

Alternatives

TO THE HIGH COST OF LITIGATION

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ADR Practice

Ten Pillars to a Productive Mediation: An Attorney's Guide

BY ERIC W. WIECHMANN

Mediation of disputes is growing, as more courts looking to clear congested dockets suggest or command mediation during the course of a litigation, and more parties wary of the cost, time, uncertainty, and often publicity of a lawsuit seek a quicker and less expensive alternative.

At the same time, parties who engage in mediation are too often disappointed or even upset with the exercise. While some disputes

just cannot be settled, the frustration with the mediation is more often caused by the parties' lack of understanding of the process, or appropriate preparation for the actual mediation.

Too many times the parties or their attorneys treat the mediation as a reactive exercise. Once a judge or one party suggests mediation, the sides frequently decide on a mediator and date, exchange memos focusing on the strengths of their case, and show up expecting the mediator to help the other side appreciate the strength of their case—or otherwise work his or her magic to create a settlement.

When no settlement is reached, the parties believe the hours spent have been a waste of time. They lose faith in the whole process.

What they forget—or may not have understood—is that mediation is an exercise that they control. Experienced advocates often

hear their mediator open by noting that the mediation is the one time in the litigation where the parties and their attorneys can control the process.

And the mediator doesn't control the session. The neutral is there to assist the parties, not direct them. The parties decide the outcome—not a judge, jury or arbitrator. They can do it expeditiously, privately, and at less expense than going to trial or even by striking a settlement on the courthouse steps.

But if the client and his attorney are going to control the mediation effectively, they must determine their goals, appreciate the other side's position and objectives, and understand the mediator's role and the dynamics of the mediation session.

To do this, the attorney and party must prepare effectively. No less effort should be used in approaching a mediation than in preparing for trial or deposition.

To execute these goals, this author proposes that the parties and attorneys consider the following Ten Pillars of a Productive Mediation.

INCREASING YOUR CHANCES

The Ten Pillars are a checklist of the many factors that go into and produce a successful

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CPR News

BRAZIL UPDATE: NEXT MONTH'S CPR CONGRESS AND TRAINING IN SÃO PAULO

The CPR Institute has revised the agenda for its Third Brazil Business Mediation Congress in São Paulo. The Congress will be followed by a Business Mediation Workshop training session.

Both the Congress and the training are next month. The April 24 Congress is titled "Forging the Future: Redefining Winning and Adapting to Change."

Full updated information, including registration and links to past Brazil congresses, is available at <http://ow.ly/IPTll>.

CPR has announced that the meeting's title sponsor is United Technologies Corp., of Hartford, Conn. CPR also announced that Washington, D.C.-based Danaher Corp. will be a Gold sponsor and Irving, Texas's Fluor Corp. will be a Silver sponsor of the Third Brazil Business Mediation Congress. Just added is Bronze sponsor Pacheco Neto Sanden Teisseire Avogados of São Paulo.

The CPR Institute's three-year-old Brazil Initiative has been



funded by the GE Foundation, GlaxoSmithKline plc and the Sondheimer Family Charitable Foundation.

Last year's Business Mediation Congress was significant for the Brazil Initiative. The event featured speakers from corporations, law firms, academia, and the mediation community, and included companies such as General Electric Co., Google, Walmart, Hewlett-Packard, Groupon, AcellorMital, Capgemini, Itau Unibanco, and Hill International Inc.

The 2014 Congress, "Resolving Conflicts in a More Transparent World," discussed how institutions and companies around the world are using ADR, including online dispute resolution and the efficiency of ADR pledges.

Top Brazil law firms Pinheiro Neto, Sergio Bermudes, and TozziniFreire supported the 2014 CPR Congress.

More on the CPR Institute Brazil Initiative's recent activities appeared in last month's CPR News feature at 33 *Alternatives* 18 (February 2015).

The 2015 Brazil Business Mediation Congress again will be conducted in partnership with CAMARB, and will be held at Amcham São Paulo (more information here: www.amcham.com.br/en).

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The Master Mediator

Back to Basics: An ADR Intervention that Converts a Legal Problem to a Human Solution

BY ROBERT A. CREO

Editor's note: Longtime Alternatives columnist Bob Creo, a veteran Pittsburgh neutral, is revisiting his classic CPR Institute website columns of a decade ago in a Back to Basics Series that he has subtitled "Human Problems, Human Solutions." In his recent Master Mediators columns, Creo has focused on neuroscience, psychological factors and cognitive biases that affect dispute resolution. These updated Back to Basics columns, in print for the first time, began in November, revisiting mediation-room techniques and practice issues. This month, the focus is on getting to closure.



* * *

Conflicts start as human problems—but dispute resolution institutions make them into legal problems.

If parties are unable to engage in self-help to solve business or interpersonal conflict, the legal system provides a forum, and the rules, to make the decisions for the parties. Once the litigation trail is embarked upon, a series of procedural and substantive decisions are made for the parties based somewhat upon their own strategic choices.

The parties start the ball rolling, and the substantive law and the procedural rules provide default or discretionary decisions along

the way. Courts narrow and limit choices of the parties and channel the actions into predictable and uniform channels.

For example, there are deadlines, presumptions, evidentiary rules and delegation of decision-making authority to legislatures, administrative agencies, judges, juries and appellate courts.

The legal system balances the goals of justice, order, efficiency, economics and pragmatic policy values. It creates the fundamental rules to resolve disputes between individuals, legal entities, and government. Randall Kiser has studied the legal system from a decision perspective and is doing groundbreaking research on decision making within the legal system. See Randall L. Kiser, "The Emotionally Attentive Lawyer: Balancing the Rule of Law with the Realities of Human Behavior," 15 *Nev. L.J.* (forthcoming in 2015).

The paradigm for addressing legal problems is a rational, analytical approach. This Cartesian methodology mimics the scientific model by claiming an outcome can be determined objectively by applying law to the facts. See last month's Master Mediator column for a further discussion, Robert A. Creo, "Back to Basics: The Playing Field," 33 *Alternatives* 24 (February 2015).

Mediators intervene to take the legal dispute and help translate it back to a human problem because there are more possible solutions to human problems than there are for legal disputes. Substantive knowledge is not as important to the skilled mediator; process skills trump substantive knowledge. Mediators are often better equipped than jurors or judges to address these complex disputes. Why is that so?

Most ADR practitioners have heard the mediator's role often framed as being a channel, a cata-

lyst, or a vehicle for transformation of the disputants. The mediator removes strategic barriers or otherwise facilitates uncovering the existing common ground between the parties.

The mediator is not only a facilitator, but also functions as an explorer, a devil's advocate, a trickster, a chameleon, an active listener, an explainer and a person who earns the trust of all.

Sometimes mediators offer opinions and are evaluative or directive. Despite the controversy over evaluation in some quarters of the mediation community, it plays an invaluable role in moving parties forward to resolution.

The reality is that all mediators start processing and evaluating from the moment they are retained until well after the case is at impasse or resolved. We differ in our practices about what, if anything, we do on a transparent level about our evaluations. This reflective thinking, interacting with our "intuition," guides our mediation moves.

INHERENT TENSION

There is an inherent tension between evaluative mediation practice and traditional concepts of impartiality and neutrality. This has been beaten to death throughout the profession, but in dismissing the debate, here are a few missives: Parties may self-determine the level of activism they want from the mediator. This is the function or effect of a free market where people can hire their own mediators and task them accordingly. If they



Robert A. Creo

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The Master Mediator

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want a mediator to call balls and strikes like an umpire, so be it. No one would claim that an umpire has lost impartiality by doing his or her job of objectively making calls. In mediation, these calls may influence the parties and the ultimate outcome, but they are still advisory and nonbinding.

