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A publication of the Dispute Resolution Section
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Message from the Chair

Edna Sussman

It is an honor to take over the reins as Chair of the Dispute Resolution Section from my able predecessors, Simeon Baum and Jonathan Honig. A great deal was accomplished under their auspices during the Section's two-year history. With your help we can achieve even greater success in fostering a greater understanding and utilization of ADR. Please review our activities, choose a committee(s) of interest, volunteer for a project and get involved.

This issue of the *New York Dispute Resolution Lawyer*, long in the planning, highlights the breadth and versatility of dispute resolution with its description of the many ADR tools available to provide precisely the vehicle that fits the needs of the parties. Our job through our DR Section activities is to educate users about the modalities and benefits of ADR and to improve our own skills and knowledge base so as to provide the very best of ADR services.

Ongoing Activities

The Section's activities tell the story of the broad scope of an ADR practice and the potential for the expanded use of ADR techniques to resolve disputes in a manner that is most beneficial to the parties.

Informal educational sessions—Many of the committees of the Section, including the mediation, arbitration and ethics committees, hold semi-monthly meetings, with call-in availability, with guest speakers to discuss subjects of interest. These meetings offer a wonderful opportunity to share views and seek advice on thorny issues from experts in the field. By joining a committee, you will get e-mail notices of the committee meetings which will also be posted on the website. All members are also invited to attend all of the Section's executive committee meetings.

Arbitration—The Arbitration Committee released a report on best practices for discovery in domestic arbitration and a brochure on the benefits of New York for international arbitration is well under way. A parallel best practices guide for discovery in international arbitration will accompany that brochure. Through a series of meetings this coming year, additional projects will be identified for examination and report.

Mediation—A report on mediator credentialing was completed by the Mediation Committee and a survey on attorneys' experience with and opinion of mediation is in the works. The Section, through the Courts Committee, has made significant progress and is continuing to work on increasing the use of mediation in the state and federal courts. Reaching out to the many diverse bar associations, the Section's Diversity Committee is working on increas-

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Message from the Co-Editor

Laura A. Kaster

Although Edna Sussman is our new Section Chair, she should also be recognized as the creator of a truly stellar journal—our own *New York Dispute Resolution Journal*, which like the Section is entering its third year. Edna is still co-editing, nurturing her project and, indeed, inspiring this issue. It was her concept to try to attempt to cover the broad range of alternatives available to resolve differences.

The Dispute Resolution Spectrum Explored

While we do not claim to have achieved complete coverage of all dispute resolution mechanisms, we have attempted to touch on many means for using negotiation, dialogue, mediation, evaluation, and ultimately private judging or arbitration to resolve disputes. Many of these methods or approaches will be familiar to you and we hope you will find that our authors have brought a new twist or insight to your attention. Others will be less familiar and will inspire all of us to broaden the application of the skills and new processes that are at the core of dispute resolution practice. This portion of the issue is organized roughly according to what Folberg, Golann, Stipanowich and Kloppenberg coined as the "Dispute Resolution Spectrum." However, we begin by using mediative skills even before a dispute arises with deal mediation, and preventing disagreements from evolving to disputes with dispute boards that have found wide international appeal; from these pre-dispute mechanisms we move to direct discussions between the parties, perhaps with the use of settlement counsel, to collaborative law, to assisted negotiation including many forms of mediation, to early neutral evaluation, mini-trial, and arbitration. Although some of these forms have often been alluded to, here we hope to remove the mystery and make it clear how they actually work in practice. To this spectrum, we add victim-offender dialog, which may take place even after the judicial system has done its work.

DRS Committee Reports and ADR News

The Membership Committee wants you and has done amazing work in the short life of our Section. We give a synopsis of its work to date and its future plans.

ADR News outlines two sets of rule changes at UNCITRAL and IBA, which take effect this year and are geared to improve the efficiency and reduce the cost of arbitration. Other organizations are also focused on ways to increase arbitrator controls that can streamline arbitration and renew its function as a true alternative to litigation as reflected in our article on the work of the College of Commercial Arbitrators in *Is Arbitration the "New Litigation": The Choice Is Yours.*

Ethics

This issue's Ethical Compass opinion column addresses and challenges the ABA ethics opinion on mediators acting as scriveners of the final agreement for pro se parties in a marital dispute.

Supreme Court Review

Our annual Supreme Court Review continues to reflect the high court's interest in the parameters of arbitral authority and its broad support for party autonomy in selecting this alternative dispute resolution method, even while Congress explores stringent limitations on arbitration's reach.

Mediation

The DRS Mediation Committee has issued a white paper on mediator quality and credentialing, concluding after thorough study that the negatives for credentialing outweigh the positives. The full report is provided here.

Arbitration

We bring to your attention the constructive reaction of the College of Commercial Arbitrators to the ongoing concerns of in-house counsel and other users to the increased costs and delays attendant to importing litigation-type discovery and delays into the arbitral process. In *Is Arbitration the "New Litigation" The Choice Is Yours,* the author encourages users, providers, counsel, and arbitrators to use the Protocols for Expeditious Cost Effective Commercial Arbitration and to abandon one-size-fits-all solutions.

Book Reviews

Our first book review is on a subject central to our mission, *International Commercial Arbitration in New York.* Our reviewer tells us that this book fills a significant gap in the literature and provides a guide to the law and practice in New York organized according the steps in the process itself. Our second book review of the ABA's *The Organizational Ombudsman: Origins, Roles and Operations—A Legal Guide* by Charles L. Howard also reflects our theme of using the core dispute resolution skills in an expanding arena.

Case Note

Out student case note explores the Eleventh Circuit's recent addition to the split in the Circuits on whether manifest disregard of the law remains a basis for review of arbitral decisions after *Hall Street.*

Laura A. Kaster

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ing diversity in the profession. A mediation mentoring program recently launched for DR Section members in cooperation with the Membership Committee will foster diversity and afford our members access to observation of practiced mediators at work.

Legislation on arbitration, mediation and collaborative law—A position paper was issued by the Section adopted by the NYSBA urging changes in the Arbitration Fairness Act pending in Congress. The Section continues to lobby Congressional representatives to avoid unintended damage to business arbitration. Progress on the adoption in New York State of the Revised Uniform Arbitration Act and the Uniform Mediation Act continues through the Legislation Committee. The Section's Collaborative Law Committee is analyzing collaborative law and the new Uniform Collaborative Law Act as well as the expansion of the use of collaborative law.

Publications and CLE Programming—This publication, published semi-annually, seeks to inform about recent developments and offers practice tips on ADR both domestic and international. Finally, the Dispute Resolution Section, through its CLE Committee, has sponsored many excellent CLE programs and opportunities for networking at the Section's fall meeting and the NYSBA Annual Meeting.

Future Initiatives

With all that is already being done, can we still do more? Yes. We continue to strive to afford our members ever greater benefits and opportunities for involvement, sharing of information and outreach. As dispute resolution cuts across all areas of substantive law, this year a concerted effort will be made to interact even more with the other sections of the NYSBA. Following last year's successful joint programs with the International Section and the Labor and Employment Law Section, this year our fall annual meeting will be held in conjunction with the Entertainment Arts and Sports Law Section and we are planning an afternoon of programming for the Senior Lawyers Section for their fall meeting.

A series of white papers on the benefits of ADR in specific areas to be prepared in conjunction with the other sections through the efforts of our Section Liaison Committee is being planned. Already identified are papers on ADR for municipal law, elder law and trusts and estates. A white paper on stakeholder engagement tools for addressing and planning for climate change is being considered by the ADR in Government Committee.

We are eager to develop joint programming and white papers on the advantages of ADR with many other sections. If you have an interest or area of expertise or are a member of another section that you feel would benefit from these initiatives, please contact me at esussman@sussmanadr.com and help us implement this vision.

A newly formed Education Committee, which will be served by professors from all of the law schools in New York State, will look into the question of whether and how ADR should be included in the bar exam and explore ways in which dispute resolution can be incorporated into law school curriculum.

District Leaders were appointed to ensure that we have representation and participation from districts throughout the state. We will be working with them to integrate all of our members in our efforts.

A Section quarterly e-mail Newsletter is being launched to provide the latest on Section activities and ADR developments. It will include a section on career moves, so if you have one to report, please e-mail your news to Stefan Kalina at skalina@lowenstein.com.

We are fortunate to have Steve Younger, a previous Chair of the Dispute Resolution Committee and one of those instrumental in the creation of this DR Section, as the President of the NYSBA this year. Steve's thoughtful presentation at the Section's meeting in July provided much food for thought and the impetus for many of our initiatives this year.

Conclusion

Our plans are ambitious. We can only succeed if many of you pitch in. Bar association work is well worth your time. It affords an opportunity to learn, meet others and contribute to the development of the profession. I can guarantee that you will find it productive and rewarding. Please do get in touch with me and let me know how you would like to get involved.

Edna Sussman

DRS Committee News

The Dispute Resolution Section's committees are engaged in working actively on many different aspects of ADR. We report on the work of the committees on a rotating basis. Please visit the website to explore other committee offerings and please join and participate in their work.

The Membership Committee

The Membership Committee, co chaired by Gail R. Davis, gdavis@resolutionsny.com, and Geraldine R. Brown, RBCG1@aol.com, has accomplished a great deal in the last 2 years. It has increased our membership from approximately 50 original members of the Section in June, 2008 to almost 800 today. The Membership Committee developed our Section brochure, posters, recruitment literature, postcards and law student literature. The committee established liaisons with various organizations, ADR and professional organizations and Bar Associations, and co-sponsored events and trainings with these organizations.

The Committee continues to work on increasing member benefits. The Section already offers many benefits including CLE programs on ADR and networking opportunities, a subscription to this publication, a subscription to the Section newsletter which will be launched shortly, the opportunity to meet with others in the ADR field at committee meetings to discuss and learn from others about issues and techniques in ADR, a mediation mentoring program for our members developed with the Diversity and Mediation Committees, reduced charges for DR Section programming, and liaisons with diverse Bar Associations and work with them in conjunction with the Diversity Committee regarding joint programs. The committee is also investigating how to provide low rate group malpractice insurance for mediators.

As our young members are critical to the Section's growth and to the utilization of ADR, the committee has been actively reaching out to the law schools and recent graduates. The committee contacts all of the law school professors that teach ADR in New York area schools at the beginning of each academic year asking them to post and hand out specially developed literature and special offers focusing on law students. The committee has utilized law students to write case notes for this publication and had them serve as "reporters" for our Annual Meeting programs which provides a student with free entry to the program and an opportunity to report on the program in an article. Section members have attended many law school events in which students learn about different areas of law and what career paths they may pursue to discuss ADR with them. Since networking is key to engagement, the committee held a joint "greet and meet" cocktail reception with the Young Lawyers Section and hopes to hold another joint reception with them during the Annual Meeting in January.

The Membership Committee plans to continue and expand on these initiatives. Please join to help continue to increase our membership, which, in turn, supports and encourages the acceptance and usage of dispute resolution processes in New York.

Collaborative Law Committee

The Collaborative Law Committee is co-chaired by Norman Solovay, NSOLOVAY@mclaughlinstern.com, and Chaim Steinberger, csteinberger@mindspring.com. Collaborative Law ("CL") has been described as a cousin to mediation. Its practitioners typically help the parties reach a resolution by agreement, using interest-based negotiation rather than positional bargaining. It differs from mediation in that each party has an attorney who helps the party develop and crystalize the party's interests, objectives, and concerns, points out the relevant and helpful practical and legal facts and arguments, and ensures that each party makes a well-informed decision. The most striking feature of CL is the parties' and attorneys' agreement that both parties' attorneys withdraw if either party leaves the negotiation and proceeds to adversarial litigation. The parties and attorneys display their commitment to a negotiated settlement and employ the techniques typically employed by mediators to establish rapport with the other party, reframing and looping the concerns of each party, and understanding the interests beneath any stated positions. CL is best when the relationship between the parties is as important as the issue that is in dispute and empowers the parties to be in control of the final resolution.

The Committee helps to (i) spread knowledge of CL to non-CL lawyers; (ii) develop best practices in CL; (iii) promote and expand the use of CL in appropriate circumstances in both family and civil cases. The Committee has been monitoring the Uniform Law Commission's efforts to promulgate a Uniform Collaborative Law Act ("UCLA") and in conjunction with other Bar Association Committees has been providing feedback to the Commission. The Committee is currently drafting a report, in cooperation with the Section's Legislative Committee, on the substance and advisability of the UCLA for the NYSBA DR Section and, if approved, for the entire NYSBA. A Civil Collaborative Subcommittee that was formed last year to explore and promote the expanded use of CL in non-family law matters, both here and abroad, is expected to be increasingly active and effective this coming year.

Please join the Committee and help develop this emerging area of practice.

ADR News

Many of the institutions and organizations that promulgate rules and guidelines for arbitration are in the process of review and revision to address developments in the field and concerns expressed by users. The new UNCITRAL Arbitration Rules and the new IBA Rules on the Taking of Evidence have been issued.

UNCITRAL Arbitration Rules

On July 14, culminating over four years of work and cooperation with governmental and nongovernmental groups, UNCITRAL issued its new arbitration rules, which became effective as of August 15, 2010. Although the press release states that the new Rules do not alter the original structure or drafting style of the 1976 version, the goal of enhancing the efficiency of arbitration has resulted in some significant changes with respect to the emphasis on efficiency and cost, multiparty proceedings, reliance on experts appointed by the tribunal and interim relief. In addition, Article 16, which is new, provides for party waiver of arbitrator liability except for intentional conduct.

The full text of the new rules is available at http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/pre-arb-rules-revised.pdf. A comparison of the old and new Rules may be found on CPR's website: www.cpradr.org.

IBA Rules on the Taking of Evidence

The International Bar Association has adopted the new Rules on the Taking of Evidence in International Arbitration including investment treaty-based disputes. The revised rules will apply to all arbitrations in which the parties agree to apply the IBA Rules after May 29, 2010, whether as part of new arbitration agreements or pending or future arbitrations. Approval followed a two-year review process that included public comment. The Rules are built upon the 1999 IBA Rules but address new challenges such as electronic discovery and legal privilege issues, with a careful eye to promoting efficiency in international arbitration. The key revisions include a requirement that the tribunal consult with the parties in an early effort to agree to an efficient, economical and fair process for taking evidence; guidance on questions of e-disclosure and requests for documents in the possession of third parties; requirements to disclose the instructions given to experts and that experts make a statement of independence from the parties, legal advisers, and the tribunal; provisions for the use of technology such as videoconferencing; specific guidance respecting issues of legal impediment or privilege, particularly if the parties are subject to different legal or ethical rules; and incorporation of an express requirement of good faith in taking evidence coupled with an empowerment of the tribunal to consider lack of good faith in the awarding of costs. They will be available on www.ibanet.org.

THE ETHICAL COMPASS

Two for the Price of One Is a Costly Choice: The Ethical Issues for Lawyer-Mediators Who Consider Drafting Agreements

By Elayne E. Greenberg

Should a lawyer who serves as a mediator for two unrepresented parties also draft the resulting agreement if both mediating parties request the lawyer to do so? On June 30, 2010, the ABA Section of Dispute Resolution Committee on Mediator Ethical Guidance (hereinafter "The Committee") issued Ethics Opinion SODR-2010-1 "Mediator's Duty of Care When Drafting Agreements."[1] This ethics opinion calls into question the blurry ethical contours between lawyering and mediation when mediating with pro se parties. In this column, I will review the Committee's ethics opinion and then, applying the New York Rules of Professional Conduct,[2] discuss the potential ethical minefields and workable alternatives for those New York lawyers who serve as mediators[3] and also contemplate drafting the resulting agreement.

"This ethics opinion calls into question the blurry ethical contours between lawyering and mediation when mediating with pro se parties."

The context that provoked the question is as follows: A divorcing couple, seeking an uncontested no fault divorce and joint custody of their child, together retained a lawyer-mediator to mediate their property settlement, custody and support. After successfully mediating all the issues, the couple then asked the mediator to draft the agreement. The parties were not represented by counsel, did not want to seek independent counsel and did not wish to have an independent lawyer review the agreement drafted by the mediator.

Four questions were posed to the Committee:

Question 1A: If the Mediator is a lawyer, should he or she prepare the agreement under these circumstances and if so, what are the ethical responsibilities and constraints, if any, that should be considered in connection with the preparation of the agreement?

Question 1B: What are the Mediator's ethical duties and responsibilities with respect to the parties under these circumstances?

Question 1C: Would the ethical considerations be different if the mediation only involved the division of property and not custody, visitation, and support for the minor child also?

Question 1D: If the Mediator was not a lawyer, are there any different ethical considerations that would apply?[4]

The Committee opined in relevant part.

Question 1A: A lawyer-mediator may act as a "scrivener" to memorialize the parties' agreement without adding terms or operative language. A lawyer-mediator with the experience and training to competently provide additional drafting services could do so, if done consistent with the Model Standards governing party self-determination and mediator impartiality. Arguably, before taking on any new role in the process, the mediator must explain the implications of assuming that role and get the consent of the parties to provide those services. The mediator should also advise parties of their right to consult other professionals, including lawyers, to help them make informed choices.[5]

Question 1B: The Model Standards arguably also permit a lawyer-mediator to provide legal information to the parties. If, however, the mediator provides legal advice or performs other tasks typically done by legal counsel, the mediator runs a serious risk of inappropriately mixing the roles of legal counsel and mediator, thereby raising ethical issues under the Model Standards. At a minimum, the lawyer-mediator must disclose the implications of shifting roles and receive consent from the parties. The lawyer-mediator should also consider legal ethics provisions governing, among other things, joint representation of legal clients and the unauthorized practice of law (UPL) in a state in which the lawyer is not licensed.[6]

Question 1C: The ethical considerations do not differ under the Model Standards even if the mediation only involves the division of property.[7]

Question 1D: The Standards would seem to allow a mediator, no matter his or her profession-of-origin, to act as a simple "scrivener" of the parties' agreement. However, given the complexity of divorce-related settlement agreements, the Committee recognizes that a mediator may likely not act simply as a scrivener in this context, except perhaps in drafting a parenting plan or a more limited aspect of the total agreement. Any drafting

activity could raise concerns under the law governing the unauthorized practice of law (UPL) in each state.[8]

Guided by the ethical mandates of the ABA Model Standards of Conduct for Mediators[9] and the Model Standards of Practice for Family and Divorce Mediation,[10] the Committee tried to harmonize these two ethical guidelines, recognizing that the Model Standards do not provide a definitive answer.[11] The Committee cautioned that these Standards are aspirational and that lawyer-mediators should also consider the application of other relevant legal ethical guidelines and laws. However, it is only in a footnote[12] that the Committee remarked that lawyer-mediators should also be mindful of Rule 1.7 Conflict of Interest: Current Clients; Rule 2.4 Lawyer Serving As A Third Party Neutral; and Rule 1.6 Confidentiality of Information contained in the ABA Model Rules of Professional Conduct.[13]

Given weight in its analysis, the Committee also noted that a mediation party's right of self-determination includes the right to shape their mediation process. The Committee observed that it is customary in the practice of divorce mediation for divorce mediation consumers to intentionally seek out lawyer-mediators with the expectation that the lawyer-mediators will also draft their resulting legal agreements.[14] Two for the price of one. After all, isn't this just an extension of party self-determination?

To this commentator's disappointment, the resulting opinion is a reiteration of the existing poorly defined ethical contours, rather than the more direct guidance that is needed. Alive and well remain the artificial lawyer / scrivener and legal advice / legal education dichotomies that are challenging to ethically implement. Unchallenged remains the questionable practice in the divorce and family mediation that parties in mediation may get "two for the price of one," lawyer-mediators who will also draft the legal agreement. In fact, there remains enough wiggle room in these dichotomies to encourage mediator choice about this ethically defining and ethically ambiguous behavior.

This commentator believes that permitting lawyers / mediators to draft agreements not only perpetuates the confusion between the distinct roles of lawyer and mediator, but also creates a liability minefield for the lawyer-mediator.[15] Sadly, this ambiguity has impeded the development of the mediation profession. For many consumers of legal services, there remains confusion about the difference between lawyers who represent them and lawyers who mediate for them. Unable to make a truly informed decision, they may opt for what they believe is the more cost-effective choice, the lawyer-mediator.

Lawyers are ethically required to take a more proactive role in clarifying this ambiguity. Central to this discussion is the New York Rules of Professional Conduct Rule 2.4 which clarifies the distinction between the role of lawyers and lawyers serving as third-party neutrals. Specifically, Rule 2.4 provides:

> (a) A lawyer serves as a "third-party neutral" when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.
>
> (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.[16]

As this commentator has elucidated in an earlier column,[17] Rule 2.4 explains that lawyers who serve as third-party neutrals are helping parties resolve a dispute, but they are *not* the lawyer's clients.[18] Rule 2.4 makes a point of saying that lawyers serving as a third-party neutral have an ongoing obligation to inform unrepresented parties of this distinction.[19] The neutral is just the neutral, not their lawyer, too. Parties are not getting "two for the price of one" and lawyers may need to repeatedly dispel this commonly held, mistaken belief of pro se. Such pro se's statements to a third-party neutral as, "I'm so glad you're working with me. You'll protect me." "I don't know the law, but I'm sure you're not going to let me make a bad deal"; and "What do you think about that legal proposal?" are representative statements that trigger the Rule 2.4 requirements.

Implicit in Rule 2.4 is a third-party neutral's obligation to refrain from conduct that might be misconstrued to be lawyerly[20] such as giving legal advice, providing legal representation and legal drafting. If you say you are not acting as the parties' lawyer, then don't. This calls into question whether the hard to differentiate dichotomies such as legal education / advice and scribe / agreement drafting by third-party neutrals may in fact, when employed by a lawyer-mediator, be construed as lawyering and be in contravention of this rule.

Another ethical quagmire for the lawyer-mediator who is thinking about drafting agreements is the issue of which of the mediation parties is the client that the lawyer is representing, and is there an ethical conflict if the mediator elects to represent one party over the other. Rule 1.7[21] warns:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

"Lawyer-mediators should be ambassadors of ethical mediation process, clarifying the distinct contributions of lawyers and mediators."

Thus, those lawyer-mediators who switch hats from mediator to lawyer and opt to draft the mediation parties' agreement may be acting in direct contravention of Rule 1.7.

As with many ethical discussions, of course this ethical discussion about lawyer-mediators drafting agreements is not taking place in a vacuum, but is also taking place in an economical and political context. Economically, many pro se parties, whether through court-connected programs or private mediators, are seeking mediation as a cost-effective alternative. Many pro se parties expect that the mediator will draft the agreement, and relieve them of the cost of retaining multiple counsel. In these economically challenging times, some mediation providers are reluctant to turn away needed business. Moreover, it is more challenging to observe ethical practice when the culture of practice is otherwise. After all, if one lawyer-mediator won't draft an agreement, the mediator consumers might find other lawyer-mediators who will. Politically, some sectors of the divorce mediation community have marketed divorce mediation as a true alternative process that doesn't have to include independent legal representation for participating parties. Instead, some lawyer-mediators create a fiction in which they draft the agreement and pretend to represent one party, while the other party is pro se. Wink! Wink!

Yet, as mediation practice increases and evolves, there are increasing reports of lawyer-mediators being sued for practicing law, the deeper malpractice pocket. And, increasing numbers of pro se mediation parties who are challenging mediated agreements, claiming lack of informed consent and mediator coercion. What is the value of two for the price of one in those cases? Possibly, the existing economic and political considerations of divorce mediation need to be reconsidered. As we have been discussing, these economic and political stances are fraught with ethical challenges that need to be addressed in more ethically responsive ways.

Lawyer-mediators may suggest viable alternatives for those mediation consumers who are committed to containing their costs to an affordable level. For example, there is an increasing culture of settlement-minded lawyers available to represent clients in mediation without unnecessarily "stirring up the pot." For those court-annexed and government-annexed mediation programs, law schools are a free, skilled resource to provide mediation representation for your pro se consumers.

Ultimately, this column encourages lawyer-mediators to rise to the challenge, recalibrate their ethical compass and take proactive steps to promote ethical dispute resolution practice. Lawyer-mediators should be ambassadors of ethical mediation process, clarifying the distinct contributions of lawyers and mediators.[22] Lawyer-mediators working with pro se parties should be mindful that engaging in the practice of "two for the price of one" where lawyer mediators also engage in such lawyerly activities as drafting and giving legal advice are in contravention of their ethical mandates as lawyers. After all, the value for one service of quality should be greater than "two for the price of one."

Endnotes

1. *See* ABA Dispute Resolution Committee on Mediator Ethical Guidance, Formal Op. SODR-2010-1 (2010) [hereinafter *The Committee*].
2. *See* N.Y. Rules of Professional Conduct (2009).
3. The Ethics Committee invited lawyers to apply their own professional codes.
4. *See The Committee* at 1.
5. *See id.* at 2.

6. *See id.*
7. *See id.* at 3.
8. *See id.*
9. *See* ABA Model Standards of Conduct for Mediators (2005).
10. *See* Model Standards of Practice for Family and Divorce Mediation (2000).
11. *See The Committee*.
12. *See id.* at 3 n.2.
13. *See id.*
14. *See id.* at 2.
15. *See generally* Michael Moffitt, *Suing Mediators*, 83 B.U. L. REV. 147 (2003).
16. *See.* N.Y. Rules of Professional Conduct, Rule 2.4.
17. *See* Elayne Greenberg, *How Attorneys Serving as Neutrals Identify and Coordinate the Ethical Mandates of the 2009 Rules of Professional Responsibility with the Ethical Mandates of Dispute Resoltuon,* N.Y. DISP. RESOL. LAW., Vol. 2, No. 2 (2009).
18. *See.* N.Y. Rules of Professional Conduct, Rule 2.4.
19. *See id.*
20. *Id.*
21. *See* N.Y. Rules of Professional Conduct, Rule 1.7.
22. *See* Robert A. Baruch Bush, *What Do We Need a Mediator For?: Mediation's Value-Added for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1 (1996).

Elayne E. Greenberg is Director of the Hugh L. Carey Center for Dispute Resolution at St. John's University School of Law and Co-chair of the Ethics Committee of this Section. She thanks Joshua T. Samples, St. John's School of Law 2011, for assistance in the formatting of this article.

The opinions expressed in this column represent only the author's viewpoint and not necessarily the views of the Association, the Section or its Officers.

Developments in Arbitration: Arbitration at the United States Supreme Court—October Term 2009

By Sherman Kahn

During its 2009 term (commencing in October 2009 and extending until June 2010), the United States Supreme Court decided four cases focusing on arbitration, suggesting that the Court continues to exhibit a strong interest in developing arbitration jurisprudence. The theme of the year's decisions, if there is one, can be reasonably said to be allocation of responsibility for determining arbitrability. The Supreme Court's decisions this year are discussed in more detail below in chronological order.

A. *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers*

Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers, 130 S. Ct. 584 (2009) concerns arbitration procedures designed to resolve employment grievances in the railroad industry. The Railway Labor Act ("RLA")[1] was enacted to promote peaceful and efficient resolution of labor disputes; it mandates arbitration of "minor disputes" before arbitration panels composed of two labor representatives, two industry representatives and a neutral tiebreaker.[2] To supply the representative arbitrators, Congress established the National Railroad Adjustment Board ("NRAB") and the representative arbitrators were to appoint the neutral arbitrator.[3] The RLA includes a requirement that before resorting to arbitration, employees and carriers must exhaust grievance procedures in their collective bargaining agreement and attempt settlement "in conference" between representatives of the carrier and the employee.[4]

"The theme of the year's decisions, if there is one, can be reasonably said to be allocation of responsibility for determining arbitrability."

