THE RESOLVER

TURNING CONFLICT INTO RESOLUTION

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Message from the Section Chair

by Joan D. Hogarth

There is not much to say or do when the thing takes care of itself or as Bill Walsh, the San Francisco 49ers coach said: "The Score Takes Care of Itself". Two years ago I accepted the challenge of chairing this ADR Section. I knew it would be a challenge in a few ways and I questioned my readiness for such an awesome position. Did I know enough? Could I influence seasoned and zealous litigators to consider alternatives to dispute resolution? Would I be able to engage and sustain members of the ADR Section? What meaningful contribution could I make to advance the Section's work?

ADR covers a broad spectrum of dispute resolution tools from negotiations to mediation to early neutral evaluation to arbitration, evidenced by the types of articles you have no doubt read in issues of

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Message from the Editor

by Alexander J. Zimmer

We are very pleased to present the September 2018 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 offer ideas, analysis, and practical tips across the varied ADR landscape. Several of our offerings promise follow-up in subsequent issues of The Resolver and challenge the reader to evaluate his or her own approach to ADR. Some of our authors invite the reader to pause and take the time to consider the elements of conducting a successful mediation. Others focus on important aspects of the arbitration practice.

Steven Bennett looks closely at discovery in arbitration proceedings detailing those aspects of the process that offer particular challenges to participants. In the first of a two-part article, points out those elements of discovery that may, or may not, fit the dispute and the process. This article includes many astute observations and suggestions to improve arbitration proceedings. Stuart Riback offers the reader a well thought out form of analysis for evaluating the suitability of a dispute for arbitration or traditional litigation. The choice is not always as straight forward as one might think.

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FALL 2018

"Hard" Tools For Controlling Discovery Burdens In Arbitration

by Steven C. Bennett[1]

Arbitration (and American arbitration in particular)[2] has received increasing criticism,[3] based largely on the contention that arbitration too closely resembles conventional litigation, producing undue burden and costs.[4] Chief among the criticisms is the view that discovery (particularly discovery of electronic information, or "ediscovery") is largely uncontrolled, undermining efforts to promote arbitration as a speedy and economical alternative to litigation. Solutions, in response to the criticisms, abound. One popular view is that better education of neutrals about the demands of modern discovery, and entreaties to neutrals to manage discovery processes more closely, can solve this problem,[5] through a system where arbitrators work with the parties to "right-size" the proceedings, and closely monitor developments in the case, to avoid a "runaway" process,[6] sometimes referred to as "muscular arbitration."[7] This approach largely mirrors the "active case manager" model recommended for judges facing similar problems of discovery control.[8]

Central to the active case management approach is a concern for "proportionality," i.e., that the scope and form of discovery should be "proportional to the stakes and issues involved in the case[.]"[9] That proportionality concern is already a central focus of arbitration-sponsoring institutions.[10] Yet, budgeting for ediscovery projects is notoriously elusive,[11] and the ability of parties to determine, in advance, precisely what information they have that may be relevant to the dispute means that a "case manager" (arbitrator or judge) may have difficulty doing much more than encouraging parties to consider their obligation to engage in "proportionate" discovery,[12] and (when and if a party complains about the burdens of discovery) adopting specific case management techniques to control undue burdens.[13] Proportionality, moreover, is a rather old, but ill-defined concept, which has often eluded parties in the heat of battle.[14]

The admonition that arbitrators should pay attention to proportionality is generally "soft" on the parties (and their counsel), meaning that the case manager arbitrator does not place any immediate limitations on discovery,[15] until the parties have had a chance to "meet and confer," and the arbitrator generally does not constrain the discovery process unless one of the parties specifically requests assistance.[16] By contrast, there are "hard" tools for limiting discovery, which can be imposed, from the outset of a case, without extensive input from the parties, and on a basis that does not depend on a detailed assessment of proportionality issues. In the arbitration context, these hard tools may be particularly useful. This Article briefly outlines some of the "hard" tools for discovery management and suggests some reasons why such tools may be useful in arbitration.