Thinking back to all the roles of mediators, at times, I am all of the above and none of them. Most of all I am human. Successful mediators may use their own humanity to assist the translation of a legal problem into a human one. We engage the parties. We are sympathetic and empathetic.

My basic thesis is that the most successful mediators possess a persona emanating humanity to the participants in the process. Mediation recognizes the tension between the rigors of reason and insight and perception, and in practice rejects classical notions of the dualism of emotion and logic that underpin legal analysis. Emotion and logic are not binary—nor are they incompatible.

The mediation process gives permission for not only the mediator, but also the participants, to humanize the conflict. The process gives permission for a host of dynamics absent from adjudication. Creativity, acknowledgment, recognition, apology, forgiveness, and choice work in the context of the interplay between uncertainty, risk, emotion, personal and community values. People make important choices in a holistic manner during an asymmetrical mediation process.

THE MEDIATOR AS ARBITRAGER: ASYMMETRY IN ACTION

Arbitrating involves the process of a person taking an advantage of a difference in market prices to broker an immediate deal between a buyer and seller. Webster defines

The mediator is not only a facilitator, but also functions as an explorer, a devil's advocate, a trickster, a chameleon, an active listener, an explainer and a person who earns the trust of all participants.

arbitrating as the purchase of securities on one market for immediate resale on another market in order to profit from a price discrepancy.

The almost simultaneous purchase and sale of a commodity or stock means that the arbitrager holds title a minimum amount of time. The arbitrager takes advantage of

What's in a Mediation?

The theory: The content and conduct of the ADR transforms a legal dispute into human problems.

Even in commercial settings? It doesn't necessarily mean emotions. It is the mediator and party creativity that settles business disputes. That's the agent of transformation. The settlement agreement likely will reflect that non-legal orientation.

Better results. The ability to craft the settlement—driven by the mediator using a broad array of skills judges can't bring to a courtroom while still following civil procedure rules—is more satisfying for parties. It's empowering and cost-effective.

asymmetrical information to serve as an honest broker to complete a transaction.

My thesis is that a skilled mediator is a kin folk of a skilled arbitrager. Arbitrators conduct symmetrical processes based upon the same information being known to everyone and conveyed in a transparent manner. Mediators do not, and should not, be confused with adjudicators.

Mediation usually is an asymmetrical process based upon multiple factors.

Asymmetrical dynamics or paradigms may include, among other elements and in no particular order:

- 1) One party—usually the defendants—often is a repeat player in the legal system, or manages a book of business risks or disputes.
- 2) The dispute for the plaintiffs, especially tort and employment claimants, usually is 100% of their court docket and/or experience with the legal system.
- 3) Repeat players, including counsel, benchmark against other cases; consistency, predictability, and uniformity often are the repeat players' core values.
- 4) Participants may have different perspectives and expectations of the processing of legal claims via the courts.
- 5) The defendants' proposals involve real dollars. The plaintiffs' demands involve abstract sums, goals or aspirations, and not relief in present, real time. Traditional negotiation frames recognize this by nomenclatures of "demand" and "offer."
- 6) One of the parties, usually the claimants, may have suffered "personal trauma" that forms the basis of the claim; this may involve a personal injury, business or economic disruption, or a perceived grievance involving their personal self-esteem or public reputation. The other participants' key interests may be "impersonal" and involve primarily economic impact. In short, one party may be making a personal decision with profound consequences, while others are involved in a business transaction.
- 7) There may be a real or perceived power imbalance among participants.
- 8) Participants have different risk tolerances and view risk in a unique, individualistic manner. Risk tolerance is fluid, contextual and situational.
- 9) Participant preparation for the mediation, and their experiences, expectations and attitudes about the process differ from each other.
- 10) Participants process information and make decisions with different cognitive preferences and biases. For example, see R. Lisle Baker, "Using Insights about Perception and Judgment from the Myers-

Briggs Type Indicator Instrument as an Aid to Mediation,” 9 *Harvard Negotiation L.R.* 115-186 (Spring 2004). People may make choices in a “non-rational” or other manner inconsistent with classical economic theory that people act to maximize their own self-interest.

11) The number of participants, stakeholders and constituents on each side are uneven.

12) One or more parties may represent public interests, while others act as purely private persons. People may make decisions in a holistic manner. Participants have different levels of authority and power to bring closure.

13) The law may provide additional protections or restrictions on some of the parties based upon their age, competency or other factors.

14) Confidentiality and privacy interests vary among the participants.

15) Counsel and advocates for different parties are compensated pursuant to different methods such as contingency, flat fee, salary, hourly, per diem, and incentives.

16) There almost always is diversity of

culture, age, income and other demographics among the participants. This almost always extends to the mediators who may share some, but never all of the demographics with some of the participants.

17) Participants each have their own relationship to time and pacing, especially the mediator.

18) The mediator has different experience with different participants, meeting some for the first time, while others are repeat players.

19) The participants have asymmetrical experiences with negotiation and mediation.

20) The mediator may have misaligned or asymmetrical goals with one or more of the participants.

21) Participants submit pre-mediation information and prepare in an asymmetrical manner.

22) Participants communicate at the mediation in an asymmetrical manner.

23) Mediators also communicate in an asymmetrical manner.

24) Mediators use different tools with different participants at different times


in the process.

25) Participants have different interests.

26) There is a difference between “retributive” and “restorative” interests and goals of participants, mediators and process. Mediators tend to pressure participants toward choosing restorative interests and goals over retribution.

27) Mediators are not neutral in the sense of an intervener who stands outside the process without permanent impact on the dispute or disputants. Mediators have their own point of view and interests.

* * *

Mediation provides a forum for a wide range of problems to be resolved in a manner not limited to the parameters of decisions permitted by the judicial system. It focuses on the reality that people and entities have problems that they wish to resolve in a principled and cost-effective way that empowers them, and respects their ability to engage in self-determination. 

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ADR Techniques

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mediation. They will help the party be prepared to actively and productively participate in the exercise.

The Pillars can't guarantee a settlement by the end of the mediation session, but will increase the chances of follow-up discussions leading to a settlement if the mediation doesn't settle the case. At worst, participants will learn more about the other side's case, and clients will be less frustrated with the process.

Each Pillar lists a number of questions to answer and issues to consider. Not every one of these points will be relevant to all mediations. But at least considering whether any issue is applicable to a particular settlement process will give the client and attorney a better appreciation of the important subjects that should be addressed and obstacles that need to be overcome.

1. PREPARATION PILLAR: CONTINUING COMMITMENT

Preparation is a continuing commitment that continues throughout the Ten Pillars process.

The first step is to decide when to seek mediation. This is where a little effort can bear a lot of fruit. From the moment a dispute arises, clients and their attorneys should be considering whether mediation is an effective dispute resolution tool.

Many times, engaging in early settlement negotiations will avoid the expense and inconvenience of pretrial discovery and preparation, and minimize the chance of the parties' enmity for each other growing as a result of the lawsuit. It can be difficult for a seasoned trial attorney to suggest such a path early in a litigation, as it might be perceived by the client as a sign of weakness.

But times are changing. Increasing numbers of clients appreciate, even demand, from their advocates at least a discussion of when mediation might be helpful. Such a dialogue,

even if it does not lead to an early mediation, better prepares both the attorney and client for mediation at a later time. In fact, more and more contracts contain ADR clauses that require a mediation effort even before the initiation of arbitration.

Some will argue that mediation will not be effective until both parties have pursued enough discovery to fully evaluate the case. Unfortunately, for the clients this means many months of time and effort and significant sums of money to learn who might have a better factual case. This in many ways might defeat the purpose of the mediation. A mediation should focus on the parties' goals or objectives in resolving the dispute, and not the respective strength of each side's case.