In *Union Pacific* the union initiated grievance procedures on behalf of five employees and, dissatisfied with the outcome of those procedures, initiated arbitration against Union Pacific.[5] Just prior to the hearing, one of the industry representatives on the panel objected *sua sponte* that the pre-arbitral record submitted by the union contained no proof of conferencing.[6] The carrier, which had not previously raised that objection, embraced it and, although the union submitted evidence that conferences had been held and argued that the carrier had waived the objection by failing to timely raise it, the panel dismissed all five arbitrations on the ground that without evidence of a conference the panels lacked jurisdiction and the record must be deemed closed upon submission of a Notice of Intent to arbitrate.[7]

The union filed a petition for review with the Northern District of Illinois, which affirmed the tribunal's order. On appeal, the Seventh Circuit recognized that the union had presented its case on both statutory and constitutional grounds.[8] The Seventh Circuit observed that the single question at issue was whether written documentation of the conference was a necessary prerequisite to arbitration.[9] It determined that there was no such prerequisite and reversed on the ground that the proceedings were incompatible with due process.[10]

The Supreme Court granted certiorari to address whether a reviewing court may set aside NRAB orders for failure to comply with due process but did not decide this constitutional question, holding that the Seventh Circuit reached the right result but should have decided the issue on statutory, not constitutional, grounds.[11] The Supreme Court held that nothing in the RLA elevates the "conference" requirement to a jurisdictional prerequisite and thus the union was entitled to have the NRAB orders vacated.[12] The Supreme Court went on to say that, given the statutory ground for relief, there was no due process issue to be decided.[13]

Notwithstanding its exercise of judicial restraint on the due process issue actually decided by the Seventh Circuit, the Supreme Court went beyond its narrow statutory ruling to reduce confusion over what constitutes a jurisdictional matter.[14] The Court commented that the term "jurisdiction" had been used to convey too many meanings.[15] The Court defined subject matter jurisdiction as the tribunal's power to hear a case and compared jurisdictional rules to "claim-processing rules" which can be forfeited if a party asserting the rules waits too long to challenge them.[16] The Court applied these general principles to the conferencing requirement under the RLA and concluded that conferencing is a claim-processing rule, the failure to comply with which does not divest an NRAB arbitration panel of jurisdiction to hear a dispute.[17] Moreover, the Court concluded "when the fact of conferencing is genuinely contested, we see no reason why the panel could not adjourn the proceeding pending cure of any lapse."[18]

Union Pacific is ostensibly limited to a very narrow category of statutory labor arbitrations. However, the discussion of jurisdictional issues in the latter portion of the opinion appears to have some broader applicability. It should at least be instructive to arbitration panels in commercial arbitrations facing jurisdictional challenges alleging failure to adhere to arbitration prerequisites set forth in step-clause-type arbitration provisions. Such provisions, which typically set forth negotiation and mediation

prerequisites to arbitration, are very common in commercial agreements that provide for arbitration. Such provisions can sometimes lead to considerable litigation and, if drafted poorly, can even be "pathological"—threatening the parties' agreement to arbitrate. *Union Pacific* can reasonably be read to suggest that the failure to strictly adhere to such provisions should not be a jurisdictional bar to arbitration in most cases.[19]

B. *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*

Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 130 S. Ct. 1758 (2010) held that an admiralty contract which was silent as to the availability of class arbitration could not be construed to allow class arbitration.[20]

The underlying dispute in *Stolt-Nielsen* concerned a contract for the shipping of goods in a type of ship called a parcel tanker—a tanker having compartments to allow the shipment of smaller amounts of liquid cargo.[21] The transport of such shipments is governed by standard contracts called "charter parties."[22] There are various forms of charter parties—and the one at issue in *Stolt-Nielsen* was known as the Vegoilvoy charter party.[23] The Vegoilvoy charter party, which was adopted in 1950, contains an arbitration clause providing for arbitration in New York governed by the FAA but which, not surprisingly given the date of its adoption, is silent as to the availability of class arbitration.[24]

The litigation began with a series of suits brought in various courts after the shippers were found by a Department of Justice investigation to have been engaging in an illegal price fixing conspiracy.[25] The suits were consolidated by the Judicial Panel on Multi-District Litigation in the District of Connecticut, where prior to consolidation the Second Circuit had held in one of the cases that the charterer's antitrust claims were subject to arbitration under the charter party's arbitration clause.[26]

AnimalFeeds then served a demand for class arbitration on the shippers, seeking to represent a class of direct purchasers of parcel tanker transportation services for bulk liquid chemicals from August 1998 to November 2002.[27] The parties to that arbitration entered a supplemental agreement providing for the question of class arbitration to be submitted to a panel of arbitrators under the AAA Supplementary Rules for Class Arbitration.[28] In a stipulation that the majority opinion of the Supreme Court found significant, the parties agreed that the charter party arbitration clause was silent with respect to class arbitration and that the silence meant that "there's been no agreement reached on that issue."[29]

The arbitration panel concluded that the arbitration clause allowed for class arbitration and stayed the action to allow the parties to seek judicial review.[30] The district court vacated the arbitrators' award concluding that it was made in manifest disregard of the law insofar as the arbitrators failed to conduct a choice-of-law analysis.[31] The Second Circuit reversed, holding that the doctrine of manifest disregard of the law survived the Supreme Court's decision in *Hall Street Associates L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008), but that the arbitrators' decision was not in manifest disregard of the law.[32] The Supreme Court granted certiorari to determine whether class arbitration is consistent with the FAA where the arbitration clause is silent on the issue.[33]

The Supreme Court decided that the arbitration panel's decision to allow class arbitration should be overturned because the arbitrators exceeded their powers by imposing their own "conception of sound policy" regarding class arbitration instead of analyzing whether there was in fact an agreement to allow class arbitration.[34] The Supreme Court reached this conclusion on the ground that the arbitrators had focused on consensus among arbitrators subsequent to the Supreme Court's decision in *Greentree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003) rather than analyzing whether the New York law, maritime law or the FAA sets out a default rule in favor of class arbitration.[35] Thus, according to the Supreme Court, the arbitrators, failing to find a reason to depart from the post-*Bazzle* consensus in favor of permitting class arbitration, substituted their own public policy views for legal analysis.[36]

The Supreme Court then proceeded to decide the issue of the availability of class arbitration rather than remand the issue to the arbitrators because "there can only be one possible outcome on the facts before us."[37] In reaching that conclusion, the Supreme Court first opined that *Bazzle* did not establish a rule of decision.[38] It then focused on the FAA—stating that the FAA's purpose is to ensure that arbitration is a matter of consent, not coercion, and that private agreements are enforced according to their terms to give effect to the contractual rights and expectations of the parties.[39] From this background, the Court concluded that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding it agreed to do so but that the parties in *Stolt-Nielsen* had stipulated that no such agreement existed.[40]

The Supreme Court pointed out that the parties were sophisticated business entities and that the charterer is customarily the party that chooses which form of charter party to use—that is, that the contract was not a contract of adhesion.[41] The Court opined that an implicit agreement to class arbitration is not a term that an arbitrator may infer solely from the fact of the parties' agreement to arbitrate.[42] However, the Court also stated that in light of the parties' stipulation "[w]e have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration."[43]

Justice Ginsburg's dissent (joined by Justices Stevens and Breyer)[44] argued that the issue of class arbitration

was not ripe for judicial review and that the petition for certiorari should have been dismissed as improvidently granted.[45] The dissent went on to say that, should the Court reach the merits, the judgment of the Second Circuit should have been affirmed due to the limitations on judicial review set forth in the FAA.[46]

On the merits, the dissent argued that the parties' agreement to submit the class arbitration issue to the arbitrators should resolve the case as the arbitrators could not have exceeded their authority when the parties explicitly provided it.[47] The dissenters also argue that the majority opinion usurps the authority granted to the arbitrators by deciding again *de novo* the issue the arbitrators had been asked to decide.[48]

"It thus remains to be seen whether consumer arbitration provisions can be held to allow class arbitration under the FAA."

Perhaps most importantly, the dissent notes what Justice Ginsburg describes as "some stopping points" in the Court's decision.[49] The dissent points out that the Court does not require express consent to class arbitration, but rather "a contractual basis for concluding that the parties agreed" to submit to class arbitration.[50] Second, Justice Ginsburg states that by observing that the parties are sophisticated business entities and the shipper chooses the form of charter party, the Court "apparently spares" from the affirmative-authorization requirement contracts of adhesion.[51] It thus remains to be seen whether consumer arbitration provisions can be held to allow class arbitration under the FAA.

The wait for further clarity on this issue may be short. The Supreme Court has granted certiorari in *AT&T Mobility, LLC v. Concepcion*, 176 L. Ed. 2d 1218 (2010), to answer the question "[w]hether the Federal Arbitration Act preempts States from conditioning enforcement of an arbitration agreement on the availability of particular procedures—here, class-wide arbitration—when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims." The underlying decision in *AT&T* held that class action waiver provision in a consumer adhesion contract was unconscionable under California law.[52]

In addition, shortly after deciding *Stolt-Nielsen*, the Supreme court granted certiorari and vacated the Second Circuit's decision in *In re American Express Merchants' Litigation*, 554 F.3d 300 (2d Cir. 2009) for further consideration in light of *Stolt-Nielsen*.[53] In *American Express*, the Second Circuit had decided that whether a class action waiver is enforceable under the FAA is for the court to decide and that the class action waiver in the contract at issue (an adhesion contract between American Express and its merchants) was inconsistent with the FAA because it left the merchants with no reasonable remedy for Sherman Act violations.[54] The Second Circuit's further consideration of this issue in light of *Stolt-Nielsen* and any subsequent review by the Supreme Court may be instructive regarding the application of *Stolt-Nielsen* to adhesion contracts.[55]

C. *Rent-a-Center, West, Inc. v. Jackson*

Rent-a-Center, West, Inc. v. Jackson, No. 09-497, 2010 U.S. LEXIS 4981 (2010) held that in an arbitration agreement providing that arbitrability is to be resolved by the arbitrators, an unconsionability argument against the arbitration agreement must be decided by the arbitrators unless the challenge is to the clause specifically delegating arbitrability to the arbitrators.[56]

Rent-a-Center arose from an employment discrimination suit brought in the District of Nevada by an employee, Jackson, against his former employer.[57] The employer, Rent-a-Center moved to dismiss the proceedings under FAA § 3 and to compel arbitration pursuant to FAA § 4 based upon a "Mutual Agreement to Arbitrate Claims" ("arbitration agreement") that the employee had signed as a condition of his employment.[58] The arbitration agreement accompanied a separate employment agreement but it was solely an arbitration agreement and did not contain other terms unrelated to arbitration.[59] The arbitration agreement provided broadly for arbitration of all claims related to Jackson's employment, including discrimination, claims and provided that the arbitrator would have exclusive jurisdiction to resolve any dispute related to "applicability, enforceability or formation" of the agreement.[60]

Jackson opposed Rent-a-Center's motion on the ground that the arbitration agreement was unconscionable.[61] The district court granted Rent-a-Center's motion to dismiss the suit on the ground that the arbitration agreement gave exclusive authority to decide whether the agreement is enforceable to the arbitrator.[62] The Ninth Circuit reversed on the question of the delegation of the enforceability decision to the arbitrator and remanded to the district court for determination of those of Jackson's unconscionability arguments that had not been addressed by the district court.

The Supreme Court reversed the Ninth Circuit on arbitrability, relying on the *Prima Paint* line of cases holding that a challenge to the specific validity of the agreement to arbitrate is for the court to decide but that a challenge to the general validity of an agreement including an arbitration clause can be delegated to the arbitrators.[63] The Supreme Court's decision in *Rent-a-Center* arguably expands the *Prima Paint* rule by applying it to differentiate among clauses in an agreement that itself addressed only arbitration. The Supreme Court held that, under the reasoning of *Prima Paint*, Jackson's challenge to the arbitration agreement should go to the arbitrators unless the challenge

was specifically directed to the delegation clause which provided that the arbitrators would assess enforceability of the arbitration agreement.[64]

Justice Stevens dissented, joined by Justices Ginsburg, Breyer and Sotomayor. Justice Stevens argued in his dissent that the issue raised by Jackson was whether there was a valid arbitration agreement, an issue that should be decided by the courts.[65] Justice Stevens also argued that under *First Options of Chicago v. Kaplan*, 514 U.S. 939 (1995) the court should determine arbitrability unless the parties clearly and unmistakably intended to submit arbitrability to the arbitrator.[66] Under this line of authority, according to Justice Stevens, where a party raises a good faith challenge to the arbitration agreement, it is difficult to say that the parties clearly and unmistakably agreed to submit the arbitrability question to the arbitrators.[67] The dissent's view is that the unconscionability claim undermines any suggestion that Jackson "clearly and unmistakably" delegated the arbitrability question.[68] Justice Stevens also, while criticizing *Prima Paint*, argues that, under *Prima Paint*, a validity challenge to a standalone arbitration agreement should always be decided by the court.[69]

D. *Granite Rock Co. v. International Brotherhood of Teamsters*

Granite Rock Co. v. International Brotherhood of Teamsters, No. 08-1214, 2010 U.S. LEXIS 5255 (2010) addresses the arbitrability of certain claims brought against a local union and its international parent organization for damages arising out of a strike.[70] In particular, the decision concerns the arbitrability of a dispute over the ratification date of the collective bargaining agreement containing the arbitration clause.[71]

Granite Rock is a concrete and building materials company that employs approximately 800 employees under a variety of union labor contracts.[72] One of those unions is the International Brotherhood of Teamsters, Local 287.[73] Granite Rock and the Teamsters local had been party to a collective bargaining agreement that expired in April 2004 and, after negotiations for a new agreement failed, the union called a strike.[74] The strike continued until July 2, 2004 when the parties reached agreement on a new collective bargaining agreement containing a no-strike clause.[75] At the time the parties reached agreement on the new collective bargaining agreement, they had not agreed on a back-to-work or hold-harmless agreement for the strike prior to the new agreement, and the parent union, The International Brotherhood of Teamsters, instructed the local workers not to return to work until a hold-harmless agreement was in place.[76] Granite Rock took the position that this continued strike was a violation of the no-strike clause in the new collective bargaining agreement and sued the local and international unions in district court for damages and an injunction against the strike.[77] On August 22, the local union ratified the new collective bargaining agreement and the local union members returned to work before the injunction motion could be heard.[78] Nonetheless, Granite Rock pressed its claim for damages.[79]

Granite Rock argued that the strike regarding the hold-harmless issue violated the July 2 collective bargaining agreement's no-strike clause and that the hold-harmless dispute was an arbitrable issue.[80] The unions opposed the complaint on the ground that the new collective bargaining agreement was not properly ratified on July 2 and thus the no-strike clause was ineffective.[81] The district court held that the issue of the ratification date was for the court, not an arbitrator, to decide and submitted the question to a jury, which in turn found that the collective bargaining agreement had been ratified on July 2.[82] The Ninth Circuit reversed the jury's verdict on the ground that the ratification date was not a proper subject for judicial resolution because the arbitration clause covered the related strike claims and because national policy favoring arbitration supported a resolution in favor of arbitrability.[83]

The Supreme Court held that the resolution of the ratification date issue should have been for the court.[84] The Court pointed out that the issue in dispute was not whether, but *when* an agreement to arbitrate had been entered.[85] The Court also noted that the parties had agreed that it was appropriate for the district court to decide whether the ratification dispute is arbitrable.[86] The Supreme Court stated the following principle:

> [C]ourts should order arbitration of a dispute only where the Court is satisfied that neither the formation of the parties' arbitration agreement *nor* (absent a valid provision specifically committing such disputes to an arbitrator) its enforceability or applicability to the dispute is in issue. Where a party contests either or both matters, 'the court' must resolve the disagreement.[87]

Based upon this principle, the Supreme Court rejected the general presumption in favor of arbitration unless the court is already persuaded that the parties' arbitration agreement was validly formed and covered the dispute at issue.[88] Thus, according to the majority opinion, in both FAA and labor cases, the presumption of arbitrability should only be applied where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand and where the presumption is not rebutted.[89]

The Supreme Court, addressing the merits, concluded that the ratification question was for the court because it related to the arbitration demand in such a way that the district court was required to decide the ratification date in order to determine arbitrability.[90] The Court pointed out that the collective bargaining agreement's arbitration clause extended only to disputes "arising under" the

agreement and did not explicitly extend to disputes regarding the agreement's formation.[91] The Supreme Court held that the "arise under" language was, in fact, not sufficiently broad to include the ratification date dispute and also held that the collective bargaining agreement's prerequisites to arbitration, which include mandatory mediation, foreclose a reading of the arbitration requirement as applicable to the dispute.[92]

Justice Sotomayor, joined by Justice Stevens, dissented regarding the arbitrability of the ratification date issue.[93] According to the dissent, the ratification date dispute was a dispute "arising under" the collective bargaining agreement and that, because the new collective bargaining agreement provided that it was retroactive to May 1, 2004, the date on which the agreement was ratified does not determine the arbitrability of the dispute.[94]

* * * * *

The coming term may bring more interesting arbitration related decisions. *AT&T v. Concepcion*, on which the Supreme Court has accepted certiorari, will likely add further to the Supreme Court's developing law regarding class-action in arbitration.[95] In addition, the Supreme Court has requested the views of the Solicitor General regarding whether it should grant certiorari in *Louisiana Safety Ass'n of Timbermen-Self Insurer's Fund v. Certain Underwriters at Lloyds, London*, 2010 U.S. LEXIS 3980 which addresses whether Chapter 2 of the FAA is subject to the anti-preemption provisions of the McCarran-Ferguson Act, a law designed to leave the regulation of the insurance business to the states.[96]

Endnotes

1. 45 U.S.C. §§ 151 *et seq.*
2. 130 S. Ct. at 591.
3. *Id.*
4. 130 S. Ct. at 591-92.
5. 130 S. Ct. at 593.
6. *Id.*
7. 130 S. Ct. at 594.
8. 130 S. Ct. at 595, *citing, Brotherhood of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment v. Union Pacific Railroad Co.*, 522 F.3d 746, 750.
9. *Id.*
10. *Id.*
11. *Id.* Justice Ginsburg delivered the Supreme Court's opinion for a unanimous Court.
12. 130 S. Ct. at 595-96.
13. 130 S. Ct. at 596.
14. *Id.*
15. *Id.*
16. *Id.*
17. 130 S. Ct. at 596-98.
18. 130 S. Ct. at 598.
19. *See* Barbara Mentz's comprehensive article regarding this issue, *Applicability of the Supreme Court's Decision in Union Pacific Railroad v. Brotherhood of Locomotive Engineers and Trainmen to Step Clauses*, Volume 3, No. 1 of New York Dispute Resolution Lawyer (2010). In contrast, as discussed below, the Supreme Court's decision in *Granite Rock* suggests that in at least some cases the existence of a step cause might be taken as a limitation on the arbitrators' authority. *See* note 92 *infra* and accompanying discussion.
20. Justice Alito delivered the opinion of the Court, joined by Chief Justice Roberts and Justices Scalia, Kennedy and Thomas. Justice Ginsburg filed a dissenting opinion which was joined by Stevens and Breyer. Justice Sotomayor took no part in the decision.
21. 130 S. Ct. at 1764.
22. *Id.*
23. 130 S. Ct. at 1764-65.
24. 130 S. Ct. at 1765.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. 130 S. Ct. at 1766.
30. *Id.*
31. *Id.*
32. *Id.*
33. 129 S. Ct. 2793 (2009).
34. 130 S. Ct. at 1767-68. Notably, the Supreme Court declined to reach the question of whether the manifest disregard doctrine survives *Hall Street* or, if so, in what form. 130 S. Ct. at 1768 n. 3. This is a question that has divided the circuits. *Cf., Stolt-Neilsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 94 (2nd Cir. 2008) (*Hall Street* "did not, we think, abrogate the 'manifest disregard' doctrine altogether"), *reversed and remanded without reaching manifest disregard issue*, 130 S. Ct. 1758 (2010); *Comedy Club, Inc. v. Improv West Associates*, 553 F.3d 1277, 1290 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 145 (2009) (finding a continued role for manifest disregard); *Coffee Beanery, Ltd. v. W.W. LLC*, 300 Fed. Appx. 415, 419 (6th Cir. 2008), *cert. denied*, 130 S. Ct. 81 (2009) (same); *Citigroup Global Markets Inc. v. Bacon*, 562 F.3d 349 (5th Cir. 2009) (manifest disregard no longer viable). *See also, Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120 (1st Cir. 2008) (dicta suggesting manifest disregard may no longer be viable).
35. 130 S. Ct. at 1768-69. *Bazzle* concerned contracts between a lender and its customers which contained an arbitration clause silent as to the availability of class arbitration. A plurality opinion decided that the arbitrator should determine whether the contract permits class arbitration. 539 U.S. at 452. In *Stolt-Nielsen* the Supreme Court pointed out that there was no majority decision on that issue in *Bazzle*. 130 S. Ct. at 1772.
36. 130 S. Ct. at 1769. In making its decision, the Supreme Court was strongly influenced by the parties' stipulation that the charter party was silent on the issue of class arbitration but not sufficiently ambiguous to allow the introduction of parol evidence, which the Supreme Court determined allowed no room for a determination of the parties' intent. 130 S. Ct. at 1770.
37. 130 S. Ct. at 1770.
38. 130 S. Ct. 1772.
39. 130 S. Ct. at 1773-74.
40. 130 S. Ct. at 1775.
41. *Id.*
42. *Id.*
43. 130 S. Ct. at 1776 n. 10.

44. Justice Sotomayor did not participate in the decision.

45. 130 S. Ct. 1777.

46. *Id.*

47. 130 S. Ct. at 1780.

48. 130 S. Ct. 1781-82.

49. 130 S. Ct. 1783.

50. *Id.*

51. *Id.*

52. *Laster v. AT&T Mobility, LLC*, 584 F.3d 849 (9th Cir.) 2009.

53. *American Express Co. v. Italian Colors Restaurant*, 2010 S. Ct. 2401 (2010).

54. 554 F.3d. at 319-320.

55. In fact the Second Circuit has already weighed in post-*Stolt-Nielsen* on the issue of class arbitration and adhesion contracts. In *Fensterstock v. Education Finance Partners*, 2010 U.S. App LEXIS (2d Cir. 2010), the Second Circuit held a class arbitration waiver in a student loan contract void as unconscionable under California law. 2010 U.S. App. LEXIS at *37. The Second Circuit also held that California law holding class action waivers unconscionable was law of general applicability not preempted by the FAA. 2010 U.S. App. LEXIS at *21. Finally, applying the Supreme Court's reasoning in *Stolt-Nielsen*, the Second Circuit held that the contract at issue could not reasonably be reformed to allow class arbitration once the class arbitration waiver was excised because the arbitration clause itself showed a clear intent by the parties that classwide claims should not be arbitrated. 2010 U.S. App. LEXIS at *21. Because this decision was just released, we do not yet know whether it will reach the Supreme Court.

56. Justice Scalia delivered the opinion of the Court, joined by Chief Justice Roberts and Justices Kennedy, Thomas and Alito. Justice Stevens dissented, joined by Justices Ginsburg, Breyer and Sotomayor. *Rent-a-Center* was decided after *Stolt Nielsen*. It is not at all clear that the Supreme Court's decision of the class arbitration issue in *Stolt-Nielsen* overruling an arbitrability decision specifically delegated by the parties to an arbitration panel is consistent with its subsequent holding in *Rent-a-Center*.

57. 2010 U.S. LEXIS 4981 at *4.

58. 2010 U.S. LEXIS 4981 at *4-5.

59. 2010 U.S. LEXIS 4981 at *15-16.

60. 2010 U.S. LEXIS 4981 at *5-6.

61. *Id.*

62. *Id.*

63. 2010 U.S. LEXIS 4981 at *12-13, *citing, Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967).

64. 2010 U.S. LEXIS 4981 at *15-17. The Court went on to state that had Jackson pleaded his argument as an unconscionability challenge to the delegation clause specifically, he might have had the right to a court determination of arbitrability. 2010 U.S. LEXIS 4981 at *19.

65. 2010 U.S. LEXIS 4981 at *26.

66. 2010 U.S. LEXIS 4981 at *33-34.

67. *Id* The majority opinion treats *First Options* in a footnote, which suggests that because the written agreement clearly submits the issue of arbitrability to arbitration, there is no necessity to determine whether both parties *actually agreed* to submit the issue to arbitration.

68. 2010 U.S. LEXIS 4981 at *31-34.

69. 2010 U.S. LEXIS 4981 at *38-39.

70. 2010 U.S. LEXIS 5255 at *11. Justice Thomas delivered the opinion of the Court, joined by Chief Justice Roberts and Justices Scalia, Kennedy, Ginsburg, Breyer and Alito. Justice Sotomayor concurred in part and dissented in part, joined by Justice Stevens

71. *Id. Granite Rock* also addressed the separate question of whether Section 301(a) of the Labor Management Relations Act, 1947 ("LMRA") authorizes a federal tort claim for alleged interference with a collective bargaining agreement. 2010 U.S. LEXIS 5255 at *42. The Supreme Court affirmed the Ninth Circuit's holding that Granite Rock had not properly alleged such a claim. 2010 U.S. LEXIS 5255 at *45-50. While the Supreme Court was not convinced that Granite Rock has sufficiently alleged the absence of alternative remedies to justify the expansion of federal common law to create such a tort claim, the majority opinion appears to leave the door open for such claims if a proper record were established. *Id.*

72. 2010 U.S. LEXIS 5255 at *12.

73. *Id.*

74. *Id.*

75. 2010 U.S. LEXIS 5255 at *12-13.

76. *Id.*

77. 2010 U.S. LEXIS 5255 at *14-15.

78. 2010 U.S. LEXIS 5255 at *16.

79. *Id.*

80. 2010 U.S. LEXIS 5255 at *15.

81. *Id.*

82. 2010 U.S. LEXIS 5255 at *17.

83. 2010 U.S. LEXIS 5255 at *17-18.

84. 2010 U.S. LEXIS 5255 at *41-42.

85. 2010 U.S. LEXIS 5255 at *19-20.

86. 2010 U.S. LEXIS 5255 at *21.

87. 2010 U.S. LEXIS 5255 at *24. (emphasis in the original; citations omitted).

88. 2010 U.S. LEXIS 5255 at *25.

89. 2010 U.S. LEXIS 5255 at *27.

90. 2010 U.S. LEXIS 5255 at *32-33.

91. *Id.*

92. 2010 U.S. LEXIS 5255 at *39. This holding may present a new ground of attack against arbitrability of numerous issues arising in commercial arbitration agreements having "step-clauses" that impose procedural prerequisites before an arbitration can be commenced.

93. 2010 U.S. LEXIS 5255 at *51-58.

94. 2010 U.S. LEXIS 5255 at *54-55. The Court's opinion dismisses the retroactivity argument as untimely raised. 2010 U.S. LEXIS 5255 at *36-37.

95. 176 L. Ed. 2d 1218 (2010).

