THE RESOLVER

TURNING CONFLICT INTO RESOLUTION

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Message from the Section Chair

by Jeff Kichaven

It is a privilege to be Chair of the ADR Section. The entire Executive Committee and I look forward to serving you this year. As part of our service, we intend to raise, and make progress on, important issues facing the ADR and Legal Communities. One such issue is Diversity. My views on the subject are set forth in this article, which originally appeared in the Los Angeles Daily Journal. Let the conversation begin!

Diversity in Mediation: Here's How

There's a problem with mediation. The profession is almost lily-white, and about as male as the Green Bay Packers. In our age of diversity, this has to change. Here's how it won't, and also how it can.

Most importantly, it won't change by itself. In mediation, as in other professions, women and minorities are concentrated at the entry and junior levels. In these economic times, it's harder for these newer mediators to break in. The market is shrinking, not growing. Many of the law firms that hire mediators have shrunk. Others have closed. We are not in an economy where a rising tide of demand can lift all mediators' boats.

Worse, these newer mediators are increasingly being asked to work for free. Court-annexed mediation programs - in which newer mediators work for free, or for below-market rates in order to develop their reputations - are growing. For example, on May 3, 2010, the Central District of California announced: "The ADR 'Pilot Program' is no more. We have made the long overdue change of deleting the 'pilot' designation. You

CHAIR *continued on page 2*

Message from the Editor

Fellow readers of *The Resolver*, after a brief hiatus, *The Resolver* is back, and I am privileged to write to you as its new Editor. *The Resolver* is the voice of the FBA's ADR Section. In its pages you may find tips for ADR practitioners; ADR theory; legal developments affecting ADR practice; insights into ADR programs in or affecting the federal court system; descriptions or announcements of ADR Section events – past or future – as well as of broader events in the ADR community; and a host of other topics. The scope and breadth of *The Resolver's* pieces are the result of efforts of our members and contributors. But it does not rest there. It depends on you. You are invited to join our contributors to make the voice expressed in *The Resolver* your own.

One benefit of serving as Editor is the opportunity to share some thoughts with you. In the hope you might be inspired to join us, here are a few thoughts from the Editor's seat.

"CHANGE". It's a statement. It's a command. It's a verb. It's a noun. It excites us. It scares us. We passionately embrace it. We hesitantly accept it. We move it along. One thing is for sure, change is the only constant in our lives. People change. Things change. Nature changes. Yet, we resist **"CHANGE".**

To know why we resist change or even how to manage it is a study in psychology and sociology, at minimum. These are subjects beyond the scope of this newsletter. But if you are curious and wish to learn more, there are many works available on why humans resist change. Sarah Fine's *Technological Innovation, diffusion and resistance*, Professor John Kotter's *Leading Change,* and the many articles readily found in the Harvard Business Review are just a few examples. Suffice it to say, students of change have observed that, even though we experience change as an integral part of our lives, we resist it because we do not understand it or we think it will negatively affect our livelihoods or the status quo.

Yet change happens. The caterpillar morphs into a beautiful butterfly. Agrarian society transformed into a wealthy industrial society; the horse and carriage gave way to the faster motor car; the ground covered by snow in winter sprouts flowers in spring; communication moved from the clack-clack of the teletypewriter to the silent jolt of mobile devices

CHANGE *continued on page 3*

SPRING 2015

CHAIR *continued from page 1*

will notice that the website and all forms now simply reference the 'ADR Program.'...any civil case assigned to any judge may be referred to the program, either at the discretion of the assigned judge or at the request of the parties, pursuant to Local Rule 16-15."

On June 17, 2010, the1st District Court of Appeal expanded the scope and complexity of its free mediation program, including numerous provisions that make it harder for mediators to get paid after the initial three free hours. To make up for this, the court now also provides ersatz collection agency services - a cumbersome sanctions procedure - to mediators who get stiffed.

These court-annexed programs are poison for diversity. Ever since I was President of the Southern California Mediation Association in 2005, newer mediators of both sexes and all races have told me the same thing: Lawyers use them for free to mediate smaller cases, and then when they can no longer afford to volunteer and want to be paid, these lawyers do not bring them new cases for pay, but rather move on to the next crop of volunteers. They either move back to what they did for a living before or move on to something else.

This toxic brew of court-annexed programs has at least two ingredients. First, great mediators are made, not born. Despite what many gray-haired judge - and lawyer - entrants to the field profess, mediation requires a separate set of skills, and you have to learn them. That requires attendance at seminars, workshops and trainings. Many courts offer introductory and sporadic trainings for free, but any veteran mediator will tell you that is not enough. To do it right, it takes effort, time and money. If mediation generates little or no revenue, how are newer mediators supposed to finance this education? Without the prospect of fair compensation for their services, newer mediators cannot develop the skills they need to move up.

The more pernicious ingredient involves scheduling flexibility. How do mediators at every level move up? By being available on short notice when the mediator one rung above you can't take the case. If a newer mediator can't get paid for mediating, though, she has to get paid for something else. Everybody's got to pay the rent. For most newer mediators, that "something else" is litigation. But a litigator's schedule is crowded with obligations that can't be changed on short notice. Court appearances. Depositions. Briefing deadlines. Trials. Unless a newer mediator can shed that work and keep her schedule open, she can't move up. If she can't get paid for that anticipated mediation work, the paying litigation work will never be shed and she will never move up as a mediator.

Who can solve this problem? Three candidates come to mind: courts, mediators and litigators. Of these three, the first won't and the second can't. Only the third - the commercial consumers of mediation services - can get the job done.

Asking courts to shrink or eliminate these programs is a fool's errand. These programs were once necessary in various communities to jump-start mediation by giving lawyers a valuable first exposure to the process. By now, the markets are mature and lawyers have figured out both when to mediate and how to find mediators. The court-annexed programs have outlived their usefulness. But when was the last time any government bureaucracy shrank or eliminated itself voluntarily?

