THE RESOLVER

TURNING CONFLICT INTO RESOLUTION

Published by the Alternative Dispute Resolution Section of the Federal Bar Association

Message from the Section Chair

by Joan D. Hogarth

Congratulations to *The Resolver*, the recipient of the FBA's Outstanding Newsletter Award for 2017. This award is the result of the tenacity and hard work of our intrepid editor - Alex Zimmer. Thank you Alex, 15 articles and two newsletters later, the quality of your work shows. If you have read these articles, you will agree that they are edifying and thought-provoking touching on familiar subjects with yet a different slant and covering the areas of negotiation, mediation, arbitration and early neutral evaluation. Visit the Section's webpage for archived issues. Of course, the newsletter would not be possible without your contribution. Additionally, we hope that contributors benefited from having their work published for members throughout to country. We hope to see more of your and your colleague's work in the upcoming term. We need you to keep this newsletter and certainly this Section strong, valued and valuable.

Thanks also to our 2016-2017 Board members who generously gave of their time to ensure that the Section

CHAIR *continued on page 19*

Message from the Editor

by Alexander J. Zimmer

We are pleased to present the Fall 2017 edition of The Resolver, the newsletter of the Alternative Dispute Resolution (ADR) section of the Federal Bar Association. Once again, our contributors are ADR practitioners from across the country. This Issue's articles remind us that the successful use of ADR requires attention to the practical application of ADR related statutes as well as public and private regulatory schemes and rules. We have also selected articles that invite the reader to pause and take the time to consider the broader possibilities of mediation and negotiation perspectives. Another of our offerings illustrates the benefits of applying that broader perspective by utilizing creative mediation or neutral evaluations to intellectual property disputes. Returning readers will be happy to be lead *Out of the Thicket* in the second of a two-part article on the evolution of information exchange in arbitration.

As you may know, we were pleased to receive the FBA's Outstanding Newsletter Award for 2017. We would like to thank all our contributors whose hard and thoughtful work has provided such a range of information, analysis, and commentary on so many facets of ADR today. And, of course we are grateful to the FBA staff for their part in publishing *The Resolver*. In this issue, we continue to pursue our goal to provide useful information and thought for the ADR practitioner and for those interested in the work we do.

Many people agree that

EDITOR *continued on page 4*

FALL 2017

Come on In, The Water's Fine: An invitation to Swim in the Deep End of Mediation (But if you prefer wading, that's fine too)

by Simeon H. Baum

Growing Use of ADR Processes & Sophistication of Counsel

Looking back on the development of ADR since the enactment of the Civil Justice Reform Act of 1990 and the ensuing creation of the initial ADR pilot programs in the federal district courts, it is gratifying to see how our field has grown. We see growth in the use of alternative processes—mediation, neutral evaluation, and arbitration. We witness greater sophistication even in the use of that granddaddy of dispute resolution processes—negotiation.

In arenas ranging from corporate to family matters, both parties and counsel demonstrate knowledgeable application of principles of cooperative, mutual gains, joint problem-solving approaches to negotiation promoted nationwide in law schools and CLEs, and through such bestsellers as Fisher & Ury's "Getting to Yes" and "Getting Past No."

Mediation: A Deep Lake

While many make good use of mediation, there remains a range of opportunities in mediation that counsel are invited to explore. Mediation is a deep lake layered with varied zones for meaningful engagement and reflection.

As representatives, we members of the Bar guide parties through the waters of mediation. As transactional counsel, we make process choices in the dispute resolution clauses we draft. It is helpful, then, occasionally to reexamine the waters we navigate to be sure we are availing our clients of the fullest and richest opportunities the process offers.

Facilitated Negotiation

Mediation is most commonly seen as a confidential, facilitated negotiation. Unlike its dispute resolution cousins, arbitration and litigation, mediation does not involve a neutral third party's making a determination, award, verdict or judgment that is binding on the parties. Rather than evaluate or tell the parties what to do, the mediator facilitates the parties' own communication and decision making.

The mediator is a special type of neutral party. He or she is a deep, compassionate listener; less on no one's side, and more on everyone's side. The mediator models active listening (validating, empathizing, clarifying, and summarizing), and helps reframe communications in a constructive direction.

Mediators, under this model, serve parties by greasing the wheels of negotiation. From this vantage point, the mediator conversant with contemporary negotiation theory can support parties and lead them through a problem-solving approach to resolving their dispute.

Counsel representing parties in this process also benefit from a sophisticated understanding of negotiation theory and skills.

Win/Win Negotiations & Dealmaking

Fisher, Ury and other contemporary proponents of negotiation theory and skills offer excellent advice to negotiators and users of the mediation process. They posit that parties are driven by interests. Like the Italian economist Pareto, who defined the optimal deal as that which most satisfies the interests of all parties, contemporary theorists urge negotiators to seek to design deals along these lines.

As Fisher and Ury taught, we discover interests through productive discussions. Being "soft on the people" by constructive communication; avoiding *ad homina*, threats, gamesmanship and dirty tricks; and building trust are more likely to induce one's counterpart to reveal interests that can be the building blocks of a deal. Being analytically "hard" on the issues – learning what stands in the way of satisfying parties' interests – reveals clues that enable parties to fashion options meeting the parties' interests.

Negotiations are kept on track if parties consciously identify standards that everyone can accept. Parties are further aided in deal-making by considering where they would be left by not taking the deal on the table. Fisher and Ury termed this concept the "BATNA," i.e., the best alternative to a negotiated agreement.

The BATNA and Evaluation

As parties in mediation assess whether a proposed deal makes sense, they might consider whether other deals are possible or whether the gains offered in a proposal on the table equal or exceed their condition should they reject a deal altogether. When parties are in litigation, a primary alternative they might consider is litigation itself.

Mediators can be very effective in helping parties and counsel engage in dialogue and contemplative reflection concerning the risks and transaction costs associated with litigation. This can be cultivated in joint sessions, with all parties around the table, or in private sessions – known as caucuses – where the mediator can help parties reflect on case risks and costs without the need to save face or display strength and commitment level to maintain strategic leverage.

Depending on their orientation, different mediators might be more inclined to have parties arrive at case and transaction cost assessment by facilitating their own communications and reflection or by sharing the mediator's own prediction or evaluation.

Transformation through Empowerment and Recognition

While problem-solving and deal-making, aided by the parties' analysis of risks and transaction costs, are valuable indeed, mediation may have more to offer. Surprising though it might seem, Baruch Bush, Joseph Folger and other proponents of "Transformative Mediation" see the mediator's purpose not as settling cases or solving problems, but as fostering party empowerment and recognition.

Publicized by Bush and Folger in their 1996 book, The Promise of Mediation: *The Transformative Approach to Conflict*, Transformative theory sees conflict as a crisis in relationship that impairs parties' ability to communicate with each other. Enabling parties to identify opportunities to make choices (about the process and communication, as well as deal terms) helps parties rise from hunkered down defensiveness and feel greater control.

With this increased sense of personal power comes a greater ability eventually to have and express a better understanding of the other party's perspective, emotions, and values. This growth in empathy and recognition is the change from which Transformative Mediation derives its name.

Transformative mediators are pure facilitators. They follow the parties, reflecting back their communications with a "micro-focus" that takes its cues, meanings and directions from where each party is.

Understanding in Mediation

Jack Himmelstein, Gary Friedman and their colleagues have spent over two decades developing an approach that sees deepening understanding as the heart of mediation. As parties move beneath the "v" in Jones v. Smith, they come better to understand themselves, each other, and their contexts – legal, economic, relational, hierarchical, and more. This growth of understanding is seen as the most fundamental opportunity offered by mediation, and as the source of real resolution.

To avoid reinforcing the divide embodied in the parties' dispute, Himmelstein and Friedman urge a transparent approach in mediation that maintains joint session throughout, dispensing with separate, private caucuses. Parties to mediation in this model "contract" to stay together and seek to understand, despite the emotions this might stir and the frustration this might engender.

Mediators in this model listen and communicate with a loop of understanding, embracing and reflecting back the speaker's meaning until the speaker acknowledges that he or she has been fully understood.

A Dizzying Array of Possibilities and Perspectives

We have here, in summary fashion, charted a few of the major zones in the aquatic topography of mediation. There are many other nuanced areas of mediation theory and practice. Indeed, at times, cross currents of theories and approaches converge and diverge in the conduct of each mediation.

Navigating Mediation's Waters

Mediation can be seen and used in many ways. Practitioners and counsel might, e.g., think of using a Transformative Mediation approach for a family matter or an embedded employment dispute. Perhaps counsel or parties might seek an Understanding-based practitioner for a partnership matter, where a continuing relationship is desired. In a complex commercial dispute, counsel might seek out a mediator who is skilled at enabling parties to encounter and assess the risk and transaction cost associated with litigation. Or, in a distributorship dispute, perhaps a mediator skilled in problem solving approaches would be ideal. These examples are not prescriptive. Different counsel might seek different mediator styles and orientations for the same matter.

Mediated matters need not fit neatly into one theoretical box. Mediator Lori Matles coined the term "360-degree mediator" for one who draws on a range of theories, and applies a variety of skills and techniques, as is needed and appropriate in a given set of circumstances.

Take the Plunge

There are many ways of understanding the rich potential of mediation. As parties search for fairness and grapple with the actualities of imperfect human behavior and the limitations of circumstances, we may recognize mediation as a forum for the working out of the norms of justice and harmony.

As people struggle to make choices and be heard – and as we build understanding and acceptance of ourselves, each other, and circumstances -- we may see mediation as a gateway of freedom and compassion.

Mediation exemplifies humanism. We seek the answers not from an external, authoritative source. Rather, persons are seen as a locus of truth. We swim in the waters of humanity. In this process, everything – emotions, principles, visions, stories, values, interests… as well as legal, economic, business, hierarchical, relational and other realities and concerns – everything is legitimate for consideration. Ours is an open process; not black and white, but living color.