As the mediator will remind advocates and parties, even if either side believes it has a strong position, you never know how a judge might rule on a legal issue. A litigant also cannot know how a judge or jury will react to witness testimony, or why a jury will

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ADR Techniques

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rule the way it does.

That is why mediators are reluctant to evaluate who has the better case. As the outcome of any suit or arbitration is fraught with uncertainty, mediation will focus on how to obtain a negotiated result that eliminates the risk of the unknown. Therefore, exhausting pretrial discovery or motion practice might not be needed.

Usually, if the clients and their attorneys undertake early dispute evaluation, they can derive a good, even if undeveloped, understanding of many of the strengths and weaknesses of the case.

If certain material facts are unknown, a good mediator can frequently convince both sides to exchange some core relevant documents or other salient information, which most likely will be produced anyway after many months and considerable effort. Why not turn it over now if it aids in the mediation, and which, even if it is unsuccessful, allows the parties to better focus their pretrial preparation efforts?

So from the beginning of a suit, an attorney should consider when to discuss with the client the mediation process, the various mediation options that can be explored, and the best time to explore a mediation effort.

Once it has been decided to undertake mediation, the attorney will consider who to use. Often, advocates seek recommendations from clients, partners or attorney acquaintances, or they select from a list maintained by an ADR provider organization like the American Arbitration Association, the CPR Institute, JAMS, or National Arbitration and Mediation. Attorney-advocates look for mediators with prominence and prestige that is often found in ex-judges, former government officials, or senior or retired trial attorneys. The assumption is that this gives the mediator the credibility necessary for the parties to trust the neutral and seriously consider his or her evaluations, suggestions or requests. Party representatives also would check the neutral's experience and fees before making a decision.

This process can be both second-hand and passive. It limits the client and attorney from

using their judgment and instincts to find the neutral who would give the mediation the greatest chance for success. Parties need to be actively engaged in neutral selection.

As more fully discussed in the latter Pillars, you want a mediator who will facilitate the parties and their attorneys in reaching a settlement. This takes more than expressing whose case is stronger or how much it might be worth. No two mediations are alike. Each

Get Ready

The goal: Entering mediation fully prepared.

The problem: Practitioners have long understood the importance of setting up for effective negotiations, and the need to stage ADR. But essential parts of the prep still fall through the cracks.

The help: The author here provides Ten Pillars to a Productive Mediation. Wrap your pre-game around them, thoroughly, before you proceed.

one presents unique intrapersonal, legal and procedural challenges.

While a mediator must have credibility, his or her past position is usually not enough. Obviously, mediation experience generally is important. But looking for someone with knowledge or expertise in the industry, technology or type of case can be of great help. ADR organizations often maintain specific panels of substantive expertise for this reason.

You should also check the potential mediator's resume closely. Credibility is not just important to your client—you want the other side to buy into the process. You want someone the other side can trust too. You want a neutral who will be considered fair and who will not be perceived as biased toward one side or the other in, for example, a plaintiff v. defendant, or employer v. employee, dispute.

Because many mediations take more than one session to reach a successful conclusion, you also should check on the mediator's

schedule, and the neutral's history of following up with the parties after an unsuccessful mediation to continue to focus on settlement options. Some mediators still treat the exercise as a half day or shorter "settlement conference," which inhibits the chances of a settlement.

Look for someone who will be attentive during the session, not just discussing the legal issues, but also focusing on the parties involved and their interests and objectives. The neutral should have good people skills, be patient with everyone, be flexible and be a problem-solver.

In selecting a mediator, do not hesitate to ask the neutral what his or her approach is to a mediation. Listen to the type of information that he or she would like from you and your client other than the claims and defenses in the underlying action.

For example, does the mediator ask about your client's business? Does the neutral analyze the parties' emotional relationships? The relationships of counsel? Consider what third parties are needed for the mediation?

Does the mediator have the ability to examine and contribute ideas to the relief, other than money, that the parties seek? Can he or she analyze the technical or scientific issues pertinent to the dispute?

Finally, does the mediator have a history of suggesting individual telephone conferences with the attorneys or clients (or both) before the mediation as a way to better understand the dynamics of the dispute?

All of this information is helpful in determining whether a mediator will be effective.

2. PLANNING PILLAR: STRUCTURE IT!

In setting up a mediation, there are many issues that should be considered other than just when and what information should be sent to the mediator. This includes identifying all people or parties with authority to settle that need to be involved, including the insurance representatives and the parent company.

Are there related actions or governmental investigations that will affect or be affected by the mediation? Do you inform these parties of the mediation, or get them involved?

You should check the potential mediator's resume closely. Credibility is not just important to your client—you want the other side to buy into the process. You want someone the other side can trust too.

How will the mediation be structured? While most mediators will discuss how they prefer to proceed, are there reasons why a joint session with the parties involved should be curtailed or eliminated?

Other than the standard joint pre-mediation telephone conference call with the lawyers to discuss timing and logistics, advocates should consider whether it would be helpful to have an individual phone interview with the attorney and his or her client. The purpose of the call is to educate the mediator about issues involving the disputes' emotional level; the relationship between the parties or attorneys; issues with third parties that could affect a settlement, or anything else that does not involve the suit's legal or factual merits.

Most mediators will make inquiries on these subjects, but it is helpful to consider them in advance of the initial joint call.

Similar consideration should be addressed as to what should be given to the mediator, and whether it should be exchanged with the other party. As to facts or arguments that underlie the client's claims or defenses and that the advocate knows ultimately will be turned over during discovery, attorney-representatives should evaluate whether to exchange it now, as it always helps for each party to appreciate the strengths and weaknesses of the side's position.

If you or your client are concerned about unveiling weaknesses in your case that might be raised during mediation, consider presenting it to the mediator in a separate *ex parte* memo. Include any sensitive personal or confidential information that should not at least initially be revealed to the other side.

Emphasize to your client that a mediation is a confidential process. The mediator cannot discuss or pass on to anyone, including the other side, any information or comments learned from you or your client unless you gave the neutral permission to do so. So sometimes

it is helpful to let the mediator digest those issues before the mediation to provide a better understanding of them when they are raised by the other party.

Finally, set a mediation date with enough time to meet with the client to fully prepare for the process. Make sure the client fully understands mediation's benefits, the general procedure the session will follow, and the dispute's history and status. Give the client enough time to evaluate this information and obtain appropriate authority to settle.

3. PARTIES/PRINCIPALS PILLAR: WHO MAKES THE CALL?

While many times the advocate might have little say in the choice of mediation participants, it may be one of the most critical factors for a successful outcome.

It will be hard to reach a settlement if the parties' representative knows little of the underlying dispute, has minimal interest in its outcome, or has little real authority. Advocates must try to determine when their client ultimately will approve a settlement. As a mediator tries to focus the parties on these goals and objectives, and not the parties' legal arguments, the preferable client representative is someone who

- knows the dispute,
- understands options that might settle the case other than focusing exclusively on the transfer of money,
- appreciates the toll in money and executive time the prosecution of the case entails,
- understands the fallout for the company if a trial turns out badly, and, finally,
- is not too emotionally invested in the underlying dispute or litigation.

The mediation's purpose is not a mock-trial exercise to show the mediator and other side that you will win. Instead, it allows the parties to control the outcome through

focusing on considerations in addition to the legal merits.

Therefore, the advocate's first important step should be identifying and trying to recruit the right person to attend the mediation. Even if they can't attend, try to get them involved in the preparation for the mediation, the discussion of the settlement parameters, and convince them to be available during the mediation for consultation.

4. PROCEDURE PILLAR: THE HOW/WHEN/WHERE

Before attending the mediation—better make that even before preparing your client—make sure you fully understand the procedure that the mediator will follow, and you are able to explain it to the client.