Asking mediators not to participate in these programs is a tough sell. As Woody Allen said in "*Annie Hall*," when a man was asked why he wouldn't give up his imaginary chicken, he replied, "I need the eggs." Here, the "eggs" are the chance for mediators without work to participate in mediations - even if they don't get paid and those mediations don't really advance their careers. Most of the newer mediators to whom I speak seem scared to give up these eggs when, in the face of expanding court-annexed programs in which many other mediators remain willing to work for free, no better eggs seem available.

Only lawyers - the demand side of the equation - can get the job done. Despite the superficial allure of getting something for nothing, once lawyers understand the long-term impact of this system on diversity, perhaps they will "just say no." Imagine how simple it would be for a lawyer to take this pledge: "In any case where I am being compensated at market rates for my services, I will compensate the mediator at market rates as well." (Of course, we should all be willing to work for free on true pro bono publico cases.)

But, wait a second. Isn't there a fundamental moral obligation of mediators to work for free when their work allows cases to be disposed of more efficiently, improving and advancing the court system's administration of justice? We hear that all the time.

Here, the answer is "no." That's because there is no means test for eligibility to participate in these court-annexed free mediation programs. In the Central District of California, participants in the Court's "Attorney Settlement Officer Program" (free mediation) routinely include Fortune 500 corporations, Am Law 200 law firms, and multi-national insurance companies. Even in tough economic times, these entities are not eligible to be served pro bono publico.

What about the contingent-fee plaintiffs' bar? They represent clients of generally far more modest means. Shouldn't mediators work for free for these lawyers? Well, these lawyers, too, run their practices as businesses, and routinely pay everyone else for valuable services provided. Does the plaintiffs' bar ask the court reporter to transcribe the deposition for free? The expert witness to analyze damages for free? The printer to furnish business cards for free? Let's treat mediators with the dignity we furnish to every other professional.

In reality, the fundamental moral obligation runs the other way. The essential moral tenets of our society require all of us to compensate other people fairly for valuable services provided, if we can afford it. Is this kind of language overly high-minded? No. Just take a look at Article 23, Section 3, of the Universal Declaration of Human Rights, adopted on Dec. 10, 1948, by no less an authority than the United Nations: "Everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity...." There's no carve-out for mediators.

Moreover, the "allow cases to be disposed of efficiently +

advance the administration of justice = work for free" formula proves far too much. Its logic extends far beyond mediation. Lawyers and judges, take heed! It applies equally to you!

Consider lawyers. How powerfully does your work allow cases to be disposed of efficiently by the court system, and advance the administration of justice? Well, just consider what a Tower of Babel the court system would become in a universe comprised exclusively of unrepresented litigants. . Yet nobody would dare suggest that the court system establish a program that would have you work for free for clients who can afford to pay you.

And, judges? Good, efficient judges are the most essential component of the administration of justice. But should judges work for free, or even reduced compensation? Few seem to think so. In October 2008, Los Angeles judges were required to take a $46,000 annual cut in compensation and benefits. *Sturgeon v. County of Los Angeles*, 167 Cal. App.4th630. The organized bar responded forcefully, and moved heaven and earth to obtain a legislative fix.

So, let's not just talk about diversity. Let's do something that will really make a difference. Let's put our money where our mouths are. Take the pledge, lawyers: "In any case where I am being compensated at market rates for my services, I will compensate the mediator at market rates as well."

Jeff Kichaven is an independent mediator with a nationwide practice. He is an Honors Graduate of Harvard Law School and a Phi Beta Kappa graduate of the University of California, Berkeley, as well as a member of the American Law Institute. His views on mediation have been cited in The New York Times and The Wall Street Journal.

CHANGE *continued from page 1*

messaging via social media. Not to change is to have change happen to you.

Webster's dictionary defines change as "a new and refreshingly different experience", "an alteration or modification", "transform". To avoid stagnation and getting set in "the way we used to do things", it is imperative that champions of change lead the way to effect the alteration, to bring about innovation. For the Federal Bar Association, the ADR section can champion change through development of alternative dispute resolution techniques. Our Section may play a significant role in growing and sustaining ADR in the private and public arenas. This may happen through education, legislation, practice development, providing assistance to our federal courts' ADR programs - and by providing a forum for thought-provoking and informative articles, *i.e.*, through *The Resolver*.

The ADR Section members and fellow contributors have the opportunity to use *The Resolver* to increase awareness of all aspects of ADR. These include developments of mediation in the courts, challenges to arbitration awards, acceptance of ADR in new and different industries, or exploring with litigators the wide range of benefits of ADR. In our above discussion of change, several characteristics appear repeatedly - "Change is challenging and requires a quiet persistence, continuity and strength"; "change happens one step at a time"; "change requires that you demonstrate the benefits of changing against the costs of not changing".

You are warmly invited to generate your own fresh breeze of change by contributing to *The Resolver*. Even if you are not an agent of change, we need to hear your views. Recall that segment on 60 Minutes called Point/Counterpoint? Discussions there developed around issues where everyone was not in agreement. *The Resolver* needs those ideas; your experiences, practice tips and events. How could we strengthen the viability of ADR as a tool in the litigator's tool box? How do we strengthen ADR as another means of access to dispute resolution?

We are proud to bring you the 2015 Spring issue of *The Resolver*, with views from coast to coast. Included, are some articles addressing change. From the West Coast, Jeff Kichaven, Chair of the ADR section, and a longtime mediator in LA, urges us to change the make-up of ADR neutrals to reflect more diversity. We would be interested in your views on his recommendation. From the East Coast, Charles Platto, Peter Scarpato and our former ADR Section Chair, Simeon Baum describe major change in the insurance industry, which has embraced ADR, as offering reliable processes to resolve claims. We hope you will find helpful the insurance white paper's tips on effectively handling arbitration and mediation of insurance matters. Those of us on the East Coast are especially receptive to this change as Storm Sandy insurance claims are being resolved through the court's mediation program. And our New Orleans Chapter members saw, first hand, the power of ADR in resolving Katrina claims several years ago. From Phoenix, Arizona, Charles Price explains how failure to change the old ways of doing deals in a cross-cultural environment could be detrimental to the bottom line and maybe even world peace. The issue also includes practice tips for advocates to facilitate the success of ADR. From Portland, Oregon, Lisa Amato explains how preparation is the most important part of an advocate's case in employment mediation and provides useful practice tips such as "know your client". Back east, again, Theodore Cheng offers practice tips for the arbitrator, the attorney drafter and the arbitration advocate, in his analysis of three cases where parties were seeking to vacate arbitration awards. Please also take a few minutes to look at the pictorial collage of the Southern District of New York at their spirited "Town

Hall" style CLE on *Effective Representation in Mediation* – a well-attended and extremely informative session for those who desired to improve their mediation practice skills.