The rich depth of mediation may offer a cure to what ails many members of the Bar. Over the years, Bar leaders around the country have considered how a substantial number of new, as well as experienced, lawyers express dissatisfaction in their legal practice. They may feel isolated before their computers, like cogs in a wheel in large firms, or alienated as they bridle at a lack of civility or bicker with adversaries over discovery. The collaborative and personally engaged message of mediation can be liberating. It is an opportunity to work with, not against, one's counterpart. It activates the whole person, drawing upon a range of personal resources that reward, and call forth, creativity.

There are times when mediating parties achieve moments of deep insight, appreciation, truth and acceptance. And there are times when people leave the table irked, but with a deal.

However it is used, mediation has much to offer. The waters of mediation beckon us to bring parties for a swim, and see where the current leads.

Simeon H. Baum, President of Resolve Mediation Services, Inc., (www.mediators.com) has successfully mediated over 1,000 disputes. He has been active since 1992 as a neutral in dispute resolution, assuming the roles of mediator, neutral evaluator and arbitrator in a variety of cases, including the highly publicized mediation of the Studio Daniel Libeskind-Silverstein Properties dispute over architectural fees relating to the redevelopment of the World Trade Center site, Trump's $ 1 billion suit over the West Side Hudson River development, and Archie Comics' shareholder/CEO dispute. He was selected for New York Magazine's 2005 - 2017 "Best Lawyers" and "New York Super Lawyers" listings for ADR, and Best Lawyers' "Lawyer of the Year" for ADR in New York for 2011 and 2017, and for the International Who's Who of Commercial Mediation Lawyers 2012-17.

For over two decades, he has played a leadership role in the bar relating to ADR, including service as founding chair of the Dispute Resolution Section of the New York State Bar Association, chairing the ADR Committee of the New York County Lawyers Association, and serving on ADR Advisory Groups to the New York Court system. Mr. Baum is a past member of the FBA board of directors, former chair of the FBA's ADR Section, and former president of the SDNY Chapter. Mr. Baum teaches on the ADR faculty at Benjamin N. Cardozo School of Law and is a frequent speaker and trainer on ADR.

EDITOR *continued from page 1*

stock-taking and reflection is a useful practice to promote positive development, insight, and growth. Simeon Baum walks us through a practitioner's self-study of mediation reviewing its origins, uses, and promises. We would be well-advised to reflect on the potentialities of mediation as a dispute resolution tool along with the surprising unintended consequences of the use and practice of this important branch of the ADR field.

Two of our contributors discuss current issues arising under the Federal Arbitration Act (FAA). Bryan Branon discusses the question: when a court may appoint a substitute arbitral forum under the lapse provision of the Federal Arbitration Act? The answer is that it depends on the jurisdiction; and the circuits are split. The consequences are significant as the decision will determine whether the agreement to arbitrate fails or a substitute forum may be named. Correspondingly, the author also raises related points for drafters of arbitration clauses. While it is important to know what the FAA does, it is equally important to know what it does not do. When looking to enforce an arbitration award, Tracey Frisch reminds us that the FAA does not provide a jurisdictional free pass to federal court. Most frequently, plaintiffs assert diversity jurisdiction under 28 U.S.C. § 1332(a). The article points out the nuances in computing the amount in controversy and cautions that different courts take different approaches to the issue.

Theodore Cheng looks at use of mediation and early neutral evaluation in controversies involving the availability of the "fair use" exception to copyright protection. The article describes a legal framework "defining fair use" in flux, and a highly subjective, fact-specific, and case-by-case inquiry. Entrusting the application of the fair use factors to a trial is a high-risk undertaking, at best, of any fair use dispute. Here is where mediation and early neutral evaluation can be extremely useful in resolving the dispute.

No two negotiations are the same; and yet every negotiation is the same in important ways. **Joan Stearns Johnsen** examines the significance of context and style in the structure and conduct of negotiations. The parties' goals, the nature of their relationship, and the posture of the negotiation in its own timeline all influence strategy and tactics. This article explores the familiar territories of negotiating a lawsuit settlement or a commercial transaction, and suggests new possibilities such as mediation of transactions.

Bob Merring continues his discussion of the exchange of information in arbitration in the second and final part of the article that he began in the last issue. Today's arbitrations are likely to have an expanded acceptance of information exchange. This article reviews the role of preliminary hearings and mandatory prehearing exchange of information as well as actions parties may take to provide broader access to information in their arbitration process. *Out of the Thicket* concludes with an overview of exchange of information in international arbitrations.

We hope that our readers will find this issue useful and thought provoking. We welcome your comments and reactions, and we invite you to contribute your own thoughts, analyses and opinions to our next issue which will be published in time for the FBA mid-year meeting in 2018.

Thank you for your support.
Alexander Zimmer, Editor

What Constitutes a Lapse Under Section 5 of the Federal Arbitration Act Allowing a Court to Appoint a Substitute Arbitral Forum

by Bryan J. Branon

What constitutes a lapse under Section 5 of the Federal Arbitration Act (FAA)[1] allowing a court to appoint a substitute arbitral forum when the named forum is unavailable? The answer: it depends on the jurisdiction. The Second, Fifth and Eleventh Circuits have held that a court cannot compel arbitration when the exclusively named arbitral forum is unavailable. The Third and Seventh Circuits have interpreted the unavailability of the forum to be a lapse under Section 5 of the FAA allowing the court to compel arbitration in an alternative forum. The pivotal question: was the named arbitral forum an integral part of the parties' agreement making the arbitration provision unenforceable; or did the parties contemplate arbitration, generally, allowing a court to compel arbitration outside of the named provider?

Section 5 of the FAA

Section 5 of the FAA allows a court to appoint a substitute forum if the one named is unavailable. Section 5 provides, in part:

> If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but . . . if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire as the case may require . . . [2]

The Split

In *Moss v. First Premier Bank,*[3] the Second Circuit followed its precedent from *In re Salomon Inc. Shareholders' Derivative Litigation*[4] which held that once a specifically named arbitration forum deemed central to the parties' arbitration agreement cannot administer an arbitration or refuses to do so, there is no "lapse" under the FAA allowing for the court to compel arbitration outside of the named arbitral forum.[5] In *Moss*, the exclusively named arbitral provider at the time of creating the contract, the National Arbitration Forum (NAF), was prevented from administering consumer disputes due to a consent judgment entered into after the Attorney General of Minnesota filed suit for consumer fraud, deceptive trade practices and false advertising. The Second Circuit found numerous indicia that the parties contemplated arbitration exclusively before the NAF at the time the parties entered into the contract, and therefore consumer, Deborah Moss, could not be compelled to arbitrate outside of the exclusively named arbitral forum. Similarly, the Fifth Circuit in *Ranzy v. Tijerina* held the unavailability of NAF prevented the Court from compelling arbitration in an alternative forum.[6]

The Second and Fifth Circuit's approach is in line with the Eleventh Circuit's. In *Parm v Nat'l Bank of Cal. (NBCal)*[7] the Eleventh Circuit applied Georgia's plain-meaning rule of contract interpretation and decided an arbitration provision was unenforceable when the arbitrator was unavailable.[8] *Parm* involved a payday loan agreement with a forum selection clause which provided that any dispute shall be resolved by arbitration conducted by the Cheyenne River Sioux Tribal Nation (CRST) and its authorized representative in accordance with its consumer dispute rules. In addition to the CRST language, the arbitration provision contained a "Choice of Arbitrator" clause allowing the borrower to select the American Arbitration Association (AAA), JAMS or a mutually agreeable provider to administer the dispute. Both parties agreed the CRST was unavailable to conduct the arbitration. NBCal argued that AAA or JAMS could administer the dispute and appoint any arbitrator under Section 5 of the FAA and the Choice of Arbitrator provision. In rejecting this argument, the Eleventh Circuit held that naming the CRST and exclusive reference to its laws and jurisdiction — even though AAA or JAMS were named in the Choice of Arbitrator clause — was an integral part of the agreement rendering arbitration unenforceable for lack of an available forum. There was no lapse under Section 5 allowing the court to appoint a substitute forum.

In contrast, the Third Circuit had previously found the Second Circuit's *Salomon* approach "unpersuasive" and held that NAF's unavailability did, in fact, constitute a lapse in *Khan v. Dell Inc*.[9] There, Dell had an arbitration provision in a computer sales agreement which provided any dispute, "SHALL BE RESOLVED EXCLUSIVELY AND FINALLY BY BINDING ARBITRATION ADMINISTERED BY THE NATIONAL ARBITRATION FORUM." The Third Circuit reversed the New Jersey District Court's decision and found the, "liberal federal policy in favor of arbitration" indicated an intent to arbitrate — even if NAF was unavailable.[10] Further, the Court noted, the unavailability of the NAF appeared to be a mechanical breakdown of the appointment process, a lapse under Section 5 of the FAA, and required the court to appoint a substitute arbitrator.

The Seventh Circuit also found that Section 5 of the FAA allowed a court to compel arbitration when NAF was unavailable in *Green v. U.S. Cash Advance.*[11] There the arbitration provision called for any dispute to be resolved, "by binding arbitration by one arbitrator by and under the Code of Procedure of the National Arbitration Forum."[12] The Court interpreted this provision to mean the NAF's Code of Procedure was to be used but not necessarily the NAF itself for administration. In fact, the Court held that the reference

to the Code was to create the ability for the parties to arbitrate outside of the NAF. The Seventh Circuit clearly favored the legislative policy in support of arbitration stating, "when a court declares that one or another part of an arbitration clause is "integral" and that the clause is therefore unenforceable as a matter of federal common law, it is effectively disagreeing with Congress, which provided that a judge can appoint an arbitrator when for "any" reason something has gone wrong."[13]

Moving Forward

The issue of what constitutes a lapse under Section 5 of the FAA remains an area of the law to be further developed. A transactional attorney drafting a dispute resolution clause may want to take notice of split in the circuits in interpreting what constitutes a lapse under Section 5 of the FAA. Is the provider viable? Should counsel draft a contingency clause in the chance the named provider or its rules are unavailable? What is the parties' intent and is it evident? These considerations, among others, should be taken into account to ensure contract enforcement aligns with the parties' expectations at the time of drafting.