Will there be a joint session? And, if so, who will speak, the lawyers or the client? How long will the joint session go? Does the mediator expect the parties to exchange demands and offers prior to the mediation? How will the individual caucuses be handled? Will the mediator expect to talk to the lawyers or clients separately? How long will the session go that day—for example, should the parties expect to stay after 5:00 p.m.?

Will the mediator want to talk to your client on the phone before the mediation session? If there are more than two parties, how will the parties be grouped or divided?

These are all questions that can be discussed with the mediator if he or she does not raise it at the first call.

In addition, it is helpful to discuss with the client some of the frustrating idiosyncrasies they might run into during the session. Explain the significant amount of downtime that needs to be endured while the mediator is in caucus with the other side. Discuss how to react to and respond to an insulting demand or offer that could be made. Discuss how not to be frustrated with the slow progress that most settlement negotiations take. Explain that this is not a linear exercise, and that many times the amount of the offers greatly accelerate at the end of the day.

Discuss whether they should expect emotional outbursts from their adversary and how to handle them, or any other actions that might be interpreted as a lack of respect or show of

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distrust. Explain why responding in kind never aids the process.

Finally, explain how mediation generally is not meant to be an evaluative process and that the mediator will usually go to great lengths to avoid giving his or her opinion as to whose case is stronger or weaker.

Still, explain to the client that the mediator will try to have each party appreciate the uncertainties they might have in getting a trier of facts to rule in their favor. This frequently is done through Socratic questions directed toward elements of the parties' positions. Ensure that your client is prepared to answer, for example, how he or she believes a jury would react to the client's position, and proof issues.

5. PROBLEM-SOLVING PILLAR: MAINTAINING FLEXIBILITY

Despite these Pillars, there is no way to anticipate exactly how a mediation will go. Every mediation is unique with relationships between and among the parties and their counsels varying. Parties' interests are hard to anticipate, and will often change. The level of understanding of your client's own case, or your opponent's case, will vary.

Therefore, there is no one way to approach every mediation. A good mediator will try to control the process's dynamic nature by being attentive, creative and flexible. The neutral will try to focus on what the parties are saying, how they are saying it, and how the other side responds in order to get a good understanding of the parties' true positions and intentions.

You should do the same. Do not reject out of hand the other side's statements as bluffing or posturing. Do not take umbrage to their responses to your declarations. Try to learn

from everything the other side says or does.

Ask the mediator in caucus why the other side said or did what it did. The neutral can't reveal what the other party said in confidence, but the mediator's response usually will help you understand the issues that must be addressed to reach a settlement.

While many lawyers believe their only role is to advocate their position, they also must help the mediator in informing their client as to the other side's goals or objectives, and evaluate responses to them. As this author's grandmother said after I was sworn in to the bar, "God gave us two eyes, two ears and one mouth—and there is a message in that."

Also, during the mediation day, the neutral may devise settlement suggestions. Sometimes those may appear to make little sense, or appear that the mediator is "giving in" to the other side. Your client should appreciate the mediator's creativity, and that the neutral is exploring various avenues to overcome issues he or she likely understands better than the advocates or clients, because a mediator is privy to the other side's concerns and goals.

Counsel clients not to be automatically intractable in their approach to the structure or settlement amount, and how to respond to any offer or counteroffer. The more flexible one is, the better chance a settlement can be reached.

Sometimes presenting the same or similar offer in a different manner can break the log jam. Look for alternative approaches to your position, change the payment terms, consider a future business deal or payment in kind. Many times, a payment with an apology is effective. A structured settlement, or a settlement with a contingent future payout, might help bridge the gap between an offer and a demand.

6. PEOPLE SKILLS PILLAR: MANAGING INTENSITY

As noted earlier, mediation is a process that the parties control. The mediator will use all of his

or her skills to create a positive atmosphere to assist the parties in communicating with each other and be open to compromise.

To accomplish this, neutrals need to maintain their credibility by understanding and respecting each party's positions, while at the same time getting them to appreciate the other side's approach.

This is a difficult balancing act where the attorneys can play an important role. Trial attorneys advocate for clients by definition, and that often may require an assertive or even aggressive posture. That intensity, while many times effective in court or pretrial maneuvering, can be counterproductive in mediation.

While advocates must believe in their arguments and should firmly support their client's case, this can be presented confidently but at the same in a respectful manner, with controlled intensity.

It is hard to settle with the other side if an advocate belittles the adversary's position or insults the adversary's intelligence, motives, or morals. As the mediator will remind participants, this type of advocacy will not impress anyone involved, and a cogent presentation of the law and facts will be more effective in settling the case.

If you have had a difficult time dealing with the opposition's attorney during the litigation, you might ask the mediator to suggest eliminating the particularly troublesome issue from the settlement discussions.

Advocates should work with mediators to find ways to minimize the emotion, anger, and ego that are frequent parts of any dispute. Often is it not what you say to each other in mediation but how it is said. This approach greatly increases the chance of settlement.

7. THE PATIENCE PILLAR: DELIBERATE PACING NEEDED

Many clients get frustrated with the pace of the mediation. Why so much down time? Why do responses to demands or answers to factual inquiries take so much time?

It is important to discuss with clients the mediator's role. The neutral is there to help the parties, not order them around. He or she will not be evaluative, at least not initially. The mediator will try to move the parties through persuasion and controlling emotions. This can take some time.

Don't delay a follow-up session or telephone call until after all pre-trial efforts have been completed. By then, the parties will have expended much of the time and money that mediation would have saved, and their positions will become more entrenched.

The mediator will know the best time to explore each party's interests, and the best time to focus on demands or offers. The client should appreciate the deliberate pace, often necessary for the result sought.

Advocates should ask their client to focus on the mediator's opening statement, in which the neutral sets out the ground rules, discusses his or her role and approach, and the schedule for the day. Clients and advocates must prepare to show patience by listening to the other side and the mediator without interrupting or immediate emotional response; that's part of moving the process along.

8. PROGRESS PILLAR: MAINTAINING MOMENTUM

You are sitting in your breakout room for a long period of time while the mediator is working with the other side. During this downtime, your client may get frustrated with the inaction or upset at insulting offers or statements made by the other side. Your client may suggest you turn up the heat. Or, in keeping with these times of connectivity, your client will start working on other matters on a laptop or smartphone, losing focus on the mediation.

These behaviors, wherever and whenever they occur, are not good for mediation progress.

Keep your client focused. First, advocates must remain focused themselves—not spending time calling or emailing other attorneys, clients or whomever. If an attorney must communicate during a session, caucus or downtime, it must be kept brief. Tell your mediation client you will be back within five minutes and want to discuss a specific issue that was previously raised.

Mediators often will try to maintain momentum by giving “homework” to a party and lawyer who the mediator is about to leave on their own. The mediator will ask “How do you respond to the other side's argument about . . . ?” or “Would you consider these options in addition to money to settle this case?”

He or she might ask for an estimate of the time and money that it will take to fully litigate the case, or what the party believes is the best and worst result that might arise from a trial or an appeal, and how it compares to a settlement.

Even if the mediator doesn't dole out such assignments, advocates may want to discuss

similar subjects with their clients to keep focused. If nothing else, such efforts will usually speed up the process and allow a more effective response to the other side's subsequent counteroffer or other declared position.

9. PERSISTENCE PILLAR: ENGAGE AND RE-ENGAGE

If at first you do not succeed, try, try again. This could be the motto of many top-notch mediators. Many times, especially in multi-party or complex cases, it takes more than one session to reach a settlement. So do not be surprised if the mediator asks at the end of a frustrating, emotionally draining session when no agreement was reached if another session or a telephone follow-up would be helpful.