We hope you find these articles and pictures not only educational but also enjoyable. We trust that you will feel motivated enough to be a part of the change taking place in the ADR field, at the FBA, in the ADR section, and certainly at *The Resolver*. Whether you are an advocate or a neutral, a judge or a mediator, a change agent or a resistor, you should contribute. Let us hear your views on developments in the field. Start a discussion on an issue that keeps you up at night. Tell us how ADR fits in or could fit in to your practice. Share tips that have proven successful for you. Let us know your experiences on what to avoid. In the long run, change will happen. *The Resolver* invites you to be an active part of it.

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Joan D. Hogarth, Esq. is an attorney and experienced business professional who has expanded her work to include arbitration and mediation. She has spent several years in telecommunications and the last 10 years in healthcare managing various aspects of regulatory and legal matters. Ms. Hogarth's most current experience includes healthcare risk management, medical malpractice, credentialing, contract services, corporate compliance, HIPAA compliance and board governance. Ms Hogarth has arbitrated approximately 200 cases and has participated and co-mediated over 60 employment discrimination cases. She is a member of several arbitration and mediation panels to include the Eastern District Courts of New York, NYC Civil Courts, American Health Lawyers, BBB and FINRA. She is a graduate of the George Washington University Law School and is licensed to practice law in the States of New York and Maryland. Her professional affiliations include the NYSBA (Health Law section and the Dispute Resolution section); the Federal Bar Association (ADR and Immigration sections); the New York City Bar, American Health Lawyers Association, and the NJ and NY LERA. Ms. Hogarth is a proud recipient of the AAA's Higginbotham Fellowship in 2014.

Preparation of Cases in Employment Mediation

(From the Advocate's Perspective)

by Lisa A. Amato

Preparation is the most important step in the mediation process. It begins before the parties decide to retain a mediator to assist them in dispute resolution. Adequate preparation includes preparing yourself, preparing your client, preparing opposing counsel, and preparing the mediator.

In an employment case, the parties are often intractably polarized and unable to begin to see the case from the opposing side's perspective. The alleged injustices perpetrated by the opposing side create anxiety and determination that need to be tempered and addressed appropriately if a mediated solution is realistically feasible.

The goal at mediation is to get to the point where the opposing side understands your positions, respects your point of view, and agrees to a solution that your client can accept. Convincing the opposing side that your point of view is the correct view is unrealistic.

Preparation for the courtroom and preparation for mediation, may appear to be different but in essence they are not: the attorney at trial needs to hold a different frame of reference for the case (present a winning case) than the attorney at mediation (how to pose the case to get a settlement acceptable to the client), but preparation is similar.

Prepare Yourself, Prepare your Client, Prepare the Opposing Counsel, and Prepare the Mediator

Prepare Yourself: Never mediate without knowing the case. Inadequate preparation can leave you unprepared. It may subject your client to excessive bluffing, or it can put you at a disadvantage in valuing settlement proposals. Balance preparation with the cost to your client and do not overspend on preparation - be realistic about the size of the case in light of your client's interests. Mediated settlements involve financial decisions and cost-benefit analyses. Spending too much money before mediation may restrict your ability to settle and too much discovery runs the risk of becoming a bloodshed - polarizing the parties in their positions.

Analyze your case early and often: assess the possible claims and likelihood of success of each claim, evaluate categories and amounts of likely damages, interview witnesses, and calculate litigation costs for each stage of the case, gauge public relations consequences and lost opportunities if the case does not settle.

- Have a strong command of the facts and law to demonstrate case strengths and to be able to address case weaknesses
- Identify key witnesses and consider obtaining declarations
- Analyze theories of the case and evaluate strengths and weaknesses. Stand in the opposing party's positon and imagine

PREPARATION *continued on page 16*

Discerning the Boundaries of an Arbitrator's Power to Fashion Appropriate Remedies

by Theodore K. Cheng

Under Section 10(a)(4) of the Federal Arbitration Act, an award may be vacated "where the arbitrators exceeded their powers." Judicial review of an arbitration award is highly deferential and is not disturbed "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority."[1] Consequently, arbitrators have broad discretion to fashion an appropriate remedy. The parameters circumscribing that discretion are not always easy to discern, but recent decisions challenging awards shed some light on that inquiry.

Northern States Power Co. v. IBEW, Local 160[2] involved an award of reinstatement after a determination that an employee had been terminated for "just cause" under a collective bargaining agreement ("CBA"). Northern States Power Co. ("NSP"), after having employed Curtis Snow for two years, learned that he had previously pled guilty to possession of child pornography and, under the terms of his probation, could have no contact with a minor. Upon learning this, NSP determined that it could not ensure that Mr. Snow would not violate those terms while performing his job and, thus, terminated him. The union submitted a formal grievance under the CBA, and the matter was submitted to arbitration. The parties stipulated that the arbitrator would decide whether Mr. Snow was terminated for just cause, and, if not, the appropriate remedy. The arbitrator ruled that, "[t]o the extent that Mr. Snow was convicted of a serious crime that raises some very legitimate concerns on the part of the Management going forward, they have demonstrated justification for their decision. At the same time however, the Union has presented convincing evidence which sets forth a number of factors that existed which ultimately favor the imposition of a penalty less than the Grievant's dismissal." He then ordered Mr. Snow's reinstatement.

The district court granted NSP's motion to vacate the award on the ground that the arbitrator had exceeded his authority in ordering reinstatement. The Eighth Circuit affirmed, concluding that the use of "demonstrated justification" was sufficient to show that the arbitrator had found the termination supported by "just cause." Accordingly, having answered the first question in the affirmative, the arbitrator had no authority to address the second question or to fashion a remedy other than the termination.