96. For a more complete discussion of this case, see William J. T. Brown, *Clash of the New York Convention with the McCarran-Ferguson Act: Can State Insurance Law Ban Arbitration of International Insurance Disputes?,* New York Dispute Resolution Lawyer Vol. 3, No. 1 (2010).

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"Deal Mediation": The Art of the Deal

By Hesha Abrams

We all know that the traffic intersection in that part of town is dangerous, but the city doesn't put a stop light there until a child is killed? Once the uproar occurs, the political will to spend the money appears. Why is it that a teenager has to get stinking, filthy drunk before he discovers that alcohol is not that much fun, and that drinking in moderation is a wiser course? We all know we should eat healthier, exercise more, take a vacation, etc, but we don't do it. There is something in human nature that doesn't value preventative care and is more comfortable with crisis management. Why?

> *"Would you lose the deal simply because there wasn't a third party there* driving *the negotiation?"*

After almost 30 years of deal making and thousands of negotiations I suggest that human beings respond from their limbic system-reptilian brain, which makes us hard wired to be short-term gratification oriented. The stock market rewards quarterly increases, not long-term planning. The CEO's compensation package rewards stock price increases so there is a natural predilection to achieve short-term gains, rather than strategically planning for future long-term growth.[1] One "aw shucks" wipes out five "atta-boys" in our social and business settings, penalizing risk takers and rewarding conformity.

Great chess players never move one move at a time, they move at least five-seven moves at a time in their head and can see the whole board *and* the end game. They also make a move designed to *provoke* a move from the other side that fits into *their* long term end game.[2]

Most negotiators move one puny move at a time. Great negotiators negotiate like great chess players, plan five moves at a time and take actions designed to provoke / encourage a particular move from their opponent. They know that it is not the battle that must be won, but the war. Allowing your opponent to become overconfident, to become lax in his or her preparation or due diligence, might allow you to sacrifice one piece in order to gain something of much greater value and / or to position yourself for victory in the whole game. There are often innocuous items that fit neatly into a larger game plan but only seem innocuous at the start before your strategy is revealed. Started early, you can position yourself to maximize your options, resources and negotiating position.

This same philosophy applies to deal making negotiations. Often, the participants and / or their attorneys in a deal think:

"I can do this myself."

"I don't need any outside help."

"I don't want any outside influence."

"I want to retain control."

"I've negotiated many deals and don't need a mediator or settlement counsel."

In many instances, these statements and beliefs are accurate…*If* your opposing party in the deal negotiation has an alignment of interest with yours,…*If* he / she has either compatible or not incompatible negotiating styles,…*If* they have an equal self-interest in closing a deal,…*If* you have the correct advanced intelligence to know what's going on in the other's camp,...*If* you have the correct pressure points in the other's armor.

But what if these statements aren't true? What if strong personalities get in the way? What if you hit a snag and one party wants to appear strong by walking out? What if your approach wasn't target specific and it missed the mark? What if you don't have the correct intelligence or are working under incorrect assumptions? Would you lose the deal simply because there wasn't a third party there *driving* the negotiation? When called upon to enter a deal where negotiations have failed, I find that both parties will either be perplexed as to why it fell apart or hypothesize and come up with the wrong reasons. Since your insight into the other camp is necessarily limited, do you know what you don't know? Ahhh, the Zen approach to deal making. It doesn't work to fix the wrong problem. As a third party with no skin in the game, a smart business deal mediator can find the actual real or psychological reasons and then come up with a fix for the right problem to drive the process forward.

If you don't diagnose the correct problem, you can't design a workable solution. In negotiation, parties are not fully forthcoming with each other so you may never know the real reason a deal works, falls apart, or becomes sluggish. Using a deal mediator, you gain insight into the tent of the other side that helps you avoid these pitfalls.

Interestingly, you can be harder and tougher in your own negotiating stance if you also don't have to play conciliator or peacemaker and leave that job to an independent third party. Each party can concentrate on trying to achieve his or her own negotiation objectives without worrying that it will disrupt or destroy the negotiations because he or she can safely rely on the deal mediator to keep the game going.

If you have a deal mediator whose job and self-interest it is to keep the negotiations going, you can employ time-honored and excellent negotiation techniques such as good cop-bad cop, referrals to an outside approval mechanism, the walk-away, the "Columbo" approach, among others. You actually achieve greater control because you know you have a deal mediator there keeping the train on track for deal culmination.

As a mediator for almost 25 years, and having conducted thousands of negotiations with tens of thousands of parties, I believe one thing emphatically: there is never only one "right," and never only one "wrong," there are only perspectives, personalities, and positions.[3] Take the exact same facts and change the human beings around the table, and you have an entirely different game. The proof for this supposition is to attend any negotiation simulation and have the same problem given to multiple groups of people and see all the different results that are achieved by the different negotiating teams.[4]

Furthermore, you never know what is going on inside the deep dark recesses of the "other" camp. There might be an IPO brewing, someone might be about to lose his job, be up for a promotion, have bad loss-to-gain ratios, have the imminent announcement of a new product or service, or the denial of a crucial governmental approval. All of which has nothing to do with the negotiation at hand factually, but may dramatically influence a desire or non-desire to culminate a negotiation. By using a *deal mediator,* someone with extensive mediation experience as well as sophisticated business acumen, you can avoid the trap of falling into the unknown of having no information or false information influencing your negotiating posture.

The trick is in hiring the right person. It can't just be any old mediator or former judge. It has to be somebody with sophisticated people skills, well-developed mediation and negotiation skills, sharp business acumen and a persistent personality. There are often unofficial outsiders in deals, i.e., brokers, consultants, investment advisers, etc. However, these folks don't have mediation skills, are tainted by perceived allegiance to one party and have their own self-interest that may make them impaired as deal makers.

Bringing in specific deal mediation talent at the onset of negotiations, before things haven gotten off track, ensures that the negotiations will stay *on track* so that the chances of a deal culminating dramatically increase. Furthermore, if an ongoing relationship is necessary between the principals after the deal closes, this ensures that there are no bruised egos or damaged personal relationships that have to be weathered post-closing.

Bringing all the resources you have to bolster your negotiating position should be a priority. If you can gain agreement from the other party to hire a deal mediator, the chances for success are improved. If the other party will not agree, still hire a deal mediator to work with your team as settlement counsel. Her / his skills will be invaluable. There have been times when I've been hired by one party as settlement counsel, but I still speak and act like a mediator, i.e., my tone and approach remain the same. Opposing parties divulge more than they otherwise would and want to treat me as a confidant simply because I speak like a mediator. This has been a valuable asset to the team working toward a successful culmination.

The deal mediation process is as creative as the parties will allow. We can use confidentiality as a tool or strategically employ open book discussions. It depends on the level of trust, the stakes, the ongoing nature of any relationship. The more involved the parties will be with each other after the deal is forged, the more important it is that frank and authentic conversations take place during the negotiating process. If the parties have to co-exist with each other it does no good to have the deal fall apart later during implementation. The deal mediator must have a keen awareness and sensitivity to this issue to properly shepherd a workable deal.

In short, using a deal mediator improves your negotiating position, improves your chances for a successful deal signing, and improves post-deal relations between the parties. Wise negotiators strategically use such talent in their transactions.

Endnotes

1. See Remarks by the Chairman of the Federal Reserve Board, Alan Greenspan, on corporate governance at the Stern School of Business, New York University, New York, New York, March 26, 2002, http://www.federalreserve.gov/BoardDocs/Speeches/2002/200203262/default.htm, also, Robert Reich's Blog, who was the 22nd Secretary of Labor for the U.S., entry dated February 1, 2007, "Bush on CEO Pay, and the Truth about CEO Pay," http://robertreich.blogspot.com/2007/02/bush-on-ceo-pay-and-truth-about-ceo-pay.html.
2. *Strategies for Chess Players and Other Warriors*, by Brian Roche, an *About Chess* guest article, June 2007.
3. For more articles on this topic, see www.abramsmediation.com.
4. Richard J. Klimoski, *The Journal of Conflict Resolution*, Vol. 22, No. 1 (Mar. 1978).

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Dispute Boards: An Effective Tool for Dispute Reduction and Prevention

By Nancy M. Thevenin

I. Introduction

While much has been written about techniques and strategies for resolving disputes, more needs to be said about techniques and strategies for preventing them. One such tool is a system that the construction industry has been using for decades—dispute boards (DBs or "Board").

Comprising one or three members thoroughly acquainted with the contract and its performance, DBs are normally set up at the outset of a contract, and remain in place throughout the life of the contractual relationship to assist the parties in resolving disagreements arising in the course of the contract's performance.

This article will explain the purpose and function of DBs, provide examples of where DBs have been used and explore the potential for their expansion into the mainstream of international dispute resolution.

"On average Dispute Boards settled disputes within 90 to 180 days at a cost of 2% of the contract value."

II. What Are Dispute Boards?

DBs are a dispute prevention tool that employs a two-tier system. That is, they are established to help the parties quickly and efficiently resolve disagreements between them. If the matter is not resolved through the DB process, the parties are free to have their matter finally settled by litigation or arbitration.

First used in the 1970s, DBs became increasingly popular in large international construction and engineering contracts. In 1995, the World Bank required DBs for all projects it financed through the International Bank for Reconstruction and Development; the European Bank for Reconstruction and Development as well as the Asian Development Bank followed suit in 1995. In 2004, a joint seminar of the International Chamber of Commerce ("ICC") and International Federation of Consulting Engineers ("FIDIC"), found that on average DBs settled disputes within 90 to 180 days at a cost of 2% of the contract value, while arbitrations lasted anywhere from 1½ to 5 years and cost more than 5% of the contract value.[1] Thus, DBs also began to be seen as a cost-effective alternative to litigation and arbitration.

A standard for international construction contracts, DBs are also beneficial in other types of commercial contracts. The ICC's Dispute Board Rules (the "ICC DB Rules") were drafted to be used in any mid- to long-term contract. While a one-time sales agreement, for example, would not require such a standing dispute resolution mechanism, a bank that outsourced its IT service requirements to a specialized service provider might benefit from the establishment of a DB comprised of members knowledgeable in the functioning and implementation of IT service agreements.[2] Other examples include outsourcing deals, technology development contracts, power purchase agreements and other long-term operating agreements.

III. Types of Dispute Boards

The primary difference between the DBs described below lies in the nature of the determinations they issue.

A. Dispute Review Boards (DRBs)

DRBs issue recommendations that become binding if neither party issues a notice of dissatisfaction with the recommendation within a specified time limit; otherwise, the parties are bound to implement the terms of the recommendation, and waive any right to subsequently object or re-submit that particular dispute to an arbitral tribunal or court. If one of the parties issues a notice of dissatisfaction with the recommendation, that party may seek to have the dispute resolved by arbitration or through the courts. In practice, however, many parties use the recommendation as a starting point for negotiations leading to settlement of their dispute.

This type of DB is generally recognized as the "American approach." DRBs were first successfully used in the U.S. during the construction of the second bore of the Eisenhower Tunnel in I-70 in Colorado, and today they have expanded to vertical and above-ground civil construction projects throughout the U.S.

B. Dispute Adjudication Boards (DABs)

DABs issue decisions with which the parties are contractually obligated to comply as soon as possible after receipt. The decisions are enforceable as a term of the contract. A party may express dissatisfaction with a decision and is entitled to commence arbitration or court proceedings to finally resolve the dispute; however, it is obligated to honor the decision until such time as it receives an arbitral award or judgment that dictates otherwise.[3]

This type of DB is known as the "United Kingdom" or "Rest of the World" approach. FIDIC and the World Bank both include DABs in their form contracts.[4] The United

Kingdom adopted a statutory scheme involving DBs with its Housing Grants, Construction and Regeneration Act of 1996.[5] German construction companies are recommending that Germany implement a similar statutory system.[6] Additionally, the German Institution of Arbitration (DIS) is proposing a final draft of new DB rules by the end of this year.[7]

C. Combined Dispute Boards (CDBs)

The ICC DB Rules contain provisions for both types of traditional DBs and also created a third type, which it calls CDBs. A CDB is a hybrid form in which the default is a non-binding DRB decision structure, but "if any Party requests a [binding] Decision with respect to a given Dispute and no other Party objects thereto, the CDB shall issue a Decision."[8] Thus, CDBs can issue both recommendations and decisions. If the other party does object, then the CDB has the discretion to decide whether to issue a decision or a recommendation.

As an example, if buyer and seller have a CDB, and buyer threatens to call the seller's million dollar bond, then the seller might very well want the CDB to issue a decision. In effect, CDBs power to render decisions becomes akin to conservatory measures within the context of dispute boards.[9]

IV. How DBs Operate

A DB is a standing panel, which is most effective when selected by the parties at the beginning of the contractual relationship as opposed to when a disagreement arises. Usually, the parties constitute the three member boards collaboratively. Most DB rules provide that each party chooses a Board member and the chosen two members in turn select the third Board member. The overarching goal of DBs is to be ready and available to review any disagreements on an accelerated basis. Thus, DBs may request the parties to provide progress reports and may establish a schedule for meetings and, if appropriate, site visits.

In the construction industry, DBs are made up of engineers and architects as well as lawyers. This is because of the view that a Board that bridges different specializations can facilitate understanding of the broad variety of disputes that may arise. In essence, the Board should be made up of individuals with knowledge and experience in the subject-matter of the contract. Members of the Board receive a monthly retainer fee to monitor the contract's performance, and daily fees for meetings, hearings, research and drafting.

All DB rules require that every member of the Board be and remain independent of the parties. In fact, many rules, such as the ICC DB Rules, require DB members to disclose "any facts or circumstances which might be of such a nature to call into question the DB Member's independence in the eyes of the Parties."[10] This duty to disclose continues throughout the process.

Proceedings before the Board fall into two categories: informal or formal. As the relationship progresses, the DB members receive updates regularly, may conduct site inspections and can solve problems informally on-site as they arise. The Board can provide assistance with disagreements at the request of a party or on its own initiative. This assistance can include, for instance, a conversation with both parties, separate meetings and informal views given by the Board to the parties. Often having a DB on hand can actually prevent disagreements from occurring. When a serious dispute does arise, if the parties cannot resolve it themselves, either party may submit the issue to the DB for a recommendation or a decision.

A formal proceeding before the Board commences with the filing of a written Statement of Case setting out the nature of the dispute, a list of issues to be determined, and any supporting documents or correspondence. The formal proceedings are intended to be reasonably fast. The responding party usually has a number of days after receipt of the Statement of Case to submit a written response. Although they may be assisted by lawyers, the parties usually appear in person or through their representatives in charge of the contract. However, the hearing can go forward with or without input from a non-responding party. While most DB rules contain default provisions for the hearing procedure, the Board has a large degree of flexibility in running the hearing.

Most DB rules provide that board "determinations" (meaning both recommendations and decisions) are admissible in subsequent proceedings unless otherwise agreed by the parties.

V. Real World Application

Where DBs have been used, they have met with success. The Dispute Resolution Board Foundation ("DRBF") keeps statistics on DB use. It found that in the U.S., as of the end of 2005, over 1,200 projects had used a DB of some sort. Of those, 58% of the projects had never submitted a dispute to the DB and 98.7% of disputes that were submitted to a DB were resolved with no subsequent litigation or arbitration.[11] This empirical data indicates that DBs are "by far the single most effective approach that has yet been developed for the early resolution of disputes."[12]

DBs have been used successfully on many large-scale and well-known international construction projects to date, including the Boston Central Artery Project (popularly known as the "Big Dig"), the Hong Kong International Airport, the Channel Tunnel Project and the Ertan Project in Sichuan, China (a hydroelectric power plant).[13]

VI. Conclusion

The speedy nature of dispute resolution, the ability to continue a project despite a dispute and the opportunity to have experts as decision makers have all been recognized as advantages of a DB system.[14] Yet, there are

other advantages to DBs, which have perhaps gone unrecognized. Alternate dispute resolution models such as mediation have become popular in the United States, but "ha[ve] had difficulty in becoming known and appreciated elsewhere."[15] This does not seem to be the case with DBs. Thus, one major advantage of DBs, which has perhaps yet to be realized, is their cross-cultural appeal. As arbitration becomes more like litigation, DBs will likely expand beyond their traditional role in construction contracts as an alternative rapid, real-time dispute resolution process in mid- to long-term contractual relationships.

"DBs will likely expand…as an alternative rapid, real-time dispute resolution process in mid- to long-term contractual relationships."

Endnotes

1. *See, e.g.*, Christopher Koch, *ICC's New Dispute Board Rules*, 15(2) ICC BULL. 10, 11 (2004).
2. *See id.* at 13.
3. *See, e.g.*, FIDIC Red Book Clause 20.4 ("[t]he decision shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award….") and World Bank's SDBW Form, sub-clause 67.1 ("[t]he recommendation of the Board shall be binding on both parties, who shall promptly give effect to it unless and until the same shall be revised, as hereinafter provided, in an arbitral award.").
4. *See, e.g.*, FIDIC Red Book Clause 20.4 ("If a dispute (of any kind whatsoever) arises between the Parties in connection with or arising out of, the Contract, or the execution of the Works… either party shall refer the dispute in writing to the Dispute Adjudication Board for its decision.").
5. Adjudication as used in the U.K. is a statutory system using one person (the adjudicator) who quickly makes decisions on issues of entitlement or liability in construction disputes. The adjudicator's decision is binding on the parties unless overturned by agreement, litigation or arbitration. *See, e.g.*, Michael Evan Jaffe and Ronan J. McHugh, *U.S. Project Disputes: Has the Time to Consider Adjudication Finally Arrived ?*, 62(2) DISP. RESOL. J. 50, (2007); *see also* Markus P. Fellner & Patrizia Netal, *Alternative Dispute Resolution—Is Austria Fit for Adjudication?*, *in* AUSTRIAN ARBITRATION YEARBOOK 247, 248 (Christian Klausegger & Peter Klein eds., 2010).
6. *Id.* at 250.
7. *Id.* at 252.
8. ICC DB Rules, Article 6(2), available at http://www.iccwbo.org/uploadedFiles/Court/DRS/dispute_boards/db_rules_2004.pdf.
9. Koch, *supra* at 17.
10. ICC DB Rules, Article 8(2).
11. James P. Groton, *The Standing Neutral: A 'Real Time' Resolution Procedure That Can Also Prevent Disputes*, 27 ALTHCL 177 (2009), *citing* The DRBF Database at http://www.drb.org/manual/Database_2005.xls.
12. *Id.*
13. JANE JENKINS & JAMES STEBBINGS, INTERNATIONAL CONSTRUCTION ARBITRATION LAW 65 (2006).
14. *Id.* at 67.
15. Mauro Rubino-Sammartano, *The View from Abroad on a Parade of Choices: Alternative Processes to the 'Traditional' Alternative, Arbitration*, 27 ALTHCL 83 (2009).

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Settlement Counsel: Answers to the FAQs

By James E. McGuire

Strategic use of settlement counsel can be an effective part of a company's conflict management strategy. The business of business is not litigation. Proper management of inevitable conflicts and effective use of techniques for efficient resolution of disputes that arise if they are not managed properly are critical risk management challenges of the 21st Century. This article addresses Frequently Asked Questions about the role of settlement counsel. The focus is on practical points that arise when using settlement counsel in a business context.

What Is Settlement Counsel?

Settlement counsel is an attorney engaged for the express and limited purpose of assisting a client to resolve a current dispute. Settlement counsel is not a member of the litigation team. Settlement counsel may be from the same or different law firm. Settlement counsel is a specialist who has developed skills and techniques in negotiation and mediation advocacy. Settlement counsel is conversant with all dispute resolution processes, the theory and practice of interest-based negotiations, effective mediation advocacy, risk analysis, and current developments in social psychology and other related disciplines. There is a lot of learning available about risk analysis, psychological barriers to good decision making, and management of conflict. Settlement counsel is expected to be an expert on these and advanced and effective negotiation and settlement techniques, usually not taught in law schools.

Why Settlement Counsel and Trial Counsel?

"Hire two teams to handle your business dispute and save money!" In response to a presentation on settlement counsel to students in his mediation course, Professor Frank Sander of Harvard Law School once quipped, "Only a lawyer could say that with a straight face." Nevertheless, experience over the last twenty-five years has demonstrated that true savings are available when settlement counsel is engaged early in the process, especially in complex cases. In simple cases, where the law is settled, where the facts are not in dispute and where the discovery and other transactional costs are predictable and proportionate to the dispute, one lawyer may effectively serve in both roles: an effective proponent for settlement and a skilled advocate if settlement is not available. As matters become more complex or more important to the parties, it may be most effective to have two different individuals (or different teams) focusing on each of the alternatives: settle or sue.

It is critical to recognize that the roles of trial lawyer and settlement counsel are fundamentally different. This difference starts with the initial framing question. The trial lawyer asks, "What happened?" The focus of fact-gathering is on the past. Settlement counsel asks, "What do you want to have happen?" The focus of settlement is on the future. Since two different questions are being asked, the information needed to answer those questions is also fundamentally different. Trial advocacy is the not the same skill as mediation advocacy. The skills needed to be the best trial lawyer are fundamentally different from the skills needed to be the best settlement counsel. Both are focused on achieving the best possible result for the client, using the tools they know best, and employing processes that are fundamentally different.

"Settlement counsel is…engaged for the express and limited purpose of assisting a client to resolve a current dispute."

Who Hires Settlement Counsel?

In my experience, settlement counsel has been hired by general counsel, in-house litigation counsel, risk managers, law firm corporate counsel, and sometimes trial counsel. General counsel usually has the ultimate responsibility to evaluate whether to settle or litigate a dispute. Smaller companies may rely on outside corporate counsel to assume these responsibilities. The individual responsible for monitoring costs and performing a cost / benefit analysis is usually the key decision-maker for engaging settlement counsel. Some corporations have made the role of settlement counsel an integral part of risk management. Other corporations have required that all law firms on a preferred provider list have both litigation and settlement counsel expertise so that on any given case the firm could be retained in either capacity.

From 1990 to 2004, when I worked as settlement counsel both with litigators in my firm and with other firms, I had engagements as settlement counsel every year. In the 1990s, certain major corporations embraced the use of settlement counsel to handle all product liability / personal injury cases with dramatic success. It has been applied in a wide range of cases including insurance coverage for environmental claims, intellectual property, closely held corporations, financial services, major commercial cases, and for States in the tobacco litigation. Since 2004 when I ended practicing law and became a full-time neutral, I have lectured and coached on the topic and have observed the increasing use of settlement counsel in all areas.

The legal market has responded to the increase in demand from corporate clients for alternatives to traditional litigation approaches. Some sophisticated law firms have developed settlement counsel expertise and will use that capability as part of the law firm's marketing and business development strategy. Google "settlement counsel" and you will see how pervasive the marketing and use of settlement counsel expertise has become.

When Should Settlement Counsel Be Engaged?

Now. Settlement counsel has the most impact if engaged early. The litigation process rarely induces goodwill between the parties. As positions harden and resources are spent on litigation, opportunities for creative, constructive settlement proposals are squandered. The true value of settlement counsel should be measured, in part, by how quickly the matter is resolved. Early engagement makes early resolution more likely.

The vast majority of civil disputes settle before trial. In the federal system, fewer than two percent (2%) of all filed cases will end with a verdict after trial. The statistics for state courts are not significantly different. It is both common knowledge and common sense that the longer a case remains in the litigation process, the more it costs both sides in legal fees, disbursements, and lost executive time. Equally true, but perhaps less well known, is the fact that about three out of four cases in mediation settle. This statistic holds true, ***regardless*** of when the case enters the mediation process, in those cases where the parties enter the process voluntarily and use a trained mediator. The potential for true cost savings by stopping the litigation process is greatest at the earlier stages of a dispute. In the 21st century, this simple truth becomes urgent when parties are faced with the enormous costs of electronic discovery. Perhaps more than any other single factor, the high cost of electronic review and production has prompted many to look to alternatives to the traditional litigation process. The information needs of the parties when focusing on settlement are fundamentally different from the litigation discovery process.

Even with respect to electronic discovery, obtaining relevant emails and electronic documents that are truly important for the settlement dialogue can be done easily and efficiently because the parties can focus narrowly on material needed for effective settlement discussions. When all material will be produced and stamped, "For settlement purposes only," parties share more freely. Some information can be accepted in summary form. Settlement counsel or a mediator can limit the scope and quantity of requested information by posing this question: "How does that information aid your client in settlement discussions?"

All of these factors combine to suggest strongly that the time to engage separate settlement counsel is at the earliest possible stage, sometimes even before formal filing of a civil action.

Who Is in Charge?

This answer to this question is simple: the client is in charge and remains in charge throughout the settlement or litigation process. Settlement targets are usually part of the engagement process. This is particularly important if the fee is in any way contingent on the result achieved. Where the engagement is based on fixed monthly retainer or hourly rates, the discussion of goals and objectives can be more flexible. It is still important, however, to establish goals and objectives. Without those, the process may resemble retreating goal posts: the better the settlement offer, the more the client wants. But the client must retain flexibility to accept or reject any settlement proposal based on the client's determination of what is in the best interests of the company.

Where no settlement targets were established at the time of engagement of settlement counsel, the process of setting the negotiation parameters is a team effort. In this process, settlement counsel performs this risk analysis, but litigation counsel provides the inputs. Establishing negotiating parameters requires consideration of trial as alternative to settlement. The litigator says, "Strong case." Using risk analysis / decision tree tools, settlement counsel helps quantify for the client what that really means. Even when an initial settlement target had been established, changing facts and circumstance may require that the client re-evaluate. This is a collaborative process.

How Do We Coordinate Work Effort Between the Teams?

Successful relations between trial counsel and settlement counsel require clear demarcation of roles and good channels of communications. Simply put, "litigators litigate; settlement counsel settles." In a three-way meeting or conference call with the client, basic ground rules can be established. The essential rule is that litigation or trial counsel must refer any settlement communication to settlement counsel. Settlement counsel must have direct access to the decision-maker with authority to settle the suit. The settlement process should be directed with one voice—that is the role of settlement counsel.

Clear instructions must also be given to settlement counsel. Settlement counsel must defer and refer to litigation counsel any question or communication dealing with the litigation process. The other side may state: "We will only talk settlement if there is a stay of litigation." That is a question for the client and the litigation team and settlement counsel should refer the question to them. The litigation and trial effort should be directed by one voice—that is the role of trial counsel.

The flow of information is usually in one direction only. Settlement counsel should learn directly from litigation counsel the relevant facts and the litigator's views on the strengths and weaknesses of various claims and defenses. Information about the settlement process and information exchanged as part of that process is usually confidential. Confidentiality is the hallmark of mediation. When settlement counsel is mediation counsel, it is easier to keep the pledge that information exchanged will be used for settlement purposes only if there is a prior understanding that settlement counsel need not or shall not disclose confidential settlement information with litigation counsel.

How is Settlement Counsel Paid?

There are many different models available to consider in discussing an appropriate fee arrangement for settlement counsel. Any good fee arrangement will align the interests of the client and settlement counsel. The hourly rate model is available and may be preferred by some clients. If the engagement is for a fixed time or if there is fee cap, clients retain control of costs.

Pioneers in the settlement counsel arena developed different approaches when there was initial skepticism about settlement counsel and whether it would yield true cost savings. Some clients were offered a dramatic fee proposal: "Double or nothing." "Engage me as settlement counsel for a period of 90 days. We will agree on the settlement value of the case. I will keep track of my time. If we reach a settlement satisfactory to you, you agree to pay double my hourly rate. If no settlement is reached, you pay nothing and the settlement engagement will terminate."