The essential notion of these "hard" tools is that parties may choose, in their arbitration clause, or by virtue of the choice of arbitration-sponsoring organization, or at the outset of the arbitration process itself, to focus and streamline discovery processes, through the adoption of one or more of these tools. The tools thus become a default framework that will apply, unless the parties thereafter agree to modifications, or the arbitrator finds good cause for a change. The use of such tools could increase the predictability of discovery obligations in arbitration and reduce disputes about the application of proportionality rules.

Differentiated Case Management

Many court systems (especially in the state courts) have adopted forms of "differentiated case management," wherein cases are assigned "tracks" (based largely on the size of the claims in dispute).[17] These tracks, in turn, determine the presumptive scope of discovery (often, by limiting the number of document requests, the period for discovery, or the availability of other discovery processes, such as depositions). In the arbitration context, the Institute for Conflict Prevention and Resolution (CPR) issued its Protocol on Disclosure of Documents & Presentation of Witnesses in Commercial Arbitration, which employs differentiated case management.[18] The CPR Protocol offers an array of "modes of disclosure," ranging from the most basic (no disclosure of documents, other than disclosure, prior to the evidentiary hearings, of documents that each side will present in support of its case), through three more modes, with increasingly expanded discovery in each mode.[19] This concept (categorization of cases, and application of different discovery rules to different sizes of cases) commonly appears in other arbitration systems.

A differentiated case management system could be combined with many of the other "hard" tools for discovery control listed below (that is, once a case has been categorized, an array of automatic discovery limitations would apply). The categorization process, moreover, need not automatically depend on the monetary size of claims. Many systems allow parties to "opt in" to a particular category, to object to a categorization (and reassign the case), and to submit information to administrators regarding the size and complexity of the case that is not confined to the dollar value of the claims at issue.[20]

Discovery Deadlines

According to the now-famous "Parkinson's Law," work generally "expands so as to fill the time available for its completion."[21] The corollary to that "law," that the more time a project takes, the more it costs, is also true.[22] That adage seems particularly true in the context of discovery. Setting reasonable, but short, deadlines for the completion of discovery, and holding firm to those deadlines (in the absence of compelling need) may be one of the most effective methods of focusing the parties on the discovery processes that actually need to be undertaken.[23] Time limits for discovery may be automatically linked to the size of the case; presumptively, a smaller case should require less time for the completion of discovery than a larger, more complex dispute. Time limits, however, could always be modified at the direction of the tribunal, and failure to observe time limits should not risk vacatur of any award.[24]

Cost Allocation

Especially in "asymmetrical" disputes (where one side has a large volume of information, and the other relatively little), the temptation to "shoot for the moon" may be strong.[25] A party may demand broad categories of information, in hopes of imposing burdens that encourage settlement, or that (at very least) will greatly complicate the other side's preparation of the case. One obvious solution is to apply a financial disincentive, in the form of allocation of costs for discovery. Perhaps the most radical allocation of costs rule would reverse the presumption that the party responding to discovery requests pays its own costs for producing the information, even if it prevails in the dispute. A more limited rule might provide for a presumption that the requesting party will pay the costs of any discovery requested, or (at least) that the requesting party will pay if (ultimately) it loses the case,[26] or where the results in the case are not in line with the costs of the proceedings. Another version of the rule might provide that, whenever a party requests information outside the scope of discovery applicable to its "track" (after case categorization), the presumption of "requesting party pays" would apply.[27] The tribunal would perhaps retain discretion not to apply the presumption (for good cause) as part of its award, but the *in terrorem* risk that unbridled discovery requests could come back to haunt the requesting party might well focus discovery processes on the highest-priority items. The value of this "hard" approach is that it is self-implementing, as opposed to a system where a decision-maker must attempt (in determining whether a discovery request is proportional) to estimate the value of the claims at issue, the cost of the requested discovery, and the likelihood that the requested information will serve some purpose in resolving the dispute.