Timegate Studios, Inc. v. Southpeak Interactive, L.L.C.[3] involved an award of a perpetual license that was not explicitly provided for in the parties' agreement ("Agreement"), under which Timegate Studios, Inc. would develop, and Gamecock Media Group would publish, a video game entitled "Section 8." The parties' relationship began to deteriorate as sales of the game failed to meet expectations, and Timegate ultimately filed suit against Gamecock, alleging breaches of the Agreement and other claims. In response, Gamecock asserted breaches of the Agreement by Timegate and moved to compel the matter to arbitration. The district court stayed the litigation pending the arbitration, in which Timegate sought recovery for breach of contract, quantum meruit, and copyright infringement, while Gamecock counterclaimed for breach of contract and fraud.

The arbitrator rejected Timegate's claims and ruled in favor of Gamecock's counterclaims, concluding that Timegate had actively engaged in a litany of fraudulent misrepresentations and contractual breaches. He then issued a monetary award, representing the cash loss suffered by Gamecock to date, but also found that that award failed to fully compensate Gamecock for all of Timegate's fraud and contractual breaches. Thus, he further amended the Agreement so that Gamecock would (a) have a perpetual license for Timegate's intellectual property in Section 8; (b) have no obligation to report to Timegate about sales of Section 8 that use that intellectual property; (c) have no legal obligation to pay any royalties to Timegate; and (d) may create sequels and add-ons related to Section 8. He also amended the Agreement so that each party could create sequels, add-ons, and other competing products, while being relieved of the obligation to pay royalties to each other.[4] The district court thereafter granted Timegate's motion to vacate the award, finding that the arbitrator had exceeded his authority because the perpetual license conflicted with the parties' agreement to enter into a temporary licensing arrangement.

The Fifth Circuit disagreed. In its view, the effect of the amendments was to realign major elements of the parties' future relationship as established by the mutually beneficial business relationship between two parties who had distinct expertise. The parties' roles as developer and publisher would be dissolved, with each party being given the right to unilaterally create derivative Section 8 merchandise and property. Moreover, the parties' previous obligations to report, share, and distribute revenues from Section 8 were likewise dissolved, permitting each of them to pursue Section 8 commercial activities independently. Accordingly, because a perpetual license would further these general aims of the Agreement (and, thus, was "rationally rooted in the Agreement's essence"),[5] and because the arbitration clause was "quite broad and contain[ed] no limits relevant to the instant dispute," the court reversed the judgment and remanded the case with instructions to confirm the award.[6]

Finally, *Matter of Colorado Energy Management, LLC v. Lea Power Partners, LLC*[7] involved an award of damages for a claim that had not been squarely presented. Lea

Power Partners ("LPP") filed a demand against Colorado Energy Management ("CEM"), alleging that CEM had engaged in gross negligence comprising nine breaches of an Engineering, Procurement and Construction Agreement ("EPCA") between the parties and seeking damages for cost overruns and consequential damages. In turn, CEM counterclaimed for an incentive fee allegedly due under the EPCA and a development fee due under a separate agreement. The parties thereafter cross-moved to dismiss all the claims. In denying CEM's motion, the arbitrator concluded that the allegations in the demand stated a claim for gross negligence that, if proven, could form the basis for the recovery of damages, notwithstanding certain limitations on liability and damages found in the EPCA. He also determined that CEM's counterclaim was arbitrable.

A successor arbitrator (the original arbitrator had passed away) concluded that LPP's cost overruns were not the result of gross negligence by CEM, but also determined that CEM had breached the EPCA. He then issued a damages award to LPP and also awarded CEM the development fee. Subsequently, the trial court granted CEM's petition to vacate the award to LPP and confirm the development fee award. The appellate court affirmed, reasoning that the demand, the motion practice, and the original arbitrator's decision made clear that gross negligence was the only claim by LPP that was presented to the successor arbitrator for a hearing. Thus, the successor arbitrator had exceeded his authority by finding that CEM had breached the EPCA and awarding damages.[8]

Here are some practice points suggested by the foregoing decisions:

For arbitrators, care should be taken not to overstep the authority granted under the parties' agreement. As *Northern States* demonstrated, arbitrators should ensure that their decision is (a) not precluded by the clause under which they are acting; (b) is adequately grounded in the parties' agreement; and (c) is not arbitrary or capricious. Additionally, irrespective of whether the Eighth Circuit's reading of the award language is convincing – the dissent did not think so – *Northern States* serves to remind arbitrators that there is no substitute for writing clearly and directly addressing the questions presented.

For attorneys who negotiate and draft arbitration clauses, *Timegate* presents some practical concerns. The outcome is far from anticipated, at least at the point when the underlying contract is being executed. One practice point to consider is the possibility of contractually circumscribing the arbitrators' powers so that they are not vested with broad, unfettered remedial authority, which was one factor upon which the Fifth Circuit relied to confirm the award.

For the arbitration advocate, *Colorado Energy* is a reminder to be clear about the relief being sought. The decision does not indicate whether there was an opportunity for the parties to set forth proposed findings of fact and conclusions of law, and it is unclear how or why the arbitrator went beyond the gross negligence claim that was presented. Particularly in the absence of post-hearing briefing by the parties, it would be wise to reiterate and set forth clearly the relief being requested so that at least the ultimate award is free of ambiguity and, thus, later challenge.

Endnotes

[1]*United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987).

[2]711 F.3d 900 (8th Cir. 2013).

[3]713 F.3d 797 (5th Cir. 2013).

[4]Notably, these amendments had not been requested by Gamecock in its proposed Final Award, Findings of Fact, and Conclusions of Law. *See Timegate Studios, Inc. v. Southpeak Interactive, LLC*, 860 F. Supp. 2d 350, 355-56 (S.D. Tex. 2012).

[5]*Cf. Misco*, 484 U.S. at 38 ("[T]he arbitrator's award settling a dispute with respect to the interpretation or application of a labor agreement must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice.").