Bryan J. Branon is an alternative dispute resolution (ADR) professional whose career has focused on the intersection of ADR and public policy. A former law clerk on the U.S. Senate Judiciary Committee and intern in the Irish Parliament and U.S. Court of International Trade, Bryan has worked for the ADR Center in Rome, Italy where he co-authored a study on the implementation of the 2008 E.U. Mediation Directive into Member States' national legislation and helped establish the Afghanistan Center for Commercial Dispute Resolution. Bryan is currently the Director of ADR Services for the American Arbitration Association (AAA) in Seattle, Washington and was previously employed by the AAA and their International Centre for Dispute Resolution where he helped launch the International Mediation Institute.

Bryan graduated with a B.S. in Political Science from St. Michael's College in Colchester, Vermont and earned his J.D. from the Benjamin N. Cardozo School of Law in New York, New York where he received his mediator certification through the New York Peace Institute in conjunction with the Kukin Program for Conflict Resolution. Bryan can be reached at BranonB@adr.org.

Endnotes

[1]9 U.S.C. §1 et seq.
[2]*Id.* § 5.
[3]No. 15-cv-02513, (2d Cir. Aug. 29, 2016).
[4]68 F. 3d 554 (2d Cir. 1995)
[5]*Moss,* supra.
[6]*Ranzy v. Tijerina,* 393 Fed. Appx. 174, 176 (5th Cir. 2010).
[7]2016 WL 4501661 (11th Cir. Aug. 29, 2016).
[8]*Parm, supra.*
[9]*Khan v. Dell Inc.,* 669 F.3d 350,356 (3d Cir. 2012).
[10]*Id.*
[11]*Green v. U.S. Cash Advance Ill.,* LLC, 724 F.3d 787, 793 (7th Cir. 2013).
[12]*Id.*
[13]*Id.*

Resolving Fair Use Disputes Through Mediation and Early Neutral Evaluation

by Theodore K. Cheng

Uncertainty – about the facts, the law, or both – is a key driver in the voluntary resolution of disputes. And there is perhaps no greater legal uncertainty facing the arts and entertainment fields today than the application of the fair use doctrine to claims of copyright infringement. That doctrine is intended to balance the interests of, on the one hand, those who possess the exclusive rights to reproduce and make derivative works of their copyrighted materials (among other rights) and, on the other hand, those who desire to exercise their First Amendment right to engage in free expression, including limited use of works that otherwise would be deemed infringement under the copyright laws. That is, the fair use doctrine essentially permits limited uses of otherwise copyrighted works without first having to obtain permission or consent from the copyright holder. Common examples of fair use include criticism, commentary, news reporting, research, teaching, and parody.

Historically, the doctrine was rooted in the common law; it is now formally codified at 17 U.S.C. § 107 as a set of four non-exclusive factors: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. Although seemingly helpful, the application of these factors to any particular circumstance, from a practical point of view, is highly subjective and fact-dependent.

For example, in *SOFA Entertainment, Inc. v. Dodger Productions, Inc.*,[1] the defendant used a seven-second clip from *The Ed Sullivan Show* in the performance of the award-winning Broadway musical *Jersey Boys*. The clip featured Ed Sullivan introducing the popular 1960s musical group The Four Seasons on his show, but not the group's actual performance, which was presented after the showing of the clip by the actors in the musical. In response to the claim of copyright infringement, the defendant moved for summary judgment based upon a fair use defense. In analyzing the factors, the court found, among other things, that (a) the parties had agreed that the musical was an entertaining dramatization of actual events, thus weighing in favor of fair use; (b) the use of the clip was "transformative" because it was being used as a historical reference point, and not just a re-broadcast of the original, thus again weighing in favor of fair use; (c) the defendant's use was commercial in nature, and, thus, weighed against fair use, but was not accorded great weight based upon the transformative nature of the use, the fact that the clip was only seven seconds long, and the lack of any evidence that the clip was used in the marketing of *Jersey Boys*; (d) the clip was creative, but also newsworthy, thereby weighing slightly in favor of fair use; (e) the clip was not the "heart" of either the television episode or the musical, thus weighing in favor of fair use; and (f) the plaintiff had presented no evidence of any plans to license the clip, and the use of the clip in the musical was not a substitute for the original, thus again weighing in favor of fair use. On balance, the court concluded that the use here was fair and, thus, did not infringe the plaintiff's copyright.

As *SOFA Entertainment* illustrates, a fair use analysis is difficult to conduct without the benefit of full discovery, which is both time-consuming and expensive. Moreover, with respect to the fourth factor ("the effect of the use upon the potential market for or value of the copyrighted work"), expert testimony will likely be required to present evidence of the relevant marketplace. All of this makes summary judgment unlikely except in the clearest of circumstances. At bottom, the application of the fair use factors is a subjective, case-by-case analysis, with no bright-line rules and little in the way of helpful guideposts.[2]

The legal parameters of this doctrine have also been undergoing some upheaval, particularly with respect to the first fair use factor ("the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes"). For example, in *Prince v. Cariou*,[3] the Second Circuit held that Richard Prince's "appropriation art" of Patrick Cariou's copyrighted photographs could constitute fair use. Specifically, the court held that twenty-five of the art works were deemed fair use because they were "new and different" and, thus, "transformative," in that they "alter[ed] the original with new expression, meaning, or message." The court also clarified that a work need not comment on the original to qualify as a fair use, finding instead that the critical inquiry was how the work in question appeared to the reasonable observer, not what the artist might say about his or her work. With respect to five other art works, the court remanded the case to the trial court for reconsideration of whether Prince had sufficiently "transformed" the original photographs to constitute fair use. The case thereafter settled.

By contrast, in *Kienitz v. Sconnie Nation, LLC*,[4] the Seventh Circuit, while ruling that an alleged infringer's use of a copyrighted photograph constituted fair use, expressed skepticism of the Second Circuit's fair use analysis in *Cariou*, characterizing the approach of "asking exclusively whether something is 'transformative'" as "not only replac[ing]" the four statutory fair use factors, but also extinguishing an author's right to create derivative works.[5] Others have also similarly criticized the Second Circuit's interpretation and application of the fair use doctrine.[6] Thus, the precise legal contours of the fair use doctrine remain indeterminate, leaving practitioners, in-house attorneys, and business decision-makers on both sides of a dispute with ample room for debate.

With a legal framework in flux, coupled with a highly subjective, fact-specific, and case-by-case inquiry, entrusting the application of the fair use factors to either a jury or a judge at trial creates grave uncertainty and doubt as to the outcome of any fair use dispute.

Here is where mediation and early neutral evaluation – two forms of non-binding alternative dispute resolution – can be of great assistance. A voluntary resolution thrives on uncertainty. Considerations about how a trial court may rule on summary judgment or evidentiary issues at trial; how a jury will assess the credibility of the witnesses who testify; the state of the law at the time when the jury is charged; and what an appellate court may do in reviewing the trial court record all create sufficient uncertainty about the litigation process to serve as strong motivators for a resolution of a dispute of the parties' own making, as opposed to having one imposed upon them.[7] Moreover, direct party-to-party negotiations are difficult to conduct when the factual and legal positions of the parties are subject to a high level of uncertainty, as is the case with the application of the fair use factors.

By providing impartial and realistic feedback on the fair use debate, from both factual and legal perspectives, a mediator can help parties evaluate their best interests while uncovering areas of mutual gain. By the time parties (and their counsel) have formulated their fair use positions, they are usually entrenched and enamored by them.[8] A mediator can try to improve communications between the parties, explore possible alternatives, and address the underlying interests and needs of the parties in hopes of moving them towards a negotiated settlement or other resolution. More specifically, a mediator can help identify the weaknesses in the factual record and the barriers presented by the legal framework relative to the parties' respective arguments on how to apply the various fair use factors. In addition, a mediator with expertise in the copyright laws would minimize the need to have the parties educate the neutral on basic, fundamental fair use principles and case law, thereby further reducing costs. Engaging in this process can help the parties realize the value in an early resolution before enormous time and costs are spent in a protracted litigation or drawn-out negotiations, which are frequently accompanied by the great risk of impasse in the absence of a disinterested, third-party neutral who has no personal or financial stake in the outcome.[9]

Another option is for the parties to jointly retain a third-party trained to conduct an early neutral evaluation of the fair use dispute. Generally, such an evaluation occurs early in the pre-trial stage. A disinterested, third-party neutral – here, preferably one who is well versed with the fair use arena – engages in an independent fact investigation, interviewing the parties, gathering additional information, and then presenting non-binding findings and recommendations to the parties. Because the neutral has the appropriate subject matter expertise and experience in the field of the dispute, whatever recommendations s/he provides is likely influential on the parties and is meant to help place them on a path to a negotiated agreement. A later step in the process could include having each party (preferably accompanied by their decision-makers) present its claims and defenses to the neutral, describing the principal evidence on which those claims and defenses are based. This step would usually take place after some exchange of information has taken place, and the neutral can assist the parties in that exchange so that the process is mutually beneficial and productive. Such information exchange would typically cost substantially less than full-blown discovery. During the presentations, the role of the neutral is to assess the strengths and weaknesses of the dispute, clarifying and probing the key issues to help the parties assess their respective positions and improve their analyses of the dispute. In doing so, the process encourages direct communication between adversarial parties about their contentions and supporting evidence. Ultimately, the neutral will prepare and submit to the parties a non-binding, written evaluation that outlines what the likely outcome of the dispute will be. This can be particularly significant in situations like a dispute over the application of the fair use factors where the parties may be far part in their views on how the law may apply or what the dispute is worth. The neutral thereafter can provide assistance to the parties' decision-makers in finding some common ground, either resolving the dispute entirely or at least greatly narrowing the disparity between the parties.[10]

In today's legal landscape, uncertainty and fair use seem to go hand in hand. For parties contending with a dispute over the applicability of the fair use doctrine, mediation and early neutral evaluation offer a pair of concrete ways to eliminate the cloud of uncertainty that comes from relying solely on the formal legal process, while reducing both time and expense and finding a mutually acceptable solution.

