insurers present a perfect opportunity for mediation or arbitration. One reason for this is that since insurers will often find themselves on one side of an issue in one case and on the opposite side of that issue in another case, or even on both sides of an issue in the same case, *e.g.*, with affiliated carriers or the same carrier involved for different insureds, there are multiple situations where it would be in the carriers' interest to have an efficient effective resolution of the particular case without setting a precedent for one position or an another.

Beyond the potential for setting unwarranted precedent in litigations between carriers, arbitration or me-

diation is simply an unusually effective mechanism for resolving disputes between entities which are in the business of resolving and paying for disputes. No entity is better equipped and has more interest in efficient effective resolution of claims and the coverage therefore than an insurance company—and insurers would prefer to avoid battling with each other, although the nature of today's' massive insured litigation is such that more often than not carriers will find themselves on opposite sides of the table from their colleagues in the industry and have difficult problems between themselves that need to be resolved. Once again the who, when, what and why become important. It is often important that insurance executives at the appropriate level recognize the significance of the issue to be resolved in the broader sense of the business rather than just the dollars and cents of a particular case. When is important in the evolution of the underlying matter and the issues between the carriers. The what is to identify an appropriate forum and mechanism and the why is because particularly with carriers it becomes a question of the best and most effective way to run their business.

5. Reinsurance

"Reinsurance" is basically the industry practice where one insurer insures all or a portion of another insurer's liabilities. Virtually all reinsurance agreements are in writing, and most contain either arbitration clauses or the occasional mediation clause. Thus, the first and best benefit of this ADR mechanism in reinsurance is that it is contractual, i.e. automatic and nonnegotiable. Unless the very efficacy of the arbitration or mediation clause is challenged, the parties *cannot* litigate.

Arbitration: By design, reinsurance arbitrations are meant to be faster, less expensive and more industry-focused than the usual litigation model. The typical panel consists of three individuals, two quasi-partisan arbitrators,[3] one selected by each party, and a third, neutral umpire, technically chosen by the two arbitrators, who manages the proceedings. The arbitrators are quasi-partisan because parties interview them in advance to ensure, based on the pre-discovery facts as described, that they generally support the party's position. Also, in some cases, the parties and their arbitrators continue to have ex parte conversations throughout most of the case, usually terminating with the parties' filing of their initial, pre-hearing briefs. Ultimately, arbitrators "vote with the evidence" in final deliberations. The neutral umpire has no ex parte communications at all with either side. While the contracts technically permit the arbitrators to select the neutral alone, most do so with outside counsel and party input. Since decisions require a panel majority, the neutral umpire casts the swing vote, if necessary, throughout the case.

Another important benefit of the reinsurance arbitration model is that all three panelists are experts in the industry customs and usages of the particular lines of business, claims and practices in dispute. This is one of the quintessential aspects of arbitration that differentiates it from litigation. The people reviewing and weighing the evidence, assessing the parties' conduct and witnesses' credibility, and interpreting the agreements have been involved in the very business in dispute for years, enabling them to make informed judgments. While arbitrators are not permitted to discuss evidence outside the record in deliberations, they may apply their knowledge of industry customs and practices to judge the facts, assess witness credibility and understand contract language.

Typically, most arbitration clauses contain a broadly worded "Honorable Engagements" clause, for example: "The arbitrators shall interpret this Contract as an honorable engagement and not as merely a legal obligation; they are relieved of all judicial formalities and may abstain from following the strict rules of law. " This clause, combined with their non-codified yet recognized authority, provides arbitration panels with broad discretion to apply industry standards and equity, not necessarily strict legal rulings, to resolve all manner of procedural and substantive disputes, to manage the proceedings before them, and ultimately to render a fair and just award based upon the totality of the circumstances.

This discretion is particularly beneficial to parties because it affords panels the ability to mold and streamline the proceedings to the particular facts, issues, and amounts in dispute. For example, to prevent the occasional overly zealous counsel from "over litigating" the dispute, panels may limit the availability and scope of discovery, the number and length of depositions, the amount and necessity of hearing witnesses, and many other procedural aspects of the case, especially since most arbitration clauses do not require the application of Federal or State rules of evidence or procedure. Like judges, arbitrators have authority to issue sanctions, draw adverse inferences and, where necessary, dismiss elements of an offending party's case, to maintain control of the process.

If properly molded and limited to the particular necessities of the given case, the arbitration process is designed to proceed to hearing and award much faster and less expensively than litigation. Following the hearing, most arbitration panels in reinsurance disputes promptly issue "non-reasoned" awards—essentially a few lines stating who won and the amount of damages awarded. The trend in more recent arbitrations and newer arbitration clauses is for parties to specifically request the issuance of a "reasoned award." Even in that instance, panels usually issue awards much faster than courts, since the acceptable form of reasoned award requires a brief statement of factual findings, followed by the panel's ruling on each contested issue—much less than the typical length and scope of a court opinion.

The benefits of a reasoned award are obvious. First, it provides the parties insight into the panel's reasoning

process and rationale for its decisions, particularly important if aspects of the panel's ruling differ from either party's requests. Second, allowing the losing party to understand how and why the panel ruled against them reduces the possibility that the award will be challenged as "arbitrary, capricious or unreasonable." And third, since many parties have business relationships, governed by the very contract(s) involved in the dispute, that continue post-arbitration, a reasoned award reveals how the parties should construe the challenged terms and conditions in the future, avoiding repetitive, expensive and wasteful arbitrations over identical issues.

Mediation: The mediation model employs an impartial, trusted facilitator to help parties explore, respect and react to objective, subjective and psychological factors creating conflict between them, helping them to perceive and communicate positions leading to an inexpensive, voluntary resolution of the dispute on their own terms. Though a mediator with reinsurance industry background is preferred, the technical aspects of the specific factual and legal issues in dispute are not the most important elements of the process. In joint meetings and private caucuses, an experienced, professional mediator with no formal power to issue rulings works with the parties, using an informal, confidential process designed to suspend judgment and promote candor, to identify and understand each side's interests and goals underlying the actual dispute. To the trained and experienced mediator, disputes present an opportunity to empower parties to structure a resolution that best meets their respective short- and long-term needs.

Currently in the U.S., disputants have been slow to select mediation to resolve reinsurance disputes. But mediation, by its very nature, fits well within the reinsurance model for many reasons. First, contractual reinsurance relationships, whether from active underwriting or run-off business, typically last longer than one underwriting year. Mediators can harness the positive power of this beneficial, continued relationship to facilitate the parties' negotiations. Second, as a facilitated negotiation, mediation is symbiotic with the usual background and experience of reinsurance professionals—industry savvy business people accustomed to arm's-length negotiations, but occasionally stuck within their own positions, unable to objectively assess their adversary's views. Finally, since the aggravation, expense and time required to arbitrate or litigate is on the rise, the reinsurance industry is searching for alternatives and beginning to choose mediation, either by contract or ad hoc agreement. Compared to arbitration or litigation, mediation is a **less** aggressive, less costly, less damaging and less divisive alternative.

The reinsurance mediation process offers participants many benefits.

Given the complexity and overlapping nature of reinsurance contractual relationships and resultant business / factual / legal issues, sufficient time and care must be given to pre-mediation preparation. Before the actual mediation session, the parties submit mediation statements containing salient documents and information supporting their positions on specific issues in dispute. Both before and after these are filed, the mediator works with the parties jointly and individually by phone or in person to uncover the underlying interests to be addressed, some of which may transcend the narrow issues briefed in their mediation statements. For example, in the usual ceding company / reinsurer relationship, the cedant and / or its broker may possess documents and information that the reinsurer has requested and / or needs to fully evaluate its current position, requiring the mediation to be "staged" to accommodate such production. Proper pre-mediation planning is critical. If handled correctly, parties, counsel and the mediator arrive at the mediation room better prepared to address their true underlying needs and interests.

Reinsurance professionals are no more immune to psychological negotiation roadblocks than anyone else. In the opening joint session, the mediator first asks parties and counsel to actively listen to, understand and acknowledge their business partner's arguments, even repeating them back to one another, as a sign of their appreciation and respect for such views. This often overlooked but incredibly powerful step builds trust, breaks down barriers and actually makes the other side less defensive and more candid, producing valuable information to use in the mediation process, information which helps define the proper depth and scope of issues the participants must address and resolve.

Especially with reinsurance experts, often negotiators themselves, who well understand the merits of both parties' positions, the real work of an industry savvy mediator occurs in private caucuses. There, the mediator meets separately with and encourages each side to suspend judgment and comfortably and critically evaluate their positions, creatively explore options to resolve their disputes and, with the mediator's help, develop proposals designed to get what they need, not what they want, from a mutually acceptable settlement. Once the mediator garners the respect and trust of both sides, s / he can deftly help parties develop, discuss and respond to successive financial and non-financial proposals, supported by an articulated rationale, designed to satisfy the offering party's needs and the responding party's interests. The very heart of the process, this unscripted, evolving and changing dynamic requires a perceptive, inventive and focused mediator, patient, calm and committed parties, and an open exchange of ever-broadening proposals that accentuate agreement and eliminate disagreement.

The true value of any mediator reveals itself at negotiation impasse. In reinsurance, internal, corporate and / or financial pressures often impact one party's ability or willingness to settle on negotiated terms, leaving a gap between the last demand and last offer. Maintaining a

positive, trusting environment, the mediator should continue moving the parties to propose alternatives and reframe the problem, remaining focused on re-evaluating barriers between them and brainstorming ways to eliminate them. A mediator who has worked in the reinsurance business can knowledgeably help the parties explore "value-generating" alternatives that lead to acceptable compromises and settlement.

Endnotes

1. Workers' Compensation insurers may initiate subrogation arbitrations to recover payments of health benefits from third parties if the defendant companies or their insurers and the subrogated insurer are parties to a Special Arbitration Agreement. In addition, persons involved in the administration or determination of Workers' Compensation benefits hearings may also arbitrate their own claims. *See* NY Workers' Compensation Law, Section 20.2.
2. A number of people are ordinarily involved in handling claims presented to an insurer. Chief among them is the insurer's claims department or claims handling unit. This can be a group within the insurer and can also involve outside adjusters or third party administrators. Claims handlers are involved from the moment notice of a claim is received, through initial efforts to assess and possibly adjust a claim, and through all stages of litigation. The claims group triggers the issuance of any letter to the insured accepting the claim, assuming the defense but reserving rights to deny coverage. Claims appoints or approves counsel to handle the defense; sets reserves for the risk; and monitors the defense of a case. Moreover, claims evaluates case strengths and weaknesses, assessing liability and damages, and ultimately determines whether and under what terms to settle the claim. Other key players are counsel who are appointed to defend and must routinely report to the insurer; any counsel separately responsible for coverage questions; and, of course, the insured, who owes a duty of cooperation to the insurer. On the other side of the equation tend to be the claimant and claimant's counsel.
3. This characteristic of arbitrators depends upon the rules under which the arbitration is conducted. For example, under Rule 17, Disqualification of Arbitrator, of the Commercial Arbitration Rules of the American Arbitration Association: "(a) Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for (i) partiality or lack of independence, (ii) inability or refusal to perform his or her duties with diligence and in good faith, and (iii) any grounds for disqualification provided by applicable law.

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The Benefits of Mediation and Arbitration for Dispute Resolution in Intellectual Property Law

By Cheryl H. Agris, Stephen P. Gilbert, Charles E. Miller and Sherman Kahn

We review the benefits of mediation and arbitration generally and how they can serve to improve your client's experience in resolving intellectual property disputes and lead to better outcomes.

I. Benefits of Mediation in Intellectual Property Cases

Mediation can provide substantial benefits for parties with intellectual property disputes and, indeed, is widely used in complex intellectual property matters to resolve disputes. Many of the courts with the heaviest dockets of intellectual property cases strongly encourage mediation. The Northern District of California, for example, submits all patent cases to its ADR program—which provides mediation as an ADR option. Judges in the Eastern District of Texas typically require that a mediation be included in the scheduling order for every patent case. The District of Delaware has a magistrate judge who devotes a substantial amount of her time to mediating disputes and who has particular expertise in mediating complex intellectual property disputes.