Before responding no, at least ask the mediator why a follow-up could be helpful. In fact, it is almost always worth the effort to pursue a telephone follow-up in a week or so. Often, after both sides have had time to digest what was discussed or offered at the first session and any residual emotion has tempered, the parties will be more willing to reengage in mediation talks.

If you or your client believes that a follow-up should wait until after a future event, such as limited focused discovery or a ruling on a specific issue, try to accomplish that quickly. Don't delay it until after all pretrial efforts have been completed. By then, the parties will have expended much of the time and money that mediation would have saved, and their positions will become more entrenched.

Consider whether there is any reason not to keep a dialogue going with the mediator.

10. PRESERVATION PILLAR: MEMORIALIZE NOW!

It is the end of the day, everyone is exhausted. But the good news is that both parties have agreed to a settlement.

Still, it is late, the parties want to go home. They tell the mediator they will work on the points of the agreement . . . tomorrow.

The mediator should say “No, we need to memorialize the settlement right now, right here.”

The settlement paper need not be the final detailed document. But it should be a writing covering all of the essential points with

both parties signing the document. If this is not done, there is a chance one party may reconsider the deal and want to back out of the agreement or renegotiate certain aspects—the classic buyer's remorse.

Remember most settlements leave one or both parties somewhat disappointed in the outcome, as it is a compromise. Without a signed or otherwise acknowledged agreement, it may be difficult for a party to try to enforce the bargain. Some courts have specifically ruled that they will not enforce a mediated settlement without a writing acknowledged by both sides.

That is why someone should bring a laptop to the mediation to memorialize the settlement terms if the location does not provide staff support, especially after hours.


Remember, the mediator will not draft the terms himself nor should he or she. The neutral by definition does not represent either party.

He or she can comment on the points that need to be recorded as accurately reflecting the agreement, but should not draft it. The advocate should make sure the document covers all necessary points so that nothing remains to be negotiated.

As to getting the document acknowledged, if for some reason there is not a printer available or operational, be creative. Email the agreement to each party and have them reply stating they have read the agreement, reviewed it with their attorney, and agreed to its terms.

And you can always go old school and write it out and sign it. One mediator finalizing an agreement at a vacation resort located a whiteboard and had the parties write the terms on the board and sign it. Then everyone, using their smartphones, photographed the board with the signatures. A little effort at the end of the day may prevent a lot of effort, expense and bad feelings later.

While focusing on these “Ten Pillars to a Productive Mediation” requires more effort from both the client and the attorney, it should increase the chances of a successful mediation and help the client better understand both the litigation and the mediation process.

To paraphrase Thomas Edison, successful mediation is 1% participation and 99% preparation. 

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SUPREME COURT WILL DECIDE WHETHER TO HEAR AN ADR DISCLOSURE CASE

A long-running Texas litigation that was mediated unsuccessfully by a former federal magistrate is on appeal to the U.S. Supreme Court because of the magistrate's conduct in the case.

It could provide the Court with the opportunity to speak on mediator disclosure schemes for the first time.

The Court is expected to decide soon whether to accept or deny the certiorari petition to hear the case, *Ceats Inc. v. Continental Airlines Inc., et al.*, No. 14-681 (Fed. Cir. June 24, 2014)(available at <http://ow.ly/IMTcw>). Ceats filed its petition Dec. 4, and last month, the defense provided the Court with its reply.

A Ceats response was due in late February under Court rules, after which it will consider whether it takes the matter at a case conference. If the Supreme Court agrees to take the case soon, it is possible that it could be heard before the current term ends in June.

Ceats was mediated, but no agreement was reached. In the case, patent holder Ceats lost a jury trial.

But the mediation part of the case has come back to the court system, with the Ceats claim that there are long-existing conflicts. The petitioner takes issue with the relationship between Dallas-based JAMS neutral Robert Faulkner, a former Texas eastern district federal magistrate, and Fish & Richardson, the law firm that represented an original 11-defendant group of companies, including Ticketmaster and major airlines, that Ceats alleged infringed on its seat-assignment software. (See <http://ceatsticketing.com> for a description of the company's ticketing platforms.)

A Texas federal district court ordered the mediation and appointed Faulkner, with the parties' approval.

Ceats is alleging in the U.S. Supreme Court that the company's questions made before Faulkner in the failed mediation redirected the defense efforts, specifically on points Ceats raised about proofs for the trial.

Ceats says in its petition that it learned of the relationship between Faulkner and Fish &

Richardson after Ceats had lost the jury trial.

In fact, the relationship between the law firm and the former magistrate already had been the subject of a case that found a conflict and struck an arbitration decision. In *Karlseng v. Cooke*, 346 S.W.3d 85 (Tex. App. 2011) (available at <http://ow.ly/IMUq0>), a Texas state appeals court overturned a Faulkner arbitration award because it found "a direct, personal, professional, social, and business relationship between arbitrator Faulkner" and Brett Johnson, a Fish & Richardson principal who was

Mediation at the U.S. Supreme Court

The story: A possible first: The nation's top court is considering reviewing a mediator disclosure case.

The issue: A relationship between the mediator and the defense law firm had been adjudicated as a conflict in another ADR case. But does the conflict apply in the current case?

The argument against granting the cert petition: Justice was served even if the mediation was tainted, because the petitioner received a full jury trial. (And lost.) But where does that leave mediation standards and rules regarding disclosure?

lead counsel for the winning party.

Faulkner had awarded about \$22 million, including more than \$6 million in attorney's fees, according to the *Karlseng* state court opinion.

A rehearing on the arbitration decision was denied in September 2011, but Faulkner had been appointed as mediator in *Ceats* a year earlier, while the initial ADR sessions had taken place in June 2011.

"Fish was well aware of the issues regarding its undisclosed relationship with Faulkner having fully briefed the *Karlseng* case in which

Fish was accused of improperly failing to disclose its partner's personal relationship with Faulkner," according to Ceat's Supreme Court petition, which was prepared by Dean A. Dickie, counsel to Miller, Canfield, Paddock and Stone in Chicago.

The Ceats Supreme Court cert petition notes that Fish & Richardson partner Thomas Melsheimer, who represented defendants in the patent litigation, also was lead attorney in the *Karlseng* defense of the arbitration award.

The defendants' response, which asks the Supreme Court to reject Ceats' petition to hear the case, says that "Melsheimer and the Fish lawyers in this case have had no relationship with Judge Faulkner at any time."

Ceats was mediated again during the eight-day jury trial, but ultimately went to a March 2012 verdict, finding that the company's patents were infringed upon, but invalid.

Ceats filed an appeal in May 2012, after it said it found news reports about a court action against Faulkner, Johnson and Fish & Richardson as a result of the overturned *Karlseng* arbitration.

It asked for relief from the final judgment under Federal Rule of Civil Procedure 60(b), which provides that decisions may be overturned because of mistakes, new evidence, fraud, and other reasons. A Texas federal district court denied the Rule 60(b) motion.

* * *

Last June, a unanimous three-judge U.S. Federal Circuit Court of Appeals—a Washington, D.C.-based appellate court that has a specific jurisdictional mandate and focuses in large part on patent matters—held that Faulkner was obligated to disclose the relationship with Johnson and his firm.

But it also denied relief under the Rule 60(b)(6) catch-all provision allowing for relief for "any other reason that justifies relief," declaring that the caselaw standard of harmless-error applied. (The rule is available here: http://www.law.cornell.edu/rules/frcp/rule_60.) The panel said that the circumstances didn't warrant the extraordinary relief that the rule provides.