Theodore K. Cheng is an arbitrator and mediator with the American Arbitration Association (AAA), the CPR Institute, Resolute Systems, and several federal and state courts, principally focusing on intellectual property, entertainment, technology, and labor/employment disputes. He has also handled intellectual property and commercial litigation matters for the past 20 years and is currently a partner at the international law firm of Fox Horan & Camerini LLP in New York City. Mr. Cheng also serves on the Boards of the AAA, the Justice Marie L. Garibaldi American Inn of Court for ADR, the New Jersey State Bar Association's Dispute Resolution Section, the Copyright Society of the U.S.A., and the Association for Conflict Resolution – Greater New York Chapter. More information is available at www.linkedin.com/in/theocheng. He can be reached at tcheng@foxlex.com.

Endnotes

[1]782 F. Supp. 2d 898 (C.D. Cal. 2010), aff'd, 709 F.3d 1273 (9th Cir. 2013).

[2]The *Jersey Boys* also spawned a second copyright infringement lawsuit brought in 2007 by the estate of an author who had assisted in the autobiography of one of the members of The Four Seasons, alleging that the musical was a derivative work of the autobiography. The case ultimately went to trial in November 2016, with the jury concluding that there had, in fact, been copyright infringement, and that 10% of the success of the musical was attributable to that infringement. However, the court later overturned the verdict, holding that the conduct in question fell under the fair use doctrine. *See Corbello v. DeVito,* No. 2:08-cv-00867-RCJ-PAL, 2017 U.S. Dist. LEXIS 91164 (D. Nev. June 14, 2017).

[3]714 F.3d 694 (2d Cir. 2013).

[4]766 F.3d 756 (7th Cir. 2014).

[5]See also *id.* at 758 ("To say that a new use transforms the work is precisely to say that it is derivative and thus, one might suppose, protected under § 106(2). Cariou and its predecessors in the Second Circuit do not explain how every 'transformative use' can be 'fair use' without extinguishing the author's rights under § 106(2).").

[6]See, e.g., Case Comment, "Second Circuit Holds that Appropriate Artwork Need Not Comment on the Original to be Transformative," 127 Harv. L. Rev. 1228, 1232 (2014) ("The Cariou court's rule was not precluded by precedent, but the definition the court adopted is still the broadest of any circuit court yet – and is in direct tension with the statutory definition of derivative works."); Br. of Amicus Curiae N.Y. Intellectual Prop. L. Ass'n, *Cariou v. Prince,* No. 13-261 (U.S. Sept. 25, 2013) (arguing on petition for a writ of certiorari that Cariou's fair use analysis did not comport with the fair use statute's preamble), available at http://www.nyipla.org/images/nyipla/Documents/Amicus%20Briefs/PatrickCariou%20vRichardPrince13-261.pdf.

[7]Take, for example, the case brought by the North Jersey Media Group, publisher of *The Record* and the *Herald News,* over the Facebook posting by Fox News of a now-iconic photograph taken by Thomas Franklin of three firefighters raising the American flag at the ruins of the World Trade Center site on the 12-year anniversary of 9/11. In February 2015, the trial court denied Fox News' motion for summary judgment, rejecting its fair use argument that the posting of the photo was a transformative use. The two companies then apparently reached a tentative settlement, but that deal unraveled, slating the case for a jury trial in early 2016. See, e.g., Eriq Gardner, "Fox News Heads to a Jury Trial to Defend Its Use of 9/11 Photos on Facebook," *The Hollywood Reporter* (Dec. 22, 2015), available at http://www.hollywoodreporter.com/thr-esq/fox-news-heads-a-jury-850674. On the first day of trial, however, the parties reached a confidential settlement. See, e.g., Dominic Patten, "Fox News Settles 9/11 Photo Lawsuit Just Before Trial," *Deadline* (Feb. 16, 2016), available at http://deadline.com/2016/02/fox-news-settles-911-photo-lawsuit-thomas-franklins-raising-the-flag-at-ground-zero-1201703269/.

[8]This entrenchment impairs the judgment and decision-making process, a phenomenon known as "client-think." See Laura A. Kaster, "Improving Lawyer Judgment By Reducing the Impact of 'Client-Think,'" *Dispute Resolution Journal,* Vol. 67, No.1 (Feb.-Apr. 2012), available at http://www.nadn.org/articles/LauraKaster-Sep2012-CLIENTTHINK.pdf.

[9]*See generally* Theodore K. Cheng, "Using Alternative Dispute Resolution to Address Your Entertainment Disputes," *NYSBA EASL Journal,* Vol. 26, No. 1 (Spring 2015), at 17-18.

[10]Wayne D. Brazil, "Early Neutral Evaluation or Mediation? When Might ENE Deliver More Value," *Dispute Resolution Magazine* (Fall 2007), at 10, available at http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1164&context=facpubs; Hon. Allan van Gestel, "The Alternative Dispute Resolution Case Evaluator's Role in Contemplated and Pending Litigation," *Corporate Law & Accountability Report* (Jan. 30, 2015), available at http://www.jdsupra.com/legalnews/the-alternative-dispute-resolution-case-81219/.

Judicial Approaches to the Amount-in-Controversy Requirement for Diversity Jurisdiction in Arbitration Cases

by Tracey Frisch

The Federal Arbitration Act (FAA) is not an independent basis for federal jurisdiction.[1] Therefore, an application to confirm, vacate or remand and reopen an arbitration award under the FAA must be brought in federal court upon independent jurisdictional grounds. Typically, when an application to confirm, vacate or remand and reopen an arbitration award is filed in federal court, jurisdiction is based on diversity of citizenship pursuant to 28 U.S.C. § 1332(a). However, to obtain federal court jurisdiction based on diversity of citizenship, the dispute must meet the amount in controversy requirement – currently set at $75,000. How a federal court calculates the amount in controversy will depend on the procedural posture of your case, what type of motion you are filing, and where in the country you are filing the motion. This article discusses the two approaches federal courts generally take to this issue.

Two Judicial Approaches

In general, federal courts have employed two different approaches to calculating the amount in controversy for purposes of Section 1332(a). One uses the amount of the arbitration award (the award approach), while the other uses the monetary amount at issue in the underlying arbitration (the demand approach).

Federal courts have historically tended to use the award approach where the sole remedy sought is an order confirming or vacating an arbitration award.[2] However, the Fifth Circuit and some District Courts have more recently adopted the demand approach under these circumstances.[3] In *Pershing, L.L.C. v. Kiebach*, a case in which the sole remedy sought was confirmation of the award, the Fifth Circuit looked past the amount awarded by the arbitrator and based the amount in controversy threshold on the amount sought in the underlying arbitration proceeding. In *Pershing*, the court relied heavily on the reasoning set forth in a previous District of Columbia Circuit Court opinion and held that "the demand approach recognizes the true scope of the controversy between the parties." Further, the court found that by adopting the demand approach, litigants would be dissuaded from bringing matters to court at the outset of an arbitration simply to gain diversity jurisdiction, rather than risk losing the amount in controversy necessary through an arbitration award rendered below $75,000.00. A strong concurrence in *Pershing* disagreed with the Fifth Circuit choosing one "approach" over another, and instead argued that the various District and Circuit Court decisions could be reconciled and amount in controversy should be decided on a case-by-case basis, not on the demand amount versus award amount alone.

The 1st, 6th, 7th and 11th Circuits have used the demand approach when an application to confirm or vacate an award is coupled with a request for further relief.[4] For example, in *Bull HN Info. Systems v. Hutson*, the 1st Circuit determined that an action to vacate an award under $75,000 which also sought remand to the arbitrator satisfied the amount in controversy requirement. The court's determination was based on the fact that the party was demanding over $75,000 upon remand to the arbitrator. Furthermore, the arbitration award was issued as part of the first phase of a bifurcated arbitration proceeding and represented only a partial award. The court explicitly did not reach the issue of the amount in controversy where relief sought in federal court is solely vacatur or confirmation.

Federal courts have also used the demand approach when a district court grants a motion compelling arbitration staying the case pending arbitration. In this situation, the district court retains diversity jurisdiction over an application to confirm or vacate the award even when the final arbitration award is rendered for under $75,000.[5]

The 9th Circuit has struggled to draw the line between the award and demand approaches. *American Guaranty Co. v. Caldwell* was the first case in the 9th Circuit to address the issue.[6] The case was initiated after an arbitration award was rendered in favor of Caldwell in the amount of $32,500. Caldwell sought to confirm the award in a California state court, but the matter was removed to federal court by American Guaranty. The federal court vacated the award and remanded it back to the arbitrator for a new arbitration. The second arbitration award was for zero dollars. This time Caldwell petitioned the federal court to vacate the award and order a rehearing and a new trial. The court granted the motion to vacate but refused to grant the other relief. American Guaranty appealed the order vacating the award, arguing that the court did not have jurisdiction to entertain the motion to vacate because the award was for less than $3,000 (the jurisdictional requirement for diversity jurisdiction at that time). In upholding the order vacating the award, the 9th Circuit stated: "[i]t is the amount in controversy which determines jurisdiction, not the amount of the award." This statement has been the source of much debate in the 9th Circuit.

In 2001, in *Goodman v. CIBC Oppenheimer & Co.*, a California trial court held that the amount in controversy in a motion to vacate an arbitration award was the amount of the award itself, not the original amount of damages sought in the underlying arbitration.[7] The court concluded that *American Guaranty*'s decision on jurisdiction was based upon its continued jurisdiction over the case, despite the decrease in the amount awarded and that this made that case distinguishable.