Mediation can be particularly valuable for intellectual property disputes because of the complexity of the applicable law. Also in patent disputes and many trade secret disputes, the presence of complex technological issues can make mediation very helpful to enable the parties to get to the heart of the dispute. If the parties think it would be useful, they can seek a mediator with knowledge of the relevant law, business field, or technology. The mediator can help to bring the parties back from the technical details of their case to examine the fundamental economic or relationship issues that drive the dispute, thus enabling a settlement beneficial to all parties.

In patent disputes, issues such as inventorship, obviousness, infringement, the doctrine of equivalents, conception, and corroboration can be very intricate both factually and legally. In trade secret disputes, issues such as the existence and scope of the alleged trade secrets and adequacy of protective measures and in trademark disputes, issues such as likelihood of confusion, dilution, and fame of a mark are complicated issues. Likewise, in copyright disputes, issues such as work made for hire, joint authorship, and fair use present difficult factual and legal scenarios. A mediator with expertise in the applicable law and business (and for patent and many trade secret disputes, in the relevant technology) can confidentially provide each party with a candid neutral assessment of the strengths and weaknesses of its case.

Because many intellectual property disputes end with a license, a mediator can help the parties fashion a relationship going forward that is suited specifically to the parties' needs. Likewise, many intellectual property disputes arise from continuing relationships among parties who had formerly worked together as licensor/licensee, joint venturers, or even co-inventors. Mediation may be useful in preserving these existing relationships.

With help of the mediator, the parties can plan how the mediation should proceed and modify the process during the mediation itself. This flexibility can be particularly useful in intellectual property disputes in which disputes often reach across national borders—while intellectual property rights, and the ability of courts to construe those rights, do not. Intellectual property litigation typically must be conducted country by country, which for a number of reasons (cost, time, possibility of inconsistent outcomes, etc.) is generally less desirable than a dispute resolution mechanism that requires just a single forum to provide a truly global solution (such as mediation).

Intellectual property disputes frequently involve extremely expensive and protracted discovery processes. During discovery, mediation may be used to facilitate efficient and cost-effective information exchange.[1] For example, in patent disputes, mediation may be used to resolve questions regarding experts, or the mediator may even help the parties formulate an entire discovery plan (interrogatories, depositions, production of documents, etc.). The mediator may help the parties target early discovery to the specific information the parties most need to engage in meaningful settlement discussions. Then, after an initial round of discovery, the mediator can start a mediation session to discuss possible settlement.

Similarly, in complex intellectual property disputes, a good mediator can help the parties reduce costs by narrowing the issues. Even if early mediation does not result in settlement and a suit goes forward, mediation may be helpful by better defining and/or narrowing the issues, which can reduce litigation expenses. For example, in a patent infringement dispute involving a number of patents each with multiple claims, the patentee may decide after a mediation session to go forward with litigating just one of the patents or just certain claims based upon the mediation. If the alleged infringer has strong invalidity and/or non-infringement arguments for some claims and shares those arguments with the mediator, the mediator can use that information to facilitate the patentee's making a more objective assessment than if the alleged infringer had presented the same information directly to the patentee. Likewise, the mediator can help the accused infringer avoid raising weak defenses.

The confidential nature of mediation can also be extraordinarily beneficial for parties to intellectual property disputes. The benefits to parties in trade secret disputes are clear. At the core of trade secret disputes are the existence and details of the alleged trade secrets. The very secret the litigants are trying to protect is at substantial risk of being compromised through litigation, which invariably involves placing the secret information in the hands not just of one's adversary, but also of the court and other parties such as expert witnesses and court reporters. Likewise, patent disputes often involve confidential technical and business information, not just of the alleged infringer but also of the patent owner. Moreover, patent disputes litigated in court can result in devastating defeat for patent holders should a patent be held invalid. A mediation can help the parties reach a business resolution without posing this risk to the patent holder.

Each of the following examples of the use of mediation for IP disputes demonstrates a number of the benefits discussed above.[2]

Patents

In one example, the owner of a number of patents wanted to sell its business related to the patents to a buyer, but a pending patent infringement lawsuit between the patent owner and a third party concerning one of the patents became an obstacle. The third party had staked its future on using technology that allegedly infringed one of the patents the patent owner wanted to sell. With the help of a mediator, the representatives of the patent owner and the third party were able to share information with one another, get to know and to understand one another, and craft a mutually satisfactory solution—allowing the patent owner to dispose of the patents. The parties were able to accommodate each other's interests and needs beyond what a judge could have done.[3]

In a second example, a licensee licensed technology from a licensor, which held patents on a compound for treating several medical disorders and methods of using it. The licensor granted the licensee an exclusive license to use the compound to treat only one disorder. After two years, the licensor asserted that the licensee was using the compound to treat an additional disorder not covered by the license. The licensor was reluctant to grant the licensee an exclusive field of use license for the second disorder. The mediator was able to help the parties reach a solution that involved renegotiating the license agreement to add a non-exclusive license for the second disorder and a right of first refusal for an exclusive license for it.

A manufacturer of wind turbine components entered into a settlement agreement in the form of a patent license with one of its competitors. The agreement contained a dispute resolution clause that provided for mediation and then arbitration if mediation failed. Three years later, the manufacturer requested mediation, alleging infringement of its U.S. patents and claiming royalty payments for the licensed technology. The mediator held an initial session with the parties and allowed them a month to consider what they had learned during that session. Mediation then resumed and the parties held separate and joint caucus sessions with the mediator and exchanged proposals to discuss what changes would be made in the agreement, particularly with respect to royalties. At the end of the second day, the parties agreed on a term sheet containing the key points of a final agreement. This procedure allowed the parties to continue their business activities.

A start-up biotech company holding patent applications in several countries granted an option to a pharmaceutical company to take a license for platform technology. The pharmaceutical company exercised the option and negotiations commenced, but after two years the parties were unable to agree on terms. The parties then engaged a mediator who had considerable licensing experience, technical expertise, and had worked in-house for a pharmaceutical company and represented small biotech companies as outside counsel. During a one-day session, the mediator helped the parties identify key issues and more fully understand the applicable law. This enabled the parties to resume direct negotiations with enhanced prospects for reaching agreement.

Trademark

A North American company involved in a trademark dispute with two Italian companies and a Spanish company requested mediation with the goal of helping the parties avoid confusion and misappropriation of their trademarks and regulate future use of their marks. The parties selected an Italian mediator with a trademark practice. The mediator conducted an initial telephone conference with counsel, during which they scheduled the mediation session and agreed on the procedure. Two months later, the mediator met with the parties in a two-day session in Italy. The mediation was held in joint session with the exception of two brief caucuses. At the end of the second day, the parties, with the assistance of the mediator, were able to execute a settlement agreement covering all of the pending issues in dispute.

Copyright

One example of the use of mediation for copyright disputes involved an individual who recorded her lengthy interview of a famous person, who died soon afterwards. There were no writings concerning what use would be made of the recorded interview. The heirs challenged the right of the individual to use the interview for a book, film, etc. about the decedent on the basis that they owned the entire copyright because the decedent was, in their view, the sole author of the content of the interview (the decedent did virtually all of the talking during the interview and the conduct of the interview and its fixation had been done at the request / direction of the decedent). Through mediation, the parties were able to achieve a resolution that a court would not have been able to provide, to do so in a much shorter time and at much lower cost

than litigation would have entailed, and to avoid the emotional toll that cross-examination of the parties in court would have taken.

A copyright owner licensed certain artwork to a licensee, which combined that artwork with the licensee's own proprietary artwork. The licensee then licensed the combined artwork to a third party for use on the third party's packaging for consumer products, assuring the third party that the licensee had the right to grant the necessary rights from the copyright owner. The copyright owner later accused the third party of copyright infringement because the copyright owner's artwork was on the packaging. The parties differed significantly on how much profit was attributable to the alleged infringement, which led them to place very different values on the monetary aspect of any possible settlement. A mediator helped the parties more realistically assess the value of their cases and ultimately reach settlement.

> ***"Choice—the opportunity to tailor procedures to business goals and prioritize—is the fundamental advantage of arbitration over litigation."***[4]

II. Benefits of Arbitration in Intellectual Property Cases

Arbitration can be a particularly effective method of dispute resolution in intellectual property cases. Arbitration can reduce costs, which are often prohibitively high in intellectual property lawsuits. It can improve efficiency of resolution. It can render results for the parties that are simultaneously more narrowly tailored to the parties and less tied to any particular national jurisdiction. Each of these advantages is discussed in more detail below.

Arbitration gives parties to intellectual property disputes more flexibility regarding procedure than would be available in any national court. The parties are free to agree to almost any arbitration procedure that does not violate the law or public policy (e.g., in some jurisdictions, an arbitrator may not award punitive damages, even if the agreement to arbitrate calls for them). Thus, the parties' agreement can specify the number of arbitrators, the amount and timing of discovery (e.g., number of and/or time limits for depositions), the type of award (e.g., ranging from a bare-bones award without any discussion of the reasoning underlying the award to detailed findings of fact and conclusions of law), a time limit for making the award (e.g., within four months of the appointment of the arbitrator), the location of the hearing, the number of hearing days, whether any motions (e.g., for summary judgment) will be allowed, the process for selecting the arbitrator, the procedural rules (e.g., the International Institute for Conflict Prevention and Resolution's Non-Administered Arbitration Rules), and whether the arbitration is to be administered by an ADR provider (e.g., the American Arbitration Association) or is to be self-administered. In contrast, in litigation, the parties have little or no control.

The potential savings in attorneys' fees and other litigation expenses often available in arbitration is particularly significant in the intellectual property context because such costs are often very high in intellectual property cases. Cooperative parties can use arbitration to eliminate many of these costs. Even without full cooperation, an arbitrator may still be able to significantly reduce discovery and other costs. For example, an arbitrator can limit the number of depositions, ban requests for admission, allow only a small number of interrogatories (if any), etc., which will significantly reduce costs. Time-consuming and expensive motion practice, common in intellectual property litigation, is also less common in arbitration.

The ability to choose arbitrators with specific legal or technical expertise can be particularly useful in IP disputes. In patent and trade secret cases, the subject matter is often highly technical. Arbitration allows parties to select an arbitrator having subject matter expertise in the technology of the dispute and to avoid spending time and money attempting to educate a judge or jury with no guarantee the attempt will succeed. Similarly, patent and trademark disputes can often involve complicated questions regarding practice before the U.S. Patent and Trademark Office. An arbitrator with expertise in patent or trademark prosecution can eliminate uncertainty in such cases. A three-person arbitration panel provides an opportunity to have many areas of expertise represented if no one arbitrator can be found having all of the requisite expertise/experience. One of the authors of this paper has proposed a legislative change to allow replacement of the fact-finding role of district court trial judges with tribunals of expert arbitrators in civil actions against the U.S. Patent and Trademark Office for judicial review of adverse USPTO decisions on patent applications involving complex technical fact issues.[5]

The private nature of arbitration can also provide advantages in intellectual property disputes. In court proceedings, protective orders can provide some level of security regarding confidential information, but a trial in court, particularly in the United States, is a public process. Many court filings are readily available from the court's file. In contrast, arbitration is private and the parties can keep the proceedings entirely confidential. The arbitrator and the provider (if any) are usually required by law and/or by the rules of the provider to maintain confidentiality. Confidentiality obligations (including with respect to documents and other evidence) are often self-imposed on the parties by agreement.[6] Parties desiring to maintain confidentiality may opt to obtain a simple (bare bones) award and not a reasoned award because either party might go to court to confirm or vacate the award (in which case the award might become part of the public record).