Limiting Categories of Information

Information managers generally differentiate between "active," online and "near-line" information (generally the easiest information to retrieve) and backup information (stored for disaster recovery, rather than as a record-keeping practice), and deleted information (often, the hardest information to retrieve). Requests for the latter categories of information tend to produce undue burden and cost (compared to preservation and search of the easier categories). Thus, a discovery protocol could exclude the backup/deleted information categories altogether, or provide that requests for such information should only be granted if some heightened showing of need is provided (and, perhaps, if the requesting party pays the cost of such efforts).[28] Additional specific categories of information might be excluded, or at least subject to a presumption of exclusion, subject to a high standard for showing clear relevance and materiality, versus the costs and burden of discovery. Presumptively, moreover, sources of information excluded from search and production obligations would also be freed from a party's correlate obligation to preserve the information.[29]

Related to this approach is the use of "staged" discovery, wherein parties may be required to focus on one set of information (considered clearly relevant to the dispute) before they move on to less relevant sources or categories of information, or categories that are more burdensome to obtain, and search. In general, the "staged" discovery approach is a "soft" tool, in that it requires assessment of the specifics of the case to determine which categories of information should be produced first. But, a "hard" form could be established. Thus, for example, if specified categories of information were presumptively the first source of information in a dispute (*see* "Specified Categories of Information," below), the staging of discovery might depend upon a mandatory exchange of certain categories of information, before any further discovery would occur. In the international arbitration context, the service of document requests might be delayed until after initial memorials of the parties (together with documents supportive of the memorials) have been exchanged. In substance, using such techniques, the question becomes not so much how to limit expensive, burdensome discovery, but when (in the course of proceedings) to consider using such techniques.

Limiting Preservation Obligations

The duty to preserve evidence for use in litigation (or arbitration) generally derives from a common obligation to avoid "spoliation" of evidence.[30] That obligation generally applies in arbitration, as it does in litigation. Determining when the duty to preserve attaches, the scope of document preservation, and the form of continued compliance obligations of attorneys and their clients is among the most

difficult aspects of the discovery process. The costs of preservation can be substantial, and parties and counsel often "over-preserve," as a result of concern that they may guess wrong as to the scope of their obligations.[31]

Perhaps the most extreme solution to this problem would be a flat rule that parties have no obligation to preserve evidence absent a specific written request from another party. A more modest, but still firm, rule would provide that, except on a showing of bad faith, a party's use of its ordinary methods of record-keeping and archiving could not form the basis for a claim of spoliation. And arbitral rules might clarify that (absent bad faith), the ordinary form of remedy for failure to preserve information would be a (permissible, but not mandatory) "adverse inference" regarding the character of the information not preserved.

Specified Categories of Information

It is possible to designate specific categories of information that must (at least presumptively) be produced in a case. This is the approach embodied in Rule 26(a) of the Federal Rules of Civil Procedure.[32] The Rule 26(a) items are generic, meaning that they do not depend on the nature of the specific case. It is possible, however, to specify categories of information, for particular types of cases, that constitute the "core" of any disclosure, and which presumptively should be produced before parties undertake more detailed (and more expensive) discovery.[33] The Federal Circuit Advisory Council, for example, has prepared a "Model E-Discovery Order," for use in patent cases, which requires parties to exchange "core documentation" concerning "the patent, the accused product, the prior art, and the finances" of the patent and accused product before making any requests for emails.[34] The Model order also places presumptive limits on the number of custodians for which email must be searched, and limits on the number of email search terms. Requesting parties presumptively bear "all reasonable costs" for discovery in excess of these limits.