In 2004, in *Loung v. Circuit City Stores,*[8] the 9th Circuit changed its position, following the *Goodman* court's interpretation of *American Guaranty*. It held that

the amount in controversy on a petition to vacate an arbitration award should be measured by the amount of the award, not the dollars ultimately at stake. It explained that in *American Guaranty*, jurisdiction was acquired when the state court matter was removed to federal court on the motion to confirm the original $32,500 award. Thereafter, the court retained jurisdiction to hear the petition to vacate the zero-dollar award because the initial action was still pending. The 9th Circuit stated in *Loung*, "it is unlikely that we meant to *hold* that jurisdiction turns on the amount in controversy rather than the amount of the award given the posture in which the issue arose and context in which the remark was made." (emphasis in original). The dissent in *Loung* strongly disagreed with the majority's interpretation of *American Guaranty*, stating "*American Guaranty* says very clearly that it is 'the amount in controversy which *determines* jurisdiction.' The statement is phrased as a rule of law, not idle chatter; if this is not a holding, I'm not sure what is." (emphasis in original). The *Loung* opinion was later withdrawn and replaced with *Luong v. Circuit City Stores, Inc*.[9] The later *Loung* decision found that there was federal question jurisdiction because the petition to vacate was based on the arbitrator's alleged manifest disregard of federal law. The second *Loung* opinion did not address the amount in controversy issue.

In 2005, in *Theis Research, Inc. v. Brown & Bain*, the 9th Circuit again revisited this issue and as in *American Guaranty* found that the amount at stake in the underlying litigation, not the amount of the arbitration award, was the amount in controversy for purposes of diversity jurisdiction.[10] But first it waited until the second *Loung* decision was final.

In *Theis* the 9th Circuit again held that the amount in controversy was the amount at stake in the underlying litigation, not the amount of the arbitration award where the plaintiff sought to vacate a zero-dollar arbitration award and recover $200 million by its complaint.[11]

Whether you are seeking to vacate, confirm, and/or remand your arbitration award, be sure to research your jurisdiction's interpretation of amount in controversy before you file in federal court based on diversity of citizenship. You may just be surprised by what you find.

As Senior Counsel for the American Arbitration Association Tracey is involved in a variety of legal matters that impact the Association. Tracey also serves as an Adjunct Professor at Benjamin N. Cardozo School of Law supervising law student mediators. Tracey is a member of the U.S. District Court for the Southern District of New York pro bono mediation panel. Tracey serves as a Small Claims arbitrator and is also a New York State certified community mediator and has mediated hundreds of cases across Metropolitan New York's community mediation centers, Small Claims and Civil Courts. Tracey has authored and spoken on numerous ADR focused topics.

Endnotes

This article is an update to the piece originally published in the American Arbitration Association's Dispute Resolution Journal, *Judicial Approaches to the Amount-in-Controversy Requirement for Diversity Jurisdiction in Arbitration Cases*, DISP. RESOL. J., Nov. – Jan. 2010, at 20.

[1]*See Southland Corp. v. Keating*, 465 U.S. 1, 15 n. 9 (1984); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 25 n. 32 (1983).

[2]*See e.g., Baltin v. Alaron Trading Corp*., 128 F.3d 1466, 1472 (11th Cir. 1997); *Ford v. Hamilton Invests., Inc*., 29 F.3d 255, 260 (6th Cir. 1994); *Fernicola v. Toyota Motor Corp.*, 313 Fed. Appx. 408, 409 (2d Cir. 2009) (rejecting appellant's argument that damages sought in counterclaim during arbitration proceeding should be included to determine amount in controversy, instead taking award approach when vacatur sought); *Curbelo v. Hita & MRQ Costr. LLC*, No. EP-09-CV-133-PRM, 2009 WL 2191084, at *5 (W.D. Tex. July 22, 2009).

[3]*See Pershing, L.L.C. v. Kiebach*, 819 F.3d 179, 183 (5th Cir. 2016); Karsner, *IV v. Lothian*, 532 F.3d 876 (D.C.C. 2008), *Smith v. Tele-Town Hall, LLC*, No. 1:11 mc 14, 2011 WL 2838134, at *4 (E.D. Va. July 15, 2011).

[4]*See e.g., Mitchell v. Ainbinder*, 214 Fed. Appx. 565, 566 (6th Cir. 2007); *Peebles v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 431 F.3d 1320, 1325 (11th Cir. 2005) (upholding diversity jurisdiction of motion to vacate zero-dollar award where party also seeking a new arbitration hearing demanding more than $75,000); *Sirotzky v. New York Stock Exch.*, 347 F.3d 985, 988 (7th Cir. 2003) (abrogated on separate grounds); *Bull HN Info. Sys., Inc. v. Hutson*, 229 F.3d 321, 329 (1st Cir. 2000); *But cf. Reichle v. Morgan Stanley DW, Inc.*, 396 F. Supp. 2d 1312, 1314 (M.D. Fla. 2005) (remanding motion to vacate award and reopen arbitration to state court based on lack of diversity jurisdiction because award itself was under monetary threshold despite underlying demand for $315,000).

[5]*See e.g., Choice Hotels International, Inc. v. Shiv Hospitality, L.L.C.*, 491 F.3d 171, 176 (4th Cir. 2007); *U-Save Auto Rental of Am., Inc. v. Furlo*, 608 F. Supp. 2d 718, 723-24 (S.D. Miss. 2009).

[6]72 F.2d 209 (9th Cir. 1934).

[7]131 F. Supp. 2d 1180, 1184 (C.D. Cal. 2001).

[8]356 F.3d 1188, 1194 (9th Cir. 2004).

[9]368 F.3d 1109 (9th Cir. 2004).

[10]400 F.3d 659, 662 (9th Cir. 2005).

[11] *See also Merrill Lynch, Pierce, Fenner & Smith, Inc., v. Moore et al*., 171 Fed. Appx. 545, 546 (9th Cir. 2006) (following *Theis*, basing amount in controversy for motions to confirm and vacate arbitration award on the good faith monetary demand in the underlying arbitration).

Understanding Differences in Different Negotiations: Why They are the Same and Why They Are Different?

by Joan Stearns Johnsen

Negotiation is not a recipe. Although in many respects it is quite simple, it is also quite complex. All negotiations are the same in that there are consistent issues to consider such as underlying interests and motivations, targets and reservation points, and the best alternative to a negotiated agreement, etc., as well as consistent approaches to analyzing these issues. At the same time, each negotiation is unique presenting specific interpersonal dynamics, considerations of relative leverage, and the precise nature of the particular negotiation. Your approach to any negotiation should vary depending upon the particulars of your negotiation. Importantly, there are a number of issues that distinguish the negotiation of a transaction from the negotiation of the settlement of a lawsuit. The skilled negotiator considers these differences in planning her negotiation approach and strategy and in conducting the negotiation.

Settlements Tend to Be Distributive and Transactions Tend to Be Integrative

When the primary consideration is money and who gets or pays how much, the negotiation is referred to as a distributive negotiation. When there are many issues of varying and different relative value to the negotiators, the negotiation is described as integrative.

A transaction is usually - although not always - about many issues of which money is only one and not necessarily the most highly contested issue. When negotiating a transaction, there are usually many issues to be resolved and not all issues will be valued equally by all parties. For example, with a licensing agreement typical issues may include, ancillary rights, obligations regarding government permits, rights, and approvals, timing, applicable territories, exclusivity, marketing efforts, good will, sales targets,, etc., well as royalty and other financial considerations. To a company more concerned about market entry with an objective to establish good will and future market share, royalties may be less important than the ability to market a product in the company's name possibly with exclusivity. These sorts of negotiations are largely integrative and lend themselves to interest based negotiations. With a free exchange of information, parties may be able to find out ways that that they can give on issues that are most important to their negotiating partner in exchange for issues that they value most.

A fundamental difference between negotiating a transaction and negotiating the settlement of a lawsuit is that a lawsuit is generally – although not always - about money. Money is also the usual remedy available through a lawsuit. Usually money takes precedence over apologies, payment terms, confidentiality, and other issues, although it may be possible to find underlying motivating interests that the parties may find a creative way to seek to address. With the right dollar number, the other issues generally become less important.

Settlements Represent the End of a Relationship While Transactions are the Beginning

For the parties to a lawsuit, in many instances the negotiation represents the end of the relationship. For parties engaged in litigation, future business is often unlikely. Usually, these parties will not be dealing with one another again.. When negotiating against someone you do not expect to do business with in the future, there may be less of a price to pay from the standpoint of the relationship for taking an aggressive approach, engaging in tactics, or bargaining positionally.

When negotiating at the inception of the relationship such as a licensing agreement or a joint venture, the parties are building a relationship as they negotiate their deal. When building a relationship, parties need to manage the need to obtain the best possible result with maintaining and nurturing the relationship. An overly aggressive approach may doom the deal before it is consummated.

The Alternative or BATNA Analysis to Failing to Reach an Agreement in a Transaction Differs Significantly from the Alternative or BATNA Analysis to Failing to Settle a Lawsuit

When parties fail to reach agreement in the negotiation of the settlement of a lawsuit, they know that they will proceed with the litigation. Parties also know that if they do not resolve the matter at the first attempt, they can revisit settlement at a later point, possibly after additional discovery or the court's ruling on a motion, etc. Leverage will be based on an analysis of what is likely to happen at trial, *i.e.* who is likely to win, how much it is likely to cost, how much a jury is likely to award, etc.

The alternatives may be simpler but in fact more problematic for failure to reach agreement when negotiating a transaction. The parties may simply walk away without a deal or there may be consequences for failing to close a particular deal. Depending on how necessary to the business of one negotiator or another, there may or may not be serious consequences for failure to consummate a deal. One side or the other may hold the cards and have the leverage. Thus, the Best Alternative to A Negotiated Agreement or BATNA Analysis of a transaction will differ substantially from that of the settlement of a lawsuit.

Both Transactions and Settlements are Negotiations

This article highlights the differences between the negotiation of a transaction and of that of the settlement of a

lawsuit. However, both are still negotiations. Skilled negotiators should seek to consider the differences and adjust their style and their approach accordingly. While both types of negotiations can and should be analyzed as such, factors may differ, but the process is the same. Both can be analyzed with the basic principles of Getting to Yes.[1] You will want to focus on problem solving and avoid personal and emotional distractions in order to separate the people from the problem. You will need to explore the motivations of all parties to the negotiation and focus on interests rather than stated positions. You should explore creative alternative paths to agreement. You should refer to objective criteria and other often less intuitive techniques rather than the more direct argument or personal opinion as your persuasion strategy. And finally, Getting To Yes focuses attention on the alternatives to an agreement in the form of BATNA and the impact of the best alternative to agreement on leverage, zones of possible agreement, and bottom lines.