But the appellate panel, in an opinion by Chief Circuit Judge Sharon Prost, gave Ceats enough ammunition for it to ask the nation's

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top court to intervene and, perhaps, opine for the first time on mediator disclosure.

The opinion noted that “all mediation standards require the mediator to disclose any facts or circumstances that even reasonably create a presumption of bias,” citing as an example the American Bar Association’s Model Standards of Conduct for Mediators. “[P]arties must have absolute trust that their confidential disclosures will be preserved,” Prost wrote.

Most significantly, the federal appeals court criticized the district court opinion in the case, noting that it “erred in finding that a reasonably objective person would not have wanted to consider circumstances surrounding the *Karlseng* litigation when deciding whether to object to Faulkner’s appointment as mediator in this case.”

The Prost opinion notes, “To the extent the district court seems to imply a different disclosure requirement for mediators and judges because Faulkner ‘had no authority to make or influence legal or factual rulings in this case,’ we reject that implication. [Citation omitted.] . . . [A] mediator’s duty to disclose potential conflicts where impartiality might reasonably be questioned is analogous to a judge’s duty to recuse. . . .”

* * *

Ceats’ U.S. Supreme Court petition does not merely take issue with the degree of severity of the failure by Faulkner to disclose. It attacks the standard the appellate court used to evaluate the lack of disclosure and couches it in terms of the continuing viability of mediation.

“[T]he question for Supreme Court [r]eview,” the cert petition notes at the outset, “is whether the failure of a court-appointed mediator to disclose a long standing conflict of interest with one of the parties to the mediation can ever be ‘harmless.’ The answer to that question strikes at the very foundation of the integrity of the Federal judicial process as well as the public’s perception of the fundamental fairness of those proceedings.”

The cert petition brief says that the standard for judging a mediator’s disclosures should be different than the FRCP standard for setting aside a judge’s ruling.

The request for the nation’s top court to hear the case focuses on the circuit court’s

application of the evaluation standards for overturning a decision under FRCP 60(b). It comes from *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988)(available at <http://ow.ly/IMWvX>).

Liljeberg requires that the decision’s level of harm requiring reversal revolved around the risk of injustice in the case; the risk of injustice in other cases, and the risk of undermining public confidence—in this case, “in the neutrality of court-appointed mediators.”

The appellate court concluded that the risk of injustice wasn’t sufficient to overturn a jury verdict, despite, for other cases, its “concerns about failing to provide a remedy for a mediator’s non-compliance with his or her disclosure obligations.”

The opinion also said that public confidence in the judicial processes wouldn’t be affected overall because Ceats had an opportunity to provide its case to a jury.

The Federal Circuit held that the nondisclosure was harmless error under FRCP 60(b)(6).

* * *

Ceats’ petition to the Court is a call for federal law on mediation. The Court needs to take on and settle the open questions because of the widespread U.S. use of mediation, Ceats’ brief says, “and a determination of the issue will provide guidance and clarity for litigants and mediators involved in court-directed mediations.”

The mediator disclosure issue directly “impacts the public’s trust and confidence in the federal judicial system,” wrote Miller Canfield’s Dickie, who did not respond to an email request for comment. (His petition is available at this link: http://pdfserver.amlaw.com/nlj/CEATS_cert_petition.pdf.)

He also noted that the Court should take the case because it’s unclear what relief can and should be provided “when a wrong has been found,” which in turn “undermines mediator disclosure requirements and has a necessary chilling effect on the trust litigants will have in mediators.”

The cert petition also notes that mediator disclosure hasn’t been considered by the federal circuits or the Supreme Court.

Among its arguments, Ceats says that the Court should hear its case because,

While less than 1% of cases filed are actually tried, [the Supreme Court] has nonetheless provided clear guidance for the standard to be applied in providing a remedy for a tainted judgment due to an undisclosed conflict of interest by a judge. There is no guidance or clarity, however, when a judgment is tainted due to an undisclosed conflict of interest by a mediator. Given the widespread approval and use of mediation as an alternative to trials throughout the United States at both the district court and circuit court levels, the standards for a mediator’s undisclosed conflict of interest are of significant public importance to warrant judicial examination. . . .

Not providing a remedy for conduct that the appeals court criticized is problematic, the brief contends, and needs to be rectified. “Far from fulfilling the goal of an appearance of impartiality, the facts here suggest to the public that litigation success is based on the litigant’s attorneys’ connectedness and willingness to ‘wine and dine’ those with power in the litigation process.”

The Ceats brief continues,

This Petition is a plea to protect the integrity of the American judicial system and the critical public perception that the system is fair, impartial, and just.

The request for the Court to hear the case also says that the lack of a sanction despite the finding that disclosure should have occurred “allows a mediator to serve with an undisclosed conflict of interest while depriving the aggrieved mediation participant of any remedy for the breach.” The result undermines mediator disclosure schemes, too, the petition states.

Finally, the petition says that the harmless-error standard, customarily used to assess judicial conduct, should not be applied to a mediator. And even if it is applied, the brief argues, the Federal Circuit misinterpreted the *Liljeberg* test, which it says is designed to avoid the appearance of impropriety in the judicial system.

“The Federal Circuit appeared to require a showing of *actual* injustice, as opposed a mere

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risk of injustice as dictated by *Liljeberg*,” the petition states (emphasis in the brief).

* * *

The brief in opposition, on behalf of 11 well-known respondents in the airline and entertainment industries that used seat-selection software, not surprisingly contests every point.

It says that Ceats is asking for a disclosure standard stricter than the federal judges’ recusal standard. That request that should have been made earlier, and the argument is therefore waived, wrote counsel of record Mark A. Lemley, a partner in San Francisco’s Durie Tangri, and director of the Stanford Law School’s Program in Law, Science, and Technology.

The response brief hotly disputes at the outset Ceats’ repeated contention, echoing back to federal district court, that the Fish & Richardson lawyers received information about Ceat’s case from mediator Faulkner.

“That insinuation is flatly false,” says the response brief Lemley provided *Alternatives*. “Substantial evidence presented with the Rule 60 motion confirmed that Judge Faulkner did not share any confidential information, . . . and no evidence suggested that he did.”

The brief says that mediators should be subjected to a lower disclosure standard than federal judges, not the higher standard the brief says that Ceats advocates in its petition.

“Misconduct by mediators is far less likely to create injustice in a particular case than misconduct by judges,” the response brief notes, adding, “The facts of this case illustrate that quite well.”

It also contested the Ceats contention that the *Liljeberg* standard for overturning a decision for harmless error was misapplied.

Finally, the original defendants note that “[t]here are multiple other grounds on which to sustain the judgment,” including the fact that Ceats’ move to overturn the decision was too sweeping because one party wasn’t represented by, nor did it have a relationship with, Fish & Richardson.

Ceats “has never sought any lesser remedy—for example, an award of its costs for participating in the mediation, or a declaration

that the mediation should have been conducted differently,” Lemley wrote.

The brief also notes that because Fish & Richardson’s Brett Johnson—the pivotal Faulkner relationship in the unrelated, overturned case—had no relationship to the *Ceats* case, and the disclosure obligation did not extend to Fish’s Terry Melsheimer, the defendants’ advocate, but who did not take part in the mediation.

The response brief also warns against the difficulty in finding uniformity in issuing a rule where the Federal Circuit used several sets of rules, including those of Faulkner’s ADR provider firm, JAMS, in discussing mediation disclosure practices. JAMS declined a request for comment sent by email to Faulkner. See the box below for the rules discussed in the opinion.