At the other end of the spectrum (in terms of claim amounts at issue, and sophistication of the parties), certain forms of cases may be channeled into strictly limited categories and volumes of discovery. Under a Local Rule in the Southern District of New York, for example, prisoner *pro se* cases are subject to a set of "standard" discovery requests, which the *pro se* plaintiff must use, absent "good cause."[35] Standard requests also exist for use in employment cases.[36]

A similar process for specification of information subject to discovery could be used in arbitration. A survey of disputes in a particular area might confirm that certain categories of documents and information routinely constitute the "core" of discovery in a particular field. For example, construction disputes almost always involve: the principal contract and amendments, plans and specifications, change orders, records of job-site meetings and the like. Arbitrators might enhance the certainty of parties and counsel by stating, at the outset of proceedings, that these core documents should presumptively be exchanged between the parties. In theory, moreover, the "core" list could be made mandatory (and restrictive), subject only to "good cause" exceptions.

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Endnotes:

[1]The views expressed are solely those of the author and should not be attributed to the author's firm or its clients. This is Part I of a two-part article examining discovery burdens in arbitration. Part II will appear in the next issue of *The Resolver*. The footnotes in this version have been limited. The complete, more fully footnoted, article is published in *Mealey's International Arbitration Report.*

[2]This Article largely focuses on the domestic (American) context, but draws (in part) on experiences, rules and protocols in the international arbitration field.

[3]Some have gone as far as to suggest that "arbitration is often not cheaper, faster or more predictable than litigation," and that arbitration is "often an inefficient method of dispute resolution." Aaron Foldenauer, *Big Risks And Disadvantages Of Arbitration vs. Litigation*, Corp. Counsel Mag. (July 29, 2014), available at www.alm.com. There are also strong voices to the contrary.

[4]There are conflicting views on whether arbitration costs and burdens are justified by the need for a fair, accurate and flexible process, especially as arbitration has grown to encompass all manner of (often complex) disputes. *See, e.g.*, Robert A. Merring, *Into The Briar Patch: Discovery In Arbitration*, The Resolver at 18 (Winter 2017), available at www.fedbar.org.

[5]*See* Albert Bates, Jr., *Controlling Time And Cost In Arbitration: Actively Managing The Process And "Right-Sizing" Discovery*, 67 Dispute Resol. J. 313, 341 (2012).

[6]*See* College of Commercial Arbitrators, *Protocols for Expeditious, Cost-Effective Commercial Arbitration* at 72 (2010), available at www.thecca.net.

[7]*See* Mitchell Marinello & Robert Matlin, *Muscular Arbitration And Arbitrators' Self-Management Can Make Arbitration Faster And More Economical*, 67 Disp. Resol. J. 69 (Nov. 2012-Jan. 2013).

[8]*See* Federal Judicial Center, *Benchbook for U.S.*

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Considering Arbitration or Mediation for Licensing Disputes

by Theodore K. Cheng

It is commonplace in the intellectual property and technology fields for parties to enter into licensing arrangements for any variety of different business reasons. Unfortunately, despite good intentions and much optimism when those deals are consummated, disputes over those agreements are themselves also a common occurrence. For example, a photographer may decide to license her catalog for use in connection with a theater production, but keeping track of which photographs are being used by the producers immediately becomes a challenge, leading to uncertainty over the appropriate amount of royalties that are due. A merchandising firm specializing in bobbleheads and other likenesses of celebrities may approach a popular NFL team to discuss the potential of making figurines of star players in football uniforms, but the end products bear little resemblance to the actual players, and the reproduced team trademarks do not comply with the specifications provided by the league. A consumer products company may need to incorporate raw materials or chemicals distributed by a manufacturer, but encounters shipping delays that threaten to cause havoc with its own production schedule and inventory.

It would not be surprising in the least to turn to commencing a traditional federal or state court action as an almost knee-jerk reaction to solving these kinds of licensing problems. But in resorting to litigation, how often do we think about the additional transaction costs that are incurred in choosing this particular way to resolve the dispute? For example, it goes without saying that it costs money to resolve disputes. But it's also important to remember that the true costs can be both direct and indirect. Direct costs could encompass e-discovery and document production costs, deposition expenses, expert witness fees, and, of course, legal fees. Indirect costs could include negative publicity, reputational harm, loss of employee productivity, and lost business opportunities because resources are being directed towards resolving the dispute. Moreover, the longer it takes to achieve a resolution, the greater the likelihood that all of these costs will have an adverse impact on future growth and profitability. And, as the dispute wears on, both the licensor and licensee derive increasingly less benefits from their underlying agreement.