The award of an arbitrator is final and binding on the parties and the grounds for court review of the award (during a proceeding to confirm or vacate it) are limited.[7] This could be particularly useful in patent cases where

there are claim construction issues. Under *Markman v. Westview Instruments, Inc.*[8] claim construction, the meaning of terms of a claim is a question of law. However, the Court of Appeals for the Federal Circuit does not consider claim construction determinations by district courts to be final or appropriate for interlocutory review. Therefore, when the Federal Circuit finally does review claim construction determinations, if it decides the trial court has erred, it often remands a case to the trial court for further proceedings, which may well involve a new trial on infringement and / or validity, thereby possibly delaying ultimate resolution by months (if not years) and costing the parties substantial additional sums. One of the authors of this paper has previously proposed arbitrating claim construction because such arbitral determinations would be final and unassailable, at least among the parties to the arbitration, except on narrow grounds, thereby significantly reducing the risk that the parties would have to retry infringement and validity issues because of a trial court's erroneous claim construction.[9]

Intellectual property disputes often involve parties from various countries, which can makes arbitration preferable for purposes of enforcement of an award under the New York Convention. Moreover, many intellectual property rights, e.g., patents and trademarks, are national in nature. They must be separately acquired and enforced on a country-by-country basis. In contrast, intellectual property disputes often involve intellectual property cutting across national boundaries (inventions, trade secrets, works of authorship, etc. are not geographically limited) even if specific rights based upon that property are. Conducting intellectual property litigation country-by-country for a number of reasons, including cost, time, and possibility of inconsistent outcomes, may be less desirable than a dispute resolution mechanism, i.e., arbitration, that enables a single forum to provide a truly global solution for a set of parties.

In the trademark context, arbitration plays a special role. Domain name disputes are arbitrated under a policy established by ICANN (Internet Corporation for Assigned Names and Numbers), which is responsible for management of the generic top level domain names (".com," ".org," etc.). ICANN adopted the UDRP (Uniform Domain Name Dispute Resolution Policy) effective December 1, 1999. Various organizations, such as WIPO (World Intellectual Property Organization), have established procedures for neutrals to decide whether to order domain name registrars to cancel, transfer, or sustain the domain names of parties accused by complainants of "cybersquatting." These arbitrations are faster and less costly than traditional litigation, and the neutrals are knowledgeable in the area. Since 1999, thousands of UDRP disputes have been adjudicated by arbitration tribunals, involving the famous and the not-so-famous. For example, the complaints of actress Julia Roberts (*Julia Fiona Roberts v. Russell Boyd*, WIPO Case No. D2000-0210) and of the estate of singer Jimi Hendrix (*Experience Hendrix, L.L.C. v. Denny Hammerton*, WIPO Case No. D2000-0364) were sustained, and the domain names "juliaroberts.com" and "jimihendrix.com" were ordered to be transferred to the respective complainants; in contrast, the complaint of singer / actor Sting was not sustained (*Gordon Sumner, p/k/a Sting v. Michael Urvan*, WIPO Case No. D2000-0596).

Each of the following examples of the use of arbitration for IP disputes demonstrates a number of the benefits discussed above.[10]

Patent

In one example, a U.S. inventor held patents in several countries and had licensed them to a company based in Asia. The inventor and licensee disagreed on who should pay the annuities to keep the patents in force. After the Asian company terminated the license, the inventor filed a demand for arbitration, claiming damages and requesting a declaration that he was free to use the patents. The arbitrator, who was knowledgeable in patent and licensing law and sensitive to the cultural issues, was able to quickly render an award after the evidentiary exchange and a brief hearing.

Two companies involved in a software patent infringement dispute disagreed as to whether there was infringement and ultimately agreed to arbitrate the matter. The two companies had done business before the dispute arose and they wanted to continue to do so in the future. The parties needed a simple yes-no answer as soon as possible to a single question presented to the arbitration tribunal, namely, whether there was infringement. The parties selected three arbitrators who were knowledgeable about software and patent law. Through arbitration, the parties received their answer from people knowledgeable about the technology and the law far more quickly than they would have through traditional litigation, at far lower cost, and with complete confidentiality.

Trademark

A European company registered a trademark for consumer goods in several countries. An Asian company started to sell the same types of goods under a similar mark in those countries. After the European company accused it of infringement, the Asian company commenced administrative proceedings in several of the countries to cancel the trademark registrations. The parties then entered into a settlement agreement containing an arbitration clause. The agreement provided for each party to restrict its use of its mark to its part of the world. After the European company used its trademark at a trade show in Asia, the Asian company commenced arbitration, claiming violation of the settlement agreement. The Tribunal rendered its award within a few months of the close of the hearing, and, among other things, ordered the European company to refrain from using the trademark in Asia.

Copyright

The copyright holder and the accused infringer both manufactured computers. The copyright holder accused the accused infringer of infringing numerous copyrights on the copyright holder's operating system software, but the accused infringer claimed it had developed its software using only publicly available information about the copyright holder's operating system. After protracted negotiations, the parties entered into a settlement agreement under which the accused infringer made a lump sum payment to the copyright holder, agreed to pay future royalties, and agreed to respect the copyright holder's intellectual property rights. Under the agreement, any disputes would first go for resolution to a group of executives from both companies and any unresolved disputes would be arbitrated. The copyright holder eventually requested arbitration, saying the accused infringer had breached its promise to respect the copyright holder's intellectual property rights. The arbitrators, who were knowledgeable in the software and copyright fields, attended a multi-day seminar presented by the parties to educate them regarding systems software. The panel made numerous rulings that shortened the proceeding. For example, rather than their examining many tens of thousands of lines of computer code, the panel asked each party to designate a relatively smaller number of code segments that it believed proved its case (i.e., infringement, or non-infringement because of, e.g., independent creation, scènes à faire, etc.). The time from filing of the demand to issuance of the award was about two years, significantly less time than litigation would have taken. The complex award provided that: (a) the accused infringer would pay for past and future use of the copyright holder's intellectual property; (b) the accused infringer's system developers could examine the copyright holder's code being used up to a specified earlier date and prepare written system specifications based on that code, which specifications would then be given to the accused infringer's software developers to write their own system code, without any further communication between the system developers and the software developers (a modified "clean room" procedure); and (c) the panel retained jurisdiction to decide any further disputes. This proceeding demonstrates several of the advantages of arbitration, including the parties' control over the process, reduced cost, and ability to select knowledgeable arbitrators.

Trade Secret

A licensor exclusively licensed technology to a licensee, which at the time needed to use the technology to make a product for which it was seeking governmental marketing approval. The licensee had collected substantial data from the various product trials it had run. The license agreement specified that if the licensee terminated the license, the licensor could use the technology to make its own version of the product and that the licensee could have access to and rely on the data when it sought governmental marketing approval. The licensee terminated the license but refused to allow the licensor to have access to or to use the data. Despite the complicated nature of the case, involving a number of days of hearing with substantial expert testimony and a lengthy post-hearing briefing schedule, the hearing was held only eight months after the demand was filed and the award was rendered less than four months later.

Endnotes

1. Mary Pat Thynge, "Mediation in Patent Cases—One Judge's Perspective," 997 PLI / Pat 296 (March 2010).
2. These examples are based on actual mediations and have been disguised for obvious reasons.
3. Thanks to David W. Plant, Esq. for suggesting this example.
4. Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the "New Litigation,"* 7 DePaul Bus. & Comm. L.J. 3 (2009).
5. Charles E. Miller, "New Procedural Rights for IP Owners and the Promotion of Judicial Economy and Efficiency Through the Use of Arbitration in Civil Actions Against the USPTO," *IPO Daily News* (Sept. 24, 2007).
6. In the United States, the patentee, assignee, or licensee of a patent is supposed to notify the Director of the USPTO of any arbitration award concerning the patent's validity or its infringement and provide a copy of the award and certain other information, which are then entered in the prosecution record of the patent. 35 U.S.C. § 294(d). The award is unenforceable until such notice is received by the Director. 35 U.S.C. § 294(e). Even though the award may become part of the public record, the information it contains will likely be considerably less than the information a publicly available litigation record would contain, particularly if the award is a barebones award. Patent interferences may also be arbitrated, and notice of the award must be given to the Director or else the award is unenforceable. 35 U.S.C. § 135(d).
7. Under the Federal Arbitration Act ("FAA"), the four statutory grounds are (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. 9 U.S.C. § 10(a). Depending on the Federal Appellate Circuit, manifest disregard of the law is or is not a viable ground for vacating the award, but it too is a narrow ground. Broadly speaking, the grounds for vacating an award under state laws are similar to those in the FAA. Experienced arbitrators are not likely to provide any basis for vacating an award.
8. 517 U.S. 370 (1996).
9. Stephen P. Gilbert, *Arbitrating to Avoid the Markman Do-Over*, Dispute Resolution Journal, vol. 61, no. 3, pp. 60-65 (Aug.-Oct. 2006).
10. These examples are based on actual arbitrations and have been disguised for obvious reasons.

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An Introduction to Alternative Dispute Resolution for the LGBT Community

By Nancy Kramer

"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, and expenses, and waste of time."

Abraham Lincoln

Litigation in this country is a lengthy and expensive proposition; a stressful process that destroys relationships. Lawyers seeking to best serve their clients who have legal disputes should consider other forms of resolution which are faster, less expensive and less disruptive. Mediation and arbitration, which are responsive to party needs in ways not possible in court proceedings, are the two most frequently utilized forms of dispute resolution. They have particular applicability in disputes involving the LGBT (Lesbian, Gay, Bisexual and Transgender) community, where confidentiality and discretion may be of particular interest to the parties and where courts may be insensitive or even hostile to parties. In LGBT family issues there is a dearth of applicable law and traditional family law can be inapplicable.

Members of the LGBT community experience disputes and may have recourse to dispute resolution techniques in virtually any situation, including situations in which the fact that the parties are lesbian, gay, bisexual or transgender is of no or passing significance to the underlying dispute. In estate matters (where the document governs), real estate transactions, business deals, etc., members of the LGBT community are in a position little distinguished from non-LGBT community people. However, there are two particular areas where unique issues and concerns for LGBT parties arise and where mediation may be particularly attractive. The first is employment discrimination claims based on the employee's actual or perceived connection to the LGBT community. The second is the whole panoply of family law matters—creation and dissolution of couples; procreation, adoption, separations, custody / visitation issues, etc. In these disputes mediation has proven to be invaluable.

Employment Discrimination

LGBT employees may experience discrimination of various kinds based on their sexual preference or orientation or their non-gender conforming appearance. These claims include creation of a hostile work environment; being disciplined unfairly; being terminated; being passed over for raises or promotions or denied training opportunities that might lead to them. In many of these situations the employee may prefer that her / his personal life (orientation or transgendering status, for example) be kept as private as is possible in the workplace—or that aspects of that life or identity be explained at a certain point or in a certain way. The privacy of a confidential dispute resolution process is invaluable in such a case.

Furthermore, a management person or team accused of insensitivity, at best, or actionable behavior, at worst, may be better able to listen and understand the situation in the private and low-key setting of a mediation. Management might be influenced by an increased familiarity with the legal protections offered in New York State. Non-discrimination rights are conferred by the New York State Human Rights Law (NYS Executive Law, Article 15) and supplemented by some more inclusive local laws as New York City's Human Rights Law (Title 8 of the Administrative Code of the City of New York).

An open discussion of the problem can enable someone unaware of it to focus on issues s / he was not familiar or comfortable with. Ideally such a person might be brought to see the employee's complaint as legally viable and / or valid and offer some workplace changes. Changes in management attitudes and behavior are difficult to bring about. However, they are more likely to occur when management persons are not put on the defensive, as happens in litigation. Furthermore, the employee might come to see and understand something about the employer's viewpoint.

Family Law

LGBT families face the same wrenching emotional issues as non-LGBT families when separating and additional issues when dealing with adoptions, custody, surrogacy, etc. The problems of custody and visitation and property division are similar,[1] but the LGBT community has traditionally been excluded from the legal system governing other families. There was no legal structure nor expectations governing their coming together as permanent couples nor their dissolution of such bonds. In essence, the LGBT community has had to create its own extra-legal family structure. And mediators, both from and outside the community, helped clarify certain recurring family issues.