[6]As a case of first impression, the Fifth Circuit also found persuasive the reasoning and analysis in *Advanced Micro Devices, Inc. v. Intel Corp.*, 885 P.2d 994 (Cal. 1994), which had affirmed the arbitrator's award of a permanent, nonexclusive, and royalty-free license to any intellectual property embodied in the chip that had been jointly developed by the parties, after having found a breach of contract and concluding that damages were inherently "immeasurable."

[7]114 A.D.3d 561 (1st Dep't 2014).

[8]*See also Morgan Keegan & Co. v. Garrett*, 495 Fed. Appx. 443 (5th Cir. 2012) (reversing the district court's vacatur of the award because the arbitration panel had not exceeded its authority in determining that the plaintiffs' claims were properly pled, and that two of the plaintiffs were "customers," thereby subjecting all of the claims to a FINRA arbitration).

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Insurance/Reinsurance Arbitration and Mediation

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

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

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

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

1. Insurance Defense and Indemnity—Third Party Claims

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

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

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

In order most effectively to utilize the mediation or arbitration process where an insurer is involved, perhaps the most significant of our questions is *"who* is involved and what role should the insurer play?" It is critical to be sure that the proper parties are engaged in deciding to enter mediation, preparing for the mediation, and attending the mediation session. Whether it is an adjuster with responsibility for monitoring the case,[2] or a lawyer or other official of the claims department, the person involved should have a full appreciation of the way mediation or arbitration can

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

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

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

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

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

Case Study: The Multi-Party Subrogation Claim

Have you ever participated in a negotiation or mediation involving multiple defendants, each pointing the finger at another? In the third party insurance world, this is a frequent occurrence. Often, counsel or claims adjusters will enter a negotiation with a predetermined percentage which they believe their company should bear relative to the other defendants. Moreover, they have set views on the percentage responsibility the other parties should bear as well – particularly party X, whom they deem to be the chief target, or party Y, who was in a position similar to their own insured's. The latter scenario can generate feel-

ings among professionals not unlike sibling rivalry.

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

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

Essentially, the mediator presented to the defendants three packages for presentation to the plaintiff – an initial, a subsequent, and a final pot – identifying, by dollar figure only, each defendant's contribution to each of these three pots. As a result, a doable settlement path appeared in place of what had been a field of warring soldiers. Defendants got their approvals to each pot – one pot at a time – and the case settled. This is just one way mediation can help create productive order out of multi-party bargaining sessions in third party liability cases.

2. Subrogation

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

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

3. Insurance Coverage Disputes Between Insurer and Insured

Disputes can arise between the insurer and the insured in either the first party (e.g., property) or third party *(e.g.,* liability) context. Such disputes can be particularly complicated in the third party context where the insurer owes a duty to defend if there is any possibility of coverage for one or more claims even if the carrier has potential unresolved coverage defenses. In all events, the carrier owes a duty of good faith and fair dealing to the insured and may have to consider settlement offers within policy limits in third party claims even if coverage issues are unresolved. Similarly, in the first party context, although the defense obligation may not be present, the carrier does have an obligation to process claims in a fair and efficient manner.

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

A typical way of raising and resolving insurer/insured coverage disputes (after the carrier sets forth its initial cov-

erage position generally by letter) is by a declaratory judgment action. Such an action may be brought by the insurer or the insured. In some states, *e.g.,* New Hampshire, a declaratory judgment action is required as a condition of denying coverage or requesting a denial.

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

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

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

Case Study- Mediating the Dream within the Dream

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

Apart from these complexities, the same who, what, when, and why consideration noted above apply. In endeavoring to coordinate an underlying claim proceeding with an insurance coverage dispute, the when of any mediation and the who is involved amongst the parties and their representatives becomes critical. On the insurer side for example, there is typically and appropriately, a separation between the adjusters or claims representatives handling the defense of the underlying litigation, and those responsible for the coverage dispute. This is where they need to coordinate. The why includes the potential benefit of resolving the coverage issue which may impede resolution of the underlying claim and/or resolving the underlying claim which may be impacting the resolution of the coverage dispute. The what may involve a mechanism to bring together in a single forum, e.g., before a mediator, parties involved in different proceedings or aspects thereof.Finally, a word about the need for subject matter expertise in mediators or arbitrators. In arbitration, expertise is what is often sought in a decision maker, although some have argued that non-experts might approach a case with a more open mind. In mediation, maintaining an open mind is essential in the mediator; and process skills are of paramount importance. Nevertheless, users of these processes in insurance coverage matters, find it helpful if their mediators or arbitrators are conversant with insurance policy interpretation and implementation.

4. Insurer v. Insurer Disputes

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

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

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

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

5. Reinsurance

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

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

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

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

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

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

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

Mediation: The mediation model employs an impartial, trusted facilitator to help parties explore, respect and react to objective, subjective and psychological factors creating conflict between them, helping them to perceive and communicate positions leading to an inexpensive, voluntary resolution of the dispute on their own terms. Though a mediator with reinsurance industry background is preferred, the technical aspects of the specific factual and legal issues in dispute are not the most important elements of the process. In joint meetings and private caucuses, an experienced, professional mediator with no formal power to issue rulings works with the parties, using an informal,

INSURANCE *continued on page 16*

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INSURANCE *continued from page 11*

confidential process designed to suspend judgment and promote candor, to identify and understand each side's interests and goals underlying the actual dispute. To the trained and experienced mediator, disputes present an opportunity to empower parties to structure a resolution that best meets their respective short and long term needs.

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

The reinsurance mediation process offers participants many benefits:

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

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

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

The true value of any mediator reveals itself at negotiation impasse. In reinsurance, internal, corporate and/or financial pressures often impact one party's ability or willingness to settle on negotiated terms, leaving a gap between the last demand and last offer. Maintaining a positive, trusting environment, the mediator should continue moving the parties to propose alternatives and reframe the problem, remaining focused on re-evaluating barriers between them and brainstorming ways to eliminate them. A mediator who has worked in the reinsurance business can knowledgeably help the parties explore "value-generating" alternatives that lead to acceptable compromises and settlement.