Setting a New Standard

The *Ceats v. Continental Airlines* case puts the following standards applicable to mediators in front of the U.S. Supreme Court, which will soon decide at a conference whether it will hear the case:

- 28 U.S.C. § 455: “(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” Full text is available at <http://www.law.cornell.edu/uscode/text/28/455>.
- American Bar Association Model Standards of Conduct for Mediators § III.C (2005): “A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator’s impartiality.” Available here: www.americanbar.org/groups/dispute_resolution/policy_standards.html.
- JAMS International Mediation Rule 6 (2011): “Any mediator, whether selected jointly by the parties or appointed by JAMS International, will disclose both to JAMS International and to the parties whether he or she has any financial or personal interest in the outcome of the mediation or whether there exists any fact or circumstance reasonably likely to create a presumption of bias. Upon receiving any such information, after soliciting the views of the parties, JAMS International may replace the mediator, preferably from the lists of acceptable

mediators previously returned by the parties.” Available here: www.jamsadr.com/international-mediation-rules/.

- Uniform Mediation Act § 9(a)(1)-(2) (2001): “(a) Before accepting a mediation, an individual who is requested to serve as a mediator shall:
 - (1) make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and an existing or past relationship with a mediation party or foreseeable participant in the mediation; and (2) disclose any such known fact to the mediation parties as soon as is practical before accepting a mediation.” Available at www.uniformlaws.org/Act.aspx?title=Mediation%20Act.
- Texas Mediator Standards of Practice and Codes of Ethics § 4: “Disclosure of Possible Conflicts. Prior to commencing the mediation, the mediator shall make full disclosure of any interest the mediator has in the subject matter of the dispute and of any known relationships with the parties or their counsel that may affect or give the appearance of affecting the mediator’s neutrality. A mediator shall not serve in the matter if a party makes an objection to the mediator based upon a conflict or perceived conflict.” Available at www.txmca.org/ethics.htm.

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There's more ammunition, at least in the court of public opinion if not the Supreme Court, on the conflicts in the case.


Circuit Judge Randall Rader, who was one of the three judges in the *Ceats* Federal Circuit decision, resigned last May just a month before the opinion released. His departure from the bench became effective less than a week after the opinion was released.

And between the time of his resignation and the opinion's release, he stepped down from his position as the Federal Circuit's chief judge, which was assumed by Circuit Judge—and *Ceats* opinion author—Sharon Probst.

Rader resigned because of a conflicts issue. He had sent an email praising a Weil Gotshal Manges attorney's performance to the subject, who showed it to clients, violating ethical restrictions on judges using their position for private financial gain, including others' work.

Ceats' attorney Dean Dickie explained to a *National Law Journal* affiliate site in January that Rader's presence is relevant to the petition "not only because Rader participated in the ruling [Dickie] is appealing, but also because in explaining his resignation, Rader invoked the same ethical concerns that are in play in the case now before the Supreme Court." Tony Mauro, "Rader's Resignation Cited in Ethics Dispute Before U.S. Supreme Court," *Supreme Court Brief* (Jan. 7, 2015)(available at <http://ow.ly/IMSVI>).

—Russ Bleemer

The author edited this issue and was editor of *Alternatives* from 1996 to 2013. 

ISKANIAN DENIED: SCOTUS LEAVES CALIFORNIA SUPREME COURT'S SPLIT DECISION IN PLACE

What likely would have been the U.S. Supreme Court's biggest arbitration case this term will not be heard.

On Jan. 20, the Court rejected a petition for a writ of certiorari in *Iskanian v. CLS Transportation Los Angeles*, No. 14-341, without providing a reason for the denial. (See the Court's page for the petition filing here: <http://ow.ly/IP4IT>.)

The original plaintiff had asked the Court to review a California Supreme Court decision in the case, *Iskanian v. CLS*, No. S204032 (Cal. Jun. 23, 2014)(case history and opinion available at <http://ow.ly/IP54i>; see also Lia Iannetti, "Even in California: State's Right to Refuse Enforcement of Class-Action Waivers on Public Policy or Unconscionability Grounds Is Preempted by FAA—*Iskanian v. CLS*," 32 *Alternatives* 129 (September 2014) (available with a subscription at <http://ow.ly/IP81L>)).

The case involves alleged labor code violations and an unfair competition claim brought by the plaintiff as both a class representative seeking damages, and also in a representative capacity under the California Private Attorney General Act, or PAGA.

Following the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011)(available at www.supremecourt.gov/opinions/10pdf/09-893.pdf), the California Supreme Court had upheld the validity of class action waivers. But the California court also had rejected the argument that an employee could waive his or her right to pursue litigation under PAGA.

The court reasoned that PAGA claims could not be waived because they were substantively different from class action claims—the PAGA plaintiff is deputized to act on behalf of the state, so the waiver would be preventing the state from pursuing a claim through an agent authorized to represent it.

The court analogized PAGA claims to *qui tam* actions, where whistleblowers bring fraud claims against the government on the government's behalf. The California Supreme Court directed lower courts to determine whether and where plaintiff *Iskanian*'s PAGA claim could proceed.

Unsatisfied with the partial victory, CLS decided to petition the nation's top court on the question of whether an "employee's waiver in an arbitration agreement of a collective or 'representative action' under the California Private Attorneys General Act, Cal. Labor Code § 2698 et seq., [is] so distinguishable from a 'class action' waiver that it is immune from the otherwise preemptive effect of the Federal Arbitration Act?" as defined by *AT&T*

Mobility. (The petition is available at <http://ow.ly/IPalz>.)

Petitioner CLS Transportation Los Angeles LLC, a regional outlet of a national limousine company, described the result as "manifestly incorrect" and "simply another attempt to insulate a parochial state statute from preemption and enforcement of an arbitration agreement according to its terms."

Stating that a PAGA representative action and a class action were "nearly identical," the petitioners argued that by allowing the California decision to stand the U.S. Supreme Court would allow states to "create an exception for PAGA that swallows the rule of FAA preemption." They also described inevitable federal court conflicts, citing multiple cases, including *Grabowski v. C.H. Robinson Co.*, 817 F. Supp. 2d 1159 (S.D. Cal. 2011), *Valle v. Lowe's HIW Inc.*, No. 11-1489 SC, 2011 WL 3667441 (N.D. Cal. Aug. 22, 2011), and *Fardig v. Hobby Lobby Stores Inc.*, No. SAC V 14-00561 JVS (ANx) (C.D. Cal. Aug. 11, 2014), where federal courts had enforced preemption and declined to follow *Iskanian*.

The CLS petition was backed by amicus briefs from business groups, including the California Employment Law Council, the National Federation of Independent Business, the Civil Justice Association of California, and the California Chamber of Commerce.

Agreeing with the petitioner, they cited the case as another in a long line of attempts by California to circumvent the FAA and the Supreme Court's precedents, and lamented the uncertainty raised by a state-federal split on the question of preemption of PAGA claims.

The California Employment Law Council warned of dangerous consequences from the decision, pointing to the difference between a *qui tam* action, which involves fraud against the government, and a PAGA action, which concerns individual employment cases. Citing the hypothetical case of a suit brought by an employee with a class-action waiver regarding a minor technical pay stub error, the brief argues allowing PAGA claims for that employee would mean that the "bargained-for quick and inexpensive resolution limited to the claims of the signatory employee [would

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ADR Briefs

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be] rendered meaningless. And all this is in the context where the state has suffered no loss or damage analogous to qui tam fraud whatsoever.” Amicus curiae brief, Employers Group and California Employment Law Council, at 27 (available at <http://ow.ly/IPuOH>).

While respondent Iskanian argued that the petitioner’s legal reasoning was wrong, the opposition brief also made arguments that the case wasn’t ripe for Supreme Court review. The

respondent suggested that the PAGA claim was still under review by lower courts to determine how it would be heard.