For a long time there were no laws or even guidelines for when a couple dissolved a union—for the division of assets; provision of support for a financially dependent partner or custody and visitation provisions for the non-custodial parent. Nor for a long time did state adoption laws contemplate single or couple gay adoptions (single, couple or second parent). As one mediator put it, "Most straight relationships have developed against a static legal background and a consistent set of social expectations, whereas same-sex couples are forced to navigate their personal relationships within a rapidly changing framework

of social norms and, depending on what state they live in, a shifting set of legal operating rules."[2]

This is changing, slowly. And bringing gay couple relationships into the framework of traditional family law raises as many issues as it answers. For one example, take the situation of a gay couple who lived together and shared their lives and assets fully for 35 years, marrying two years ago when that became possible. If they divorce after two years of legal marriage, how would traditional divorce law, which takes into account the duration of the marriage, apply? Surely the fact that they lived as married, but were not able to acquire that legal status until late in the relationship, is of major relevance.

Some have posited that many LGBT couples have a deep distrust of the legal system which has ignored or been hostile to their needs and issues. In fact, they may have benefitted from relying largely on mediation to resolve personal disputes.[3] The absence of a set and rigid system of family expectations, rituals and laws may have resulted in the molding of solutions more individually tailored to the people involved and their particular situation—which is one of the great benefits of mediation.

Successful LGBT Community Mediation Stories—And Who Knows What Might Have Happened In Litigation (True mediation cases with a few identifying facts changed to protect confidentiality)

***** *Two men were romantically involved and lived together briefly (less than three years) with no domestic partnership, no marriage, and no explicit understanding. There was a big difference in their professional stature and earning capability—Ted was a successful big firm lawyer and Billy a former construction worker now enrolled in college in order to become a school teacher. During their short and tempestuous relationship together they adopted one daughter. As the relationship deteriorated, Ted adopted another daughter on his own. The two men considered the girls to be sisters and Ted's extended family provided love and back-up care for the girls, who were two and four years old at the time of the mediation. Both men viewed their romantic relationship as long over. Both were deeply committed to their roles as fathers and to raising the children as sisters.*

They came to mediation (Ted with great skepticism) to try to formulate a living plan that would last. At that point the two little girls lived with Ted in his brownstone with a full-time nanny available during the days. Billy had moved into a small shared apartment but frequently visited and sometimes stayed over at Ted's house. Billy had one more year of college to complete and asked for financial help from Ted for that one year to become financially independent. Two mediation sessions worked it out (this was a rare poster case situation—more sessions are often necessary). Ted agreed to help Billy financially and to give him almost unlimited access to the children as long as they remained living with him.

I have heard from one of them since and was told that the family continues to do well. Both girls live with Ted, with frequent visitation by and to Billy, who now teaches elementary school in Brooklyn and has much more free time than Ted to spend with the kids.

These two men created an atypical but highly functional family. Who knows what would have happened in court.

*****Another case involved a long-term lesbian couple, women who had spent all their life together since they were teenagers and had thought that would continue forever. The women had two children: Karen gave birth to the first child, a daughter, and 10 years later, Brenda gave birth to a son. Karen and Brenda had conflicts but were very committed to each other and their family—until Karen fell out of love with Brenda and into love with someone else.*

Brenda had adopted the daughter shortly after she was born. It had been intended that Karen would adopt the son, but this had not taken place before the two parents split up and Karen moved out of the family apartment.

When they started mediation, at the suggestion of a family therapist, Brenda had not fully accepted the situation. Some drama and what looked like a potential reconciliation between them followed, but eventually they stayed separated and Karen's new partner came into the children's lives. Both women were clear that the children should be raised together and they had to and would co-parent them. Also, Brenda had a successful corporate career that necessitated a great deal of travel. She had relied on Karen to provide stability and child care to back her up and she wanted this to continue.

After a long series of sessions, they worked out a fluid joint custody, with the children moving between their two apartments which were one block from each other. Assets, including a country home, were divided, as were considerable debts.

Also, and very key, the parents managed to have the second adoption take place after disclosing to the court that they had dissolved their relationship. At the parties' request, the mediator wrote a statement to the court discussing her sense of the strong family structure and supporting approval of the adoption. Again, one wonders what a litigated resolution would have entailed—and at what cost.

Endnotes

1. Nancy Kramer, The Same But Different: Mediating Separations of Same-Sex Couples (ACResolution Summer 2005).
2. Frederick Hertz, Mediating Same-Sex Disputes: Understanding the New Legal and Social Frameworks (to be published in upcoming issue of Massachusetts Family Mediation Quarterly).
3. Mark J. Hanson, Moving Forward Together: The LGBT Community And The Family Mediation Field (Pepperdine Dispute Resolution Law Journal 2006).

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The Benefits of Alternative Dispute Resolution for Resolving Municipal Disputes

By Pamela Esterman, Michael Kenneally, Jr. and Howard Protter

Application of Mediation and Arbitration to Municipal Disputes

The number of contexts in which mediation and arbitration may be utilized by municipalities is limited only by the context of the disputes they may be a party to. Below are a just a few examples of how arbitration and mediation can be incorporated into common municipal disputes.

1. Inter-Governmental Disputes

Mediation can be particularly helpful in resolving disputes between two or more local governments. As noted above, one important advantage of mediation is to preserve existing relationships. Due to their nature, local governments interact with one another on a continual basis. And despite recent efforts to reduce their number, chances are that these governments will continue to exist and work together in perpetuity.

Nevertheless, disputes between governmental entities occasionally arise. As individuals responsible for governance change frequently, clashes of personality, politics or otherwise may operate to deteriorate existing relationships. When such disputes arise, it is in the best interest of the public for local officials to resolve these disputes as amicably, cheaply and expeditiously as possible. Two common contexts where such disputes arise are inter-governmental planning and zoning and the consolidation / sharing of services.

a. Inter-Municipal Planning and Zoning Disputes

One common context for these inter-municipal disputes is planning and zoning. When one government undertakes a project in another nearby community, or within a different level of government within its boundaries (i.e., a county undertaking a project in a town within its bounds), there are often questions about whether the host community's zoning and planning laws will apply to the project. To answer these questions, the host community must conduct a balancing test, taking into consideration a number of factors enumerated by the Court of Appeals in 1988 case *In re County of Monroe v. City of Rochester*.[1] Pursuant to *Monroe*, the host community must weigh the following nine factors:

1. The nature and scope of the instrumentality seeking immunity;
2. The encroaching government's legislative grant of authority;
3. The kind of function or land use involved;
4. The effect local land use regulation would have upon the enterprise concerned;
5. Alternative locations for the facility in less restrictive zoning areas;
6. The impact upon legitimate local interests;
7. Alternative methods of providing the proposed improvement;
8. The extent of the public interest to be served by the improvements; and
9. Intergovernmental participation in the project development process and an opportunity to be heard.

A quick glance at these factors reveals that inter-municipal zoning disputes provide an excellent opportunity for resolution through mediation. Mediation can offer a forum for the evaluation of these factors in an expeditious and non-adversarial manner, and encourages the participation and cooperation of all parties involved. A cooperative approach to resolving these disputes is particularly important as it is likely that the municipal parties involved will have to work with one another not only on the subject project, but on other issues as well.

b. Inter-municipal Cooperation and Consolidation

One area where there is likely to be an increase in inter-municipal disputes is shared services / inter-municipal cooperation. Although the concept of sharing services among and between local governments is not a new concept in New York State, such initiatives have received much more attention recently. A State grant program for shared services has been included in the state's budget each of the past five years, and recent legislative enactments have attempted to make it easier to offer cooperative services and consolidate local governments.

There are a number of issues associated with cooperative services and government consolidation that can be very complex and very difficult to resolve. When entering into a cooperative agreement for a particular service, issues such as liability of employees and the allocation of costs can give rise to disputes between the parties. If the disputes that arise during the course of an agreement are resolved through litigation, the efficiencies and cost-savings associated with the agreement can easily be lost. No matter how well intentioned they may be, governmental parties to cooperative agreements are well served by anticipating such disputes and agreeing to a means to resolve them without resorting to litigation. When agreed to and incorporated into the inter-municipal agreements,

a dispute resolution clause will provide certainty to the parties as to how to proceed, and encourage them to work cooperatively to resolve the dispute.

A recent addition to the General Municipal Law is designed to facilitate the consolidation and dissolution of certain types of local governments.[2] The process can be initiated by either the governing bodies of the local governments involved, or by petition of the residents of such local governments. Either way, the consolidation or dissolution of local governments must be in accordance with a consolidation / dissolution plan. These plans, however, must be comprehensive and will often address issues that are controversial and require local officials to make decisions that may be politically unpopular. Mediating these issues in the course of developing a plan can save both time and money for the local government entities involved.

Regardless of the particular context, inter-municipal disputes often invoke strong emotional support or opposition from the local officials involved as well as the residents of the community. Resolving these disputes through mediation can provide an opportunity for all to be heard and ultimately lessen the emotional burden caused by the disputes.

2. Disputes Involving Public Officers

One of the more difficult positions a municipal attorney may find him or herself in is resolving a dispute between two elected officials or bodies. A chief executive may challenge the authority of a local legislative body, a local clerk may refuse to perform a non-discretionary act, or a legislative body may be attempting to discipline another elected official. Just recently, the Mayor of New York City pursued an action against the City Council all the way to the NYS Court of Appeals over their respective powers.[3] Although these disputes occur on a routine basis, they litigated only on occasion.

The lack of case law on many of these issues means that there is no clear precedent for many of these disputes, making resolution more difficult. What is more, these disputes often become political, leaving the parties involved, as well as the public, frustrated and cynical about government and public service. As these officials will likely have to continue working with one another, and with the public, for the duration of their terms of office, resolving these disputes through a non-adversarial mediation process will help preserve the working relationship needed between these officials.

Mediation has also proven to be a useful tool to resolve disputes between public officials and citizens within the community that may not otherwise be actionable in a court of law. For example, Civilian Police Review Boards (CPRBs) have been established in some communities to increase police accountability and improve the public's communication with the local police department. In some cases, rather than pursue a costly and time-consuming investigation of the citizen's complaint, the complainant and the police officer may agree to resolve the dispute through mediation. Resolving disputes of this nature through mediation not only provides an expeditious and cost efficient remedy, but helps maintain the public's confidence in its officials.

3. Municipal Purchase and Public Works Contracts (Non-employment)

Municipalities enter into contracts as a routine part of their day-to-day operations, whether it be a purchase contract for a quantity of road salt or a public work contract for an expansion of the town hall. Such contracts serve an important function in government operations. Despite the best intentions of the parties, disputes will occasionally arise under these contracts.

Municipalities are authorized to enter into arbitration and mediation agreements to resolve the disputes arising under such contracts.[4] This authority is derived from the principle that the "authority to contract implies the authority to assent to the settlement of disputes by a means of arbitration."[5] Although the authority to assent to arbitration may be implied from the authority to enter into contracts, the intent to arbitrate a dispute arising under a contract must be an "express, direct and unequivocal agreement in writing between the parties."[6]

A well written dispute resolution clause can be particularly beneficial for complex public works projects. For example, it can often be difficult for a public official to determine whether a contractor has complied with the written specifications, or has otherwise satisfactorily performed its obligations under the contract. In such cases, independent engineering consultants may agree to be the arbiter of such factual issues arising under the contracts. Again, this will allow for a much more expeditious and cost effective manner of resolving complex factual issues than would otherwise be accomplish through litigation

4. Land Use

Dispute resolution may be used in connection with local land use review processes to enable parties representing diverse interests to negotiate a consensus on some or all of the controversial aspects of a proposed application prior to the decision of a town board, planning board, architectural review board or zoning board of appeals. It may also be used to prevent or settle a lawsuit after a board's decision, or in connection with town planning initiatives.