Given that both deals and settlements are negotiations, the tools used to facilitate the negotiation of the settlement of a lawsuit apply equally to the negotiation of a transaction. Currently the use of third party neutrals to facilitate the negotiation of a settlement is increasing in popularity because it adds efficiencies of time and resources. The ADR Movement began with Professor Frank Sander's speech at the Pound Conference in 1976.[2] The use of mediation in federal disputes dates to the Executive Order of President Clinton in 1998[3]

The acceptance of mediation is largely due to top down initiatives such as those of the courts, the federal government, and the clients. Mediation is less common today in transactions, but its acceptance is growing as clients become more familiar with mediation. Given the differences between the negotiation of a complex multi-party, multi-issue, multi-cultural joint venture and the settlement of a lawsuit, mediation is even more beneficial for a transaction than for a lawsuit.

Given that both are negotiations, there is no reason other than the difficulty in changing the *status quo* to explain why the mediation of transactions has not yet been embraced by transactional lawyers as it has by litigators. One can predict that once corporate clients become familiar with the increased certainty and cost and time savings from using a third-party neutral to facilitate a negotiation, the use of deal facilitation will grow.

Conclusion

Negotiation is often perceived as intuitive and reactive rather than analytical and strategic; it in fact is all of these. All negotiations are the same, and no two negotiations are exactly the same. All negotiations offer an opportunity for advanced planning and preparation, and all provide an opportunity for creativity and strategy. Every negotiation requires preparation, flexibility, and analysis. This is particularly true when considering the differences between negotiating a transaction and negotiating the settlement of a lawsuit. The skilled negotiator takes into consideration relationships, leverage, and alternatives. The skilled negotiator also adjusts her style depending on whether the subject of the negotiation is a transaction or the settlement of a lawsuit.

Joan Stearns Johnsen is a Legal Skills Professor at the University of Florida Levin College of Law, and a commercial arbitrator and mediator. She sits on the panels of the American Arbitration Association, CPR, and FINRA, and is certified by the International Mediation Institute and is a Fellow of the Chartered Institute of Arbitrators.

Joan is an active member of the Dispute Resolution Community. She is Vice Chair of the Dispute Resolution Section of the American Bar Association and a member of its Executive Committee. Joan also is co-chair of the Mediation Sub-committee of the ADR Committee of the ABA's Section of Litigation.

Endnotes

[1]Roger Fisher, William Ury, and Bruce Patton, *Getting to Yes,* (Random House 2d ed. 1991)

[2]Frank Sander "The Causes of Popular Dissatisfaction with the Administration of Justice" (Sander 1976)

[3]Statement of Administration Policy: H.R. 3528 - Alternative Dispute Resolution Act of 1998, April 21, 1998

Out of the Thicket: Discovery in Arbitrations (Part II)[1]

by Robert A. Merring

In the Winter 2017 issue of The Resolver, Part I of this article explored the traditional antipathy of courts and arbitrators toward the use of discovery in arbitrations and how that position has been modified in recent years. This second and final part will: (1) examine the increasingly important role that preliminary hearings and the mandatory prehearing exchange of information have come to play in arbitration proceedings; (2) describe what the parties to an arbitration agreement can do to ensure that they have provided for a level of discovery adequate to meet their needs: and (3) address some of the special issues that arise in international arbitrations.

Preliminary Hearings and the Prehearing Exchange of Information

There is nothing quite so destructive to the smooth operation of an arbitration hearing as for the parties to wait until the first day of hearing before exchanging the documents they intend to use as exhibits, or producing documents that the other side has subpoenaed to be produced at the hearing. However, there has been a strong trend among alternative dispute resolution providers to control the prehearing process and mandate the exchange of documents and the identification of witnesses prior to the arbitration hearing.

While preliminary hearings are at least nominally optional at the request of a party or at the direction of the arbitrator,[2] their use has proliferated in recent years. As a practical matter, there is now almost always a telephonic prehearing conference held in AAA arbitrations even in consumer cases under $25,000.[3] Many other ADR providers, whether expressly or not, have taken a similar viewpoint. As Martha Stewart would say: "It's a good thing." Preliminary hearings and conferences provide an ideal opportunity for the arbitrator and counsel to address scheduling matters, discovery issues, and the prehearing exchange of documents and other information at an early stage in the proceedings.

Preliminary hearings can be especially valuable when the parties have not made any express provision in their arbitration agreement for discovery. Discovery in arbitration involves a much more collaborative process than in court proceedings. Indeed, when there is no express right to discovery under an ADR provider's rules or even an outright proscription against discovery, any discovery the parties voluntarily agree to during a preliminary hearing will normally be permitted by an arbitrator. In other words, an arbitrator will intervene only when there is a disagreement among the parties whether discovery should be allowed, or the appropriate scope or manner of discovery. Even then, most arbitrators will effectively try to negotiate a just resolution among the parties without being forced to make a binding determination.

Another mechanism that most of the major ADR providers have now adopted is some procedure for the exchange of exhibits and the identification of witnesses to be called at the arbitration hearing.[4] JAMS mandates an even earlier exchange. Somewhat reminiscent of Federal Rule of Civil Procedure 26, the "Exchange of Information" provisions under both JAMS' "Streamlined" and "Comprehensive" Arbitration Rules direct that the parties complete a "voluntary and informal exchange of all non-privileged documents and other information (including electronically stored information ('ESI')) relevant to the dispute" and the names of potential witnesses within 14 and 21 days, respectively, after all the pleadings have been received.[5]

FINRA (formerly NASD Dispute Resolution) takes the self-executing process even further.[6] In its Discovery Guide and Document Production Lists, FINRA has promulgated a comprehensive inventory of documents that are "presumptively discoverable" and required to be produced in customer arbitrations within 60 days after the answer is due.[7] For example, Document Production List 1 requires a member firm to produce not only all records relating to the customer's account[8] but also all "[r]ecords of disciplinary action taken against the associated person by any regulator (state, federal or self-regulatory organization) or employer for all sales practices or conduct similar to the conduct alleged in the Statement of Claim."[9]

Through these and similar procedural devices,[10] ADR providers have taken great strides in recent years to ensure that all parties to an arbitration are provided with information sufficient to allow all sides to prepare adequately for the hearing and that the hearing itself goes as smoothly and expeditiously as possible. Nevertheless, the extent and scope of "traditional" discovery in arbitration proceedings remain severely limited. Ultimately, it is largely up to the parties themselves to craft what they deem to be the proper scope and extent of discovery. It is to this subject that I now turn.

Working with Each Other and the Arbitrator to Ensure an Appropriate Level of Discovery

The thrust of Part I of this article was largely focused on what "right" to conduct discovery, if any, a party has in arbitration proceedings. However, it cannot be emphasized strongly enough that discovery provisions under the Federal Arbitration Act or state law are essentially "default" rules and merely establish the minimum levels of discovery to which a party is entitled. Provided that the minimum due process and "conscionability" standards are met, any discovery procedures which are agreed upon among the parties either before or after a dispute has arisen will generally override these default rules and be enforced. These include not only adopting by reference the rules of a given ADR provider, but also modifying those rules to suit the parties' specific discovery preferences. In other words, the parties can craft a "right" to prehearing discovery by including such provisions in their arbitration agreement. By doing so, they may largely dictate the manner and scope of discovery

themselves.

For example, if the parties want to be able to propound interrogatories to one another, then they are free to agree upon a provision in their arbitration agreement expressly indicating that interrogatories will be permitted and even specifying how many and what types of interrogatories will be acceptable. Indeed, most ADR providers expressly acknowledge this flexibility in their respective rules. For example, AAA Commercial Rule R-1 states: "The parties, by written agreement, may vary the procedures set forth in these rules." Rule 2(a) of JAMS's "Streamlined" and "Comprehensive" Rules similarly provide that parties "may agree on any procedures not specified herein or in lieu of these Rules that are consistent with the applicable law and JAMS policies. . .."

Some ADR providers also have tiered sets of arbitration procedures which variously apply depending upon the amount in controversy or the number of parties involved. Yet, the parties can normally stipulate to have an alternative set of rules apply that provide for a greater level of discovery regardless of the amount in controversy.[11] To illustrate, in construction industry disputes, AAA's "Fast Track Procedures" apply by default to all two-party disputes that do not exceed $100,000. They provide that there is no right to discovery "except as ordered by the arbitrator in exceptional cases."[12] Conversely, when the amount in controversy exceeds $1 million, AAA's Procedures for Large, Complex Construction Disputes instruct that the "parties may conduct such discovery as may be agreed to by all the parties, provided, however, that the arbitrator may place such limitations on the conduct of such discovery as the arbitrator shall deem appropriate.."[13] By agreeing to apply the Large, Complex Construction Dispute Procedures in their arbitration agreement or at the time the initial claims are filed, the parties can thereby effectively agree in advance to allow the whole panoply of discovery mechanisms subject only to the oversight of the arbitrator to keep the proceedings under control.

Finally, after you have determined what your mandatory discovery obligations are under the existing law, which set of discovery rules of your chosen ADR provider apply to your specific controversy, and what modifications to these rules the parties have (or can) mutually agree upon, perhaps the most important consideration of all is the selection of the arbitrator. For in the final analysis, it is in his or her experience, integrity, and discretion that your ability to conduct the level of discovery your case deserves will ultimately depend.

Discovery in International Arbitrations: No Longer a Stranger?