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[1]Workers' Compensation insurers may initiate subrogation arbitrations to recover payments of health benefits from third parties if the defendant companies or their insurers and the subrogated insurer are parties to a Special Arbitration Agreement. In addition, persons involved in the administration or determination of Workers' Compensation benefits hearings may also arbitrate their own claims. *See,* NY Workers Compensation Law, Section 20.2.

[2]A number of people are ordinarily involved in handling claims presented to an insurer. Chief among them is the insurer's claims department or claims handling unit. This can be a group within the insurer and can also involve outside adjusters or third party administrators. Claims handlers are involved from the moment notice of a claim is received, through initial efforts to assess and possibly adjust a claim, and through all stages of litigation. The claims group triggers the issuance of any letter to the insured accepting the claim, assuming the defense but reserving rights to deny coverage. Claims appoints or approves counsel to handle the defense; sets reserves for the risk; and monitors the defense of a case. Moreover, claims evaluates case strengths and weaknesses, assessing liability and damages, and ultimately determines whether and under what terms to settle the claim. Other key players are counsel who are appointed to defend and must routinely report to the insurer; any counsel separately responsible for coverage questions; and, of course, the insured, who owes a duty of cooperation to the insurer. On the other side of the equation tend to be the claimant and claimant's counsel.

[3]This characteristic of arbitrators depends upon the rules under which the arbitration is conducted. For example, under Rule 17, Disqualification of Arbitrator, of the Commercial Arbitration Rules of the American Arbitration Association: "(a) Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for (i) partiality or lack of independence, (ii) inability or refusal to perform his or her duties with diligence and in good faith, and (iii) any grounds for disqualification provided by applicable law.

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ANNOUNCEMENTS

If you are an FBA ADR section member, check your FBA emails for a link to participate in the ADR membership survey. The survey deadline has been extended to April 17, 2015.

The executive committee of the FBA ADR Section is looking for your input to help us provide interesting and meaningful content and discussions relevant to your practice area, whether you are still an advocate, a neutral or both. There are countless ADR committees, organizations and sections on the national, state and local level and the abundance of information, newsletters and articles can be overwhelming. We want to know what you would like to see from our committee in the near future.

If you never received a link from the FBA, please contact Lisa Amato, FBA ADR Section Vice-Chair, at laa@wysekadish.com.

PREPARATION *continued from page 4*

how he or she views their case and how they view your case
- Make a realistic assessment of the possibilities of success on both sides
- Think carefully about the measure, calculation and amount of damages
- Identify what terms in a proposed settlement agreement are important to your client

Prepare Your Client: Preparing your client begins at the moment of your initial client meeting before you decide to take the case. Preparation is part full disclosure of facts, potential theories and weaknesses and part managing expectations. When preparing your client for mediation, help them be prepared to be the decision maker and explain how your role will be the advisor. Mediators tend to look at the client as the decision maker. If the client is not prepared for that, the client will be put in an awkward position that leaves him or her feeling vulnerable and dismayed by the process.

Ultimately, the goal in preparing your client is to help him or her decide what changes in their negotiating position he or she is willing to make during mediation to overcome any anticipated impasse.

- Explain how mediation will be conducted, including the roles of participants, and confirm that the client or the client's representative will have the authority to settle the case
- Go over agreed, disputed facts and opposing side's theory of the case
- Discuss with the client issues that the opposing side will put on the table or ask the mediator to explore the issues that may cause your client to alter their decision
- Prepare the client on what you will and may say, how you will say it, and when you will say it (private caucuses, later in the mediation session)
- Discuss negotiation strategy, including the need to have an open mind rather than bottom line approach
- Discuss realistic alternatives to a negotiated settlement including litigation budget, attorney fees calculation and realistic damages and awards, likelihood of success or failure and net financial result to be expected if the case does not settle
- Discuss statistics for your jurisdiction
- Help your client become comfortable communicating key issues and facts

Who attends the mediation with your client can make the difference in a successful or unsuccessful mediation. Bring the person with ultimate authority to make the settlement decision. Do not invite witnesses who may be volatile resistive to settlement, or who further strain the relationship of the parties. Above all, remind your client of the need for patience.

Prepare the Opposing Counsel: In addition to having discussed disputed facts with opposing counsel and potential damages, discuss mitigation issues and establish agreed upon facts. Typically, the largest stumbling block in mediation is that one or more parties do not fully understand the theories of liability or even the damages. If the case is in its early stages, consider engaging in focused and limited discovery. Provide opposing counsel with information they need to evaluate the case. There is always the inherent fear of laying cards on the table, but if the case is supported by evidence, provide opposing counsel with information they need to evaluate the case. This is a show of strength and can be a critical step to maximizing settlement in mediation.

Prepare the Mediator: After having selected an appropriate mediator, one that you have vetted for your case, chosen in consideration of the personalities of the parties, and one that you trust, write or call the mediator as needed in advance of the mediation session. The more the mediator knows about your case the better your chances are for a good result and, most importantly, a good process.

Providing the mediator with helpful and appropriate information that gives the mediator a sense of the personalities involved and the various conflicts between them allows the mediator to plan a flexible strategy for the mediation session. During the phone call and in a later written submission, highlight and discuss:

- Suggest what the mediation process may look like for its best chance of success
- Frame the conversation to establish your agenda and your goals
- Identify outstanding issues between the parties
- Discuss strengths and weaknesses
- Suggest ways that the mediator can be successful
- Inform the mediator of respectful adversarial negotiations or hostile negotiations

In a mediation submission, remember your audience. In a confidential submission, your audience is the mediator. In an exchanged submission, your audience is the opposing counsel and client. In either situation, support statements with evidence not argument and breakdown damages.

In a confidential submission, critically identify issues so that the mediator can more effectively present them in a neutral fashion to get movement from the opposing side. Highlight potential conflicts or other issues that may cause problem in the mediation or be impediments to settlement. If done well, a written submission provides the mediator with a roadmap of the case, summarizes issues in dispute, realistically assesses the parties' best and worst case scenarios, and suggests at least one plausible resolution of the matter.

Parting Thoughts

Adequate and proper preparation is a critical component to settling a case at mediation. Preparation is an ongoing process that begins at the initial consultation before you decide to take the potential client's case. By the time there is an agreement to try to mediate a resolution, there would have been countless

opportunities to educate your client and opposing counsel with an eye toward settlement. Preparation is essential. Approached wisely, it will give a case the best chance of settling at mediation.