The traditional land use review process focuses to a large extent on the public hearing, at which speakers state whether they are for or against the proposed application. The process, and especially the public hearing, is often emotionally charged and adversarial. The format of the hearing, which is based on a courtroom model, affords no opportunity for meaningful dialogue among the inter-

ested parties and therefore does not lend itself to collaborative problem solving. Often, a board must sift through reams of written comments and testimony, which may contain conflicting scientific and technical data.

After the hearing, the board must then decide whether to grant, deny or conditionally grant the application before it. It often does not have the latitude to devise creative solutions beyond the scope of the specific application upon which it is deliberating in order to respond to certain legitimate concerns that may be raised by the public. Dissatisfaction with the outcome of the process often results in the filing of lawsuits challenging the decision of the board.

Unlike the traditional process in which there are typically winners and losers, ADR can often achieve a "win-win" resolution for all of the interested parties. In the context of land-use decision making, mediation is the most commonly used form of ADR, although other forms of ADR, such as collaborative decisionmaking or consensus building, may also be utilized. In this process, a neutral facilitator assists parties to develop a collaborative framework for reaching consensus on a particular path or strategy, such as in connection with the development of a comprehensive plan or proposed regulation.

Mediation provides an atmosphere in which representatives of all interested parties, experts and planners can communicate more effectively and collaborate on issues of concern. A mediated process encourages brainstorming and the creation of solutions that can satisfy the interests of most, if not all, participants in the mediation. Because of the opportunity for improved communications, mediation often has the added benefit of streamlining the review process, especially where it its utilized at an early stage.

Most types of land use matters are appropriate for ADR. Examples include applications for site plan or subdivision approvals, special use/conditional permits, rezonings, subdivision plats, floating zones, and planned unit developments. It may also be used to facilitate the preparation or update of comprehensive plans or zoning ordinances. Some land use professionals have argued that ADR should not be used in connection with non-discretionary decisions, such as for use variances, which require application of specific legal criteria. It is uniformly agreed, however, that if a use variance is granted, ADR may be used to impose conditions on the variance, which are discretionary in nature.

The New York State Legislative Commission on Rural Resources previously published a model local law providing for the use of voluntary mediation in the prevention or resolution of municipal planning, zoning and land use disputes. The model contemplates the use of existing voluntary mediation programs, technical assistance and training as an optional means to enhance the quality of life for local citizens. It helps bring about cost-effective prevention or resolution of certain planning, zoning and land use disputes in the community.

The Rural Resources model provides that the commencement of any such mediation proceeding is at the discretion of the authorized municipal board or body having jurisdiction in the dispute or potential dispute, and that all costs associated with voluntary mediation should be allocated among the parties of interest as determined by mutual agreement of the parties. It further provides for a required notice to the parties in interest that: 1) the mediator has no duty to protect their interests, or provide them with information about their legal rights; 2) signing a mediated settlement agreement may adversely affect their legal rights; and 3) they should consult an attorney before signing a mediated settlement agreement, where they are uncertain of their rights.

The Rural Resources model also recognizes limitations upon government discretion, by providing that: 1) any mediation proceeding or outcome initiated shall complement, but not replace, otherwise applicable practices, procedures or enforcements, whether required by state law, local law, or ordinance; 2) the outcome of a mediation proceeding shall not be deemed to bind or otherwise limit the discretion of the authorized municipal board or body having jurisdiction in the matter being mediated; and 3) an agreement that requires additional action by the authorized municipal board or body shall not be deemed to be self-executing. If any such additional action by the authorized municipal board or body is required, the landowner or his or her agent shall be responsible for initiating a request for such action and supplying any information required by said municipal board or body to undertake the action.

5. Local Code Enforcement

Mediation of any dispute requires consent to a process separate and apart from the judicial system. While use of mediation in the code enforcement context can be a useful additional tool, establishing a preventive system which can eliminate or reduce the need for judicial enforcement seems to be very effective. Many communities in the U.S. and in Western Europe have established voluntary systems for community mediation of property maintenance and nuisance disputes which, when unresolved, otherwise consume municipal code enforcement resources—typically code enforcement, police or animal control.

The New York State Unified Court System currently partners with local non-profit organizations, known as Community Dispute Resolution Centers (CDRCs), to provide mediation, arbitration and other dispute resolution options. The Court System also provides special mediation services to the agricultural community through the New York State Agricultural Mediation Program. According to the Unified Court System, in 75 percent of the cases that are mediated, parties reach a mutually acceptable

agreement and a recent statewide survey indicated that 90 percent of people who mediated their case felt that mediation was a good way to address the dispute even when they did not reach agreement on all of the issues.

Typical issues resolved through a community mediation system include:

- Noise complaints
- Complaints about pets / barking dogs and leash violations
- Parking space problems
- Property maintenance / nuisance issues
- Safety and environmental concerns

While these issues often can be addressed by neighbors talking to each other, there are times when people simply can't work out their differences and they resort to the courts, or complain to the municipal code enforcement authorities for assistance. If there is an alternative system made available for dispute resolution which is low cost, fast, confidential, and, most importantly, effective, experience shows mediation can solve the dispute at less cost to all—including the local government.

When it comes to the enforcement of a municipality's local codes, the municipal interest is frequently served by obtaining compliance with the law—not in fines or penalties. In those circumstances, arriving at a compliance process and timetable through mediation can be a viable option. This "compliance first" policy can be served by incorporating a mediation process as an enforcement tool by local law.

There is no reason that the Rural Resources model law, discussed above, could not be applied in the context of the state's Property Maintenance Code (State Code). According to the code, violations of must be dealt with "in a manner appropriate to the applicable provisions of a city, town, village or county and shall be in accordance with the applicable provisions of local law."[7] Thus, the code anticipates enforcement mechanisms will be provided by local law.

The State Code provides, in general, that property must be maintained "in a clean, safe, secure and sanitary condition…so as not to cause a blighting problem or adversely affect the public health or safety." While local governments can't waive, modify or otherwise alter the State code, what constitutes a violation in any individual context can sometimes be the subject of discussion and hence mediation.[8]

Similarly, how a violation may be remedied is frequently capable of alternative solutions. The State Code explicitly recognizes this in §105.2 which provides for alternative materials and methods:

> The provisions of this code are not intended to prevent the installation of any design or material or to prohibit any method of construction not specifically prescribed by this code, provided that any such alternative has been approved. An alternative material, design or method of construction shall be approved where the State Fire Prevention and Building Code Council finds that the proposed design is satisfactory and complies with the intent of the provisions of this code, and that the material, method or work offered is, for the purpose intended, at least the equivalent of that prescribed in this code in quality, strength, effectiveness, fire resistance, durability and safety.

For example, the State Code provides that "drainage of roofs and paved areas, yards and courts, and other open areas on the premises shall not be discharged in a manner that creates a public nuisance."[9] How that is accomplished can be an appropriate mediation topic.

6. Environmental Cases

Dispute resolution is especially useful when a municipality faces potential liability for soil or groundwater contamination under such statutes as the Comprehensive Environmental Response, Compensation and Liability Act. A municipality's liability may arise from its ownership or operation of a municipal solid waste landfill, from the generation and disposal of municipal waste, or from spills of petroleum or chemical contaminants. These types of environmental disputes may involve many potentially responsible parties. ADR can facilitate agreement among the disputing parties concerning their liability in a manner that is less expensive and time consuming than litigation.

Mediation can also be used to settle oil and petroleum spill cases in which a town may be either the discharge or the injured party. Oil and petroleum spills can damage lakes, beaches, fish, drinking water and other natural resources, and result in significant property damage and clean-up costs. For example, when an underwater pipeline ruptured affecting a body of water between New York and New Jersey, mediation rather than litigation was used to craft a settlement which would not have been likely in a court-ordered decree.

ADR may also be used to assist a municipality with problems stemming from industrial operations such as odors, air emissions or noise issues. It may also be used to address issues related to climate change. Frequently, a municipality may be faced with the competing needs of protecting the quality of life for its citizens and preserving its relationship with the industry which provides needed jobs and tax revenues in the community. Paper mills, quarries, power plants, pharmaceutical companies,

incinerators and sewage treatment plants are just a few of the industries which might present such conflict within a community. Mediation or other forms of ADR have been used in such cases to allow all parties to the dispute to participate in a process to identify the source of the odor, noise or emission, gather needed information on technical solutions, develop a plan for reduction or elimination of the offending matter, and establish a timetable for accomplishing such tasks.

Conclusion

When it comes to disputes involving a municipality, there is often more at stake for municipal officials than dollars and cents. Establishing effective communication with the public, obtaining compliance with its local codes, maintaining the public's confidence in its public servants and working cooperatively at all levels in the best interest of the public are paramount considerations. The alternative dispute resolution measures discussed in this paper help local government officials maintain this perspective in the face of a dispute, and the effectiveness of these techniques will be limited only by the extent to which the municipality makes ADR processes available and accessible.

Endnotes

1. *Matter of County of Monroe v. City of Rochester*, 72 N.Y.2d 338 (1988).
2. General Municipal Law Art. 17-a, New York Government Reorganization and Citizen Empowerment Act.
3. *Mayor of the City of New York v. Council of the City of New York*, 9 N.Y.3d 23 (2007).
4. *Village of Brockport v. County of Monroe Pure Waters District*, 75 A.D.2d 483 (1980).
5. *Dormitory Authority of the State of New York v. Span Elec. Corp.*, 18 N.Y.2d 114 (1966), *citing Campel v. City of New York*, 244 N.Y. 317 (1927), "The expediency of such a settlement of differences is to be determined by the public officers to whom the regulation of the form of contracts is confided by the statute."
6. *Village of Brockport*, *supra* note 4, at 488.
7. (§PM106.1).
8. (§PM111.1).
9. (§PM507.1).

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The Benefits of Mediation and Arbitration for Dispute Resolution in Outsourcing Agreements

By Julian Millstein and Sherman Kahn

Benefits of Mediation in Outsourcing Cases

In outsourcing, a business process or technology process is transferred from one organization (the "customer") to another organization (the "service provider") so that the customer can focus on its "core competencies." For example, a company might contract with a service provider to run its IT functions, its data management or its telephone sales activities.

Outsourcing agreements typically establish long-term relationships between the customer and the service provider. Outsourcing agreements are usually complicated agreements that must be managed by both parties over the long term. Beset by issues that arise from business and technology changes, these long-term agreements are never performed without disagreements over scope, price, adequacy of performance, reasons for delay, and changed requirements. Handling these disputes is an important aspect of the day-to-day governance of outsourcing relationships.

Disputes come in all shapes and sizes in outsourcing relationships. For example, disputes frequently arise during the initial transfer to the provider's process, often as a result of delay by one or both parties. Disputes over scope and price ("scope creep") are also typical, with the customer concerned about paying extra for services which it argues should be included in the provider's services, while the provider argues that such services are extras, and were never intended to be delivered at the initial pricing.

Parties also frequently dispute the cause of performance failures, or indeed whether such failures were correctly measured (*i.e.*, whether there was in fact a failure). Agreements contain various pricing mechanisms which often call for "equitable" price adjustments, "truing up" to revised figures on baseline assets and transaction volumes, and benchmarking to market price, and the parties may not be able to come to mutual agreement about such forward pricing or adjustments. In all of these situations, the parties managing the outsourcing attempt to resolve their differences, and frequently they are able to do so on their own. However, for those occasions when the parties reach an impasse, timely mediation can ensure that disputes over specific issues do not fester and contribute to a broader communication problem, ultimately affecting the viability of the relationship.

Mediation in outsourcing disputes can be used to remind the parties of the positive reasons both chose to enter into the agreement. Because it is usually in the interest of both the customer and the provider to reach a resolution that allows for the ongoing viability of the relationship, it makes sense that the parties should look to a mutually trusted neutral who understands the history and objectives of the venture. It is often useful to select this person in advance, so that the use of mediation is not itself considered a failure of the relationship.