Closer alignment of interests may be achieved by an engagement for a fixed monthly fee for a fixed period. Since a successful settlement will predictably lead to good referrals and future business, settlement counsel has significant incentives to work diligently toward a mutually satisfactory settlement.

It may make sense to provide a premium to be earned if the settlement achieved is more favorable than the settlement target. In some cases, a premium may also be earned if settlements occur earlier in the retention period. The retention period is determined by settlement counsel and client. Providing for a premium may permit a lower fixed monthly fee since the success factor will compensate for any difference between the monthly fee and the time value of settlement counsel's work at hourly rates. This approach rewards both the client and settlement counsel for settlements at better than the settlement target. In a complex multi-party matter, variations can be used to tailor the fee arrangement to the particular challenges of that engagement.

"The use of settlement counsel has been increasingly well-received as businesses have focused on effective conflict management."

Usually, it is best to have a termination date for the engagement as settlement counsel. If ultimate settlement is inevitable, there may be little value added to the late achievement of settlement. Moreover, if credibly informed that there is a 90-day window for settlement discussion with settlement counsel and that an effective settlement must meet the needs of both parties, the other side is often motivated to sincerely explore settlement within that time frame. However, in some cases, right before trial is precisely when settlement counsel is most critically needed, so that trial counsel can focus on preparing for the true alternative to settlement, trial.

Conclusion

The use of settlement counsel has been increasingly well-received as businesses have focused on effective conflict management. Settlement counsel is a proven resource to help meet business' best practice of providing prompt and fair resolution of those disputes that arise when conflicts degenerate.

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Collaborative Law and the Uniform Collaborative Law Act

By Andrew Schepard

Groups of divorce lawyers have developed collaborative law—a new ADR process with many of the same peacemaking benefits for divorcing families as mediation. While efforts are under way to expand collaborative law into other areas and it is beginning to be utilized productively more broadly, it has its deepest roots in divorce and family law. Thousands of lawyers have been trained in collaborative law, and many parents have participated in it. Initial empirical evaluations of collaborative law indicate high levels of client satisfaction.[1] Many experienced divorce lawyers report that collaborative law increases their satisfaction with their practice because of the constructive role they play in helping clients reorganize their families—especially their relationships with their children—after divorce and separation.

"The UCLA is a milestone in the development of collaborative law, as it is a uniform statutory framework for its operation."

This article briefly describes what collaborative law is. It then focuses on the Uniform Collaborative Law Act (UCLA) developed by the Uniform Law Commission (ULC) (formerly the National Conference of Commissioners on Uniform State Laws). The UCLA is a milestone in the development of collaborative law, as it is a uniform statutory framework for its operation. Readers interested in more detail, including citations, about collaborative law and the UCLA can consult the Act (which has an extensive Preface and Commentary) and can be found at the website of the ULC.[2]

A Brief Introduction to Collaborative Law

The goal of collaborative law is to encourage parties to engage in "problem-solving" rather than "positional" negotiations. As described by Roger Fisher, William Ury and Bruce Patton in their famous book, *Getting to Yes*,[3] problem-solving negotiators focus on finding creative solutions to conflict that maximize benefits for all sides, while positional negotiators focus on arguing for and against positions to "win" concessions. Collaborative lawyers emphasize that no threats of litigation should be made during a collaborative law process and the need to maintain respectful dialogue. Parties disclose information voluntarily, without formal discovery requests. They voluntarily assume an obligation to correct information they supplied when it materially changes. Parties also have the option to participate extensively in the planning for and conduct of negotiation sessions with their collaborative lawyers. Many models of collaborative law engage mental health and financial professionals in advisory and neutral roles—e.g. divorce coach, appraiser, and child's representative. Collaborative law negotiations are confidential.

Collaborative law is thus like mediation in that it emphasizes problem solving, interest-based negotiation. It differs from mediation in that the parties are represented by lawyers and no neutral facilitates negotiations. Collaborative law is like arbitration in that the parties are represented by lawyers. It differs, however, from arbitration in that the parties in collaborative law seek to negotiate a voluntary settlement, and no third-party neutral is empowered to impose an outcome on them.

Lawyers have, of course, long engaged in problem-solving negotiations without formally labeling the process collaborative law. Lincoln's famous advice to young lawyers in 1848 captures the longstanding tradition of lawyer collaboration:

> 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, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough.[4]

The distinctively modern enhancement collaborative law makes to the tradition of lawyer professionalism and collaboration articulated by Lincoln is, however, its enforcement mechanism to ensure that problem-solving negotiations actually occur. Parties sign a written agreement ("collaborative law participation agreement") which states that a collaborative lawyer represents a party only for the purpose of negotiations and will not represent the party in court. The parties also agree that their lawyers are disqualified from further representing parties if the collaborative law process ends without agreement ("disqualification requirement"). Finally, parties agree they mutually have the right to terminate collaborative law at any time without giving a reason.

A collaborative law participation agreement is thus a strong and enforceable mutual commitment for problem-solving negotiations. It addresses the age-old dilemma for negotiators of deciding whether to cooperate or compete in a situation where each side does not know the other's intentions and "where the pursuit of self interest by each leads to a poor outcome for all"—the famous "prisoner's dilemma" of game theory.[5] In collaborative law "[e]ach

side knows *at the start* that the other has similarly tied its own hands by making litigation expensive. By hiring two Collaborative Law practitioners, the parties send a powerful signal to each other that they truly intend to work together to resolve their differences amicably through settlement."[6]

Collaborative law has thus far largely been practiced by lawyers in groups which draft their own model participation agreements, set their own membership qualifications and can include mental health and financial professionals. Collaborative practitioners have established their own professional association, the International Academy of Collaborative Professionals (IACP), and have worked diligently to articulate their own code of ethics within the broad framework created by the rules of professional responsibility.

There are risks for parties who choose collaborative law—especially of incurring the economic and emotional cost of employing a new lawyer. But there are also benefits for them and their children. "[I]t would be a mistake to focus solely on the risk that [collaborative law] poses for clients. Other things being equal, spouses who choose court-based divorce presumably run the greater risk of harming themselves and their children in bitter litigation or rancorous negotiations. [Collaborative law] clients presumably bind themselves by a mutual commitment to good faith negotiations in hopes of reducing the risk that they will cause such harm, just as Ulysses had his crew tie him to the mast so he would not succumb to the Sirens' call and have his ship founder."[7]

The organized bar has recognized that representation of a client in collaborative law is consistent with the Model Rules of Professional Conduct. Numerous bar association ethics committees (including the American Bar Association's) have validated collaborative law as a permissible limited purpose and scope ("unbundled") representation.[8] They have emphasized that parties can decide for themselves whether the benefits of collaborative law outweigh the risks if they do so with informed consent.

The Uniform Law Commission and the Uniform Collaborative Law Act

The ULC has worked for uniformity of state laws since 1892. It consists of over 300 lawyer commissioners from every state. It has drafted more that 200 uniform laws on numerous subjects where uniformity is desirable and practicable. The signature product of the ULC, the Uniform Commercial Code, is a prime example of how its work has simplified the legal life of businesses and individuals by providing rules and procedures that are consistent from state to state. The ULC has taken the same approach to alternative dispute resolution and family law developing, for example, the Uniform Mediation Act, the Uniform Arbitration Act and the Uniform Child Custody Jurisdiction and Enforcement Act.

The process of drafting a uniform act is transparent, and enlists expertise and key stakeholders. The ULC decides on a project, establishes a drafting committee of Commissioners, and designates a Reporter (usually a law professor), who produces multiple drafts for review in open meetings. Drafts are posted on the ULC website and observers from interested groups participate extensively in the drafting committee deliberations. Drafts are also reviewed by the ULC Style Committee for style and consistency. The entire ULC reviews a draft act line by line in two consecutive years. If approved, the act is then transmitted to the states for adoption and the ABA House of Delegates for approval

The reasons that the ULC decided to undertake the drafting of the UCLA are similar to the reasons it undertakes any project—to promote the development of uniform law in an important and emerging area. A number of states have enacted statutes of varying length and complexity which recognize collaborative law,[9] and a number of courts have taken similar action through the enactment of court rules.[10] Participation agreements are crossing state lines as use of the collaborative process increases. As the use of collaborative law grows, the UCLA will provide consistency from state to state regarding enforceability of collaborative law agreements, confidentiality of communications in the process, a stay of court proceedings and the privilege against disclosure should the process not result in settlement.

Drafting the Uniform Collaborative Law Act took three years. The Drafting Committee included several Commissioners from the Committee that drafted the Uniform Mediation Act and collaborative lawyers. The Committee was advised by representatives of various ABA Sections and the ABA Commission on Domestic Violence. Many collaborative lawyers from around the country served as observers of the drafting process and contributed their expertise to the final product.

The Provisions of the Uniform Collaborative Law Act

The UCLA:

- Makes participation agreements enforceable if they meet basic requirements (e.g., are in writing and designate collaborative lawyers) (section 4);
- Creates an evidentiary privilege for communications made during the collaborative law process, similar to mediation privilege (section 17, 18 and 19);
- Codifies the disqualification requirement (section 9);

- Creates an exception to the disqualification requirement for emergency recourse to court (Section 7);
- Limits the scope of the disqualification requirement for low-income and government clients (Sections 10-11);
- Requires voluntary disclosure of information during a collaborative law process (Section12);
- Requires collaborative lawyers to secure informed consent before parties enter into a collaborative law participation agreement including comparing collaborative law to other dispute resolution options such as mediation and arbitration (Section 14);
- Requires collaborative lawyers to screen for domestic violence and coercive behavior (Section 15);
- States clearly that collaborative law representation does not change legal ethics (Section 13).

"The lawyers who practice [collaborative law] feel greater satisfaction in the profession they have chosen by helping their clients resolve their disputes productively and expeditiously."

The UCLA and the American Bar Association House of Delegates

The ULC approved the UCLA for transmission to the States in July, 2009. As of June 30, 2010 Utah has enacted it,[11] and it is under active consideration in a number of other states including Ohio,[12] Oklahoma,[13] Tennessee,[14] and the District of Columbia.[15]

The ULC presented the UCLA to the ABA House of Delegates for consideration in February 2010. After extensive comments and discussion, the ULC decided to withdraw the UCLA from House of Delegates consideration to address concerns that had been raised without compromising the Act. The ULC anticipates that the amended UCLA will be submitted for consideration to the ABA House of Delegates at its mid-year meeting in January 2011.

Subsequent to the ABA House of Delegates meeting, the Drafting Committee proposed two amendments to the UCLA which were adopted by the ULC at its summer meeting in July 2010.[16] The first gives states an option of enacting the provisions of the UCLA by court rule rather than by legislation. This amendment is responsive to ABA concerns that the UCLA could be interpreted as regulation of lawyers rather than regulation of a dispute resolution process. In general terms, the ABA favors preserving the independence of the bar by locating its regulation in the judiciary rather than the legislature. Indeed, in some states, regulation of the practice of law is a power reserved to the judiciary.[17] Adoption of the UCLA by court rule would be an appropriate option for those states.

The second amendment to the UCLA creates another option for enacting states—to limit the scope of collaborative matters to divorce and family law matters. A number of comments at the ABA Meeting suggested that the UCLA would be more easily approved by the House of Delegates if the collaborative law process were limited to family and divorce disputes where it has gained the most acceptance and recognition. While suitable for other areas as well, collaborative law is ideally suited for divorce and family law as the parties to such disputes inevitably have continuing relationships. As stated in a leading ADR text:[18]

> Ordinarily, when people fall into disagreement, they have the option to separate. If a couple has children, they usually cannot completely dissociate even when they divorce, however. Instead, ex-spouses remain connected in their roles as parents, often for many years. Divorced parents must find ways to share their children's physical presence, financial responsibility, teaching, socializing, and a variety of other tasks.

Some states may, however, decide not to create subject matter limitations on matters parties and their counsel decide to submit to the collaborative law process, relying on their good judgment to decide when it would be appropriate and when it isn't.

A Vision of the Lawyer's Role

Not all lawyers can or will practice collaborative law. Some are more suited to the courtroom while others are more suited to the conference room. Nonetheless, collaborative law benefits the entire legal profession by providing clients with another valuable option for dispute resolution. The lawyers who practice it feel greater satisfaction in the profession they have chosen by helping their clients resolve their disputes productively and expeditiously.[19] Lawyers who do not practice collaborative law nonetheless benefit because the public has another option for responsible dispute resolution, thus creating greater public confidence in the legal system. The UCLA will provide statutory support for this evolving dispute resolution process and help our profession fulfill Lincoln's inspirational vision of the lawyer "[a]s a peacemaker."

Endnotes

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9. *See* CAL. FAM. CODE § 2013 (2007); N.C. GEN. STAT. §§ 50-70 to 79 (2006); TEX. FAM. CODE §§ 6.603, 153.0072 (2006).
10. *See* MINN. R. GEN. PRAC. 111.05 & 304.05 (2008); SUPER. CT. CONTRA COSTA COUNTY, LOCAL RULES, RULE 12.8, (2007); L.A. COUNTY SUPERIOR COURT RULE 14.26 (2005); LRSF 11.17 (2009); SONOMA COUNTY LOCAL RULE 9.25 (2005); UTAH CODE OF JUDICIAL ADMINISTRATION, RULE 4-510 (2006); LA. CODE R. tit. IV, § 3 (2005).
11. State of Utah, H.B. 284 Substitute Uniform Collaborative Law Act *available at* http://le.utah.gov/~2010/htmdoc/hbillhtm/hb0284s01.htm (last visited May 25, 2010).
12. State of Ohio, H. B. No. 467 *available at* http://www.legislature.state.oh.us/bills.cfm?ID=128_HB_467 (last visited May 25, 2010).
13. State of Oklahoma, HB3102 *available at* http://webserver1.lsb.state.ok.us/CF/2009-10%20SUPPORT%20DOCUMENTS/BILLSUM/House/HB3102%20INT%20BILLSUM.doc (last visited May 25, 2010).
14. Tennessee General Assembly SB 3531 *available at* http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB3531 (last visited May 25, 2010).
15. Bill 18-829 *available at* http://www.dccouncil.washington.dc.us/lims/searchbylegislation.aspx (last visited June 15, 2010).
16. Draft of Proposed Amendments to Uniform Collaborative Law Act, April 2010 *available at* http://www.law.upenn.edu/bll/archives/ulc/ucla/2010april_amends.htm (last visited May 24, 2010).
17. See Attorney Gen. v. Waldron, 426 A.2d 929, 932 (Md. 1981) (striking down as unconstitutional a statute that in the court's view was designed to "[prescribe] for certain otherwise qualified practitioners additional prerequisites to the continued pursuit of their chosen vocation"); Wisconsin *ex rel.* Fiedler v. Wisc. Senate, 454 N.W.2d 770, 772 (Wis. 1990) (concluding that the state legislature may share authority with the judiciary to set forth minimum requirements regarding persons' eligibility to enter the bar, but the judiciary ultimately has the authority to regulate training requirements for those admitted to practice). *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. c (2000).
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19. Susan Daicoff, *Lawyer, Be Thyself: An Empirical Investigation of the Relationship Between the Ethic of Care, the Feeling Decisionmaking Preference, and Lawyer Wellbeing*, 16 VA. J. SOC. POL'Y & L. 87, 133 (2008); *See* Janet Weinstein, *Coming of Age: Recognizing the Importance of Interdisciplinary Education in Law Practice*, 74 WASH. L. REV. 319, 337-38 (1999).

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A New Online Approach to Managing and Resolving Monetary Claims

By James F. Ring

Although most cases settle, most cases do not settle until the eve of trial.[1] Game theory—which involves a relatively rigorous approach to the subject of conflict—offers a relatively simple explanation for this phenomenon. Game theory suggests that litigation may, like most forms of conflict, be understood as a tacit bargaining process: each side has, and knows that the other has, incentives and excuses to posture until such time as the bargaining is about to be brought to an end. Utilizing this general approach to the subject, this article describes a mechanism that allows one party to place both parties in a position where the incentives and excuses for posturing fall away at a much earlier time.

"[The 'System'] can be initiated and used by one party without the other party's cooperation or consent."

Studies indicate that two parties on opposite sides of a claim for money would both be better off if, without having to secure the other party's cooperation or consent, either party could access and use a mechanism or device that (1) would enable each party to commit to a confidential settlement proposal, and (2) would impose a settlement in the event that each party made a confidential proposal and those proposals matched or overlapped. For example, Babcock and Landeo describe a study in which test subjects who were able to use such a mechanism achieved settlements 69% of the time (as opposed to a 49% rate for test subjects that were limited to traditional forms of bargaining), settling at an earlier stage more than twice as often, and with litigation costs that were 37% lower.[2] Moreover, these studies suggest that, when such a mechanism is properly designed, it does more than increase settlements and reduce costs. It "generally leads to…payoffs that are more in line with the underlying merits of the case…."[3]

For purposes of analyzing how and why access to this type of mechanism produces a higher percentage of better settlements earlier, this article begins by summarizing an escrow mechanism that has similar properties, and then considers how a party's initiation and use of the mechanism serves to produce these results in various contexts. The escrow mechanism (the "System") can be initiated and used by one party without the other party's cooperation or consent. It involves a series of simple steps, each of which can be carried out online in the manner described below (a fully operational version of this System can be examined, tested, and used online at https://www.fair-outcomes.com/run_fpm/home.pl).

Summary of the Three-Step Process

Step 1: One party (a "First Party") uses the System to specify, in confidence, an amount of money ("*x*"), providing the System with a binding proposal to settle the claim for *x* by a fixed deadline (for example, within 30 days). The System will not disclose the value specified by the First Party unless the System determines that the other party (the "Second Party") has agreed to settle for *x* by the deadline. (This allows the First Party to propose a reasonable value for *x* without fear of prejudice, e.g., without fear that it will simply become a starting point for further demands if the matter does not settle.)

Step 2: The System provides the Second Party with an opportunity to confidentially specify an amount of money ("*y*") and agree to settle for *x* if *x* is equal to or more favorable to the Second Party than *y*. If it is, then the matter settles for *x*. If not, then the Second Party can continue revising *y* up until the deadline. The System will not disclose even that the Second Party has used the System unless the matter settles for *x*. (In combination with other features, these features deprive the Second Party of any incentive or excuse for failing to use the System to propose a reasonable value for *y* prior to the deadline.)

Step 3: If the matter does not settle for *x*, then the System will offer a party that has specified a value for *x* or *y* an affidavit confirming that value (but not revealing any value specified by the other party), and attesting to the fact that the other party had lost an opportunity to settle for that amount at that time. (In combination with other features, this makes proposing a reasonable value the most sensible strategy for each party, regardless of whether the other party follows that strategy.)

A Hypothetical Game

Consider a hypothetical situation in which a failure to settle would not result in a trial but, rather, in the flip of a fair coin, with "heads" yielding a $10,000 award to the Plaintiff, and "tails" yielding an award of zero, with no other possible outcomes. Since each party would independently recognize that it had a 50% chance of winning or losing $10,000, the Defendant could not reasonably be expected to settle for any number higher than $5,000, and the Plaintiff could not reasonably be expected to settle for less. A settlement of $5,000 would constitute what Schelling refers to as a "focal point."[4] Specifically, if we imposed

rules under which the parties could not communicate and under which the case would not settle unless both parties placed sealed bids that matched or crossed into a black box by a fixed deadline, self-interest would oblige a party who wished to settle to bid $5,000 by that deadline. A party that proposed a number more favorable to itself—even by a single dollar—would accomplish (and would know that it was accomplishing) the functional equivalent of proposing no number at all.

An important corollary is that changing the rules by allowing the parties to communicate and engage in traditional bargaining with one another does not change the outcome. Either party can effectively force an adversary that wishes to settle to bid $5,000 by the deadline by simply depositing a number itself and then refusing to communicate at all. (Note also that a party that bids $5,000 will have no basis for regret regardless of what then transpires because it will have proposed a settlement that was reasonable in light of the prevailing risks to both sides. In contrast, a party that fails to make a bid at $5,000 prior to the deadline would not know what its adversary had proposed and would face the prospect of recriminations and regret as the coin tumbled through the air.)

Litigation, Settlement, and the Politics of Regret

Litigation is less like a coin-flip than it is like a roll of dice: it may produce a variety of different outcomes. However, just as a party familiar with dice understands that certain outcomes are more probable than others, an experienced attorney should be able to assess the relative likelihood of various outcomes of litigation. He or she can independently identify a range within which both parties should be willing to settle, given the risks and costs faced by each side (a "focal range"). Facilitating assessments of that range is a central function of the common law. Game theorists have suggested that the primary function of institutions such as the common law is to allow two adversaries to independently arrive at similar assessments of that range.[5]

Opposing counsel may privately arrive at similar assessments of what would constitute a reasonable settlement range at a very early stage. However, each side has, and knows that the other has, a strong incentive to posture in an effort to influence its adversary's assessment and drive its adversary in a desired direction. Thus, neither views the other's declared position to be genuine, nor can either persuade the other of the genuineness of its own position. If either party offers a settlement that is well within that range prior to the parties' arrival at a key decision point, such as the eve of trial, that party's adversary will be excused for rejecting it and for interpreting it as a signal of weakness and as a starting point for demanding further concessions, all to the prejudice of the offering side. Similarly, until the parties arrive at a key decision point, an offer to negotiate, mediate, or use a traditional sealed-bid arrangement will often be rejected (in an effort to signal strength) or, in many cases, simply lead to a process of posturing.

In situations where no communication can be viewed as credible and an honest communication can be highly prejudicial, no meaningful communication can take place. This serves to offer one possible explanation for why, although the majority of cases settle, the majority do not settle until the eve of trial.[6] The eve of trial may be fairly viewed as a deadline similar to the deadline for using the black box hypothesized above: the incentives, justifications, and excuses for failing to propose or accept a settlement within a focal range fall away. As with the coin-flip game, a party that commits to a settlement that is clearly focal will—regardless of whether the case settles—have no basis for subsequent regret, while a party that fails to do so will face the prospect of recriminations and remorse, and cost, as the next phase unfolds.

"The System has features that negate any incentive for either party to try to use it to bluff or posture…"

Strategic Aspects of the Three-Step Process

The System described above lets one party unilaterally place both parties in a position where the incentives and excuses for posturing fall away. It lets a party do this at any time (including prior to the filing of suit), without signaling weakness and—if that party confidentially commits to a settlement well within the focal range—without incurring any prejudice whatsoever if the matter does not settle by the deadline. The System has features that negate any incentive for either party to try to use it to bluff or posture (or to try to posture through a refusal to use the System). For example, a Second Party that fails to use the System to make a reasonable proposal will not credibly be able to cite any of the standard excuses that litigants typically cite, including a fear of signaling weakness or of losing hypothetical surplus. In the words of Schelling (1960, p. 160): "One constrains the [other's] choice by constraining one's own behavior."

If the case does not settle for the amount proposed by the initiating party (x), then a party that proposed a reasonable value for x or y can demonstrate, via an affidavit from the System, that its adversary had effectively walked away from a reasonable settlement. That party can then use that affidavit to justify devoting its resources to litigation and trial, to gain or maintain support from its constituents or from interested third parties, and to demonstrate, when the case is finally resolved, that all loss and expense incurred by the parties following the use of the System was attributable to its adversary's failure to accept a reasonable outcome that had been firmly placed

within its grasp through the use of the System. Conversely, a party that fails to make a reasonable proposal will be deprived of such justification, will be unable to make such a demonstration, and will not know whether it had walked away from a reasonable settlement unless and until its adversary elected to reveal that information.

Conclusion

The System's structure makes it readily apparent to both parties that—in order to pursue and protect one's self-interest, and even where the System is used far in advance of trial—the most sensible strategy for each party consists of using the System to commit to a settlement that is reasonable in view of the risks and costs faced by each side. A party that does so will either settle the case on terms that it deems to be acceptable or will be able to justify devoting its resources to litigation and— if it becomes necessary—rolling the dice at trial.

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Mediation—Alchemical Crucible for Transforming Conflict to Resolution

By Simeon H. Baum

Mediation in Context—Negotiation and Dialogue

Day in and day out, we encounter one another, make deals and resolve disputes. Whether it is setting a bedtime with a recalcitrant five-year-old, making dinner plans with a narcissistic couple, setting up a distributorship, breaking a lease, working out credits and offsets in a requirements contract, accounting for changes and delays in a construction job, or the host of issues that might make their way into court if not otherwise resolved—we negotiate. Negotiation is so common, we barely notice it. We are like fish not noticing the water in which we swim. We communicate with others, offering trades where needed, to obtain the cooperation of the other to achieve satisfaction of our needs and interests. Cooperation might come in the form of offering goods, land, information, intellectual property, services, cash, securities, some other form of property, right, permission, or agreement of non-interference or cessation of offending activity,

Sometimes, all that is sought is understanding and acknowledgement. Beyond the trades of negotiation, there are times when, at home or at work, we meet one another in the depth of our humanity, sharing time together in a manner that breaks the mold of social expectations or joint projects, celebrating the wonder of life and mutual existence. Conversely, there are times when we cannot recognize one another, when all we can see is the bundle of needs and obligations that lie upon us. The "other" is an impediment, failing to assist in the achievement of our ends. Or, the other reads us this way, ignoring our humanity. There is a crisis in our relationship, and with it, as said by the Captain of Road Prison 36 to Paul Newman's character in *Cool Hand Luke*: "What we got here is a failure to communicate."

Escalation to Agents and Authorities

When there is a snag in negotiations or in communications, one option is to seek the help of others. We turn to agents to negotiate or intercede on our behalf, including lawyers. We turn to authority figures to help us—such as the boss or HR department in an employment setting or, G-d forbid, a mother-in-law for help at home. And, of course, when we get nowhere, and the problem merits the financial outlay, time, disruption, negative impact on our relationship with the other, and reputational risk, we, or our counsel, turn to the Courts, or to arbitrators, to render a decision that will resolve the dispute and bear with it the force of law.

Mediation Defined by a Developing Profession

Even before reaching the courthouse, there is another time-honored practice: turning to a trusted, neutral third party to help us in our negotiation. In its simplest form, mediation is a negotiation, or dialogue,[1] facilitated by a neutral third party. As early as medieval Japan, one Zen master acted as intermediary bringing about peace between warring lords. Mediation has been used informally in many contexts and many lands. Today, with substantial growth in the U.S. over the last two decades, mediation is used as a dispute resolution process both through court-annexed panels and through private mediation providers. Mediation has increasingly become professionalized. There are associations of mediators,[2] rules of ethics, like the Model Standards of Conduct for Mediators prepared jointly by the AAA, ABA, and SPIDR during the early 1990s and revised in 2005; mediator training programs, like the three-day Commercial Mediation training offered through NYSBA's Dispute Resolution Section last Spring; mediation practice reflection groups; and legislative initiatives, like the effort to enact in New York the Uniform Mediation Act to provide for a mediation privilege adopted by eleven other states.