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Town Hall on Effective Representation in Mediation Nov. 5, 2014, at SDNY

On Nov. 5, 2014, the FBA's SDNY Chapter and ADR Section held a "Town Hall" on Effective Representation in Mediation. The program was a great success, due in no small measure to the Section/Chapter collaboration and the generosity of ADR Section Chair, Jeff Kichaven, who made a day's round trip - from LA to New York and back - to join the program panelists. Quite likely, part of the program's draw, held in the new SDNY Courthouse ceremonial Room 850, was the offer of cocktails before and after the one hour CLE program. The novelty of this program design was its active involvement of all audience members in a discussion, facilitated by Simeon H. Baum (www.mediators.com) as moderator, of their advice to advocates on how to be effective representing parties in mediation. To keep audience participation lively and coherent, we held back on the single malt scotch until after the CLE was done.

SDNY Chapter President, Olivera Medenica, introduced the program and its moderator, Simeon Baum who quickly passed the baton to Chief Judge Loretta A. Preska. Judge Preska expressed the Court's appreciation for the mediators who were present and the service offered by Court's mediation program. Many of the 120 persons present were members of the Court's ADR panel, who had been invited by the next speaker, Rebecca Price, the SDNY's Mediation Supervisor. Following Rebecca's remarks, Jeff Kichaven modeled mediator advice by sharing his tips on how to "win" for one's client in mediation. Jeff presented his excellent and thoughtful remarks—that clearly come from two decades of experience—in a somewhat provocative way that did the trick. It gave Simeon Baum, the Program Moderator a set of issues that were perfect for presentation to the sophisticated group of mediators who filled the room. The ensuing discussion addressed questions on: (a) the nature of winning—as value creation—in mediation, in a manner that is consistent with mediation's potential for going beyond competition to cooperation; (b) the role of evaluation, in a process where the parties' own thoughts and decisions are key; (c) the use and timing of caucuses and joint sessions; (d) effective preparation for mediation; and (e) effective openings by representatives in mediation—to foster open dialogue, information disclosure, realistic assessment of alternatives to the deal, and a spirit conducive to understanding and deal making.

This event, presented by the FBA's SDNY Chapter and ADR Section, was co-sponsored by the New York State Bar Association's Sections on Dispute Resolution, Commercial and Federal Litigation, and Labor and Employment; as well as by New York City's Metropolitan Black Bar Association. The presenters offer their thanks to all attendees, panelists, sponsors, and the Court for their support. We note, with special thanks, the extraordinary efforts of SDNY Chapter members, Elyssa Emsellem, who handled CLE, and Stacy Yeung, who handled a variety of logistical issues—along with Chris McClure of Simeon Baum's office. You may want to visit the ADR section on the FBA website at www.fedbar.org/Sections/Alternative-Dispute-Resolution-Section/Recent-Events.aspx to view the photo album.

Cultural Diversity in International Negotiation and Mediation

by Charles Price

American law firms and other organizations are increasingly promoting diversity initiatives. The thrust of current diversity efforts is to bring into the open cultural differences that have historically been ignored or glossed over. Awareness of specific cultural differences and patterns can have an immediate and positive impact in international business negotiations. Ignoring cross-cultural dynamics, by contrast, can make it much harder to reach a deal, and can kill deals that might otherwise have been consummated.

Let us begin with a classic American negotiation story: Apple and Microsoft. In late 1983, Microsoft announced plans for a mouse-based graphical user interface called Windows. Microsoft was doing work for Apple at the time. Apple Chairman Steve Jobs believed that Microsoft's plans breached an agreement between Apple and Microsoft. Microsoft's position was that the graphical user interface was not original to either Apple or Microsoft, but had been originated by Xerox. Bill Gates traveled, by himself, to Apple headquarters to discuss the issue.

According to an insider account by Senior Macintosh Developer Andy Herzfeld:

"Steve started yelling at Bill, asking him why he violated their agreement.

" 'You're ripping us off!', Steve shouted, raising his voice even higher. 'I trusted you, and now you're stealing from us!'

"But Bill Gates just stood there coolly, looking Steve directly in the eye, before starting to speak in his squeaky voice.

" 'Well, Steve, I think there's more than one way of looking at it. I think it's more like we both had this rich neighbor named Xerox and I broke into his house to steal the TV set and found out that you had already stolen it.' "[1]

Two years later, in late 1985, Microsoft had released Windows 1.0. Apple believed that operating system infringed Apple's copyrights. The companies engaged in rushed negotiations toward a license agreement, with each company principally represented by a single individual. There were widely divergent drafts, and far different ideas about what the license should provide. Apple provided a narrow first draft, and Microsoft a broad second draft. Ultimately, a federal district court decided that Apple had inadvertently licensed Microsoft to use virtually all of the visual displays in the Macintosh graphical user interface in future products, although there was no evidence that anyone at Apple thought that was what they were doing.[2]

It is important to understand the Apple/Microsoft negotiation not only as a seminal business deal, but as a quintessentially American case study that would be almost unthinkable in many other cultures. Two key concepts from the world of culture studies help explain what happened:

- High context vs. low context: Cultures differ in the extent to which they perceive words as having an immutable meaning, as opposed to having varying meanings depending on the context.
- Communitarian vs. individual: The self-made person is an American icon. In America mobility, both geographical and social, is highly prized. In other cultures, the individual is perceived as existing primarily in a complex web of social, community and family relationships.

America is a classic "low context" culture, in which the meaning of particular words is considered to be relatively immutable and independent of the surrounding context. We admire "plain speaking" and the person who "tells it like it is" in any context. It appears that both Apple and Microsoft assumed that the words they used in their initial, simple license agreement were unambiguous and meant the same thing in every context. The subsequent tens of millions of dollars in litigation expenses, seven District Court opinions, and one Ninth Circuit opinion would tend to suggest that both were wrong.