In addition, a knowledgeable mediator may be able to help the parties identify creative ways to resolve disputes. Mediators are trained to look for value which can be traded in such a way that an item that is valued highly by one party, but not by the other, may be traded for a reciprocal item. Often, the mediator can identify these while the parties themselves cannot. For example, a mediator can act as a bridge, receiving confidential information from both sides, and, without disclosing it to the other side, use it to help the parties reach an accord. And the mediator is trained in techniques that encourage the parties to focus on positive solutions, rather than wasting effort in blame and recrimination. Finally, the mediator can help the parties agree to adopt changes in the governance of the relationship that will reduce the chances of future misunderstanding.

Often outsourcing relationships give rise to disputes that are essentially technical in nature. It therefore may be useful to appoint a technically savvy mediator to resolve these types of issues as they arise. A number of the leading arbitral institutions administer proceedings in which experts can be brought in to mediate or resolve disputes. If an agreement has a technical component, providing for resolution of particular categories of technical disputes by a neutral expert can go a long way to smoothing the relationship.

The parties' agreement to devote time and energy to the mediation process is itself an important indicator of the likelihood of success of an outsourcing relationship. The mediator can also act as a guardian of the parties' relationship, resolving disputes as they arise and, if appointed for the long term, even anticipating and smoothing over disputes before they become a problem. For these reasons, particularly in large outsourcing relationships, judicious use of mediation can considerably enhance the customer / provider relationship.

Benefits of Arbitration in Outsourcing Cases

Arbitration is often used as the final dispute resolution process in outsourcing disputes, especially in international outsourcing relationships. Using arbitration in out-

sourcing relationships can benefit both the outsourcing provider and the customer in a variety of ways. Where, as in outsourcing, the goal is a continued relationship of mutual benefit to both sides, a public dispute in court is usually the last thing that either party wants. Court litigation can even have the effect of ending a relationship over a dispute that otherwise could be resolved. On the other hand, because neither party wants to go to court, the threat of litigation in court can cause both parties to avoid dispute resolution until a point when the parties' positions are so far opposed that it is no longer possible to salvage the relationship.

Arbitration is beneficial to outsourcing customers because litigation, an expensive and time-consuming last resort in most commercial relationships, cannot usually address the customer's business risks associated with a failing outsourcing relationship. It becomes a "nuclear option" that, if initiated, ends the relationship at the expense of great business disruption to the customer. Moreover, it is seldom in the interest of the customer to publicize its difficulties with the provider of key services by filing a lawsuit.

The outsourcing provider likewise has reasons to resolve its disputes outside of court. Its business success depends very much on its reputation as a professional, competent supplier of services. Consequently, most service providers prefer to settle disputes without public airing, and will work very hard to retain relationships which were expensive to obtain, and may have required substantial up front investments which cannot be recovered unless the agreement continues for several years.

Finally, many outsourcing relationships involve offshore or nearshore performance. Even after the long and arduous process of obtaining a judgment in court, it is often very difficult to enforce such a judgment in a foreign jurisdiction—and it may be necessary to do just that if the other party resides (or keeps its assets) in that foreign jurisdiction. In the more than 150 jurisdictions that are signatories to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention"), arbitration awards can be routinely enforced with very little opportunity for challenge or relitigation even if the award was obtained and confirmed overseas.

Arbitration is an important tool when a dispute must be adjudicated (or enforced) in a court system which has problems in rendering timely decisions. For example, under Indian law, a dispute under an agreement between the Indian affiliates of two contracting companies must be litigated in Indian courts, which are notoriously slow, unless the parties agree to arbitration. Thus a global deal which provides for litigation between the parties could contain an exception providing that disputes between certain local country affiliates will be arbitrated. Similarly, agreements involving parties residing in countries where courts are not reliable or may be unlikely to enforce foreign judgments should include arbitration provisions.

Parties may wish to accept that in these complicated multi-year (and often multi-party) relationships, difficult disputes will be inevitable, and therefore designate arbitration panels which are available on call should an impasse occur. So-called Dispute Resolution Boards are used in the construction industry, where large multi-year projects cannot be put at risk of being side-tracked by disputes between developers, contractors and sub-contractors. The building must go on, just as the process must go on in an outsourcing relationship. A readily available resource to resolve disputes, including arbitration services, mediation services, or both, can go far to make the outsourcing relationship a long and productive one for both parties.

Indeed, it is often useful to try to resolve a given outsourcing dispute through a combination of mediation and arbitration. A mediator can help the parties narrow down a dispute. For example, with the help of a mediator, general displeasure with service performance may be tracked to a root cause. Both parties can settle on an agreed solution, with only the cost of the solution left to be arbitrated. The roles of mediation and arbitration can be pre-arranged in the outsourcing agreement through the use of an appropriate "step-clause" providing for mediation then, if necessary, arbitration or through provisions allocating some types of disputes to mediation and other types of disputes to arbitration. The parties may also decide to use arbitration and / or mediation on an ad hoc basis as disputes arise.

In sum, arbitration protects the outsourcing process by providing an efficient mechanism for resolution of disputes between the outsourcing customer and provider outside of the public eye. Arbitration is also a vital element of outsourcing agreements that cross international borders as it results in awards more easily enforceable internationally. A carefully drafted arbitration clause in the outsourcing agreement can help to ensure a long and profitable partnership between the outsourcing provider and its customer.

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Use of Mediation and Arbitration to Resolve Securities Related Disputes

By Irene C. Warshauer

I. Securities Related Disputes Arise in Several Contexts

1. Disputes between corporations relating to acquisitions and dissolutions
2. Disputes arising under the Securities Laws between investors and corporations in which they invested
3. Disputes between customers and brokers-dealers or their investment advisers
4. Disputes between investment advisers and their employers, broker-dealers
5. Disputes between broker-dealers

Arbitration and mediation are dispute resolution processes that can be used to resolve these disputes in a faster and less expensive way than a court proceeding. Depending upon the nature of the dispute, it may be brought before the Financial Industry Regulatory Authority ("FINRA"), a dispute resolution provider such as the American Arbitration Association or JAMS or as a court annexed or order mediation. Many securities related disputes are required, by law or regulation, to be resolved before FINRA.

II. FINRA Arbitration of Securities Disputes

Most disputes arising from securities transactions are arbitrated pursuant to the rules of the Financial Industry Regulatory Authority ("FINRA"). Agreements between customers and broker-dealers have a standard arbitration clause requiring arbitration under those rules. All registered representatives, investment advisors and their broker-dealer employers are required to sign a "Uniform Application for Securities Industry Registration or Transfer" (Form U-4) which contains an arbitration provision. Disputes between broker-dealers who are FINRA members are also arbitrated pursuant to FINRA rules.

Traditionally, customer disputes were held before a panel of three arbitrators comprised of two public arbitrators and one industry arbitrator. Public arbitrators are defined as persons who do not work in the securities industry or receive 10% or more of their professional income from securities business.[1] In 2008, FINRA started a voluntary two-year Public Arbitrator Pilot Program allowing investors in cases involving only a firm to have a panel consisting of three public arbitrators, instead of two public arbitrators and one non-public arbitrator.[2] At the end of the two years, FINRA submitted a rule filing to the SEC requesting approval of a rule amendment to allow customers with the option to choose an all public arbitration panel in *all* cases (involving firms *or* individual brokers). 75 Fed. Reg. 69,481 (Nov. 12, 2010). The rule proposal is pending comment and approval.

In the interim the pilot program has been extended for another year. The composition of all other disputes will remain unaffected by the proposed rule filing. Disputes between two broker-dealers are resolved with solely industry arbitrators.[3] In disputes between a registered representative and his broker-dealer employer, if the panel has only one arbitrator, she will be a public arbitrator. A three-member panel will have two public arbitrators and one industry arbitrator with a public arbitrator serving as chair.[4]

The FINRA arbitration process follows rules which are readily available online (http://www.finra.org/ArbitrationMediation/Rules/CodeOfArbitrationProcedure/). Arbitration pursuant to FINRA rules is an efficient process for resolving disputes. The rules include a discovery guide of the types of documents that must be produced, including lists of documents which must be produced (1) by the customer and (2) by the broker-dealer and registered representative in various types of claims. Most FINRA arbitrations are heard within a year to a year-and-a-half of filing the statement of claim, and awards are issued shortly after the hearings. In 2010, the average resolution time for FINRA arbitrations was within 12½ months. For arbitrations that concluded with a hearing, the 2010 turnaround time was 14.9 months.[5]

Arbitration is very useful for disputes in all areas of securities law. Arbitration offers the advantage of arbitrators who are knowledgeable about securities law, as opposed to judges who are likely to be generalists. The parties may also have more detailed information about the backgrounds and securities industry experience of potential arbitrators. As with all other arbitrations, records of proceedings in securities cases are confidential, thus avoiding publication of private business practices and trade secrets. Discovery is also much more limited and discovery sanctions, while permitted, are rarely used. The arbitration process is usually less expensive than litigation as there is much less motion practice, so even though the parties pay a small honorarium for FINRA arbitrators, the total costs can be significantly lower.

III. Securities Mediation

Mediation is an effective means of resolving securities disputes. It can be used in all types of securities disputes, including those between a customer and a broker-dealer, an employee and a firm, and between broker-dealers. In mediation the parties and counsel meet with a mediator, explain their positions and discuss common interests in a joint session and may break into private caucuses to discuss the issues and settlement possibilities separately with the mediator. The mediator can work with each side to identify and address its needs and can be helpful in reestablishing working relations between the parties. The mediator can work with the parties to reach a resolution that works for both sides and lessen antagonism through the use of venting, reframing and other mediation techniques.

FINRA has a voluntary mediation program, with mediators drawn from a panel of experienced mediators. During the Initial Pre-hearing Conference of a FINRA arbitration, the parties' representatives are advised of the mediation process, in which a mediator facilitates negotiations between disputing parties. They are advised that the mediator's role is to help the parties find a mutually acceptable solution to the dispute.[6]

Securities mediation has the advantage of permitting resolutions beyond simply monetary payments. Customers and registered representatives have the opportunity to present their claim directly to the broker-dealer or registered representative, and sometimes to executives of the broker-dealer. Many of the customers who bring a claim have lost money in the market and are angry. Mediation permits the customer to explain what he or she experienced and why it is improper. This process can often enable the claimant to gain perspective and move on with his or her life. Confidential statements made during the mediation may also result in changes to the broker-dealer's business mode of dealing with and communicating with customers.

Mediation can also provide for resolutions that are not obtainable in arbitration. Examples of such agreements include: a year's free subscription to a broker-dealer's publications, establishment of a new process for handling customer complaints, an apology from the registered representative or the broker-dealer, and expungement of the claim from the registered representative's record.[7]

For example, a registered representative's parents had been killed in a plane crash and she was raised by her aunt and uncle. She invested for them and one of the investments went sour. They cut her out of her grandfather's estate, filed a FINRA arbitration and then agreed to mediate. At the mediation they were in the same room for the first time in over a year. Each side presented their position. The registered representative said that she thought she was giving them a great opportunity by putting them in the IPO and never intended to hurt them. The aunt was very pleased to see her "daughter." After several confidential caucuses, the matter resolved with a payment of money. The mediation also resulted in a family reconciliation, something impossible in an arbitration or lawsuit.

FINRA mediation occurs in a separate but parallel process with any filed arbitration and does not slow down the arbitration process if the mediation is unsuccessful. An overwhelming majority of FINRA mediations result in resolution. FINRA asserts that parties who mediate in the FINRA forum resolve four out of every five cases.[8] For the year 2010, FINRA mediations took an average of 99 days from start to finish.[9]

Mediation of securities disputes also may be held privately or under the auspices of provider organizations, either by agreement of the parties after a dispute has arisen or pursuant to a dispute resolution provision in the contract between or among the parties.

Conclusion

The use of arbitration and mediation is an effective means of resolving securities disputes. It saves time and effort while achieving fair results.