Mediation, as a confidential, facilitated negotiation, unlike its dispute resolution cousins arbitration and litigation, does not involve a neutral third party's making a determination, award, verdict or judgment that is binding on the parties. Rather than evaluate or tell the parties what to do, the mediator facilitates the parties' own communication and decision making. Mediation is binding only to the same extent that any negotiation is binding: when a deal is struck and memorialized in writing, that becomes a binding agreement. As with the settlement of any matter, the agreement can have bells and whistles—requiring the filing a stipulation of dismissal or discontinuance, papers attendant to a security agreement, including an affidavit of confession of judgment, if appropriate, notes, liens, mortgages, or any other document that the parties and their counsel might require to complete or enforce the agreement transaction.

Evaluation and Facilitation Considered

Mediation has also been distinguished from neutral evaluation. In the latter process, parties, typically with counsel, present a preview to the mediator of what their case might be like at trial. The neutral evaluator, after discussion that can include caucus, gives the parties a preview of the judicial outcome. This is a predictive exercise in which it is best that the evaluator draw on meaningful expertise. The parties can then use that prediction

to clarify the "shadow of the law" under which they are bargaining and, in its light, strike a deal. In former Magistrate Judge Wayne Brazil's model, before sharing the prediction, the evaluator advises the parties that he or she has written it down and offers, before delivering the message, to facilitate their negotiation of a settlement, essentially shifting to the role of mediator. If the parties reach an impasse, at that point, the evaluation can be shared, and the mediation can continue.

During the 1990s there was significant debate in the mediation field on whether it is ever appropriate for a mediator to provide the parties with an evaluation. This debate was prompted by a seminal article by Professor Len Riskin,[3] which presents a "grid" for classifying mediator orientations, types and strategies. Riskin's grid identifies two major spectrums: broad / narrow focus, and evaluative and directive / facilitative approach. A narrowly focused mediator might attend only to the legal question, ignoring, discarding, or directing discussions away from "irrelevant" emotions, values, business considerations, or even broader societal concerns—all of which are recognized as meaningful by those who maintain a broad focus. The other spectrum distinction shows some mediators as being more evaluative and directive—sharing with parties their own views on the merits of a case, or even, where broadly focused, their views on the moral, just, fair, economically sound, or appropriate thing to do and urging the parties to take a particular course of action. Other mediators, Riskin found, tended to refrain from sharing their view or telling the parties what to do. Their function was primarily to facilitate the parties' own reflection and analysis, decision making and communication. Responding to Riskin's article, Professors Kimberly Kovach and Lela Love published a piece calling "evaluative mediation" an oxymoron.[4] Their view was that the mediator's role is to help the parties with their own problem solving, facilitating their own thinking and communication, but not to drive them to the mediator's solution or, especially, to act as a private judge.

Adding Transformation and Understanding to the Mix

This debate was enriched by the transformative mediation and understanding-based mediation schools. The transformatives urge that the mediator's role was not even to be a problem solver or to get a settlement. Rather the mediator's purpose is twofold, fostering empowerment and recognition.[5] Transformative mediators take a micro focus, following the parties with reflective feedback wherever their discussion leads, and, as they proceed, noting opportunities along the way to make choices (empowerment) or for understanding and acknowledging the other. Transformative theory sees disputing parties as feeling embattled, weakened, and even "ugly," and as uncomfortable with the condition of dispute. Disputes are crises in relationship affecting the quality of the parties' communication. The theory is that when parties begin seeing opportunities to make choices, they feel more empowered. As empowerment increases, parties can shift from defensiveness to recognition of the other. The growth of empathy is the "transformation" for which this school bears its name. As this occurs, relationship and communication are enhanced and disputes tend to resolve themselves. This approach has particularly taken hold for use in family, neighbor, and embedded employment disputes—where there are obvious continuing relationships.

The understanding-based model emphasizes that parties are in conflict together and can resolve it together, by a growth in understanding.[6] The most controversial aspect of this approach is Himmelstein's and Friedman's insistence on using joint session only in mediation, eschewing caucus. Caucuses are confidential meetings of fewer than all participants in a mediation. Himmelstein's and Friedman's concern is that caucus takes parties away from jointly resolving their conflict and makes the mediator the bearer of critical information unknown to one or more of the parties. A caucus process might produce a "fix" with a settlement. But it risks being one imposed from without, maintaining the barriers between the parties. It might not resolve their fundamental conflict in the way that occurs with mutual decisionmaking as a result of deepened understanding, which produces a shift in the parties' understanding of their "own" reality. Critics of Himmelstein and Friedman observe that disputing parties might prefer to express certain views independently or to maintain separateness for the sake of reflection and decision making. Moreover, caucus enables the mediator to give feedback in a manner that does not put the recipient of the mediator's comments in an awkward spot. In caucus, mediator and party can metaphorically sit on the same side of the table and wonder together about possible outcomes of a case or possible deal packages—all of this without putting that party on the spot.

The 360-Degree Mediator

Many providers today consider themselves 360 degree[7] mediators, maintaining a broad focus, utilizing facilitative skills, raising opportunities for empowerment and recognition, facilitating the parties' own evaluation, even giving evaluative feedback when appropriate, and utilizing both joint sessions and caucus.

Case and Mediator Selection as Guided by an Understanding of Mediation

Understanding the debate and divergences in mediation theory and practice, and the opportunities available in mediation, enables counsel to make sophisticated choices in designing mediation clauses for contracts, selecting a mediator, determining if and when a matter is appropriate and ripe for mediation, and in effectively rep-

resenting parties in the mediation process. If the matter is an embedded employment dispute, primarily involving an ongoing relationship with significant communication problems and low economic stakes, transformative mediation might be the best way to go. In these circumstances the form of the settlement might matter far less than healing the relationship and improving the parties' communication. The United States Postal Service set up a program to handle Equal Employment Opportunity complaints using transformative mediation.[8] In other matters where ongoing relationship is important and where both parties are willing to invest in the greater time that a joint-session-only approach might take, counsel might opt for the Himmelstein Friedman understanding-based model. In a scenario where a partnership dispute has devolved into a costly accounting proceeding that threatens to kill the goose that lays the golden egg, restructuring of their business relationship might be the most effective path to resolution. Wise counsel might then seek a mediator who will have a broad enough focus to shift from legal to business considerations, put on a "business head," and activate the parties to develop creative options. If two commercial parties—with little emotional investment in the dispute by party representatives and counsel alike, and ample capacity to bear the cost of litigation—have a *bona fide* difference of opinion on how a point of law affects their respective rights, it might make sense to select a mediator with capacity and credibility to facilitate the parties' analysis of this legal point, or, when and if appropriate, add some reliable evaluative feedback.

Disputes are complex social animals. At times parties might believe they are stuck on a point of law when, in fact, it is a point of pride. For this reason, it is often wise to seek a mediator with "360" capacity, who can make insightful assessments on all fronts, work with the participants to design an appropriate process, and adapt as the mediation process and circumstances require. It is not a bad idea for counsel to determine the mediator's background or orientation through talk with others who have used that mediator or an initial, frank discussion with the mediator at time of selection or in the initial pre-mediation conference.

What Mediators Can Do for You

Mediators may play many functions to lubricate the wheels of a negotiation or to fine-tune the channel of dialogue. Whether it is a hard-core commercial dispute or a family or employment relationship matter, parties—and even counsel—might have strong feelings about the matter or their counterparties. Mediators are trained to facilitate difficult discussions and to use "active listening" skills—validating, empathizing, clarifying, summarizing and reflecting back statements by the participants. Good listening engenders satisfaction in the speaker, a sense of being heard, acknowledged and understood. From a utilitarian standpoint, permitting emotional expression enables people to get past feelings of frustration, disappointment, anger and despair and engage constructively in problem solving to get a dispute resolved. From a non-utilitarian standpoint, good listening creates opportunities for realizing meaning and humane regard for one another. Either way, where emotions are drivers in a dispute, mediation is the process of choice—a richer forum for expression than the witness chair under cross-examination, with objections on relevance and materiality, motions to strike, and directions to limit the answer to just the question that was asked.

Mediators can also assist the parties with a joint problem solving, mutual gains approach—the "win / win" popularized by Fisher & Ury's book "Getting to Yes." Also known as integrative bargaining, this approach seeks to expand the pie by identifying the issues, the needs and interests of *all* parties, and then seeking options that will meet as many of those needs and interests as fully as possible, thus resolving the issues in dispute. Options proposed during this process can be judged and supported by identifying or developing standards—principles with which all parties can agree and which take the matter away from a subjective battle. Standards can include fairness, legality, doability, equity, empathy, durability or whatever principle the parties can adopt. Good communication and cooperation enables parties to learn about one another's needs and interests and be effective in brainstorming and generating options, Thus, Fisher and Ury recommend separating the people from the problem, being "soft" on the people and hard (focused and analytic) on the issues. Counsel might seek mediators who are effective in facilitating this problem solving.

Another Fisher and Ury concept is the BATNA, the best alternative to a negotiated agreement. Considering what might happen if a party does not take a proposed deal is a good way to judge whether the deal is worth taking. In the legal context, the litigation alternative can also be analyzed with a focus on risk and transaction cost. Here, effective mediators might gather information in advance of the mediation session, through phone conferences with counsel and review of pre-mediation statements laying out key facts, any critical law, settlement history and proposals, and annexing useful documents. These pre-mediation communications can also address process issues, making sure the right people with full authority attend, and learning about inter-party dynamics to be sure the process is designed to maximize its effectiveness. Thus, finding a mediator who can be adept at gathering the key information, facilitating a good analysis of the case at the mediation, and helping the parties assess risk and transaction costs (fees for lawyers and witnesses and related costs) can be key. At times, where one's own client, or the other party, is having difficulty hearing tough news about litigation prospects from its legal champion, "reality testing" by a mediator might open the client's eyes to legitimate case risks and prompt more realistic settlement discussions.

Benefits and Promise of Mediation

Properly conducted, mediation offers parties a host of benefits. It can dramatically cut the cost of litigation. This confidential process can reduce some litigation side effects, such as reputational damage through the play of the press and media, and the more localized disruption of griping at the water cooler or removing key employees from work to answer discovery demands, undergo witness preparation, and appear to testify or observe in depositions or trial. It provides a forum for much richer communications, and for addressing a host of feelings, issues, principles and concerns that could never directly be considered or respectfully and humanely given their due at trial. It provides opportunities to improve or restore relationships. Moreover, mediation, like negotiation, permits parties to design their own creative solutions, taking into consideration economic and other factors, to arrive at more doable, durable and mutually acceptable resolutions than a judgment that cannot be collected due to evasion or the lack of funds.

"It [mediation] supports compassion, creativity and realism as parties work together to understand each other and their needs, constraints, and context."

Ultimately, mediation, which has at its core the principle of party self-determination, wrests decision making from third parties—judge, jury, arbitrator—and restores it to the parties. Indeed, while lawyers can still play a very significant role in mediation—as process guides, counselors, and even advocates in opening session or later in laying out the litigation risk to the other side—parties do not live or die on competence of counsel, witnesses, or other agents in presenting a case; again, power lies with the parties in the mediation outcome.

Mediation offers a depth of possibility and sensitivity to truth and values consistent with the philosophical resources and developments in our history of ideas. An underlying humanism puts people, not external systems or things, in the driver's seat. With a valuing of people comes recognition of all aspects of the person, not just that which is legally relevant. Yet, to quote Frank Sander and Robert Mnookin, we bargain in the shadow of the law. The mediation sphere is a place where the norms of both justice and harmony can work themselves out in a manner that fits the actual parties and their circumstances. With recognition of the significance of all parties' perceptions, the philosophical advances of phenomenology come into play. The individual, business and circumstantial focus bears with it the influence of pragmatism. Business considerations embrace our theories of economics. Ultimately, by affirming the parties' joint decision making, mediation celebrates our freedom and our interdependence and our relatedness. It supports compassion, creativity and realism as parties work together to understand each another and their needs, constraints, and context. It offers the possibility of holistic solutions. Fundamentally non-coercive and fostering party responsibility, mediation offers participants a chance to be their best selves and to arrive at superior resolutions.

Endnotes

1. As discussed *infra*, proponents of transformative mediation do not see the mediator's role as assisting in problem solving or in settlement of a dispute. Rather, the role is to foster empowerment and recognition. Similarly in Himmelstein and Friedman's model, understanding is the key. Accordingly, for those schools, non-utilitarian "dialogue," as an encounter of persons, might be a better description of the mode of communication that is facilitated by the mediator. A rich description of dialogue is found in the writings of Martin Buber, such as "I and Thou." *See, e.g.*, Martin Buber: The Life of Dialogue by Maurice S. Friedman (The University of Chicago Press, 1955, reprinted 1960 by Harpers, N.Y. as a First Harper Torchbook edition, and available online at: http://www.religion-online.org/showbook.asp?title=459).
2. E.g., The Association for Conflict Resolution (ACR), a merged entity of SPIDR, CreNet and ACR.
3. Riskin, L., *Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed*, Harvard Negotiation L. Rev., vol. 1:7, Spring 1996, available online at: http://www.mediate.com/pdf/riskinL2_Cfm.pdf. An earlier version of this piece was published by Riskin, L., *Mediators' Orientations, Strategies and Techniques*, Alternatives to the High Cost of Litigation, at 111, September 1994.
4. Kovach, K. K. and Love, L. P., *"Evaluative" Mediation is an Oxymoron*, CPR Institute for Dispute Resolution, Alternatives, Vol. 1, no. 3, at 31 et seq., March 1996.
5. The transformative mediation manifesto is "The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition," by Bush, R. A. B. and Folger (J. P., Jossey-Bass, Inc. 1994).
6. *See*, Friedman, G. and Himmelstein, J., Challenging Conflict: Mediation Through Understanding (ABA 2008).
7. I first heard this term used by Lori Matles.
8. The USPS program is known as REDRESS (Resolve Employment Disputes Reach Equitable Solutions Swiftly). Instituted over a decade ago when the Postal Service had nearly a million employees, this program significantly reduced costs of administering EEO claims, and produced settlement of the vast majority of claims with a very high user satisfaction rate and enhancement of employee morale.

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Cross-Border Commerce and Online Dispute Resolution: Emerging International Legislative and Systemic Developments

By Vikki Rogers and Christopher Bloch

The increase and indispensability of information and communications technology (ICT) in the developed and developing world represent significant opportunities for access to justice by buyers and sellers concluding commercial transactions via Internet and mobile platforms. In parallel with the sharp increase over the last two decades of commercial transactions concluded online (B2B, B2C, and C2C[1]),[2] there has been extensive discussion regarding the use of systems—either judicial or extra-judicial—to resolve the domestic and cross-border disputes which inevitably arise as part of the management of this type of commercial transaction. Online dispute resolution (ODR) is gaining new momentum as a desired extra-judicial (ADR) procedure for the fair and expeditious settlement of such disputes.[3] To illustrate the current wave of events:

- At the 43rd session of the United Nations Commission on International Trade Law (held in New York, from June 29–July 9, 2010) state delegations overwhelmingly supported the creation of a working group to develop legal standards (the form to be determined) for ODR mechanisms established for the resolution of cross-border electronic commerce disputes.[4] Notably, the mandate extended to the Working Group included both B2B and B2C disputes in its scope.[5]
- This November 2010, a conference will be held in Vancouver, Canada to discuss the logistical and functional aspects of creating a global ODR system.[6]
- The U.S. recently submitted a revised proposal to the Organization of American States (in connection with the Seventh Inter-American Specialized Conference on Private International Law (CIDIP VII) which is currently focusing on consumer protection), proposing, among other things, an OAS-ODR Initiative for electronic resolution of cross-border e-commerce consumer disputes designed to promote consumer confidence in e-commerce by providing quick resolution and enforcement of disputes across borders, languages, and different legal jurisdictions.[7]
- ODR 2010 took place in Buenos Aires this past June ("Peace Building in the Digital-Era"—International Forum on Online Methods for Alternative Dispute Resolution),[8] and was followed by a colloquium specifically addressing the creation of a global ODR system for cross-border electronic disputes.[9]
- The Practice and Standards Committee of the Chartered Institute of Arbitrators has recently established a Technology sub-committee to examine and provide appropriate guidelines on the use of technology in dispute resolution.

Given this flurry of activity, this article (1) defines ODR, and (2) highlights the need for and the considerations in the creation of a global ODR system.

"Online dispute resolution, however, is not the equivalent of traditional face-to-face arbitration, in an online environment."

Defining Online Dispute Resolution

ODR has been defined as a "collective noun for dispute resolution techniques outside the courts using [information and communications technology], and, in particular, Internet application."[10] Online dispute resolution, however, is not the equivalent of traditional face-to-face arbitration, in an online environment. Rather, ODR systems have separate and distinct features from traditional ADR processes. Most disputes in the ODR environment are resolved at the online negotiation and / or mediation phase, with few cases going to online arbitration. Unique software packages and an ODR XML language has been developed for ODR application—technology is considered the "4th party" in a dispute. The rules for the process are very different from traditional ADR, with quicker turnaround at every phase, and varying reliance on the "rules of law," and varying enforcement mechanisms. The online environment is also a catalyst for constant innovation in ODR systems (to satisfy consumer and merchant needs), *e.g.*, the online community court established by Ebay / Paypal.

Over the last ten years, private and public ODR systems have developed around the world to provide online redress for commercial disputes.[11] For example, Ebay / Paypal has built an ODR system that handles approximately 60 million disputes a year.[12] ICANN has built a system that has resolved thousands of disputes across

borders, remaining unfettered by the specifics of local jurisdictions. Smartsettle[13] is an example of a private ODR provider and The Mediation Room[14] has developed software that can be tailored to handle different categories of disputes online. Some countries also provide access to online systems for the resolution of consumer disputes, *e.g.*, the ConcialNet system run by Profeco in Mexico. Moreover, in the last decade, a groundbreaking dispute resolution agreement between Consumers International and the Global Business Dialog on eCommerce[15] was reached, and the European Extrajudicial Network[16] was launched, as well as the Better Business Bureau / Eurochamberstrustmark alliance.

"With these challenges comes a tremendous opportunity to provide a cost-efficient, speedy redress system for consumers and merchants around the world, and to establish a model for online redress that could be applied in domestic contexts as well."

Creating a Global ODR System

Cumbersome and expensive resort to courts or traditional international arbitration procedures established for more complex disputes are not useful or necessarily needed for that vast majority of cross-border e-commerce disputes. Although ODR has emerged as a viable alternative for the resolution of these sorts of disputes, all of the recent strides have remained disjointed and do not yet provide the legal or operational infrastructure to satisfy the dispute resolution needs on a cross-border, global scale. For example, ODR providers do not apply the same level of due process. Most ODR providers lack the ability to handle cross-border disputes and rather focus on domestic disputes. Additionally, there is no uniform standard for enforcement of ODR awards. Moreover, ODR is still generally not a readily apparent option to buyers compared to mainstream litigation and ADR. These shortcomings reflect some of the reasons why many buyers largely refrain from engaging in cross-border electronic commerce and why it is crucial that a global harmonizing instrument or set of principles be created in the near future to support ODR systems that can handle cross-border disputes across the commercial spectrum, including the potential millions of small-value B2B, B2C and C2C disputes that occur annually.

Fortunately ODR experts are convening around the efforts to create this global system at legislative and systemic levels (*e.g.*, efforts at UNCITRAL, OAS, as well as the Vancouver conference in November). In creating such systems, the experts will have to be cognizant of several issues, including volume and scalability, diverse languages and culture, technological developments and hindrances (availability and advancement between the developed and developing world), enforcement, cost differentiation between large and small claims, the role of national consumer protection agencies, applicable law, and distinctions to be made between B2B and B2C systems. With these challenges comes a tremendous opportunity to provide a cost-efficient, speedy redress system for consumers and merchants around the world, and to establish a model for online redress that could be applied in domestic contexts as well.

Endnotes

1. Business-to-Business, Business-to-Consumer, Consumer-to-Consumer transactions, respectively.
2. "[A]n increasing number of transactions in international trade are carried out by means of electronic data interchange and other means of communication, commonly referred to as 'electronic commerce,' which involves the use of alternatives to paper-based methods of communication and storage of information." Model Law on Electronic Commerce with Guide to Enactment, Preamble (1996), *available at* http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf.
3. Support and comments related to the development of extra-judicial procedures: "Recourse to courts in disputes resulting from international Internet transactions is often complicated by the difficult questions of which law applies, and which authorities have jurisdiction over such disputes. Furthermore, international court proceedings can be expensive, often exceeding the value of the goods and services in dispute. If this were the only means to settle disputes, it would certainly not enhance consumer confidence in international electronic commerce and would strongly encourage merchants to restrict the geographic scope of their offers. This is turn would limit competition and consumer choice. An important catalyst for consumer confidence in electronic commerce is that Internet merchants offer their customers attractive extra-judicial procedures for settling disputes as an alternative to the cumbersome and expensive resorts to courts." SeeAgreement reached between Consumers International and the Global Business Dialog on Electronic Commerce, Alternative Dispute Resolution Guidelines, Global Business Dialogue on Electronic Commerce, p. 54-55 (Nov. 2003) (hereinafter "GBDe Agreement"). The GBDe Agreement reflects a ground-breaking consensus document between industry and consumers declaring the need for extra-judicial procedures for the settling of disputes for contracts concluded electronically, and outlining principles regarding the creation of such a system. See also Conference on Empowering E-Consumers: Strengthening Consumer Protection in the Internet Economy, Background Report, p. 35 (Washington DC, Dec. 8-10, 2009) (hereinafter "OECD Consumer Background Report") ("Consumers should be provided with meaningful access to fair and timely alternative dispute resolution and redress without undue cost and burden.").
4. See Note submitted to UNCITRAL in support the assignment of a Working Group to ODR. Approximately 40 organizations and institutions from every region of the world endorsed the Note. See, *Note supporting the possible future work on online dispute resolution by UNCITRAL, submitted by the Institute of International Commercial Law*, A/CN.9/710, May 26, 2010. At the Commission meeting, remarks were also made by state delegations supporting the extension of legal standards for ODR to mobile commerce as well as electronic commerce (mobile commerce reflects transactions sales for goods and services concluded using the mobile phone as the intermediary, either for purposes of accessing the merchant's online site and/or using the mobile phone account to pay for the goods as well).

5. On March 29-30, 2010, UNCITRAL also co-sponsored a Colloquium with the Institute of International Commercial Law and Penn State Dickinson School of Law on ODR related both to electronic and mobile commerce B2B and B2C disputes. Leading ODR experts from every region of the world participated as speakers and approximately 200 persons attended the event. The Colloquium was prompted by the U.S. proposal to UNCITRAL for such a Colloquium. See, *Possible future work on electronic commerce—Proposal of the United States of America on online dispute resolution*, A/CN.9/681/Add.2, June 18, 2009. To hear Colloquium presentations, please go to http://web.pace.edu/page.cfm?doc_id=35560. The UNCITRAL Secretariat also issued a report on the Colloquium. See, *Possible future work on online dispute resolution in cross-border electronic commerce transactions*, A/CN.9/706, April 23, 2010.
6. ODR and Consumers 2010, http://www.odrandconsumers2010.org/.
7. On file with the authors. Available on request from the Office of Legal Advisor (dennismj@state.gov).
8. *See* ODR 2010 Argentina, http://www.odr2010.com.ar/ing/.
9. *See* InstitutoLatinoamericano de ComercioElectrónico, ColloquioInternacional RED/ODR, http://www.einstituto.org/onlinedisputeresolution/.
10. J. Hornle, Cross-Border Internet Dispute Resolution 75 (2009).
11. ODR pre-dates 1995; however, focus is given in this article to the last ten years given rapid technological developments and the surge in online transactions over this period.
12. Colin Rule & ChittuNagarajan, *Leveraging the Wisdom of Crowds: the eBay Community Court and the Future of Online Dispute Resolution*, ACResolution Magazine (Winter 2010), *available at* http://ec.europa.eu/consumers/policy/developments/acce_just/acce_just07workdoc_en.pdf.
13. *See* Smartsettle, http://www.smartsettle.com/.
14. *See* The Mediation Room, http://www.themediationroom.com/.
15. Global Business Dialogue on Electronic Commerce, Alternative Dispute Resolution Guidelines, Agreement Reached Between Consumers International and the Global Business Dialogue on Electronic Commerce (Nov. 2003), *available at* http://www.gbd-e.org/ig/cc/Alternative_Dispute_Resolution_ Nov03.pdf.
16. European Extra-Judicial Network, *Commission Working Document on the Creation of a European Extra-Judicial Network (EEJ-NET)*, Working Document SEC (2000) 405, *available at* http://ec.europa.eu/consumers/policy/developments/acce_just/acce_just07_workdoc_en.pdf.

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Telephone Mediation

By Daniel Yamshon

In the almost two decades since *Dial M for Mediation*,[1] electronic communication has exploded both in number and form. Electronic commerce has boomed as well; in a single one-year period, non-retail, non-consumer small business e-commerce transactions alone increased twelve and a half times.[2] Where there is commerce, there is conflict.

"In complex and/or multiparty mediation, it is possible to approximate an on-site mediation with telephone communication in combination with the Internet."

Given the boom in Internet trade, one could logically assume people would use the Internet for ADR. Searching the Internet for "on line mediation" leads to many sites.[3] There are several well known on line organizations providing what they describe as mediation services; CyberSettle and Square Trade are among the largest. Square Trade, used by eBay and Amazon, appears to be primarily a vendor of warranties.[4] CyberSettle's approach seems more to resemble an on line auction or price/cost driven positional bargaining[5] than what most mediators think of as mediation. Each party inputs an offer to settle; it is not revealed to the other party. The program then determines if there is overlap; if there is an overlap it calculates a settlement figure. CyberSettle reports two hundred fifty thousand cases heard since its beginning, with a closure rate of sixty percent.[6]

Many neutrals probably use the Internet and telephones in their ADR practices more than many realize. In arbitration, for example, e-mail is used to transmit briefs, motions, notices, minutes of conference calls, orders and occasionally documentary evidence. Almost all pre evidentiary hearings and motions are conducted by conference call. Testimony may be taken by telephone from distant witnesses or from those for whom travel is difficult. This is probably no longer anything new for most practitioners. Just as with arbitration, phones and Internet, particularly e-mail's ability to instantly and handily transmit documents, have become indispensable for any but the most simple mediations.

As electronic technology has become fully integrated into ADR practice, one might ask why on line mediation has not gained equality with face-to-face mediation. On line mediation typically uses an auction format (sometimes with a computer program determining the final settlement as with CyberSettle), an e-mail or chat room format, or a combination of both. Paula Young has pointed out several limitations of text-based mediation: "[T]he written text of e-mail puts a greater emphasis on literacy and written communication skills. Some online practitioners also note that parties feel more free to exchange inflammatory comments and *ad hominem* attacks that would not likely occur if the parties found themselves in the same room."[7] On the other hand, at least one theorist believes on line text-based mediation can reduce race or gender bias.[8] But the inability to see and hear one another forecloses the communication that can build the understanding that takes place during face-to-face or teleconference mediation.[9] Important elements of communication are lost in text, including tone of voice, informality of speech, hesitations, volume, and expressiveness. Some disputants will say much more when speaking than they will write in e-mail or chat. Instant messaging, e-mail or chat rooms create time delay between responses. Pauses in a conference setting will often stimulate conversation but the stimulation is lost in text-based mediation because every communication has a time gap. There is no sense of shared space when all communication is by keyboard and screen.

A great deal of what makes mediation work so well is, of course, enhanced communication that may lead parties to understand each others' interests. On line mediation does not eliminate that communication but it diminishes it. It is the diminished capacity for the communication subtleties to work in on line mediation that may explain its lack of demand in larger or more complex cases and perhaps why on line mediation has not experienced as large a boom as other areas of Internet use.