In 1995, one learned international law arbitrator and litigator wryly observed:

> It is difficult to overstate the horror with which parties and counsel outside the United States view the prospect of American-style discovery, with parties able to serve upon one another sweeping requests for production of documents and other information relevant to the litigation, and to obtain oral deposition testimony of witnesses in advance of trial. In civil law countries, such discovery is rarely permitted, and is viewed by many as an affront to the expectations of privacy and confidentiality that private parties have in their business information. Foreign parties doing business in the United States often insist on arbitration clauses in their agreements precisely to avoid the prospect of discovery and the other risks of litigation in the United States.[14]

In large measure, this abhorrence to discovery stems from fundamental differences in the legal process and "trial" procedures in civil law countries. In the civil law tradition, "at the outset of the proceeding, parties submit favorable documentary evidence along with the factual allegations on which they rely to meet their burden of proof. Without a specific court order, there is no obligation to submit an unfavorable document. Unlike in the United States, in civil law systems a party is not expected to disclose to its adversary all of the relevant documents in its possession, especially detrimental ones."[15] "Nor, in most cases, is there any single event that the common-law lawyer would recognize as a trial. Instead, a civil-law civil action is a continuing series of meetings, hearings, and written communications through which evidence is introduced and evaluated, testimony is taken, and motions are made and decided."[16] In a word, discovery was--and still is--a procedural device "alien" to the civil law judicial tradition.[17]

However, over the years, two developments have at least opened the doors to discovery in international commercial arbitrations. First, formerly international arbitrations were rare in the United States. However, in 1970, the United States ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). "As parties and counsel from the United States and United Kingdom have increasingly participated in the international arbitral system, the system has evolved to incorporate elements of both the civil and common law traditions. . . and also appears to be evolving more in a common law direction that tends to favor counsel trained in the adversarial process."[18]

Second, the major international arbitration providers have come to accept at least limited discovery. While their rules seldom mention discovery, "the arbitral tribunal is given the broad power to determine whether, and to what extent, discovery will be permitted."[19] A few go further and mandate the prehearing exchange of documents and/or the witness statements the parties intend to introduce at the evidentiary hearing.[20] But even the AAA's International Dispute Resolution Procedures take a much more parsimonious view on discovery than do its domestic rules: "Depositions, interrogatories, and requests to admit as developed for use in U.S. court procedures generally are not appropriate procedures for obtaining information in an arbitration under these Rules."[21]

Finally, "mandatory limitations upon the freedom of parties (or the arbitral tribunal) to conduct arbitration proceedings are extremely uncommon. Instead, parties' freedom to agree upon the arbitral procedures is a common feature in international commercial regulations. Article V(1)(d) of

the New York Convention. . . contemplates, among other reasons, setting aside an arbitral award in cases where an arbitral procedure was not in accordance with theagreement of the parties."[22]

In sum, although discovery is now permitted to a certain extent in international arbitrations, it is largely limited to the disclosure of documents that can be identified with particularity and accompanied with an adequate description of their relevancy and materiality to the pending action. On the other hand, if you do not expect the arbitrator to allow you to propound interrogatories, requests for admissions or take depositions, you probably will not be disappointed. However, as is largely the same in domestic arbitrations, if the parties work together and agree to fuller discovery, ask and ye may receive; don't ask, and ye surely will not.

Robert A. Merring has been an arbitrator with the American Arbitration Association for over 25 years and is the principal of Merring ADR in Costa Mesa, California. He is a mediator with the AAA, U.S. District Court for the Central District of California and AMP Mediation in Irvine, California. He also serves as an arbitrator and mediator for the American Health Lawyers Association and the Orange County Superior Court.

Endnotes

[1]This work was based on an article that originally appeared in the Orange County Lawyer, and has been substantially changed. Discovery in Commercial Arbitrations: "What do you mean I can't serve interrogatories?", Robert A. Merring, Orange County Lawyer, June 2006 (Vol. 48, No. 6), p.18.

[2]*See, e.g.,* JAMS Comprehensive Arb. Rules 16 (2014); AAA Com. Rules R-21, P-1 & P-2 (2013).

[3]AAA Com. Rules P-1(a); AAA Consumer Rules R-10 (2014).

[4]*See, e.g.,* AAA Com. Rules R-22 & P-2 ("Checklist").

[5]JAMS Streamlined Rules 13; JAMS Comprehensive Rules 20.

[6]Code of Arb. Proc. for Customer Disputes, FINRA Rules 12000-905 (2017).

[7]FINRA Discovery Guide (2013), https://www.finra.org/sites/default/files/ ArbMed/p394527.pdf.

[8]*See generally id.*at List 1.

[9]FINRA, Discovery Guide, List 1, ¶ 15.

[10]Some other recent procedural devices, such as "due process protocols," are explored in Part I of this article. Robert A Merring, *Into the Briar Patch: Discovery in Arb.,* The Resolver 18-19 (Winter 2017)(Fed. Bar. Ass'n, Arlington, Va.),

[11]For example, the "Regular Track Procedures" of the AAA's Construction Industry Rules (2015) state: "Parties may, by agreement, apply the Fast Track Procedures, the Procedures for Large, Complex Construction Disputes or Procedures for the Resolution of Disputes through Document Submission (Section D of these Rules) to any dispute." Id. at R-1(d).

[12]*Id*. at R-1(b)(emphasis added)

[13]*Id*. at Rule L-4(d).

[14]Javier H. Rubenstein, *Int'l Com. Arb.: Reflections at the Crossroads of the Common Law & Civil Law Traditions*, 5 Chicago J. Int'l L. 303. 304 (2004), http://chicagounbound.uchicago.edu.edu/cjil/vol5/iss1/20

[15]Giacomo Rojas Elgueta, *Understanding Discovery in Int'l Com. Arb. Through Behavioral Law & Econ.: A Journey Inside the Minds of Parties & Arb.,* 16 Harvard Negot. L. Rev. 165, 171 (2011)(footnote omitted),http://www.hnlr. org/wp-content/uploads/2012/04/ UNDERSTANDING_DISCOVERY_IN_ INTERNATIONAL_ COMMERCIAL_ARBITRATION_THROUGH_BEHAVIOR.doc

[16]James G. Apple & Robert P. Deyling, A Primer on the Civil-Law System 26-27 (Fed'l Jud. Ctr. 1995), https://www.fjc.gov/sites/default/files/2012/Civil Law.

[17]Elgueta, *supra,* at 171.

[18]Rubenstein, *supra,* at 304.

[19]*Id. See also, e.g.,* UNCITRAL Arb. Rules 17.1 ("the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate"); London Ct. of Int'l Arb. Rules ("The Arbitral Tribunal shall have the widest discretion to discharge [its] general duties. . . ."); Int'l Chamber of Com. Arb. Rules 22.2 ("the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided they are not contrary to any agreement of the parties.")

[20]See, e.g., In'tl Bar Ass'n Rules on the Taking of Evidence in Int'l Arb. arts. 3 & 4 (2010); Int'l Ctr. for dispute resolution ("ICDR") & AAA, int'l Dispute Resolution Rules (Including Mediation & Arb. Rules) art. 21 (Exchange of Information) & 23.

[21]ICDR at art. 21 (10).

[22]Elgueta, *supra,* at 167-68 (footnotes omitted).

Federal Bar Association Application for Membership

The Federal Bar Association offers an unmatched array of opportunities and services to enhance your connections to the judiciary, the legal profession, and your peers within the legal community. Our mission is to strengthen the federal legal system and administration of justice by serving the interests and the needs of the federal practitioner, both public and private, the federal judiciary, and the public they serve.

Advocacy
The opportunity to make a change and improve the federal legal system through grassroots work in over 90 FBA chapters and a strong national advocacy.

Networking
Connect with a network of federal practitioners extending across all 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands.

Leadership
Governance positions within the association help shape the FBA's future and make an impact on the growth of the federal legal community.

Learning
Explore best practices and new ideas at the many Continuing Legal Education programs offered throughout the year—at both the national and chapter levels.

Expand your connections, advance your career

THREE WAYS TO APPLY TODAY: Join online at www.fedbar.org; Fax application to (571) 481-9090; or Mail application to FBA, PO Box 79395, Baltimore, MD 21279-0395. For more information, contact the FBA membership department at (571) 481-9100 or membership@fedbar.org.

Applicant Information

First Name M.I. Last Name Suffix (e.g. Jr.) Title (e.g. Attorney At Law, Partner, Assistant U.S. Attorney)

❍ Male ❍ Female Have you been an FBA member in the past? ❍ yes ❍ no Which do you prefer as your primary address? ❍ business ❍ home

Business

Firm/Company/Agency Number of Attorneys

Address Suite/Floor

City State Zip Country

( )

Phone Email Address

Home

Address Apt. #

City State Zip Country

( ) / /

Phone Date of Birth

Email Address

Bar Admission and Law School Information (required)

U.S.
Court of Record: _____
State/District: _____ Original Admission: / /

Foreign
Court/Tribunal of Record: _____
Country: _____ Original Admission: / /

Tribal
Court of Record: _____
State: _____ Original Admission: / /

Students
Law School: _____
State/District: _____ Expected Graduation: / /

Court of Record:* *Name of* ***first court* *in which you were admitted to practice.*

Authorization Statement

By signing this application, I hereby apply for membership in the Federal Bar Association and agree to conform to its Constitution and Bylaws and to the rules and regulations prescribed by its Board of Directors. I declare that the information contained herein is true and complete. I understand that any false statements made on this application will lead to rejection of my application or the immediate termination of my membership. I also understand that by providing my fax number and e-mail address, I hereby consent to receive faxes and e-mail messages sent by or on behalf of the Federal Bar Association, the Foundation of the Federal Bar Association, and the Federal Bar Building Corporation.

Signature of Applicant ***Date***

(Signature must be included for membership to be activated)

*Contributions and dues to the FBA may be deductible by members under provisions of the IRS Code, such as an ordinary and necessary business expense, except 4.5 percent which is used for congressional lobbying and is not deductible. Your FBA dues include $15 for a yearly subscription to the FBA's professional magazine.