Endnotes

1. FINRA *Regulatory Notice*, published on May 9, 2008.
2. http://www.finra.org/ArbitrationMediation/Parties/ArbitrationProcess/NoticesToParties/P116995.
3. FINRA Rule 13402.
4. *Id.*
5. FINRA response to inquiry.
6. FINRA Initial Pre-hearing Conference Arbitrator Script.
7. Such consent does not alter the full expungement process required by FINRA rules, including court approval.
8. FINRA Initial Pre-hearing Conference Arbitrator Script, Para. F.
9. FINRA response to inquiry.

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Resolving Disputes Among Small Business Owners: Assessing the Benefits of Mediation and Arbitration Versus Litigation

By Richard Lutringer, Geri S. Krauss and Leona Beane

Any litigator will attest that litigation among business owners can become lengthy and overly expensive, as well as destructive to long-standing relationships and the business itself. As disputes of this kind will inevitably arise, lawyers seeking to best serve their clients must consider whether forms of dispute resolution other than traditional litigation may in certain cases not only minimize the delay, expense and business disruption inherent in traditional litigation, but also result in a far more satisfactory outcome. Mediation and arbitration, both of which are often responsive to party needs in a way that is not possible in a court proceeding, are two of the most frequently utilized forms of dispute resolution. They have particular applicability where disputes arise among owners of small businesses as these cases raise unique legal and emotional issues, which, if not addressed and resolved promptly, may have a devastating impact on both the owners and the business.

Under current law, a court has relatively few options available to it to resolve disputes between partners, shareholders or managing members of business entities. Those options are often limited to a determination as to whether dissolution is appropriate, as that may be the only remedy that a court can provide. Derivative actions, too, are complex and uncertain in the closely held entity context. Mediation and arbitration, on the other hand, are flexible procedures which can be focused on the issues and interests that are key to the parties, offer a whole range of remedial options and do so in an expeditious and cost effective manner. In fact, for just these reasons, judges often refer disputes between business owners to mediation at the outset of a litigation.

In the determination of whether litigation is the right method of resolution for a particular dispute between small business owners, lawyers advising small businesses owners have to be both wise architects at the time of formation in the drafting of appropriate dispute resolution clauses and cautious advisors when issues subsequently arise, often years later, among the principals. This paper is intended to give guidance to the practitioner as to the differences between litigation, arbitration and mediation and the impact the choice of each may have both on the process, the parties and the result.

To illustrate, let's look at three fact patterns that typify small business disputes arising in the partnership, corporate and limited liability company context.

- **Partnership Dispute**: Peter and Arthur have been partners in an unincorporated television and electronic retail business doing business under the name "TV World" for the past 12 years. They never entered into a formal partnership agreement, but both signed a letter of agreement in 1998 which provides simply that they will be 50/50 partners in the business. Recently, however, Peter has begun taking Fridays off and is no longer coming in during the three evenings a week when TV World is open till 9 p.m. To cover Peter's absence, an extra employee has been hired. Arthur, who did not agree to Peter's reduced schedule and believes he is carrying an unfair share of the burden, has instructed their bookkeeper to deduct the extra amounts from Peter's drawing account. About the same time Peter received his first reduced paycheck, he learned that Arthur had hired Arthur's 22-year-old son, Adam, as a 20 hour/week consultant to the business for video game research and testing and has been paying Adam $50/hour for two months without Peter's knowledge or agreement. In response to Arthur's unilateral actions, Peter closed the partnership bank account at X Bank, and opened a new partnership bank account at the Y Bank with Peter as sole signatory. How can this escalating situation best be resolved?
- **Shareholder Dispute**: Alice, Bob, and Charlie are the sole shareholders and directors of ABC Stationery Corp., a New York corporation which has been operating a stationery store in New York City for the last 8 years. Alice and Bob each own 20% and Charlie owns 60% of the outstanding shares. Because they wanted to save on legal fees when they formed the business, they only drew up a very simple shareholders agreement providing only a restriction on the sale of shares to third parties. Six months ago, Bob was injured in a skiing accident and has been unable to work, but he believes he is still entitled to receive his regular ABC salary each week, as well as the automobile and other perks that the company provides. Alice and Charlie disagree. Just about the time Bob was injured, Charlie, without telling the other shareholders, incorporated another stationery business in Westchester near his home where he spends three afternoons a week. Now that Alice and Bob have learned about Charlie's Westchester store, they insist it should be part of ABC. All

parties agree that the New York City store is a profitable enterprise that they would all like to continue to operate if they can work through these two issues. How can that best be achieved?

- **LLC Member Dispute:** Assume the same facts as above, except ABC Stationery was originally organized as an LLC instead of a corporation and Alice, Bob and Charlie each have full managerial authority in a one-page operating agreement. Does this make a difference?

In the following sections we examine how a choice of litigation, arbitration or mediation could impact the resolution of each of these disputes.

Litigation

Litigation claims addressing ownership and management disputes must conform to established and limited statutory and common law rights, procedures, causes of action and remedies. Substantial lawyer time is required just to get the process moving: analyzing the facts and applicable causes of action and commencing an adversarial and public proceeding, often seeking immediate injunctive relief. Litigation requires the preparation of adversarial documents that contain strong allegations of wrongdoing to meet statutory requirements, having the incidental and predictable effect of infuriating the other party and further exacerbating the dispute. It generally involves an expensive and time-consuming discovery process, which is subject to numerous avenues of delay, before a hearing or trial is held. During this lengthy process, the public and adversarial nature of the dispute may itself have a serious impact on the business, as the stress in the parties' relationship seeps into the workplace and employees feel caught in the middle, customers start to look elsewhere, accounts receivables go unpaid, the owners focus on their dispute instead of the business and legal costs spiral upward. When the process finally concludes, the facts are determined and a remedy is imposed by a third party—judge or jury—who may be constrained by law to only take into account limited options. All too often, the end result is that neither party is satisfied and the business itself may not have survived.

The ability of litigation to deal effectively with the real world disputes set out in the above hypotheticals is severely limited. Certainly, in the **Partnership Dispute**, a court might provide an avenue for Arthur to seek protective equitable relief against Peter's actions in usurping sole possession over the partnership bank accounts. However, because courts do not traditionally entertain issues among partners of an ongoing partnership, apart from preserving the assets for both parties, the resolution of the many additional underlying business-related issues would not be possible in a court outside of breach of fiduciary duty, breach of other contract or other common law or statutory theories. Moreover, given the nature of an at will partnership, it is likely that the only legal remedy the party seeking redress would have is to seek dissolution of the partnership and an accounting.

Similarly, in the **Shareholder Dispute** described above, Alice and Bob, owning more than 20% of the shares, may be able to commence a proceeding under BCL Sec. 1104-a and seek to hold Charlie, the majority owner, accountable for misconduct. That statutory remedy, however, generally requires dissolution, followed by winding up and splitting the remaining assets less liabilities among the shareholders pro rata. Alice and Bob's stated goal of compelling Charlie to transfer the Westchester store may simply be beyond the power of the court. Even a derivative action would add complexity and expense. Moreover, for Alice and Bob to prove their case, they may have to demonstrate that Charlie's conduct was "illegal, fraudulent or oppressive" and whether he stole a corporate opportunity or diverted corporate assets—allegations that are likely to inflame Charlie and which they ultimately may fail to prove. The adversary process will likely irrevocably damage any trust between Charlie, Alice and Bob and make it impossible for them to achieve the uniformly desired objective of continuing to work together if the two discrete issues in dispute can be resolved. That result may also be difficult to reach under the law and remedies available to a court. If Alice and Bob "win," a likely scenario is that they will sell their shares to Charlie at "fair value" (the determination of which may itself extend the litigation process considerably), lose their jobs and will no longer be associated with ABC. If they lose, they may have their shares, but will most likely be replaced on the board and may also lose their salaries and perks. They will also have a large legal bill to pay.

If the ABC controversy were a **LLC Member Dispute**, Alice and Bob would be unable to seek a court order transferring the Westchester Company's shares and, like a shareholder of a corporation, would not have the right to withdraw from ABC at will. Under NY LLC Law Sec. 702, the court may dissolve an LLC if it is not "reasonably practical to carry on the business in conformity with the articles of organization or operating agreement." This remedy, however, is rarely granted unless the business is no longer viable or the majority has egregiously breached fiduciary duties to the minority. Whether it is "reasonably practical" for ABC to continue in business if it has continued to be profitable and whether Charlie has violated his fiduciary duties would be the subject of discovery and legal arguments. Even though the N.Y. courts have created a derivative-type remedy for minority owners of an LLC, it is time consuming, complex and uncertain in result. In the end, just as the shareholder dispute described above, the litigation track may result in a no-win situation for Alice and Bob as LLC members.

Arbitration

With the ability to design the process and the best practices that have developed, arbitration is worth considering either in a pre-dispute agreement or even an agreement after a dispute has arisen. In many situations, arbitration can offer significant advantages over litigation, and the final result, if not settled beforehand, will be an award that is similar to a court judgment. Additionally, in court proceedings, parties have the right to appeal the decision which can be either an opportunity or another hurdle, depending on which side one is on. In 2008, for example, the civil case reversal / modification rate of the N.Y. Court of Appeals was 52% and in the Appellate Division, First Department, 38%. The grounds for court appeal of an arbitration award, on the other hand, are extremely limited, so that, for all practical purposes, the arbitrator's award is final and binding.

Mediation

The growth of mediation over the past fifteen years has been exponential, a tribute to the success of the process. User satisfaction is high as parties retain control and tailor their own solution in a less confrontational setting that preserves relationships and often results in a win / win instead of a win / lose. While not every case can be settled, an effort to mediate is often appropriate, particularly for disputes among business owners. Most importantly, mediation is not an "alternative" to litigation or arbitration, but a complementary process that can exist prior to, during, or even after a court judgment or arbitration award. If utilized early in the process, however, it can have its most dramatic effect on the expense and time incurred in order to reach a final result.

How could the use of mediation impact the resolution of the disputes raised in the fact patterns set forth above?

In all three of the above scenarios, the **Partnership Dispute**, the **Shareholder Dispute** and the **LLC Member Dispute**, the use of mediation at an early stage could have focused the parties on their actual interests and brought prompt resolution to the issues. Precisely because the remedy obtained through mediation is dependent on the individual needs and interests of the parties, it is impossible to foresee in advance in what way the parties might resolve their issues. One could imagine that in the TV World scenario an agreement could be reached that Peter would take a smaller share of the profits and Arthur would charge most of his son's consulting fee to his drawing account, but there could be many other workable solutions. Similarly, with respect to ABC Stationery, whether as a corporation or an LLC, the parties might reach a compromise on the ownership of the Westchester business and continue working together. They may even agree on a structure for future discussions about contentious issues so that they can resolve matters before tensions escalate. The net effect is that within a relatively short time frame, the business can continue in whatever form the parties can agree is best for them.

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Trusts and Estates Law Section

The following are the observations of four experienced trusts and estates lawyers who are presently involved in mediation and other forms of dispute resolution.

By Kevin Murphy, Esq.
Law Clerk, Westchester County Surrogate's Court

The views expressed herein are the views of the author personally and do not in any way reflect the views of the New York State Bar Association or the Surrogate's Court.

Mediation as a method of dispute resolution in trusts and estates law presents the same potential benefits as it does in other practice areas—reduced financial and emotional costs to the litigants; expedited, certain and confidential results; and the empowerment of the litigants to participate in achieving a self-directed result. It is clear, however, that these potential benefits apply particularly to trusts and estates law for a number of reasons.

Most trusts and estates litigation involves a dispute among family members and / or outsiders over who is entitled to share in a decedent's estate. Most are family disputes—siblings vs. siblings, or children of a first marriage vs. a second spouse. More recently, an increasing number of disputes involve family members vs. non-family member caregivers (e.g., home healthcare aides). Most often, such disputes initially come before the court in the context of a contested probate proceeding or a contested administration proceeding. Although the legal issues are generally discrete, long-standing unresolved emotional issues between the parties, which courts are ill-equipped to resolve, usually drive the litigation.

Surrogate's Court has its own set of procedures, and many attorneys who do not regularly practice there often struggle to master the procedural differences between Surrogate's Court and other courts. They attempt to file procedurally infirm papers which the court must reject, sometimes several times.