However, electronic media has a place in more complex mediations. In complex and/or multiparty mediation, it is possible to approximate an on-site mediation with telephone communication in combination with the Internet. A live process that closely resembles a mediation with the parties present can be accomplished by combining telephone conferencing with digital support as seventy-five mediations and med-arbs that the author has conducted demonstrate. The mediator retains all the aural tools such as active listening, judging tone of voice, hesitation, etc. and does not suffer the delays of waiting for a text reply to appear on a screen. The mediator or a party can respond immediately to a statement and can validate, acknowledge, seek clarification, or whatever is appropriate in real time.

What the mediator lacks in telephonic mediation is the ability to see the parties, and, of course, the parties cannot see each other. Video conferencing may be an enhancement but given its expense and the added layer of technology, it is not a necessity.

Telephonic mediation is most useful to save time and travel expense when geography separates the parties. In a telephonic mediation, parties participating in the media-

tion are not required to be physically with their counsel; each participant in the mediation may be in a different location, but they are all fully present during the proceedings. Legal Services of Northern California runs a Senior Mediation Hotline, a free mediation service for anyone residing in California over age 60. Parties are often in different cities and the mediators are based in Sacramento.

The basic idea behind telephone mediation is to create a process that resembles as closely as possible a mediation with everyone present. The most important work in telephone mediation may take place before substantive talks begin. It will be necessary to discuss and explain the process during the pre-mediation conference calls when procedural negotiations take place. The mediator should confirm that everyone has fax and/or e-mail access (which will probably be the case) but be aware that some people remain unconnected and make appropriate accommodations if they are. If some people will be on a cell phone, encourage them to find a place with good reception and where they can write without too much difficulty.[10] Go over and confirm all your procedural agreements during your opening remarks when the substantive talks begin.

Commercial conference calling services have evolved to the point where they permit caucusing on private lines with a single party or counsel or between a party and his or her own counsel. If your conference calling system will not handle subconferences, a service with an operator who can come in and out to handle the appropriate connections will be needed. The alternative would be to have two telephone lines available, one for the plenary discussions and the other for caucusing and subconferences. Think about how you conduct mediations in your own conference rooms, then try to replicate it in non-physical space.

Although fax use is on the decline, it can be handy in telephonic mediation. If a document that had not been sent to other disputants needs to be circulated, fax will save time as it will not be necessary to scan and e-mail the document. Confidentiality agreements may be signed in counterpart to allow the participants to sign multiple copies.[11] Electronic signatures may be used or a signed agreement may be faxed to the mediator.

A similar process may be used when a settlement agreement is reached. The agreement will likely be written on a word processor in any event, which can be uploaded into e-mail, then circulated and edited, if need be, by the parties while still in conference. With the advent of cloud computing, multi-party editing and drafting can take place in real time at the multiple locations. Netmeeting or other similar sites that allow shared documents may be used.[12]

Endnotes

1. *Dial "M" for Mediation: The New Age of Dispute Resolution by Telephone & Electronic Communications,* Daniel Yamshon, Dispute Resolution Journal, American Arbitration Association, March, 1991.
2. *Finding Deals, Small Businesses Buy More Online,* New York Times, May 15, 2000.
3. Attempts were made to contact a statistically invalid sample consisting of three sites that met the following criteria: (1) The site must list a telephone number; (2) The site was previously unknown to the author; (3) The site must have appeared in the first twenty hits. None had a live person answer and no messages requesting a return call led to a result.

"The basic idea behind telephone mediation is to create a process that resembles as closely as possible a mediation with everyone present."

4. See their home page at: http://www.squaretrade.com/pages/.
5. The disputants do not know each other's demands or counter offers.
6. Ibid. By comparison, many community mediation programs report settlement rates in the range of 75%.
7. Paula Young, *On Line Mediation, Its Uses and Limitations,* http://www.mediate.com/articles/young4.cfm.
8. C. Rule, Online Mediation: The Next Frontier for Dispute Resolution, 23 SPIDR News 10 (Fall 1999).
9. One of the strongest defenses of on line mediation is that it offers an alternative to "traditional" mediation. Jeff Thompson, *On Line Dispute Resolution,* http://www.mediate.com/articles/ThompsonJbl20090706.cfm. Mr. Thompson does not argue that on line dispute resolution is inherently superior, but merely another alternative.
10. In third world countries where the land-line telephone systems are at best unreliable, cell phone systems often work better and it was possible to find decent Internet connections. Extra care does need to be taken with maintaining confidentiality if the only available connection is at a cyber café.
11. This procedure also eliminates the problem that might arise when previously unanticipated people, such as experts or new counsel, appear at the mediation.
12. There are growing concerns about confidentiality and security when using cloud computing or real time on line document creation services. See for example, Debra Cassens Weiss, *Hewlett Packard G. C. Says Tech Industry Faces "Erosion of Trust Over Cyber Security,"* American Bar Association Journal, June 10, 2010, http://www.abajournal.com/news/article/hewlett-packard_gc_says_tech_industry_faces_erosion_of_trust_over_cybersecu, or Jon Brodkin, *Seven Cloud Computing Security Risks,* Network World, http://www.infoworld.com/d/security-central/gartner-seven-cloud-computing-security-risks-853.

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Early Neutral Evaluation in the Northern District of California: A Distinct and Valuable Process, but Not for Every Case

By Howard A. Herman

Early Neutral Evaluation (ENE) is a process pioneered in the Northern District of California that has been in use there for more than 25 years. In recent years, there has been an upsurge of interest in ENE, but true understanding of the procedure is still murky. Many people simply and incorrectly assume that ENE is just an evaluative mediation process. This article describes ENE as it has been designed and practiced in the Northern District of California in an effort to clarify how the procedure actually works, what it is designed to achieve, and why parties choose ENE rather than other ADR processes.

"Many people simply and incorrectly assume that ENE is just an evaluative mediation process."

Genesis of and Theory Informing ENE

In the early 1980s, the Chief Judge of the Northern District, Robert F. Peckham, created a task force of lawyers who were asked to find ways to reduce the expense of litigation for civil litigants. Led by Wayne D. Brazil (then a law professor, later a magistrate judge in the Northern District), their idea was to identify the principal sources of unnecessary cost and delay and "to craft a procedure that parties of good will could use could use to cut through the formalities, indirection and inertia of the traditional system in order to get to the center of their dispute more quickly and set up a cost-effective way to resolve it fairly."[1] The problems ENE was designed to address may be summarized as follows:

- Poor or nonexistent communication across party lines
- Procrastination
- Difficulty confronting the case comprehensively and objectively
- Unfocused and unnecessary discovery and motions
- Lawyer "meter running"
- Unrealistic clients
- Unrealistic lawyers
- Lack of confidence
- Alienated clients
- Reluctance to broach settlement

In response to these perceived problems with traditional litigation, the task force determined that it should create an externally imposed event, early in the litigation, that would force counsel and parties to:

- Conduct core investigative work early
- Communicate directly across party lines
- Confront systematically their situations in the case
- Consider the possibility of early settlement
- Attempt to devise mechanisms for efficient and fair resolution, whether through motions, trial, direct settlement talks, or some other form of ADR

That event became the process we now know as Early Neutral Evaluation.

Perhaps the most noteworthy element of this history is that settlement is not ENE's principal focus. The designers certainly hoped that ENE might help lead the parties to early settlement, but the main point was to improve the quality of justice and the litigation process itself, not to engage in a direct effort to settle the case.

How the ENE Process Works

ENE allows the parties and their lawyers to meet, in the early stages of the case, with a neutral person who has substantial expertise in the subject matter of the action. The evaluator's core responsibility is to provide the parties and their lawyers with a neutral assessment of what is likely to happen if the case proceeds through the traditional litigation process. This ordinarily entails a prediction about the likely outcome of the entire case, though sometimes the prediction is limited to the outcome of a key motion. Evaluators are encouraged to address both liability and damages, as frequently the parties are so focused on liability that they fail adequately to consider the likely range of damages. To promote openness and candor, sessions are subject to the same confidentially rules as mediation. Lead counsel, the clients themselves, and any insurers are required to attend. Clients may participate actively, and witnesses may also be included—but no testimony is taken and no record is made of the proceedings.

The process begins with a mandatory, pre-session telephone conference between the evaluator and all counsel. This conference ensures that all counsel understand the particular components of ENE and how it

differs from other ADR processes. It also provides an opportunity for the evaluator to begin developing an understanding of the case and of the particular lawyers and parties involved. Logistical concerns such as scheduling are addressed in this call, but the primary purpose is substantive.

One week before the ENE session itself, counsel provide the evaluator with written ENE statements outlining their views on the law and the facts. These statements are exchanged—confidential submissions are not permitted. The theory here is that the integrity of the process requires the evaluator to develop his / her assessment transparently, with all parties being aware of the information being provided.

The ENE session begins with each side presenting its case to the neutral in a joint session. The neutral typically asks questions in order to clarify both the facts and the legal positions. The process is meant to be informal, and some back and forth between the parties may be allowed, but cross examination is not permitted. The evaluator may attempt to identify areas of common ground and then may review the key disputed issues. Once the evaluator feels he / she understands the matter sufficiently, the evaluator adjourns to prepare a written evaluation. For the same reason that confidential written submissions are not permitted, no private caucuses are permitted until after the evaluator commits the evaluation to writing. Evaluations are intended to be written simply, in a short period of time (perhaps 45 minutes to an hour), so that they may be read aloud to the parties—the writing itself is not ordinarily distributed to the parties.

Once the evaluation has been prepared, the evaluator asks the parties if they would like to discuss settlement before hearing the evaluation. If all parties would prefer to discuss settlement, the evaluator may facilitate those discussions on the spot, including the use of private caucuses if desired. If negotiations fail, the evaluator then reads the previously prepared evaluation in a joint session—without adjustments for anything learned during the course of negotiations.

If any party wants to hear the evaluation immediately after it is prepared, the evaluator must present it. The evaluation is then read in joint session with all participants present. After the evaluation is presented, the evaluator again asks the parties if they would like to discuss settlement. Again at this juncture, facilitated negotiations only occur if all parties agree.

If an agreement is reached through the ENE process, that agreement is documented in the same fashion as it would be in mediation. If no agreement is reached, or if the parties do not agree to negotiate, the evaluator works with the lawyers and parties to develop a case management plan. This may include agreements about stipulated facts, focused or staged discovery and motions practice, and further ADR proceedings.

ENE Distinguished from Other ADR Processes, and the Resulting Qualities of the Neutral

As the foregoing description of the process may suggest, ENE entails components of both mediation and non-binding arbitration. In the first phase of ENE, the basic goal of the process is much like non-binding arbitration—to provide the parties with an advisory opinion about the likely outcome of the case. ENE is designed to be less formal—no testimony, no actual award—but like non-binding arbitration it is fundamentally used to provide the parties with information that will likely inform their risk analysis in the case. And this assessment phase is performed in a manner that ensures the evaluator is providing the same analysis to each side of the case, which parties sometimes suspect may not occur in caucused mediation. The settlement phase, if it is reached, resembles mediation. It is only during this phase of the ENE proceedings that the underlying interests of the parties come into play. Until this point, the process is wholly focused on the legal claims.

The best evaluators, accordingly, must be highly expert counsel able to provide reliable opinions about the likely outcome of the litigation. They *also* should be skilled mediators with a full complement of tools to enable them to guide the parties beyond the contours of the legal problem to a consideration of their underlying needs and interests as they facilitate settlement negotiations.

ENE in Practice: The Northern District of California Experience

For the past 10 years, in the Northern District of California, ENE has been an integral part of an ADR Multi-Option Program that includes court-annexed mediation, settlement conferences conducted by magistrate judges, non-binding arbitration, and the use of private ADR (which almost always means private mediation). Parties in civil cases presumptively use some form of ADR, which they may choose. Mediation is by far the most popular and flexible of the ADR processes, but ENE has consistently remained the process of choice for about 15% of the civil cases. And non-binding arbitration has fallen into disuse almost entirely.

Although it is difficult to know with certainty, it seems that the primary benefit of non-binding arbitration—a neutral assessment of the likely outcome of the case—can be obtained earlier and less expensively through ENE. Beyond this insight, it is difficult to generalize about the types of cases choosing ENE. No particular case type dominates. The most common profile appears to be the circumstance in which one or both sides strongly believes it will prevail and is therefore unwilling negotiate. These parties seem to prefer ENE because it means they do not have to agree to mediation (whether court-annexed or private) or a settlement conference, both of which imply a willingness to negotiate. Put more positively, ENE provides the parties with a disciplined

proceeding focused on the legal merits, the outcome of which is not necessarily expected to be settlement.

"…the overall settlement rate of cases participating in ENE and in court-annexed mediation is about the same…"

Interestingly, based on evaluator reports, once engaged in the ENE process, about half the time the parties choose to move into settlement negotiations *before* hearing the evaluation. And, about half the time, the parties choose to move into settlement negotiations *after* hearing the evaluation. Accordingly, although the reason for choosing ENE appears to be the desire not to be forced into a settlement conversation, about 75% of the time the parties in ENE end up in such a conversation. And the overall settlement rate of cases participating in ENE and in court-annexed mediation is about the same, with somewhere in the neighborhood of 60-65% of cases settling at or as a result of the ADR process.[2]

Clarification of issues and the development of an improved information base for making decisions about the case are reported to happen more than half of the time, but formal case planning—for example, making agreements about stipulations of fact, discovery and motions practice—are reported to occur less than 15% of the time. This may be the result of much more active efforts by the judges to take an active role in case management in recent years.

Overall, lawyer and client satisfaction with ENE has remained consistently high. In response to questionnaires, almost 90% of lawyers and clients said that the process was fair and that they would volunteer an appropriate future case for ENE.

Conclusion

ENE is a highly specialized procedure that may not be appropriate for every case. Particularly for cases in which the parties desire a disciplined procedure focused on the law and they are unsure about or unready to agree to a settlement-focused ADR process, it may be just the right approach.

Endnotes

1. Brazil, Wayne D., Early Neutral Evaluation Manual for Evaluators, page 2 (2008 revision).
2. All of the data cited here and in the following paragraphs are based on responses to questionnaires filled out by lawyers, parties, and evaluators, the results of which are on file with the ADR Program of the U.S. District Court, Northern District of California.

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The Summary Jury Trial and Other Hybrid Forms of ADR

By Thomas D. Lambros

When I first became a lawyer 58 years ago (at the tender age of 22), and then as a young judge (at the age of 30), I had dreams of enhancing the system of justice in this great nation of ours, by helping litigants not only to achieve the justice they desired, but also to actually help them solve their problems. I recognized that taking a case to trial was, and still is, a strict, formal, extraordinarily costly and risky process, and that many times, the benefits of forgoing those costs and risks through an early settlement was outweighed by the litigants' desire to have their day in court. I was driven to find a better way to achieve justice for all, and sought assistance from my colleagues, who were older, established judges. However, I quickly became discouraged when I realized that they were stuck in the ways of the past, and it seemed they had no interest in doing anything other than simply administering the time-honored process of the jury trial. It was from my colleagues' lack of vision regarding a stagnant process and my goal of establishing a better way to achieve justice and solve the problems of the litigants who appeared before me that I created the Summary Jury Trial.[1]

The Summary Jury Trial is a hybrid ADR process that I consider to be a "trial science," as it is a method for predicting the outcome of litigation that regularly and reliably produces trustworthy results. In other words, the Summary Jury Trial converts our adversarial system of litigation from what is usually an imprecise art, involving a great deal of guesswork, to a predictable process. It permits the participants to predict the outcome of a jury trial in any type of case without going through the significant expense of preparing for, and putting on, a full-blown trial[2] by presenting a significantly shortened version of their case to a real jury and receiving a non-binding verdict. In a Summary Jury Trial, the parties have the opportunity to see and hear how their case is presented, how their opponent's case is presented, how a random cross-section of the community reacts to the presentation of each side's case, and how a typical jury ultimately decides the issues. While this article focuses on Summary Jury Trials, Summary Bench Trials can be used in a similar manner for cases that will be tried before the judge instead of a jury.

The Summary Jury Trial is the most advanced mode of ADR, the purpose of which is not to supplant the jury trial, but to encourage a fair and informed settlement among the parties by demonstrating the strengths and weaknesses of each side's position, permitting them to assess the merits of the claims and defenses of the case as a whole, and allowing them to mutually place a realistic settlement value on the case. Thus, the Summary Jury Trial allows the litigants to have their day in court while simultaneously avoiding the expense of a trial by reaching a fair settlement that is based upon an informed assessment of the case.

In a Summary Jury Trial, a jury is summoned and selected in the same manner as in a jury trial. The lawyers for each side present a one- to two-hour summary of their case, consisting of opening statements, reference to exhibits, recitation of pertinent documents, and deposition testimony; the "judge" or "magistrate" reads a brief jury charge; the jurors are left to deliberate and, if a verdict is reached, it is read to all participants. Whether or not a verdict is reached, after the jury has finished deliberations, the judge, attorneys, and parties are given time to engage in a dialogue with the jury to explore their views on the case and how they reached the decision they did. The entire process takes only one day.

"The Summary Jury Trial…is a method for predicting the outcome of litigation that regularly and reliably produces trustworthy results."

Typically, the subject of the Summary Jury Trial is broached at the final pre-trial, when all prior settlement negotiations have failed, and the judge asks the attorneys and parties whether they wish to participate in one last effort to resolve the case short of trial. At this time, a majority of discovery has been completed, such that the parties have a full grasp of the evidence in the case, but extensive trial preparation has not yet begun. However, lawyers and litigants who would prefer to cut to the chase need not wait for the final pre-trial, but may instead agree to engage in limited, voluntary discovery and proceed to a Summary Jury Trial long before the case generates any longevity of its own, with the consequent expense and disruption to the parties, and settle it early.

In most circumstances, the Summary Jury Trial is non-binding, as the judges in this process are without the power or authority to order the outcome to bind the parties. Occasionally, however, in cases in which settlement negotiations have resulted in an impasse, the parties may agree to be bound by the outcome of a Summary Jury Trial in connection with a "high-low" agreement. For example, if the verdict is for the defense or less than the low, the plaintiff will agree to accept the low; if the verdict is greater than the high, the plaintiff will agree to accept the high; and for any verdicts in between, the parties will be bound by the jury's verdict. In this regard, a smart and versatile mediator can effectively resolve the impasse by integrating the hybrid Summary Jury Trial into the mediation process. When the dialogue shifts to a Summary Jury Trial, the parties can either agree to participate in a binding Summary Jury Trial, or at the very least, the

discussion serves to provide momentum for the dialogue and a settlement results.

Moreover, recently there has been an increasing use of the unilateral Summary Jury Trial, which is often called an "advisory proceeding," in which one party presents both sides of a case to a jury that has been selected by a facilitator in a private courtroom or conference room. While this type of advisory proceeding does not allow both parties to hear a neutral assessment of the case for purposes of reaching a settlement that is deemed fair by both sides, it certainly assists a party that needs or desires a neutral assessment of the strengths and weaknesses of each party's case so that it may better evaluate its own settlement position.

In my experience, Summary Jury Trials work. I have presided over 80 Summary Jury Trials, and of those, all but seven cases settled following the Summary Jury Trial. Of the seven cases that did not settle, but instead proceeded to trial, five of the verdicts were virtually identical to the verdicts rendered in the Summary Jury Trial; only two trials resulted differently. By way of example, in one construction case, the jury in the Summary Jury Trial found in favor of the defendant after deliberating for only thirty minutes. When the parties failed to settle, and the case proceeded to a jury trial, the jury returned a verdict in favor of the defendant after deliberating for only twenty minutes. Similarly, in one antitrust case, the jury in the Summary Jury Trial returned an award of $27 million for the plaintiff. When the parties failed to settle, and the case proceeded to a jury trial, the jury returned an award of $25 million for the plaintiff. Thus, in my experience, the Summary Jury Trial accurately predicts the ultimate outcome of a jury trial in a cost-effective manner which allows the parties to reach a fair and informed resolution while saving the expense of preparing for and participating in an actual trial ***and*** still having a version of their day in court.

I am not alone. The Judicial Conference of the United States endorsed the experimental use of Summary Jury Trials as a potentially effective means of promoting the fair and equitable settlement of civil jury cases in September of 1984. Also, the Federal Judicial Center reached the tentative conclusion that "summary jury trial worked well in settling cases that might have gone on to full trials had they not been assigned to such a procedure."[3]

While I am certainly partial to the Summary Jury Trial, I would be remiss if I did not at least briefly mention several additional hybrid ADR processes. The first is the mock trial, which is, in essence, an enactment of the trial in which each of the parties presents a shortened version of their case, including opening and closing statements and rebuttals and witness examinations, over a two- to three-day period, after which a mock jury deliberates and renders a verdict. Afterwards, the lawyers listen while the mock jury is "debriefed" by the "judge," who is often a forensic expert, and then have the opportunity to discuss the strengths and weaknesses of the case with the mock jury. One downfall of this particular ADR process is that often nearly as much preparation is put into the mock trial as would be put into the actual trial, thus not saving the litigants a great deal of legal fees.

A second hybrid ADR process is the mini trial, which is most often used in business disputes. In a mini trial, the attorneys for each party present their side of the case to a neutral advisor, sometimes a retired judge, and to the high-level representatives of the parties, particularly those who have settlement authority. Key witnesses or experts may be called to testify if necessary, but the rules of evidence do not apply. During the mini trial, this neutral advisor and the party representatives may ask questions to probe the strength of each side's case. Afterwards, the party representatives meet to discuss potential settlement. If no settlement can be reached based on this discussion alone, the neutral advisor may be asked to give his or her opinion as to the likely outcome at trial. The mini trial is not a trial in the real sense of the word, but is rather an enhanced and intensive settlement dialogue which utilizes the evidentiary components of a trial, including actual witnesses in a process that is moderated by a neutral. [4]

A third hybrid ADR process is the shadow jury, which is a select number of individuals who are retained by one party to watch the jury trial as it is being presented to the actual jury and provide feedback to the attorneys throughout the trial. There are several drawbacks to this option, the primary one being that it does not save the parties any of the expense that goes into preparing for trial, the secondary one being that the information is only given to one side such that it does not assist in reaching a mutual resolution.

A fourth hybrid ADR process is known as the virtual jury study, in which jurors are recruited online by forensic experts and are provided with written material prepared by the attorneys for each party consisting of introductory remarks, an outline of the case, and each side's presentation. After the jurors have read the materials, they participate in a chatroom with the forensic experts, who ask them questions and engage in a dialogue with them regarding their thoughts on the case. One forensic expert, Dr. Robert Gordon of the Wilmington Institute, who was the first to use virtual jury studies, plants a "provocateur" in the chatroom to stir up the jury's reactions. Dr. Gordon's creation of this online virtual trial may be proven to be the most cost-effective way to conduct a jury study. [5]

Finally, the reach of the hybrid ADR processes is limitless—the only limit is one's imaginative and creative abilities. This is the most fascinating aspect of using different dispute resolution mechanisms as part of the adversarial process, for it permits us to experiment with new ways and methods and to modify existing means of predicting outcomes, all with the objective of providing people with opportunities to achieve more informed settlement decisions. This type of forensic science is not

tampering with an established system, but is merely fine-tuning it and making due process a modern day reality rather than an old-fashioned list of stagnant imperatives. We must remember this: with or without ADR, most cases settle. The Supreme Court, the appellate courts, and the trial courts handle to conclusion and decision a relatively small number of cases. Thus, if most cases settle, and settlement is the staple of the adversarial industry, we should keep working on making it better.

*"…*all *hybrid forms of ADR are important to litigants in that they allow the parties to predict the outcome of trial and thus enhance the quality of settlements."*

As the Summary Jury Trial—at least in my opinion—is the best method for predicting the outcome of a jury trial without having to go through the time and expense of actually preparing for trial, I strongly recommend that all practitioners take this route if they have reached the final pre-trial stage and settlement negotiations have reached an impasse. Not only will the attorneys be spared the stress, headaches, and sleepless nights that often go hand-in-hand with trial preparation, but the litigants themselves will be spared the stress and expense for that preparation while achieving the same outcome—all while having their day in court. However, whether or not the Summary Jury Trial is utilized, it should be remembered that ***all*** hybrid forms of ADR are important to litigants in that they allow the parties to predict the outcome of trial and thus enhance the quality of settlements.

Endnotes

1. Some commentators and practitioners refer to Summary Jury Trials as "mock trials." I believe that this characterization discredits the process, as it is a real trial with a real jury reaching a real decision based upon real facts and evidence, the difference being that in most circumstances the result is not binding.
2. In my experience, trial preparation and attendance (for attorneys and lay and expert witnesses) typically comprises approximately 40% of all legal fees.
3. Stephen B. Goldberg, et al., Dispute Resolution 282-283 (1985) *quoting* M. Daniel Jacoubovitch & Carl M. Moore, *Summary Jury Trials in the Northern District of Ohio*, Federal Judicial Center 7 (1982).
4. *See* Stephen B. Goldberg, et al., Dispute Resolution 271-279 (1985).
5. *See* David Berg, The Trial Lawyer: What it Takes to Win 56-57 (2003).

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An Arbitration GPS

By Abigail Pessen

The drawbacks of litigation fretted over most frequently by the bar—its high cost, snail's pace, and lawyers' lack of control over trial dates and other scheduling difficulties—could be avoided by choosing to arbitrate instead. Indeed arbitration offers many benefits, including flexibility and party choice, that can lead to significant cost and time savings, the ability to choose the decision maker, and—in the international arena—a neutral forum, cross-border expertise and crossborder enforceability.[1]

"…arbitration may only be invoked if both parties have agreed in writing (their 'Governing agreement' or 'arbitration clause') to arbitrate their dispute."

Yet litigators who are comfortable and confident in court are sometimes flummoxed when confronted with an arbitration clause. Two of arbitration's hallmarks, privacy and finality, while highly beneficial, are also the likely cause of this unease: the privacy the process affords its participants equates to a lack of transparency, making it virtually impossible for neophytes to observe the proceedings and "learn the ropes." Similarly, the finality of the arbitrator(s)' decision, due to the drastically limited grounds for review, raises the stakes, and anxiety level.

This "GPS" will guide practitioners through what may be unfamiliar terrain. It is also an acronym for the troika underlying all arbitrations: the parties' "Governing agreement;" the Provider rules; and the applicable Statutes.

I. Overview

Arbitration is a process for resolving disputes that both resembles and differs dramatically from its dispute resolution counterparts: court litigation, on one end of the spectrum, and mediation on the other. Like judges and juries in court litigation, arbitrators hear evidence and decide who "wins" the case; arbitration is an adjudicative proceeding. It thus differs fundamentally from mediation, in which the parties themselves decide whether and how to resolve their dispute and the mediator lacks power to impose the outcome.

Our legal system generally permits aggrieved parties to commence lawsuits in court against whomever they choose, so long as jurisdictional criteria are satisfied. In contrast, arbitration may only be invoked if both parties have agreed in writing (their "Governing agreement" or "arbitration clause") to arbitrate their dispute. The parties in arbitration choose their arbitrators, much as they select jurors, but not judges, in court; the parties also pay their arbitrators for their service. Unlike court proceedings, arbitration hearings are not open to the public, and the resulting decisions (called "awards") typically are not publicly available unless the parties make them so. Another key difference from court litigation is that those awards cannot be appealed or overturned except on very limited grounds.