Application continued on the back

Federal Bar Association

Membership Categories and Optional Section, Division, and Chapter Affiliations

Membership Levels

Sustaining Membership

Members of the association distinguish themselves when becoming sustaining members of the FBA. Sixty dollars of the sustaining dues are used to support educational programs and publications of the FBA. Sustaining members receive a 5 percent discount on the registration fees for all national meetings and national CLE events.

	Private Sector	Public Sector
Member Admitted to Practice 0-5 Years	❍ $170	❍ $150
Member Admitted to Practice 6-10 Years	❍ $235	❍ $215
Member Admitted to Practice 11+ Years	❍ $285	❍ $245
Retired (Fully Retired from the Practice of Law)	❍ $170	❍ $170

Active Membership

Open to any person admitted to the practice of law before a federal court or a court of record in any of the several states, commonwealths, territories, or possessions of the United States or in the District of Columbia.

	Private Sector	Public Sector
Member Admitted to Practice 0-5 Years	❍ $110	❍ $85
Member Admitted to Practice 6-10 Years	❍ $170	❍ $145
Member Admitted to Practice 11+ Years	❍ $215	❍ $175
Retired (Fully Retired from the Practice of Law)	❍ $110	❍ $110

Associate Membership

Foreign Associate

Admitted to practice law outside the U.S. ❍ $215

Law Student Associate

First year student (includes four years of membership) ❍ $50
Second year student (includes three years of membership) ❍ $30
Third year student (includes two years of membership) ❍ $20
One year only option ❍ $20

All first, second and third year student memberships include an additional free year of membership starting from your date of graduation.

Dues Total: _____

Practice Area Sections

- ❍ Admiralty Law $25
- ❍ Alternative Dispute Resolution $15
- ❍ Antitrust and Trade Regulation $15
- ❍ Banking Law $20
- ❍ Bankruptcy Law $25
- ❍ Civil Rights Law $15
- ❍ Criminal Law $10
- ❍ Environment, Energy, and Natural Resources $15
- ❍ Federal Litigation $20
- ❍ Government Contracts $20
- ❍ Health Law $15
- ❍ Immigration Law $10
- ❍ Indian Law $15
- ❍ Intellectual Property Law $10
- ❍ International Law $10
- ❍ Labor and Employment Law $15
- ❍ LGBT Law $15
- ❍ Qui Tam Section $15
- ❍ Securities Law Section $0
- ❍ Social Security $10
- ❍ State and Local Government Relations $15
- ❍ Taxation $15
- ❍ Transportation and Transportation Security Law $20
- ❍ Veterans and Military Law $20

Career Divisions

- ❍ Corporate & Association Counsel (in-house counsel and/or corporate law practice) $20
- ❍ Federal Career Service (past/present employee of federal government) N/C
- ❍ Judiciary (past/present member or staff of a judiciary) N/C
- ❍ Senior Lawyers* (age 55 or over) $10
- ❍ Younger Lawyers* (age 40 or younger or admitted less than 10 years) N/C
- ❍ Law Student Division N/C

For eligibility, date of birth must be provided.

Sections and Divisions Total: _____

Chapter Affiliation

Your FBA membership entitles you to a chapter membership. Local chapter dues are indicated next to the chapter name (if applicable). If no chapter is selected, you will be assigned a chapter based on geographic location. *No chapter currently located in this state or location.

Alabama
- ❍ Birmingham
- ❍ Montgomery
- ❍ North Alabama

Alaska
- ❍ Alaska

Arizona
- ❍ Phoenix
- ❍ William D. Browning/ Tucson

Arkansas
- ❍ Arkansas

California
- ❍ Inland Empire
- ❍ Los Angeles
- ❍ Northern District of California
- ❍ Orange County
- ❍ Sacramento
- ❍ San Diego
- ❍ San Joaquin Valley

Colorado
- ❍ Colorado

Connecticut
- ❍ District of Connecticut

Delaware
- ❍ Delaware

District of Columbia
- ❍ Capitol Hill
- ❍ D.C.
- ❍ Pentagon

Florida
- ❍ Broward County
- ❍ Jacksonville
- ❍ North Central Florida–$25
- ❍ Orlando
- ❍ Palm Beach County
- ❍ South Florida
- ❍ Southwest Florida
- ❍ Tallahassee
- ❍ Tampa Bay

Georgia
- ❍ Atlanta–$10
- ❍ Southern District of Georgia Chapter

Hawaii
- ❍ Hawaii

Idaho
- ❍ Idaho

Illinois
- ❍ Central District of Illinois–$25
- ❍ Chicago
- ❍ P. Michael Mahoney (Rockford, Illinois) Chapter
- ❍ Southern District of Illinois

Indiana
- ❍ Indianapolis
- ❍ Northern District of Indiana

Iowa
- ❍ Iowa–$10

Kansas
- ❍ Kansas and Western District of Missouri

Kentucky
- ❍ Kentucky

Louisiana
- ❍ Baton Rouge
- ❍ Lafayette/ Acadiana
- ❍ New Orleans–$10
- ❍ North Louisiana

Maine
- ❍ Maine

Maryland
- ❍ Maryland

Massachusetts
- ❍ Massachusetts –$10

Michigan
- ❍ Eastern District of Michigan
- ❍ Western District of Michigan

Minnesota
- ❍ Minnesota

Mississippi
- ❍ Mississippi

Missouri
- ❍ St. Louis
- ❍ Kansas and Western District of Missouri

Montana
- ❍ Montana

Nebraska
- ❍ Nebraska

Nevada
- ❍ Nevada

New Hampshire
- ❍ New Hampshire–$10

New Jersey
- ❍ New Jersey

New Mexico
- ❍ New Mexico

New York
- ❍ Eastern District of New York
- ❍ Southern District of New York
- ❍ Western District of New York

North Carolina
- ❍ Eastern District of North Carolina
- ❍ Middle District of North Carolina
- ❍ Western District of North Carolina

North Dakota
- ❍ North Dakota

Ohio
- ❍ Cincinnati/ Northern Kentucky-John W. Peck
- ❍ Columbus
- ❍ Dayton
- ❍ Northern District of Ohio–$10

Oklahoma
- ❍ Oklahoma City
- ❍ Northern/ Eastern Oklahoma

Oregon
- ❍ Oregon

Pennsylvania
- ❍ Eastern District of Pennsylvania
- ❍ Middle District of Pennsylvania
- ❍ Western District of Pennsylvania

Puerto Rico
- ❍ Hon. Raymond L. Acosta/ Puerto Rico–$10

Rhode Island
- ❍ Rhode Island

South Carolina
- ❍ South Carolina

South Dakota
- ❍ South Dakota

Tennessee
- ❍ Chattanooga
- ❍ Knoxville Chapter
- ❍ Memphis Mid-South
- ❍ Nashville
- ❍ Northeast Tennessee

Texas
- ❍ Austin
- ❍ Dallas–$10
- ❍ El Paso
- ❍ Fort Worth
- ❍ San Antonio
- ❍ Southern District of Texas–$25
- ❍ Waco

Utah
- ❍ Utah

Vermont
- ❍ Vermont

Virgin Islands
- ❍ Virgin Islands

Virginia
- ❍ Northern Virginia
- ❍ Richmond
- ❍ Roanoke
- ❍ Hampton Roads Chapter

Washington*
- ❍ At Large

West Virginia
- ❍ Northern District of West Virginia–$20

Wisconsin
- ❍ Wisconsin

Wyoming
- ❍ Wyoming

Chapter Total: _____

Payment Information

TOTAL DUES TO BE CHARGED
(membership, section/division, and chapter dues): $ _____

❍ Check enclosed, payable to Federal Bar Association
Credit: ❍ American Express ❍ MasterCard ❍ Visa

Name on card (please print)

Card No. Exp. Date

Signature Date

CHAIR *continued from page 1*

accomplished its objectives. They are: Lisa Brown, Chair Elect; Roni Elias, Secretary; Ted Raynor, Treasurer; Jeff Kichaven, Immediate Past Chair; and Simeon Baum, Past Chair/Member-at-Large.

Here are a few of the objectives we accomplished:

- Four ADR Webinars have been scheduled for July, August and September. By the time you receive this newsletter there still will be time to sign up for at least two of them. Visit the Section's webpage.
- We collaborated with the Young Lawyers Division and with the Law Student Division, each of which will have representatives to the ADR Section Board. We also collaborated with the Eastern District of New York and the New Orleans chapters; and the Admiralty, Health Law and Employment Law Sections for joint events. ADR, like litigation, affects all substantive law areas. If you are a member of a substantive law section and you see a need for collaboration with ADR, contact us.
- As of June 2017, the Section was 320 members strong with many actively participating in events. We encourage you to invite a colleague to join and bring your skills and knowledge to this Section. Sign up for a committee, present your area of knowledge in a webinar, keep on writing, coordinate an event, offer opportunities to members of the Section and put in action other creative ideas you may have.
- We regularly provide commentary and ideas on the issues in ADR that matters most. Do you have a thought or idea that you would like to share with the entire FBA community? Then be a guest columnist in Beyond ADR , the frequently published column of the Federal Lawyer.

We are very excited about our accomplishments and see the Section on the trajectory to expand its programming in the 2017-2018 term. Please think about becoming a part of the FBA's ADR Section. Put yourself on the forefront of a process that is becoming an integral part of the litigator's conflict resolution toolbox. Visit the ADR Section webpage to learn more.

Lastly, welcome to the newly-elected Board members for the 2017-2018 term. Congratulations,

Joan Hogarth, Chair
Lisa Brown, Chair Elect
Roni Elias, Secretary
Alexander Zimmer, Treasurer

Until the next edition, keep ADR top of mind as another approach to resolving your client's conflicts and disputes.

Joan Hogarth
Section Chair

THE RESOLVER

Published by the Alternative Dispute Resolution
Section of the Federal Bar Association
1220 N. Fillmore Street, Suite 444
Arlington, VA 22201

ADR Section Leadership

We would like to thank our chapter liaisons and encourage you to contact them if you would like to get involved in the ADR section. If you are interested in becoming the ADR liaison for your chapter, please send an email to Debbie Smith, chapters coordinator, at dsmith@fedbar.org.