When the issue is finally joined and discovery commences, the parties exchange allegations of misconduct or wrongdoing, and each litigant takes the allegations extremely personally. They become resentful of and indignant in their denial of allegations against them, and respond with vitriolic counter-allegations. Each side becomes entrenched in their respective positions, insisting that they must carry out the decedent's wishes "as a matter of principle." This results in a breakdown in whatever communication existed between the parties, or it extinguishes any hope of communication if there was none. Motion practice and extended litigation ensue, depleting the assets of the estate and increasing each party's attorney's fees. Consequently, each party demands a higher settlement during negotiations to offset the increased costs of litigation.

Unfortunately, the litigants often fail to realize or appreciate that the initial contested proceeding can be merely the first step in a series of contested, and therefore expensive, proceedings and appeals. As the emotional and financial costs and delay in finality increase, so does the litigants' disillusionment with their attorneys and the judicial system. Meanwhile, their inheritances decrease.

With the assistance of willing parties and attorneys, a skilled mediator can successfully avoid the pitfalls common in trust and estates litigation. Litigants in Surrogate's Court proceedings often want to explain their position—whether it is to make allegations of wrongdoing against their adversary or refute allegations of wrongdoing made against them—to a neutral party. A skilled mediator can allow the parties to do so in a way which does not jeopardize the possibility of a settlement. Starting mediation early in the process can result in significant savings of time, money and stress to the parties.

While some attorneys believe that the Surrogate or the court staff should act as mediator, courts are faced with increased caseloads and, especially in the present economic conditions, are asked to do more with less. Many courts, particularly those in which the Surrogate serves as a judge in other courts, simply lack the necessary resources, time, staff, experience and / or training to act as mediator in every contested case. Mediation offers a viable alternative in which the mediator can give a dispute the individual attention it deserves.

Consistent with this, Part 146 of the Rules of the Chief Administrative Judge allows the administrative judge of each judicial district to "compile rosters in his or her judicial district of [mediators and neutral evaluators] who are qualified to receive referrals from the court" (22 NYCRR § 146.3 [a]). It also provides requirements for qualifications and training of (§ 146.4) and continuing education for (§ 146.5) mediators and neutral evaluators serving on court rosters, and the approval of training programs (§ 146.6). This indicates that the Chief Administrative Judge supports the use of court supervised mediation to resolve disputes which otherwise would have to be resolved through litigation.

By Jill Teitel, Esq.
Private practice; previously, Law Department, Kings County Surrogate's Court

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A skillful mediator can be useful in the resolution of contested trust and estate proceedings. A trained mediator

will be able to deal with the issues at hand and anticipate ones to come. Issues may arise at the inception of a Surrogate's Court proceeding which may challenge a mediator's skill in identifying all of the problems, such as who will be the designated administrator or temporary administrator of the estate, how to recover property improperly taken from the estate, which debts are chargeable against the estate, how to construe an ambiguous provision in a will, and how to invest trust assets (to maximize return for the present beneficiaries, or those having future interests, or the creator if he or she retains an interest in the trust). These issues may beget a host of other issues and conflicts, which, if unresolved, may cause years of family squabbling. Such issues may be a spouse's—whether first, second, or third spouse—right to a statutory elective share, or the rights of half-siblings. Familial strife, having lain dormant for years, is often unearthed and, absent skillful resolution, may explode.

Take, for instance, a party who needs letters of administration to marshal the assets of an estate. The petitioner appears in court, having duly served notice of the proceeding on all necessary persons requesting that the parties appear in court or consent to the petitioner's request to be named administrator. At the return date of the citation, the petitioner is suddenly confronted with an adversarial sibling or step-parent who may have priority or equal priority to obtain letters.

This unexpected challenge may lead petitioner to bring in counsel armed with damaging information and exacerbate the conflict and therefore make settlement even less likely. This strategy oftentimes creates an undesirable situation for the beneficiaries of the estate who must finance the legal battle. As bad as this is in substantial matters, it can be the death knell to more modest estates or trusts. Mediation, if successful, brings about a prompt and mutually agreed-upon settlement, resulting in reduced legal fees. Furthermore, the mediator can go beyond the matters formally before the Court and help the parties to resolve personal issues that would otherwise stand in the way of a settlement. This is an option not available to the Court, which can only deal with the matters formally before it.

The following is an example of a common controversy, an iteration of which is frequently seen in Surrogate's Court, whether it be in the context of a probate, administration or accounting proceeding.

A sibling vs. sibling estate dispute creates the perfect storm. In one instance, such a dispute arose in a jurisdiction which recommended mediation in some of the more difficult estate proceedings. The issues were multifaceted, but all emanated from a sibling relationship gone awry decades earlier. The decedent had named his son as sole executor and left his son the profitable family business. The daughter was left a less profitable investment business. The daughter felt slighted and the son behaved as though the estate's coffers were available for his personal endeavors without having to account to anyone. The daughter brought a proceeding to remove her brother as executor. In the midst of the removal proceeding, the brother resigned as executor and a neutral third party administrator, c.t.a. was appointed. Resolved? Not really. The son stymied the distribution of the estate by bringing various claims against his sister to punish her for disgracing him before the community when she exposed his less than fiduciary behavior over a period of ten years. He also prevented disclosure of necessary business records and disparaged his sister so that her investment business suffered and her life was all but taken up by the strife. Further proceedings ensued: depositions of accountants of the decedent's businesses, expert witness testimony regarding suspect accounting procedures, and the prosecution of forgery allegations which required the retention of handwriting experts.

The mediator, a local and well-revered attorney and former judge, caucused the matter, met with each party individually and allowed the parties to voice their feelings, particularly about the past, and their disappointment with their attorneys and the concomitant waste of legal fees. The mediator permitted the parties to "present their cases" to him and to each other. Over the span of three sessions the mediator heard their stories and complaints concerning the length of the court proceedings, which at that point was well over three years. The intensity of the siblings' emotions did not dissipate and the parties did not transform into loving siblings, but they were able to gain their voices and be heard, if not by the other, at least by the mediator. The siblings settled their case for much less than it would have cost either of them to pay his or her attorney to proceed to a final accounting.

By Leona Beane, Esq.
Private Practice

The views expressed herein are the views of the author personally and do not in any way reflect the views of the New York State Bar Association.

One of the first significant uses of ADR in this country was George Washington's will, which provided that if there were any disputes relating to his will, the dispute would be resolved by arbitration with three arbitrators. Now, I am sure we all agree that George Washington was a very wise man.

Currently, arbitration of a will dispute may still be useful in certain instances, but I believe that most trusts and estates attorneys would prefer mediation rather than arbitration. In mediation, the parties maintain control over the process and outcome.

Both arbitration and mediation have many uses in resolving trusts and estate disputes. One key benefit of utilizing either method is that the proceeding is private, which may be important to the parties. They can avoid the need for allegations and counter-allegations to be set

out in a public court file. Many families (and businesses that may be involved) prefer to keep their disputes private and to have no public court record. Both arbitration and mediation are confidential processes.

Many times there are disputes between numerous beneficiaries, distributees, other relatives, or business associates of the decedent. Furthermore, there are problems associated with second and third marriages, and further problems with dysfunctional families, which can be better served by mediation than by litigation. Mediation of these disputes is the most effective form of conflict resolution due to the inter-personal relationships involved. When there is a significant emotional component to the dispute, mediation provides a venue for the various parties to "vent" their anger and frustrations. Venting can and should occur during mediation, and certainly is not available in the courthouse.

Disputes arise with trusts of all types, wills and other trusts and estate documents. Many times there are disputes between co-fiduciaries, and between one or more of the beneficiaries and the fiduciary (trustee or executor or administrator).

It has been shown that mediation is a good option when encountering one or more of these disputes.

In trusts and estate disputes, there can be a prior history of sibling rivalry, jealousy, animosity, and other emotional issues related to the family dynamics. Sometimes these disputes and animosity have been festering for years. The family history may explain the underlying reasons for the parties' actions, motives and agenda in dealing with each other, particularly while experiencing grief after the death of a loved one. Grief associated with the death of a loved one creates extra tension.

There have been many suggestions that trust instruments and wills should include provisions requiring the parties to proceed with mediation in good faith if there is a dispute.[1] The inclusion of a dispute resolution mechanism in the instrument would encourage the settlement of disputes in advance of any dispute. Furthermore, it has been proposed to add to the Uniform Probate Code a discretionary clause requiring mediation.[2]

When drafting trust documents, wills, and other estate type documents, parties should realize that if disputes should arise between the beneficiaries or between the co-fiduciaries, mediation provides a much better choice instead of filing proceedings and motions in the Surrogate's Court. In court, there may be delays until final resolution, along with the possibility of further expenses and delay with appeals. There are also large expenses relating to discovery and motion practice, obtaining expert witnesses and other expenses, all inherent in the court process till final resolution. The litigation scenario must be compared with mediation, where the parties rule who the mediator is, and the parties decide what resolution is agreeable to all.

By Barbara Levitan, Esq.
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Trust and estate litigation particularly lends itself to mediation because the financial issues are often "covers" for the emotional issues at the root of the dispute. Sibling against sibling, children of a first marriage against the second wife—even children against their own parent—may argue that a will was the product of undue influence, or an executor "cooked the books" to her own benefit and the detriment of the other beneficiaries, when the underlying issues—who got the better birthday presents, or whom daddy loved more—have little or nothing to do with the legal issues raised.

Traditional litigation can do very little to address these issues, and as a result, clients spend astronomical sums in discovery, motion practice, dispositive motions and trial, and are unable to achieve the true result that will give them some sort of closure. Mediation, by contrast, allows the resolution of a dispute by giving the parties, rather than their lawyers, a chance to listen and be heard. This direct approach is often much more effective than having their lawyer argue a motion for discovery of documents, or sitting for days at a deposition which addresses the legal, but not the emotional, issues.

An experienced mediator will be able to recognize these hidden issues and draw them out, allowing the parties to say to each other, perhaps for the first time, what is troubling them.

Endnotes

1. Professor Love provides a sample mediation clause: "In keeping with my desire that our family remain strong and harmonious, any disputes arising under this will shall be resolved by mediation. The estate shall pay the cost of the mediation. I recommend the following mediators be considered: _____." Lela Love, Mediation of Probate Matters: Leaving a Valuable Legacy, 1 Pepp. Disp. Resol. L.J., at 265 (2001).
2. Andrew Stimmel, Mediating Will Disputes: A Proposal to Add a Discretionary Mediation Clause to the Uniform Probate Code, 18 Ohio St. J. on Disp. Resol. 197 (2002).

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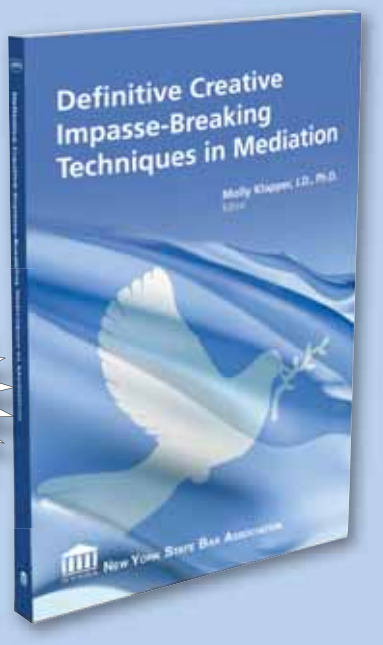

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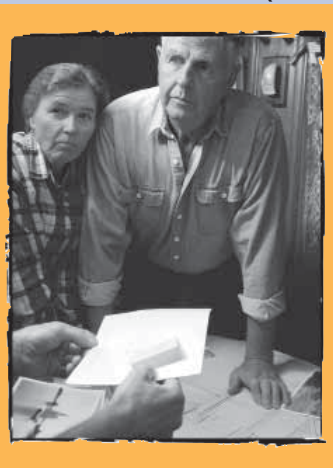

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