What follows is an overview of the process, from commencement of an arbitration proceeding to confirmation of the award.

II. Getting Started

Arbitration is often described as a "creature of contract, not coercion," because a party will not be compelled to arbitrate a dispute unless it has agreed in writing to do so. The parties' governing agreement (which can be made before or after a dispute has arisen), whether highly detailed or a single sentence, is the advocate's starting point. It typically specifies which jurisdiction's law will apply, which entity shall administer the case, such as the American Arbitration Association or JAMS (the "provider"),[2] the number of arbitrators to be selected,[3] the location of the arbitration, and consent to confirming the award in any court of competent jurisdiction.

Although the governing agreement is given great deference by the courts, it is a contract subject to the same defenses available to contracts in general, such as fraud, duress, unconscionability, and incapacity.[4] Thus, the lawyer's first task—whether initiating or responding to a notice of intent to arbitrate—is to analyze the clause and determine whether it is vulnerable to attack or likely to be enforced. (The case law on this subject is voluminous and beyond the scope of this article.) In general, courts, not the arbitrators, decide whether an arbitration agreement is invalid, or does not cover the issue in dispute (i.e., is not "arbitrable"), unless the governing agreement unequivocally states otherwise.[5]

Once it has been agreed or determined that a dispute is indeed arbitrable, the provider rules spell out the process for selecting the arbitrator(s) and hearing and pre-hearing procedures consistent with any specific provisions of the governing agreement.[6]

Two statutes complete the GPS troika. The Federal Arbitration Act ("FAA")[7] provides the broad statutory framework for compelling and conducting arbitrations, defining their scope, and confirming or vacating arbitration awards. The FAA applies to all arbitrations affecting interstate commerce (thus, virtually all arbitrations). It is supplemented in New York by Article 75 of the CPLR,

which contains more specific procedures for commencing, defending, and challenging arbitrations and should also be reviewed before commencing an arbitration.

III. Pleadings

An arbitration is commenced when the party seeking relief (the Claimant) serves its counterpart with a Demand for Arbitration. This is a pleading akin to a complaint in court litigation, but unfettered by the rules and case law constraining the latter,[8] and may be as detailed or terse as its drafter chooses. (Many arbitrators believe, however, that a bare-bones demand is a missed opportunity by the advocate to begin educating and persuading the tribunal.) Similarly, the Respondent may answer the demand point by point, contain a competing narrative, combine the two, or be dispensed with altogether (if the provider's rules allow). Here too, though, an answer merely in the form of a general denial (or no answer at all), forgoes a golden opportunity to influence the tribunal's first impressions of the case, and a general response or no response leaves the tribunal uncertain as to which issues are genuinely in dispute.

After an arbitration has been commenced, arbitrator selection begins, in accordance with the clause's specifications and the provider rules. Counsel are well-advised to thoroughly understand in advance how the process works; the provider's case managers are an excellent resource. Some governing agreements provide that the two sides each appoint an arbitrator of their choosing and specify how the third arbitrator is to be chosen. Where there is no such provision, typically (but with important nuances) the provider process allows each party to rank potential arbitrators in order of preference and strike unacceptable ones until a match is found. With vast amounts of data a mouseclick away, advocates should learn as much as they can about the potential arbitrators under consideration.

IV. Pre-Hearing Procedures

Soon after the tribunal has been appointed, a preliminary conference call with counsel is held. During this call, counsel give brief descriptions of the case, hearing dates are established, and a schedule for pre-hearing discovery is set. Although discovery is typically less extensive than in court litigation, and depositions are discouraged unless requested by both parties, the governing agreement may trump the default "minimal discovery" setting or provide for even more limited discovery, and other exceptions may also be made as circumstances dictate. Electronic discovery can be as daunting as it is in the courts, but arbitrators' readiness to intervene if needed encourages proactive resolutions of e-discovery disputes to limit burden and expense.

Motion practice in arbitration is an anemic imitation of its court litigation counterpart. Generally parties wishing to make a motion (other than *in limine* motions) will need to persuade a skeptical tribunal that doing so will achieve substantial savings of time and expense.

The tribunal will transmit a procedural order setting forth the various deadlines for exchanging documents, expert reports if applicable, prehearing memoranda and hearing exhibits, and describing the manner in which the hearing will be conducted. Periodic status conference calls are usually scheduled too, to ensure the proceedings are on track.

"Arbitration offers litigators frustrated by 'the disappearing trial' the increasingly rare and exhilarating experience of actually trying a case…."

Adjournments are governed by the Provider rules. If requested on consent, they are almost universally granted—another plus for harried litigators.

V. The Hearing

Arbitration offers litigators frustrated by "the disappearing trial" the increasingly rare and exhilarating experience of actually trying a case: presenting testimony and documentary evidence, cross-examining their opponent's witnesses, and arguing in summation. Although the tribunal is not required to follow the rules of evidence (unless the governing agreement provides otherwise), and lawyers complain that some arbitrators are too quick to allow everything in "for what it is worth," rank hearsay on crucial points is not likely to be admissible. The flexibility of the process allows for witnesses to be taken out of turn, testimony via videoconference, and other accommodations to be made and innovations employed so that the hearing is conducted as efficiently as possible.

VI. Post-Hearing Issues

The prevailing party in arbitration receives an award, i.e., a written decision. Once issued the tribunal lacks authority to modify the award except for typographical or mathematical error; no motions to renew or reargue are permissible. To convert the award into a judgment that can be enforced like any other, a special proceeding must be brought in court to "confirm" it; although the procedure is routine, peculiar jurisdictional rules and strict time limits can imperil this process.[9] In addition, the losing party may cross-petition to vacate the award on one of the few grounds permitted under the FAA[10]—and in this regard, the parties' agreement cannot expand the statutory grounds for review.[11]

VII. Conclusion

Arbitration can be a speedy and cost-effective antidote to litigation; its privacy is often another enormous

benefit to the participants. Practitioners who take full advantage of its potential will enjoy a greater degree of control over their schedules and the conduct of their case, while dazzling their clients with the trial advocacy skills that have lain dormant during years of court litigation.

"Arbitration can be a speedy and cost-effective antidote to litigation; its privacy is often another enormous benefit to the participants."

Endnotes

1. See, Edna Sussman, *Why Arbitrate the Benefits and Savings*, NYSBA Journal, October 2009.
2. Arbitrations may also be, and sometimes are, conducted *ad hoc*, without the services of an administering dispute resolution provider.
3. The arbitration may be decided by a single arbitrator or by three arbitrators (also called a "panel" or a "tribunal"), depending on what the governing agreement specifies and what the provider rules provide.
4. 9 U.S.C. section 2.
5. Here, too, the caselaw must be read with care. See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995).
6. The AAA arbitration rules are available at adr.org; JAMS' rules are at jamsadr.com.
7. 9 U.S.C. sections 1 *et seq.*
8. *See, e.g., Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).
9. 9 U.S.C. section 9.
10. 9 U.S.C. 10.
11. *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). See also, William J.T. Brown Heightened Review of Arbitration Awards Under State Law After the Supreme Court's Decision in *Hall Street Associates v. Mattel*, New York Dispute Resolution Lawyer, Fall 2008 ; Carroll Neesemann, Sherman Kahn and Benjamin Smiley, Helping the Supreme Court Help Arbitration: Narrowing the Grounds for Review of Awards in *Hall Street* and Beyond, New York Dispute Resolution Lawyer, Fall 2008,

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Creating Space for Dialogue Involving Serious Crime

By Mark Collins

A mourning mother wished she could get some answers about what really happened on the day her 20-year-old son was murdered eight years ago. She learned of a way for her to meet with the young man responsible for her son's death. He voluntarily agreed to participate in a facilitated dialogue session. During the three-hour session, the mother asked him about the events of that day and why it escalated to the point of murder. The young man was able to help the mother by answering her questions and expressing how sorry he was for his actions on that fateful day. Two months after the dialogue, both mother and young man said that the session had helped alleviate their nightmares and offered them great hope for opening new chapters in their lives in the wake of their unfortunate relationship. It is this type of relationship that is at the core of a victim offender dialogue session that this article aims to describe.

Is it possible to heal from losing a child to murder? Who can possibly understand why a parent wants to reach out to the one person who can answer questions about how their loved one was killed? These are questions that can only be understood by individuals who have experienced this type of excruciating loss. One New York State Program run by the New York State Office of Court Administration through collaborative partnership with the state's Department of Correctional Services is well suited to offer this option to individuals who are victims of serious crime, and has done so since 1990 when its first two cases were aired on the Home Box Office network. The variety of serious crimes that permeates its caseload is diverse and includes assault, robbery, vehicular homicide, sex offenses and burglary, but murder remains the predominant crime that brings together the surviving victims and the incarcerated offenders.

A Framework: Restorative Justice

Victim offender dialogue is one of many restorative justice processes that also include victim offender mediation, family group conferencing, restorative or community conferencing, restorative circles and sentencing circles. Restorative justice can be traced back to multiple cultures and nation states, but often is attributed to the heritage of indigenous populations such as the Maori in New Zealand, Indian nations in Canada and the United States, and the Aborigines in Australia.[1] In 1990, Howard Zehr called for a new focus on crime and justice by examining our assumptions, and distinguishing between a "retributive" and "restorative" paradigm.[2]

Restorative justice has completely reframed the concept of what crime is by recognizing crime as an offense against human relationships, and victims and the community as central to achieving justice. Instead of focusing solely on the offender and defining justice as the placing of blame or guilt and the meting out of punishment, restorative justice recognizes that crime causes harm to the victim, the community and the offender. Restorative justice seeks to right the wrong done by holding the offender accountable with the goal of restoring the losses, as much as possible, to all who have suffered due to the crime. It is not a single program or set of programs, but rather a guiding philosophy. Restorative justice can be understood by asking the oft-quoted "three questions": Who has been hurt, what are their needs, and whose obligation is it to meet the needs and repair the hurt?

One of the first mediations between a victim and an offender was conducted 36 years ago in Kitchener, Ontario as a part of reform in North American prisons and jails. The restorative justice work that began in the 1970s has come to dramatically change the ways we can work with people who commit crimes, and the outcomes of this work have been much more powerful for not only offenders, but victims and entire communities. As early as the 1980s, New York's Community Dispute Resolution Centers (CDRCs) mediated between victims and offenders, and since then, they and other organizations have created a range of additional programming that draws on these restorative principles. Perhaps the clearest expression of how the field has continued to develop is the recognition it received in 1994 when the American Bar Association (ABA) endorsed the practice of victim-offender mediation. After many years of supporting civil court mediation, with limited interest in criminal mediation, the ABA now endorses the process and recommends the use of "victim-offender mediation and dialogue" in courts throughout the United States.[3]

Victim-Offender Dialogue (VOD)

The mourning mother described in the opening paragraph is but one example of many who have come to benefit from a victim-offender dialogue. The New York State Office of Court Administration, through its Office of Alternative Dispute Resolution, has established protocols in cooperation with the Office of Victim Services, New York State Department of Correctional Services. These protocols are based on the core characteristics of the process that include case initiation by victim, voluntary participation, confidential and honest communication, offender admission of guilt, offender remorse, and both physical and emotional safety.

The Initial Meeting with the Victim

Victims and their families must initiate the dialogue. An offender cannot begin the process, predominantly because the program does not want to re-victimize those

victims who may not want to meet their offender. After initiation by a victim, two trained facilitators travel to the victim's home county—often meeting at the local Community Dispute Resolution Center for a confidential setting—to talk about the VOD process and why he or she is interested. Facilitators allow the individual to articulate why he or she wants to meet the offender, what are some of the questions he or she wants to ask, and what his or her goals for participating are. They want to ensure that the victim can benefit from a dialogue process and that the process will be emotionally and physically safe. There are no two victims alike, but reasons for participation may include to hear why and how the crime happened, to tell the offender how it affected them and others, to lessen the fear of a repeat crime or retribution, to learn what the offender has done to prepare himself or herself for eventual transition to the community, to further their healing process and to lessen the severity of the trauma associated with their loss or criminal victimization.

"Victim-Offender Dialogue is not appropriate for everyone. It is not counseling or therapy, and it is not a 'cure' for all problems related to the crime. Rather, it is a conversation between the person harmed and the person responsible for the crime."

Interviewing the Offender

After the initial meeting, if the victim has decided to continue the process, facilitators travel to the correctional facility to meet with the offender, again describing the process but also assessing whether the offender admits guilt, is remorseful, and wants to help the victim in the process. An offender may choose to participate in a VOD to show remorse and accountability, to apologize to the survivor, to describe to the victim what progress and changes have been made since the crime, to move toward making amends and to try to begin repairing the harm committed by his or her action, Offenders are turned down when they do not admit guilt, and are not remorseful for their actions. The screening is exhaustive. The interviewers get to know how well offenders are doing in prison, and get a good sense of their sincerity in wanting to help the victim. Victims have occasionally changed their minds and are constantly reminded that they can do so at any point in the process. But while offenders are informed that victims may change their decision to participate, facilitators encourage the offenders not to do so and stress that if they change their mind , it can be another form of victimization. Fortunately no offender has thus far changed the decision to go forward after initially agreeing to participate.

The Dialogue

The victim typically travels to the correctional facility with a family member or friend and meets the two facilitators at the prison entrance. The facilitators earlier have communicated to the victim on what to expect regarding entering the facility, being searched for weapons or cell phones, walking to the meeting room and how the room will be set up. The victim is seated on same side of table with one facilitator and the offender is seated next to the other facilitator directly across from the victim. The duration of the dialogue is based on the victim's needs, but oftentimes lasts between two and four hours. The opening question posed by the victim is often as simple as, "Why did this happen?" Follow-up questions and comments from both victim and offender typically stem from ideas discussed at earlier preparation meetings. The victim and offender discuss the crime and the impact it has had on them, their families and communities. For participating, offenders receive no tangible benefits related to their sentence or confinement, but they often benefit greatly from the opportunity to express remorse for their crime. Facilitators know that when offenders look into the eyes of the person they have harmed, they often feel true remorse and can begin to turn their own lives around.

Follow-up Meetings

Immediate feedback from both victims and offenders participating in a VOD has been incredibly positive. One woman who recently met with the man who murdered a family member said, "The VOD process may not be for everyone, but it should be made available to anyone who needs it. The process doesn't even have to end in a dialogue to be helpful. Simply organizing one's thoughts about what one would say if given the opportunity can be beneficial. In my case, the dialogue itself was very helpful." Facilitators conduct individual follow-up evaluation meetings in person at both the victim's home county and the offender's correctional facility approximately two or three months after the dialogue. The goals for these follow-up meetings include checking in with the participants to see how they are doing, to assess how they were impacted by the meeting, to provide a last opportunity for each to share information with each other through the facilitator, and to integrate their feedback into future VOD processes.

Victim-Offender Dialogue is not appropriate for everyone. It is not counseling or therapy, and it is not a "cure" for all problems related to the crime. Rather, it is a conversation between the person harmed and the person responsible for the crime. In New York, the Victim-Offender Dialogue is victim-requested, victim sensitive, and victim-driven. As it is voluntary by the crime victim and the offender alike, it is empowering for both. For more information regarding this program, call the New York State Office of Court Administration's Office of Alternative Dispute Resolution at (518) 238-4355.

Endnotes

1. Mark S. Umbriet. (2001) The Handbook of Victim Offender Mediation, p.xvi.
2. Howard Zehr. (1990) A New Focus for Crime and Justice: Changing Lenses.
3. "Guidelines for Victim-Sensitive Victim-Offender Mediation: Restorative Justice Through Dialogue," Mark Umbreit Ph.D.; Jean Greenwood, University of Minnesota, Center for Restorative Justice & Mediation, U.S. Dept. of Justice, Office of Justice Program, 2000 [www.ncjrs.gov / App / Publications / abstract.aspx?ID=176346].

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Mediation Committee White Paper—Report of the Dispute Resolution Section on Mediator Quality and Credentialing

Introduction

This year, the State Bar DR Section asked its Mediation Committee to examine the issue of mediator quality / credentialing and to make recommendations to the Section. The Mediation Committee, in turn, appointed a subcommittee consisting of its two Chairs, the former Chair of the DR section, and several other Mediation Committee members who expressed interest in participating in this project.[1]

From its beginnings as a "grassroots" movement in the late 1970s, mediation as an alternative to litigation has become an accepted and often preferred method for resolving legal disputes. It is perhaps not surprising, then, that the issue of mediator quality and credentialing is not only front row center for the New York State Bar, but also has been with us in one form or another for a very long time. This report seeks both to set the context for its recommendations on the subject, and to suggest specific action steps for adoption by the Section.

In taking a fresh look at the issue this year, the Mediation Committee has reviewed much of the literature and reports by other Bar Associations and entities; we have listened at our subcommittee meetings to some key thinkers in this area; and we have debated the issues among our members, the Dispute Resolution Section, and the wider State Bar membership.

Background

A. Earlier Efforts at the National Level

The issue of mediator quality / credentialing has been and continues to be controversial, both nationally and within our own statewide community. At the national level, one of the earliest efforts to address this issue from a policy perspective occurred when the Society for Professionals in Dispute Resolution ("SPIDR") appointed a Commission on Qualifications in the late 1980s to examine the subject of qualifications for mediators and arbitrators in both court-connected and independent programs and services. The Commission's report contains a useful reminder of the goals of such an endeavor, goals which can often be lost in the din of the controversy:

> The most commonly discussed purposes of setting criteria for individuals to practice as neutrals are 1) to protect the consumer and 2) to protect the integrity of various dispute resolution processes. Concerns have also been raised, particularly about mandatory standards of certification, including 1) creating inappropriate barriers to entry into the field, 2) hampering the innovative quality of the profession, and 3) limiting the broad dissemination of peace-keeping skills in society.[2]

Another early cautionary note was expressed at a symposium on ADR convened by the Seton Hall Legislative Journal in New Jersey in 1987, where one of the presenters observed:

> Even if there is agreement that some degree of professionalization is desirable, and agreement with respect to the form—licensure, certification, accreditation, or subscription to formal standards of practice—the question still remains as to how competence will be measured. Experts disagree whether competence should be measured on the basis of "input," on the mediator's years of schooling, testing and continuing education, on the basis of the individual's "output" and actual performance, or some combination.[3]

In the early 1990s, the State Justice Institute funded another early effort to examine and make recommendations on the issue of mediator quality / credentialing. This effort, which culminated in a document entitled "National Standards for Court-Connected Mediation Programs," brought together judges, court administrators, academics and experienced mediators to recommend best practices for courts looking to initiate and run mediation programs. The Standards' section on qualifications of mediators states in part:

> Qualifications of mediators to whom courts refer cases should be based on their skills. Different categories of cases may require different types and levels of skills. Skills can be acquired through training and / or experience. No particular academic degree should be considered a prerequisite for service as a mediator in cases referred by the court.[4]

The report presents a detailed list of mediator skills, and suggests that courts continue to monitor the performance of mediators to whom they refer cases and to ensure performance of a consistently high quality.

B. Earlier Efforts at the State Level

In New York State, the subject of mediator qualifications was first tackled formally by the New York State Alternative Dispute Resolution Project constituted over fifteen years ago by then-Chief Judge Judith Kaye in

February, 1994. The goal of that project was "to examine such {ADR} techniques as augmenting and complementing the work of the New York State courts."[5] On the issue of qualifications / credentialing, the Project's final report noted that when ADR is mandated or encouraged by a court, litigants must be able to rely on a certain minimum level of mediator qualifications. The report therefore recommended that all jurisdictions with court-annexed ADR impose requirements regarding qualifications for neutrals combining one or more of the following: academic degrees, training, apprenticeship or mentoring, and practical experience. For mediators, training in mediator skills, knowledge of the law, and participation in the mediation of at least three cases in the subject matter under the apprenticeship of an experienced mediator,[6] were highlighted as important qualifications.

All of this earlier thinking informs our efforts today to grapple with the issue of ensuring mediator quality, albeit in a changed and more complex environment in which the number of mediation users has mushroomed, as has the number of individuals desiring a career in the field.

C. Recent Reports

The subcommittee reviewed the extensive materials and reports reflecting prior work and thinking on this issue, including the American Bar Association's 2002 report on Mediator Credentialing and Quality Assurance ("ABA 2002 Report"), the New York City Bar Association's 2006 Report on Mediator Quality ("City Bar Report"), and the 2008 Report of the ABA's Task Force on Improving Mediator Quality ("ABA 2008 Report").

The ABA 2002 Report summarized past and then-current dispute resolution professional credentialing practices, provided an overview of generic professional credentialing practices, and recommended certain action steps. Recognizing that mediators may want credentials, the Report minimized the value of pro forma paper credentials:

> Professional credentialing is typically thought of as licensing, certification and accreditation. The task force believes that credentialing is a part of quality assurance, and that the primary goal of credentialing program is to support the assurance of quality practice. The Task Force has looked for a model that will do more than simply create a hurdle for mediators to leap over in order to have the status that permits them to practice. We believe that a more practical approach to start with is to develop a mechanism to accredit mediator preparation programs, either through a national system, or state by state.

(ABA 2002 Report at p. 5).

The City Bar Report, for its part, concluded that "the most practical, flexible and effective way to promote mediator quality advancement, and the one with the least serious disadvantages, would be adoption of two mutually compatible programs": intensified development of voluntary certification programs by mediator membership organizations, and development of disclosure registration systems for mediators. (City Bar Report at 6-7).

> The worthy goals of promoting quality in all mediations and protecting the public from untrustworthy and incompetent mediators are best met by drawing upon exiting strengths within the mediator community… By committing resources of time, energy and money to an expanded mediator certification process combined with a mediator disclosure registration system, these organizations will benefit practicing mediators, mediation parties and the public at large and advance mediation as a preferred means of resolving disputes. (City Bar Report at p.8).

More recently, and as a follow-up to its 2002 report, the ABA formed a Task Force to investigate factors that define high quality mediation practice. The Task Force reviewed existing policy documents, reports, and research on mediation quality, and then organized a series of focus group discussions of mediation users with follow-up questionnaires. With its emphasis on mediator quality rather than credentialing, the Task Force's Final Report includes a useful "Tool Kit for Improving the Quality of Mediation in Your Geographic or Practice Area," a publication that has been useful in the implementation of one of the State Bar Mediation Committee's initiatives described later in this report.

Mediation Committee Efforts

As set forth above, the subcommittee reviewed the extensive materials and reports reflecting prior work and thinking on this issue, including the American Bar Association's 2002 Report on Mediator Credentialing and Quality Assurance, The New York City Bar Association's 2006 Report on Mediator Quality, and the 2008 Report of the ABA's Task Force on Improving Mediator Quality. The subcommittee also interviewed OCA's statewide ADR coordinator Dan Weitz, who discussed with us the efforts of the Office of Court Administration to establish training and experience requirements for mediators in the courts and in community dispute resolution centers. Another contributor to the subcommittee was Rachel Wohl, head of the Mediation and Conflict Resolution Office in Maryland. This office has initiated a Program for Mediator Excellence with branches for, among other things, a mentoring program, ethical practice standards, ethical training, an ombuds program and continuing education, along with an on-line mediator directory. Finally, the subcom-

mittee presented a panel discussion of mediator quality at the Dispute Resolution Section's Annual Meeting in January, 2010; the panelists' observations were insightful and instructive.[7]

Analysis

As previous failed efforts have shown, the qualities which any credentialing system would be required to measure defy precise definition or measurement. Because of this problem, the Mediation Committee has concluded that licensing and / or other credentialing efforts are impractical, prohibitively costly, and unnecessary; and, instead, determined that the most appropriate approach is to act based on the consensus that was reached with respect to the following principles:

1) a mediator credentialing system or other changes to the profession should not be a pre-ordained recommendation; rather, we should be open-minded and not feel compelled to fix a system that isn't necessarily broken; 2) the subcommittee should focus on ways of enhancing mediator quality; and 3) practitioners' freedom and autonomy should be respected while also recognizing the need to protect the public.

Recommendations

The Committee recommends instead that the State Bar pursue the initiatives listed below, some of which are already being implemented. These initiatives, which reflect the principles stated above, will enhance mediator quality in New York without creating barriers to the profession:

- Ongoing mediator skills and ethics training should be offered and encouraged.
  - The Section recently sponsored such training at Fordham Law School, which benefited the enrollees and the Section.
- Mentoring opportunities for inexperienced mediators should be provided.
  - The Mediation Committee is establishing a protocol for matching mentees and mentors; the most likely mentoring opportunities are in court-annexed mediations.
- Feedback from mediation consumers should be encouraged and integrated into our practice.
  - The Mediation Committee is currently conducting a survey of New York litigators to learn more about their concerns and suggestions regarding the conduct of mediators. The results will be made available to the Section.
- Forums, peer discussion groups, and other opportunities for professional development should be provided and encouraged.
  - The Mediation Committee has begun to devote a portion of its meetings to discussions of practice issues, such as best practices regarding settlement agreements, mediator's proposals, techniques for moving through impasse, and business development. Future topics under consideration are risk analysis techniques and ethical dilemmas.
- Mediator Registry.
  - The Mediation Committee has appointed a subcommittee to investigate the feasibility of creating an online registry of mediators who are Committee or Section members, similar to the registries maintained by the State Supreme Court Commercial Division, the U.S. District Court for the Eastern District of New York, and the Eastern and Southern District Bankruptcy Courts, and containing such information as education, background, training, and experience. One idea under consideration is that the registry be hosted by the State Bar, posted on its website, and be accessible to State Bar members. While a mediator's inclusion in the registry would not constitute "certification" or indicate any "seal of approval" by the State Bar, the registry would provide a convenient way for consumers to get information about various mediators in one place.

Conclusion

The Mediation Committee requests that this Report be endorsed by the Dispute Resolution Section of the New York State Bar Association to reflect the Section's desire to encourage the use and enhance the quality of mediation in New York.

Endnotes

1. The Subcommittee consisted of Simeon Baum, Mark Bunim, Gail Davis, Francis Halligan, Abigail Pessen, Tom Rothschild, Israel Rubin, and Margaret Shaw.
2. *Qualifying Neutrals: The Basic Principles* (1989).
3. Margaret L. Shaw, *Mediator Qualifications: Report of a Symposium on Critical Issues in Alternative Dispute Resolution*, 12 Seton Hall Legislative Journal 1 at p. 126 (1988).
4. *National Standards for Court-Connected Mediation Programs*, Family and Conciliation Courts Review, Vol. 31 No. 2, April 1993.
5. Court-Referred ADR in New York State: Final report of the Chief Judge's New York State Court Alternative Dispute Resolution Project, May 1, 1996.
6. Ibid.
7. The panelists were Daniel Weitz, New York City Bar Association, ADR Committee Chair Peter Woodin, and Cardozo Law School Professor and scholar Lela Love.

Is Arbitration the "New Litigation"? The Choice Is Yours

By Thomas Stipanowich

"*Because of expense and delay, both civil bench trials and civil jury trials are disappearing.*" So says a task force co-sponsored by—of all groups—the American College of Trial Lawyers. Since litigation can be very costly and time-consuming, the group notes that parties nearly always settle or stop suing before trial. While the great majority of disputes have always been resolved out of court, today even many parties with strong claims may be daunted by costs and delays.