"High context" speakers, by contrast, are comfortable with the notion that the same words can mean different things in different contexts. Such speakers can be cautious about expressing themselves too forcefully or even too clearly. It can be hard for speakers in such a culture to deliver a blunt "no" or other clear message. Timing is extremely important in dealing with a high context negotiator, since much probing and small talk often precede a substantive discussion, and then every word counts. People in such cultures may see Americans as carelessly wordy. They would find the kind of aggressive, accusatory exchange that Gates and Jobs engaged in jarring and inappropriate[3].

The high context negotiator hates surprises. High context cultures tend to be "face saving" cultures. Surprises carry with them the high likelihood of a loss of face[4]. It is critical to reassure such a negotiator that you have "nothing up your sleeve," and that they are being dealt with in a forthright, up-front way. In dealing with a high context negotiator, it can be very important to create and cultivate a personal relationship, and to brainstorm general concepts, before "getting down to the nitty gritty."[5] The high context negotiator views the relationship as being primary and the "deal" as secondary. Roosevelt understood that he had to cultivate a relationship with Stalin during World War II before the Allies could work together. Churchill was not at all pleased when this was done, to some extent, by Roosevelt's making jokes with Stalin at Churchill's expense. Roosevelt, however, understood the big picture, the importance of context, the workings of subtle, indirect speech, and the importance of relationship to the Soviets (a high context culture).

In addition to being a "low context" culture, America is an

CULTURAL *continued on page 24*

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CULTURAL *continued from page 20*

individual, as opposed to a communitarian, culture. One of our icons is the "self-made," "rugged individual" type. Gates traveled by himself to negotiate at Apple—highly unlikely in a communitarian culture. Americans allow people to be creative, and to make mistakes and learn from them. One striking feature of American culture is the almost endless possibility of redemption. There is a long list of high-profile Americans -- Bill Clinton, Elliot Spitzer, Richard Nixon, Tiger Woods and many others -- who have hit bottom and begun a long climb back. All we ask is a certain level of contrition and accountability. In sharp contrast is the concept of losing face, seen in many communitarian cultures as being devastating and permanent. Bill Gates's retort to Steve Jobs—essentially, "I may have stolen from you, but you stole from Xerox"—is emblematic of a culture in which saving face is not paramount.

One of the highest priorities in dealing with a negotiator from a more communitarian culture is to make sure they are not embarrassed or made to feel slighted. Experienced international negotiators have observed that Americans are often seen as employing a "my way or the highway" approach. It can be very important and powerful to counteract this impression, by the strategic use of such phrases as, "I'm here to learn," "I'm here to listen," "We Americans don't have all the answers," etc. America is in fact (and is perceived to be) a relatively young country to have a position of world leadership. It can be disarming to note the ways in which a counterparty's culture and economy may be just as developed and sophisticated as ours.

In the mediation context, a confrontational "evaluative" mediator might not be the best bet in dealing with a high context and/or communitarian counterparty. It would be worth considering a mediator who was highly attuned to notions of relationship-building and face-saving.

The Internet offers many resources for information regarding cultural tendencies and differences. One helpful starting point is the "country profiles" section of Kwintessial.co.uk.[6] Wikipedia provides a good summary of high and low context cultures, with numerous examples of each[7].

As a final note, the Cuban missile crisis demonstrates the importance of not overgeneralizing with regard to cultural stereotypes. Some individuals embody the characteristics of their culture more than others, and most people display a variety of communication styles over time. The resolution of the Cuban missile crisis involved many of the above principles, but in a different way than a culture studies purist might have predicted. Few remember today how close we were to an actual nuclear conflict in 1962. In late October of that year, after learning of Soviet-sponsored nuclear missile sites in Cuba, the Kennedy administration met and drew up plans for airstrikes on those sites. The U.S. Navy dropped a series of "signaling depth charges" (practice depth charges the size of hand grenades) on a Soviet submarine at the quarantine line that the U.S. had established. The Americans were unaware that that particular Soviet sub was armed with a nuclear-tipped torpedo with orders that allowed that nuclear weapon to be used if the submarine was damaged by depth charges or surface fire. On the same day, a US U-2 spy plane made an accidental, unauthorized ninety-minute overflight of the Soviet Union's far eastern coast. In short, it was as close as the world ever got to nuclear conflict.

In the midst of this crisis, the substance of a deal emerged, under which the Soviets would withdraw their missiles from Cuba, in exchange for America withdrawing its Jupiter missiles from Turkey. America insisted, however, that the latter concession be secret, in order to allow it to save face. Khrushchev understood this key request and acceded to it (ultimately to his political detriment; he was thrown out of office two years later). The personal relationship of trust between U.S. Atty. Gen. Robert Kennedy and Russian Ambassador Anatoly Dobrynin also proved to be of critical significance in resolving the crisis. The young John F. Kennedy, relatively untested in foreign affairs, was perhaps more motivated by saving face than was the old warrior Khrushchev, although their cultures of origin might suggest the opposite. The principals' understanding of the underlying dynamics, however, allowed a deal to be reached—and may have averted a catastrophic global conflict.

***

Charles S. Price is a civil litigator and mediator, in the areas of securities, contract, insurance, health care, and antitrust law. Mr. Price is listed in the current editions of "Best Lawyers in America," "Who's Who in American Law," and "Southwest Superlawyers." He was described in Gain the Edge, a book by negotiation expert Martin Latz, as a "master information-gatherer," a "very effective negotiator," and "one of the best lawyers I know." Mr. Price may be contacted at cprice@dickinsonwright.com.

Endnotes

[1]Andy Herzfeld, "A Rich Neighbor Named Xerox," www.folklore.org/StoryView.py?story=A_Rich_Neighbor_Named_Xerox.txt&showcomments=1

[2]*Apple Computer, Inc. v. Microsoft Corporation*, 821 F. Supp. 616 (N.D Cal. 1993), *aff'd in part* 35 F.3d 1435 (9th Cir. 1994).

[3]R. Cohen, *Negotiating Across Cultures* (1997), at 28-33.

4Id. at 75-82.

[5]Id. at 69-75.

[6]www.kwintessential.co.uk/resources/country-profiles.html

[7]en.wikipedia.org/wiki/High-_and_low-context_cultures

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