The respondent also pointed out that the Ninth Circuit had not yet heard cases on the issue, so the district court cases that the petitioner cited did not yet present a conflict: “Should a real conflict develop, this Court may consider whether it justifies review; conversely, congruence of results and reasoning may indicate that review is unwarranted.”

These arguments may have carried the day in the Supreme Court’s decision not to hear the case, but they also suggest that the PAGA claims issue may come before the Court again soon.

—By Gideon Hanft

The author is a CPR Institute research assistant.

(For bulk reprints of this article, please call 800-835-6770.)

CPR News

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A CPR-CAMARB training program, the Second International Business Mediation Workshop, will follow the Congress, also in São Paulo, on April 26-28. The full agenda on the fundamentals of mediation appeared last month in the CPR News feature and is on the CPR website at the link above.

The Workshop materials have been posted in Portuguese on CPR’s website, here: <http://bit.ly/1xUumrv>.

The Workshop is the second the CPR Institute has conducted in conjunction with the 16-year-old Brazilian commercial conflict resolution nonprofit CAMARB (Portuguese information here: <http://camarb.com.br/camarb>).

CPR’S LAUNCH EVENTS FOR THE INTERNATIONAL ADMINISTERED ARBITRATION RULES

The International Institute for Conflict Prevention and Resolution’s new Rules for Administered Arbitration of International Disputes were released in December. CPR is holding launch events worldwide to introduce practitioners to the advantages of and the reasons for using the new rules.

There’s action both in the United States and abroad. Receptions this month to present the new rules and discuss their application will be held in:

- Miami, on Thursday, March 12, at the offices of Akerman LLP;
- Geneva, Tuesday, March 17, at the offices of the Swiss law firm, Lalive;
- London, Thursday, March 19, at Cleary Gottlieb Steen & Hamilton LLP, and

- Madrid, Wednesday, March 25, at the offices of Bird & Bird.

Last month, the CPR Institute visited Paris’s Gide Loyrette Nouel, which hosted a Feb. 9 launch party.

The rules, which are effective as of Dec. 1, 2014, are for use in cross-border business disputes, and complement CPR’s domestic administered arbitration rules, which were promulgated July 1, 2013.

The rules also complement the wide variety of nonadministered business conflict resolution resources in CPR’s toolbox. For those tools and the complete collection of all CPR Institute rules, see www.cpradr.org/RulesCaseServices.

Both sets of administered arbitration rules were developed by expert in-house and law firm practitioners. The new international rules reflect best practices, including Uncitral’s arbitration work, and address hot-button issues such as arbitrator impartiality, time, costs, and administration.

The rules are intended to provide fair, fast, flexible, and cost-effective procedures and increase quality. They include an innovative “screened” arbitrator selection process: To address concerns about the party-appointment process, parties may agree that the arbitrators can be appointed without knowing which party selected them.

CPR has established an International Arbitration Council, which is an independent body of expert practitioners available to assist CPR with the rules’ quality control.

Parties using the rules have access to the experienced neutrals on CPR’s global and industry-specific panels, but are free to designate for appointment any arbitrators they choose.

The arbitrators, parties, and the CPR Institute are all subject to an express confidentiality requirement under the rules.

The CPR Institute’s arbitration administration is provided by

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multilingual staff attorneys who have extensive international arbitration experience.


The rules are designed to increase efficiency and lower costs via party control, providing only for administrative functions that are needed.

The CPR Institute must approve any extensions beyond one year from the constitution of the arbitration tribunal. The tribunal concurrently is authorized to propose settlement and to promote resolution by assisting the parties in initiating mediation at any stage of the proceedings.

The rules' flat-fee structure is based on the amount in dispute, and often is lower than existing fee schedules—and always more predictable.

Moreover, the administrative costs are capped. CPR's sliding fee schedule is capped at \$34,000, absent special circumstances.

CPR began the launch events for the new international administered rules with a Jan. 14 reception at White & Case in New York.

For more information on the receptions or the use of the new rules, visit the link above or call +1.212.949.6490. 


CPR COMMITTEES: CALL FOR MEMBERS

CPR's committee work is the cutting-edge of commercial conflict resolution practice.

It's unlike most professional association committee work. At nonprofit CPR, in-house counsel, attorneys, academics, and neutrals analyze how leading companies, law firms, and government entities are handling the most sophisticated commercial dispute matters. The committees produce a variety of rules, papers, and guidelines that present a continually evolving view of best practices in ADR.

Committee participation is a free CPR membership benefit that works to improve the justice systems. CPR committees currently soliciting members include:

- Arbitration Committee
- Banking and Financial Services Committee
- Employment Disputes Committee
- A new Environmental Committee
- Mediation Committee
- National Task Force on Diversity in ADR
- Patent Mediation Task Force
- Product Liability Committee
- Energy, Oil & Gas Committee

For information on CPR Institute membership and committee participation, please contact Terri Bartlett, CPR members' services vice president, at tbartlett@cpradr.org, or call her at +1.212.949.6490. 


CPR'S Y-ADR SETS SPRING CHICAGO DATE

The CPR Institute's Y-ADR group has announced its first event for 2015.

Save the date: A Wednesday, May 6, program has been scheduled at CPR Institute member law firm Sidley Austin in Chicago.

The program agenda and speakers will be announced as soon as they are available at Y-ADR's page on the CPR website, here: www.cpradr.org/EventsEducation/Y-ADR.aspx.

CPR's Young Attorneys in Dispute Resolution program, best known as Y-ADR, promotes commercial dispute resolution mechanisms with the younger generation of lawyers—those who are 45 years old or younger, or those with less than eight years of professional experience in international ADR practice.

Through periodic seminars and various other initiatives, Y-ADR participants get an insider's look at the role of dispute resolution processes and practices in corporations and multinational organizations. Participants also have a unique opportunity to gain insight into the corporate ADR world by networking with in-house counsel and experts in the field. 


FOR MEMBERS ONLY: CPR COLLABORATES ON A TRAINING WITH THE COLLEGE OF COMMERCIAL ARBITRATORS

The CPR Institute is collaborating with the College of Commercial Arbitrators to launch a new training opportunity for CPR's corporate members.

The purpose is to enhance companies' ability "to achieve sustainable excellence in dispute resolution," CPR says, at no additional cost to members.

The training is customized to address specific ADR issues, including

- The role of corporate counsel in structuring and conducting commercial arbitration and mediation;
- Working with outside counsel to control commercial arbitration costs without sacrificing results;
- Modifying arbitration agreements to make commercial arbitration faster and less expensive, and
- Using early dispute resolution and early case assessment techniques to shape your arbitration and mediation strategies and programs.

Please contact Mara Weinstein at mweinstein@cpradr.org or Beth Trent at btrent@cpradr.org for more information on the CPR-CCA training programs. 

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How You Can Help:
 Choose diverse neutrals for your legal matters
 Recommend diverse neutrals to CPR's Panel of Distinguished Neutrals
 Join CPR in its many diversity in ADR efforts



Mediation with CPR Dispute Resolution Services

Why Use Mediation to Resolve Your Commercial Disputes?

- Saves time and money by helping you stay out of court
- Proven high success rate
- Preserves your valuable business relationships

Why Use CPR's Mediation Procedure?

- Can be used at any time, pre- or post-dispute
- Provides procedural ground rules to avoid deadlocks and reduce time spent selecting neutrals
- Offers a top-notch process to assist you in the selection of the mediator best suited for your dispute

Why Use a CPR Mediator?

- CPR's mediators are highly qualified professionals who have been peer-reviewed and user-approved to handle complex commercial disputes
- They have resolved cases with billions of dollars at issue, worldwide
- CPR's mediators are specialized in more than 20 industry practice areas

For more information about CPR's Mediation Services,
 please contact Olivier Andre at oandre@cpradr.org or +1-646-753-8241