The primary culprit is American-style discovery, which accounts for as much as 90 percent of litigation costs—leading some to conclude that our "look-under-every-rock" system is simply unworkable. The problem has metastasized with e-discovery, producing what the Trial Lawyers' task force dubbed "a nightmare and a morass." This has led to a call for critical changes in the landscape of American litigation, including an end to the "one size fits all" approach of federal and state procedural rules. The bottom line: it's critical to fit the process to the problem.

Fitting the process to the problem, and avoiding the perceived pitfalls of litigation, is what leads many business users to submit disputes to binding arbitration. One would expect the current dissatisfaction with the "one size fits all" model of court trial to provide fertile ground for the growth of arbitration.

Advocates point out that arbitration awards are likely to prove much more "final" than court judgments, tending to substantially reduce post-hearing process time and costs. Through written agreement, businesses that choose arbitration have the opportunity to implement a process that proves vastly superior to litigation in many cases; parties are able to choose their decision maker(s) (including subject matter experts), procedures and venue. Parties may also identify what issues will be arbitrated, help set the timetable, and take steps to ensure the confidentiality of proceedings and of documents disclosed.

As such, arbitration may be an appealing alternative to litigation regardless of the relative cost and length. If, as frequently happens, business users regard speed, efficiency and economy as important goals in dispute resolution, there are steps that can be taken to tailor a process to serve those goals. The same ends are sometimes achieved through the excellent management skills of arbitrators and / or the cooperative efforts of counsel.

It is, therefore, surprising to often hear corporate counsel complain loudly about arbitration. Among their grievances, the cost and length of arbitration top the list. Failed expectations for a cost-effective, expeditious process undermine arbitration's vaunted advantages and turn off many business users. As one West Coast in-house lawyer with a major company recently reported,

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

A similar calculus may lay behind the 2007 decision of the American Institute of Architects to delete from its widely used model construction industry contracts the long-standing provision calling for binding arbitration of disputes.

Recently, a national Summit on the Future of Business-to-Business Arbitration in Washington D.C. brought together nearly 200 corporate counsel, lawyers, arbitrators and arbitration providers for a "town meeting" on the gap between expectations and experiences in commercial arbitration. They concluded that the blame for lengthy, costly arbitration must be shared by everyone involved.

Overly expensive, lengthy arbitration begins with businesses that incorporate arbitration clauses in their contracts. Drafters of commercial contracts may be unable or unwilling to take advantage of the choices inherent in arbitration. Without discussion or reflection, they include a boilerplate arbitration clause—frequently an omnibus, all-purpose scheme that leaves parties and arbitrators with considerable "wiggle room." When disputes arise, they "turn the keys over" to legal advocates who bring a "litigation mentality" to arbitration. Insisting on full-blown discovery, these lawyers reflexively file motions and raise objections, increasing costs and dragging out the process. Arbitrators may be reluctant to "ride herd" on such behavior, limit discovery, rule on those motions that hold promise for getting key elements of the case resolved, or act decisively on scheduling.

In response, National Summit participants supported the idea of shared solutions and called upon all "stakeholders" in arbitration to help address the problem. The resulting College of Commercial Arbitrators Protocols for Expeditious, Cost-Effective Commercial Arbitration—guidelines soon to be made public—will play a key role in changing the culture of commercial arbitration by speaking directly to business users, lawyers, arbitrators and providers of arbitration services. Some basic tenets to remember are:

Users: It's your process. For businesses that use arbitration and their legal counsel, the message is clear: "the solution must begin with you." If speed and economy are your priorities, plan your arbitration procedure accordingly. Consider arbitration in the context of a *comprehensive* strategy for resolving conflict—including the possibility of a negotiated resolution. (For some, this may mean providing "stages" for negotiation and mediation. Keep in mind that mediators, if they can't help get a case settled, may be able to help parties tailor a more suitable process for arbitration.) Eschew a "one size fits all" approach in favor of a more tailored process. Set an overall timetable-with a "fast-track" for some or all kinds of disputes. Give clear guidelines for the use and granting of motions.

"The Protocols for Expeditious, Cost-Effective Commercial Arbitration will soon be available online…."

Above all, curtail discovery by establishing meaningful standards that base information exchange on proof of relevance and materiality, or other scope limits. Reinforce these initial choices with others made after disputes arise. Choose outside counsel willing and able to act consistently with your priorities; pick arbitrators with the skill, courage and time to manage a case efficiently and expeditiously.

Service providers, give users more help. To institutions that provide arbitration rules, appoint arbitrators, and administer cases: business users depend on you to provide effective, reliable choices, including templates for speedy and less costly process. So, do it better! After years of over-reliance on a "one size fits all" approach to arbitration, you are putting a lot of effort into developing key tools for users, including expedited or streamlined rules, standards giving arbitrators meaningful authority to limit discovery, and guidelines for the handling of dispositive motions. However, you must go further and actively support these options by collecting and sharing information about their successful application by business users in different kinds of disputes.

"Success stories" are essential to overcoming the reluctance of many to try new approaches. You also need to improve the ability of arbitrators to effectively manage arbitration, with particular emphasis on the early stages, including discovery and motion practice. Finally, you should provide users better guidance regarding key process choices and offer avenues for complaints.

Outside counsel, align with your client. Litigators, change your tune. Help your business clients make the most of special opportunities by appropriate dispute resolution approaches, including arbitration. Begin by sitting down with your client, assessing the best means of managing the dispute in light of agreed-upon goals, and committing yourself to an appropriate strategy. Working with opposing counsel to help clients embrace the special opportunities afforded by arbitration—a choice-based process that affords many opportunities for efficiency, fine-tuning and out-of-the-box thinking. Take advantage of having sophisticated decision makers with pertinent experience rather than "blank slate" jurors.

Arbitrators, be more proactive and brave. Though likely to be more skilled than the arbitrators of a generation ago, you must modify your approach in light of today's complex challenges. It is not enough to know how to run arbitration hearings. In most cases, your key contributions will occur in the prehearing process, in actively—even aggressively—shaping the process, encouraging cooperation between parties, tailoring and urging forward information exchange, and zeroing in on motions that hold real hope for getting key elements of the case resolved.

In today's environment, the pre-hearing process is usually the longest and most expensive element of arbitration. Moreover, it is often the springboard to settlement of the case—obviating the need for hearings. It is no longer sufficient for arbitrators to postpone all decision making until the conclusion of a hearing on the merits—the circumstances demand a different approach, and the parties deserve better.

The Protocols for Expeditious, Cost-Effective Commercial Arbitration will soon be available online and in print. They are a clarion call for stakeholders in arbitration, beginning with business users, and they have already stimulated significant efforts by leading providers of arbitration services. Those who claim to desire speed and economy in arbitration now have their best opportunity ever to realize their expectations. It is time to put them to their proof. The Protocols will appear as an appendix to the Second Edition of the College's *Guide to Best Practices in Commercial Arbitration*, to be published by Juris Net in autumn 2010. A downloadable version of the Protocols will also appear on the College's website (www.thecca.net) in the near future.

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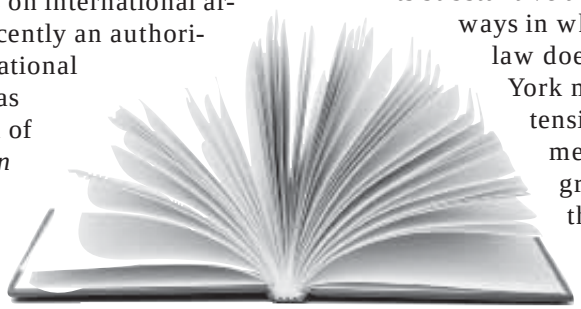
Book Reviews

International Commercial Arbitration in New York by James Carter and John Fellas, Editors

Reviewed by Lawrence W. Newman

It is ironic and frustrating that, although there are many deservedly respected treatises on international arbitration, there has not been until recently an authoritative single volume work on international arbitration in New York. That gap has now been filled with the publication of *International Commercial Arbitration in New York*, edited by the well-known practitioners and arbitrators, James Carter of Sullivan & Cromwell and John Fellas of Hughes Hubbard & Reed.



Carter and Fellas have gathered together some of the leading lawyers in the international arbitration field in New York to write, together with them, 13 chapters on the law and practice relating to the conduct of international arbitration in New York. The contributions are arranged in the order in which arbitrations are conducted, starting with the arrangements for the commencement of arbitration, the compelling or enjoining of it, attachments and other provisional remedies, both by the courts and by arbitrators, in aid of arbitration through the enforcement of arbitral awards, including those rendered abroad. Each chapter presents a careful and thoughtful discussion of the subject, providing not only the kind of astute observations that can come only from lawyers experienced in the field, but also references to authorities, referral to which will guide the novice to a greater understanding of the issues and which will serve as a reminder to those more experienced.

Of course, New York is not an island whose laws and precedents are markedly different from those of other jurisdictions in the United States. Writing about the law in New York does, however, provide the benefit to the reader of a thorough examination of the law in a single jurisdiction—indeed one that is, without much question, the most important venue in this country for international arbitration. New York has extensive case law involving issues relating to international arbitration law, and it is the site of such important institutions as the International Centre for Dispute Resolution of the American Arbitration Association and CPR—the International Institute for Conflict Prevention and Resolution. Therefore, discussion of international arbitration law as interpreted and applied in New York can be a solid base for obtaining an understanding of the law in other parts of the country, where many of the issues addressed in New York courts have simply not come up.

It is evident that the book was intended, in part, for an audience outside the United States, or, at least an audience unacquainted with New York law. Thus, there is a chapter on the elements of New York contract law and a chapter on the judicial structure in the United States and New York, including the way in which litigation is conducted. New York law is referred to extensively, both in its substantive and procedural aspects. Perhaps the ways in which New York judicial procedural law does not apply to arbitrations in New York might have been examined more extensively. Thus, the chapter on enforcement of damages in arbitration gives greater attention to the ways in which the 9% pre-judgment interest rate of the Civil Practice Law and Rules has been applied in the courts than it does to the applicability of the statutory interest rate to disputes decided by arbitrators, stating only, "Arbitrators sometimes but not always apply the court statutory interest rate." But the basis for arbitrators' not applying the CPLR rate is not made clear. The CPLR applies, as it states in its first article, only to proceedings in courts in New York. In addition, there is no mention that time limitations applicable to the commencement of lawsuits in the courts of New York State are not binding on arbitrators sitting in New York. By specific reference in Section 7502(b) of the CPLR, arbitrators are not obliged to apply the time limitation periods that would be applicable in a court of the state under the CPLR.

These small cavils aside, the editors are to be commended for their selection of the authors of the chapters, all of whom have great depth of experience in the field, and for their assuring that the book adheres to high standards of scholarship and care. The authorities cited can serve as a springboard for further exploration of the cases and the other authorities to which reference is made. The book has the distinct advantage, at least currently, of being very much up to date, although continuing pronouncements by the Supreme Court on arbitration issues require the reader, as always, to check the latest case law. For example, the very recent Supreme Court decision in *Stolt-Nielsen* would require a reconsideration of the points made in Chapter 11 on class actions.

The book would also be useful as a basic text for law school courses in New York (and even other states) on international arbitration. Much of what has to be communicated in the field of international arbitration is, in my teaching experience, material that is not well suited to the casebook approach. Rather, with this book as a base, a teacher of international arbitration can have the students obtain from the public domain (from Google Scholar, for example) certain of the key cases discussed. Also helpful

are the central documents that comprise the last third of the volume and include the New York and Panama Conventions, the Federal Arbitration Act, the rules of the leading arbitration institutions, ethics rules for arbitrators and guidelines and protocols for discovery in arbitration.

The fine work that has been done in this book should be applauded and it must be hoped that the editors will, in the course of time, retain the enthusiasm that gave rise to it and cause their illustrious contributors to keep it up to date, whether online or otherwise. As the law evolves with the Supreme Court continuing to take an interest in arbitration issues, updates to the book would be of great interest. The book should get the wide attention that it deserves.

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* * *

The Organizational Ombudsman: Origins, Roles, and Operations—A Legal Guide by Charles L. Howard

Reviewed by Stefan B. Kalina

As author Charles Howard states, "A principal purpose of this book is to serve as a legal guide for ombuds and those with whom they work on three critical questions: What is an organizational ombuds program? Why is it important? How can its claim of confidentiality be protected?" A glance back at these questions reveals only one whose answer appears to be useful to busy lawyers, i.e., how to maintain the confidentiality of communications with an ombudsman in the course of litigation. The other two appear to pose historical and policy-based questions better suited for academics. Indeed, they might. However, Mr. Howard's well-guided journey into these background questions provides useful, if not necessary, context for counsel grappling with the current confidential aspects of an ombudsman's work. Therefore, this comprehensive, yet compact, single volume reference warrants consideration by lawyers representing "ombuds ***and*** those with whom they work" to resolve disputes.

This distinction bears repeating at the outset, as it highlights a prime characteristic of a modern American form of ombudsman most lawyers will likely encounter: the "organizational ombudsman." This type of ombudsman strives to be ***independent*** of his or her organization in order to provide informal, confidential, and mediative resources to surface and facilitate resolution of conflict. Such work requires the attention of lawyers representing three distinct groups to a dispute: individual claimants, institutional clients, and the ombudsmen themselves. This is especially true because when an ombudsman is or has been involved, counsel for all three groups may interact in an adversarial or coordinated basis over the course of an investigation, attempted resolution, and potential litigation.

Despite its prevalence, the term ombudsman remains unfamiliar in sound and meaning. Mr. Howard notes that the ombudsman is not yet fully understood by practitioners or the courts, despite first appearing in some of the largest American institutions over 50 years ago. For that reason, Mr. Howard devotes time detailing the historical forces that have shaped the ombudsman role generally, and in American organizations specifically, as well as the public policies advanced by ombuds practice and why such organizations have implemented this unique form of conflict prevention and resolution. It is only against this backdrop that the legal issues surrounding ombuds, mainly confidentiality, come into sharp relief.

The first ombudsman was appointed in the eighteenth century by an exiled Swedish monarch seeking to maintain authority over his kingdom. The term ombudsman referred to a form of agent. The King's highest ombudsman was granted prosecutorial power to ensure that his government officials discharged their duties according to law. The office gained constitutional status as Sweden evolved into a parliamentary democracy and the ombudsman evolved into a "citizen defender," with powers to receive, investigate, and recommend a response to the wrongdoing or abuse. The concept of an ombudsman was later exported to Scandinavia and beyond, reaching American shores in the 1960s.

The advent of the public ombudsman in America coincides with the expansion of bureaucracy and the growing concern over administrative problems. Reflecting the ombudsman's evolution into an agent of administrative change for the betterment of the citizenry, the American Bar Association adopted a resolution in 1969 asking governments at all levels to consider establishing an ombudsman authorized to "inquire into administrative action and make public criticism." Many governments appointed such public ombudsmen.

The role of the private ombudsman began to take new shapes as many non-governmental, yet still bureaucratic, organizations adopted the idea in response to societal pressures. The earliest adopters were public universities during the 1960s and 1970s when campus unrest high-

lighted the need for an independent voice to respond informally to faculty, student, and administrative concerns and mediate disputes between them. Corporations later began using an ombudsman to bridge communication gaps between management and employees and to work informally with, but not as part of, management, to resolve disputes. Subsequently, in the 1980s, firms such as defense contractors embraced the ombudsman, in the wake of reported alleged misconduct, to assist with monitoring compliance and to disclose violations that sought to increase their public accountability.

Mr. Howard further contends that what is past is also prologue, and that societal challenges will likely continue to stress and potentially compromise our public and private institutions. Accordingly, he argues that having ombudsmen in place will continue to help provide the needed checks and balances on these institutions and promote their ethical conduct. In so doing, an ombudsman fosters compliance with several civil and criminal statutory schemes in such arenas as workplace harassment or securities fraud that may otherwise be violated.

In this context, the organizational ombudsman continues to emerge as a neutral party. This role contrasts with the traditional Scandinavian or "classical" ombudsman who served as an independent government official with formal powers to investigate and report, as well as the "advocate" ombudsman who represented concerned constituencies within an entity.

As a neutral, the work of an organizational ombudsman includes: communication and outreach, issue resolution, issue identification, and issue prevention. To carry out these functions, an organizational ombudsman must be independent, impartial, confidential, and informal. Mr. Howard explains that most of an ombudsman's work centers on issue resolution by providing a confidential and off-the-record resource where "inquirers" can obtain information about potential or actual issues they may observe within the organization. Notably, the ombudsman in this setting is located outside the formal, organizational channels for reporting or identifying wrongdoing. The ombudsman instead serves as an alternative to the bureaucratic apparatus and is, in fact, a real person with whom persons can interact freely. This affords inquirers the ability to discuss issues without necessarily identifying themselves. In turn, an ombudsman can gather data and pass it on to the inquirer in their effort to deal with a particular issue. For this reason, an ombudsman should have full access to the organization's information and procedures. During an information exchange, an ombudsman neither advocates for the inquirer nor the organization. The work does not, however, necessarily end here.

An ombudsman may also assist the inquirer to identify pertinent issues out of several presented, coach the inquirer how to present the issue on her own to the organization, help the inquirer to gain the perspective of other parties to the issue, and educate the inquirer on the limits on how the organization may respond. This may end the inquiry. Alternatively, if it does not, either the inquirer or the ombudsman may ultimately choose to broach the issue with the organization. If the ombudsman does so, then the ombudsman need not disclose the identity of the inquirer.

Lastly, an ombudsman with independent access to all persons, procedures, and information of an organization is able to work on a broad scale, above individual inquiries, to identify grounds for systemic change that may prevent future conflict. Again, without disclosing the identity of any inquirer or group of inquirers, an ombudsman can provide trend reports to organizations on the nature and type of issues he or she is handling, thereby providing or encouraging an organizational response on how to address current or emerging problems.

For this reason, Mr. Howard explores why organizations, public or private, should create an ombudsman program to create confidential discussion and, hence, promote issue prevention and, where needed, resolution. He identifies that current statutory compliance programs and whistleblower protections aimed at similar goals are limited in scope or intended effect. Therefore, he suggests that an ombudsman program that provides an off-the-record resource can supplement the commonly found (if not required) reporting programs and possibly promote the prevention of issues before they become sanctionable.

This necessarily raises issues as to the scope of confidentiality an ombudsman can provide. There are three main impediments to maintaining confidentiality. First, and foremost, there are no federal or state statutory guarantees of confidentiality.[1] Moreover, when the subject matter of a reported incident involves fraud or criminal behavior, pertinent policy reasons or constitutional rights may require the ombudsman to make disclosure(s) in order to protect a victim from imminent harm or so that the accused may confront his accusers. Second, in the absence of any statutory protection, disclosure must be defended on a case-by-case basis, in accord with legal principles that favor the public disclosure of facts needed to resolve disputes. Third, and somewhat related, courts deciding these issues are often unfamiliar with ombudsman programs and the nature of their communications.

To address these challenges, Mr. Howard maintains that an ombudsman program should be properly structured to respond to demands for disclosure and possess adequate resources to assert its confidentiality. The ombudsman's neutral posture, predicated on independence, stands apart from the historical concept of agency that marked earlier forms of ombudsman, and plays a direct role in maintaining the confidentiality of their communications. Under concepts of agency, notice to an ombudsman can potentially be imputed to an organization. This

may occur if the ombudsman has an express duty to disclose his or her knowledge or if the ombudsman is held out as a formal reporting channel so that he or she may be deemed to have apparent authority to receive notice on behalf of the organization.

Mr. Howard provides a detailed discussion of how the ombudsman can structure and operate his or her office to counter the risk of imputed authority, maintain independence, and successfully assert confidentiality over communications. Additionally, Mr. Howard surveys the legal bases that the ombudsman's counsel may advance when dealing with confidentiality issues. Case law and factual hypotheticals, together with practice tips, usefully illustrate how suggested best practices and legal principles are applied in real world situations and have been construed by the courts. These features expand the text into an accessible reference work for counsel representing ombudsmen, their organizations, or the aggrieved person(s).

In the last section of the book, Mr. Howard turns his attention to the non-lawyer ombudsman, and presents several topics that may be encountered in the course of practice. Some of the topics are essentially primers on the legal aspects of litigation and ADR and are of potential use to corporate lawyers and in-house counsel who may be asked to counsel organizations on risk management in general or render advice in the throes of a dispute or litigation. Other bodies of law pertinent to an ombudsman's duties are also covered. They range from the general to the specific. College and university ombuds may be interested in the treatment of the Jeanne Cleary Act for reporting incidents of campus violence, while government ombuds may refer to the exposition on records retention and freedom of information laws. Ombuds for multinational corporations may likewise consult the treatment on European data protection. Last, as all ombuds are apt to face employment-related issues, the survey on federal employment law is particularly useful, especially given the case summaries that follow.

In sum, Mr. Howard's work provides an insightful introduction to the ombudsman and demystifies this less familiar aspect of dispute resolution practice. The breadth of his book is matched by its accessibility and practicality. It should therefore be consulted by practitioners on any side of an organizational dispute, as well as students of the legal limits and potential of the office of ombudsman.

Endnote

1. The text does point the reader to the federal Administrative Dispute Resolution Act which provides potential protection for communications that fall within the definition of "alternative means of dispute resolution."

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The Eleventh Circuit Rejects Manifest Disregard

By Colleen Hibbert

In *Frazier v. CitiFinancial Corp.*,[1] the Eleventh Circuit weighed in on an issue left unresolved by the Supreme Court's decision in *Hall Street Assocs., L.L.C. v. Mattel, Inc.*[2] and even more recently in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*[3] That issue is whether an arbitral decision may be overturned based on manifest disregard of the law, and exactly what would constitute such manifest disregard. Although *Hall Street* held that statutory grounds for vacatur and modification of arbitral awards provided under the FAA are exclusive, the decision does not explicitly address the judicial gloss permitting reversal for manifest disregard. The Courts of Appeals are divided on the survival of manifest disregard.

In *Frazier*, the court read *Hall Street* to invalidate all judicially created bases for vacatur and therefore held an arbitrator's manifest disregard for the law is no longer a valid basis for vacating arbitral awards.[4]

In ruling against manifest disregard based on *Hall Street*, the Eleventh Circuit joins the First and Fifth Circuits.[5] In contrast, according to the Second and Ninth Circuits manifest disregard of the law remains a valid basis as an extension of statutory power. [6] Furthering the confusion, the Sixth Circuit has taken the middle ground, albeit in an unpublished decision.

Background

Mr. Frazier entered into a loan agreement with HomeSense in April 2000 for $33,570, which included a promissory note, mortgage, and arbitration agreement for resolution of disputes.[7] Mrs. Frazier's signature was also on these documents, but the arbitrator found that Mr. Frazier had forged it.[8] HomeSense later assigned its rights to Associates Financial Services Company of Alabama, Inc., who then assigned its rights in the loan to CitiFinancial.[9] The parties entered arbitration after Mr. Frazier stopped making payments and he and Mrs. Frazier filed a complaint claiming breach of contract, fraud, and misrepresentation.[10] The arbitrator ultimately found for CitiFinancial and awarded it almost $48,000 in damages and attorneys' fees in the form of an equitable lien against the Frazier's home, while stating that he did not have the authority to allow foreclosure and Mrs. Frazier had the right to retain her homestead exception.[11]

The District Court confirmed the arbitration award,[12] and Mr. and Mrs. Frazier appealed, challenging the award based on both statutory and non-statutory grounds.[13] After dismissing Mr. Frazier's appeal and hearing Mrs. Frazier's, the Eleventh Circuit found there were no applicable statutory grounds for vacatur under the FAA.[14] Mrs. Frazier also argued the award should be vacated because it was "arbitrary and capricious, in violation of public policy, and made in manifest disregard for the law."[15]

Discussion of Non-Statutory Grounds

In its analysis of manifest disregard, the court reviewed the different approaches other circuits have taken on this issue. The court articulated the First and Fifth Circuits' views post *Hall Street* as barring all "extra-statutory grounds for vacatur whether judicially-created or contractually agreed-upon."[16] It stated that the Second and Ninth Circuits have taken a different approach and concluded that manifest disregard is a separate valid basis as a judicial application of the statutory basis for vacatur where the arbitrator "exceeded [his] powers."[17] Finally, the court referred to an unpublished decision by the Sixth Circuit that held *Hall Street* prohibited parties from contractually altering the grounds for vacatur or modification, but did not expressly preclude the judiciary from supplementing the existing statutory grounds.[18]

Having explored the other circuits, the court moved to a close examination of *Hall Street*. In *Hall Street* the Court held the text of the FAA "compels a reading of the *§§ 10* and *11* categories as exclusive" and provides that those categories are the exclusive source for review.[19] In addition, the court relied upon the statement in *Hall Street* that "the statutory text gives us no business to expand the statutory grounds."[20] As a result of this close reading, the court determined that the categorical language used in *Hall Street* required rejection of any judicially created basis for vacatur.[21] It therefore affirmed the district court's confirmation of the arbitral award.

Conclusion

Until the Supreme Court speaks to the issue, the Circuit in which a party appeals an arbitration award will determine whether manifest disregard will be a basis for challenging an arbitral award, and results will vary.

Endnotes

1. 604 F.3d 1313 (11th Cir. Ala. 2010).
2. 552 U.S. 576 (2008).
3. 130 S.Ct. 1758 (2010).
4. *Frazier v. CitiFinancial Corp., LLC*, 604 F.3d 1313, 1314 (11th Cir. Ala. 2010).
5. *Frazier*, 604 F.3d at 1323. *See also Citigroup Global Markets Inc. v. Bacon*, 562 F.3d 349 (5th Cir. 2009); *Ramos-Santiago v. United Parcel Service*, 524 F.3d 120 (1st Cir. 2008).
6. *Frazier*, 604 F.3d at 1323 (quoting 9 U.S.C. § 10(a)(4)). *See also Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1290 (9th Cir.), *cert. denied, Improv West Assocs. v. Comedy Club, Inc.*, 130 S.Ct. 145, 175 (2009); *Stolt-Nielsen v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 94 (2d Cir. 2008), *cert. granted, Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 129 S. Ct. 2793 (2009), *rev'd, Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758 (2010).
7. *Frazier*, 604 F.3d at 1314.
8. *Id.*
9. *Frazier*, 604 F.3d at 1316-17.

10. *See Frazier*, 604 F.3d at 1317.
11. *Frazier*, 604 F.3d at 1319. Alabama's homestead exception prevents the transfer of a homestead without voluntary and signed consent of both spouses. Ala. Code § 6-10-3.
12. *See Frazier*, 604 F.3d at 1319.
13. *See Frazier*, 604 F.3d at 1320-21.
14. *See Frazier*, 604 F.3d at 1321.
15. *Frazier*, 604 F.3d at 1322.
16. *Frazier*, 604 F.3d at 1323.
17. *Id.* (quoting 9 U.S.C. § 10(a)(4)).
18. *See Frazier*, 604 F.3d at 1323-24; *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 Fed. Appx. 415, 418-19 (6th Cir. 2008).
19. *Frazier*, 604 F.3d at 1324 (citing *Hall Street*, 552 U.S. at 586, 128 S. Ct. at 1404, 1406).
20. *Frazier*, 604 F.3d at 1324 (quoting *Hall Street*, 552 U.S. at 586, 128 S. Ct. at 1406).
21. *See Frazier*, 604 F.3d at 1324.

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