In that regard, disputes also unavoidably take up time, and, as Benjamin Franklin once noted, "Time is money." And worse yet, disputes spend time on your behalf. Three-time Pulitzer Prize-winning American poet, writer, and editor Carl Sandburg once said that "Time is the coin of your life. It is the only coin you have, and only you can determine how it will be spent. Be careful lest you let others spend it for you." Every metric of time diverted to handling a dispute is not being devoted to furthering the core business interests of either the licensor or licensee. Disputes also hold the parties hostage to a particular moment or moments in time. Most poignantly, the point in time when the dispute arose becomes the focus and remains so until the dispute is resolved.

Money and time are the most obvious transaction costs. But the loss of emotional capital can be equally, if not more, debilitating. David Packard, the late co-founder of Hewlett-Packard, said, "A group of people get together and exist as an institution we call a company so they are able to accomplish something collectively that they could not accomplish separately – they make a contribution to society, a phrase which sounds trite but is fundamental." A business is nothing but the passion, dedication, and commitment of its people, and, as Jack Welch, former CEO of GE, said, "It goes without saying that no company, small or large, can win over the long run without energized employees who believe in the mission and understand how to achieve it." Individuals who can direct their emotional capital toward what they enjoy doing are the ones who contribute the most to the business objectives and, consequently, to overall success. At the same time, individuals who are compelled to invest emotionally in issues having little or nothing to do with the business objectives – such as an unresolved dispute – are likely to find themselves impeded in their ability to participate meaningfully and, thus, feel disheartened, discouraged, and demoralized. Devoting energies towards resolving disputes requires an expenditure of emotional capital that will almost always take a negative toll.

Finally, putting faith in the courts to achieve a resolution means ceding ultimate control over the outcome to someone other than the parties to the dispute, namely, the judge and/or the jury. Influential management consultant Peter Drucker once said, "Management is doing things right; leadership is doing the right things." Steering a business in line with its mission, growing profitability, respecting and responding to its customers, and safeguarding its reputation are all responsibilities over which management must exercise proper control. Disputes, however, hold the potential to diminish management's ability to control one or more of these areas. In a court proceeding, both licensors and licensees have little to no control over the outcome, creating the potential for results that could adversely impact each of their respective businesses.

Considered together, these transaction costs point to one inescapable conclusion: the more we rely on court litigation to achieve our dispute resolution goals, the more money, more time, and more emotional capital we expend to secure an outcome over which we have less and less control. Litigation is an appropriate dispute resolution mechanism in certain circumstances, but it has many serious limitations, including the inability to accommodate a customized process for the dispute in question; appearing before a decision maker who more than likely has little to no expertise in the subject matter of the dispute; and the inability to maintain true confidentiality because of the public nature of the proceedings.

Licensing disputes have long been resolved competently, cost-effectively, and expeditiously by arbitrators and mediators, who either work wholly outside of the court systems or in court-annexed programs designed to

offer litigants an alternative to slavishly following court procedural rules. These processes afford the parties a great degree of flexibility because, at their core, they are processes that the parties contractually agreed to undertake utilizing parameters determined, for the most part, by the parties themselves. Even after a dispute has arisen, the better practice by arbitrators and mediators is to engage the parties and their counsel to continue tailoring the process to fit the dispute in question, assisting the parties to design a process that makes sense to them and their business priorities. One design option to consider is placing reasonable limitations on the scope of information exchange so as to avoid the broad and nearly unfettered discovery found in court litigation. For example, the parties could agree to informally exchange information in advance of a mediation session; eliminate depositions; severely restrict the use of interrogatories; or exchange witness statements in advance of the hearing in lieu of conducting direct examinations. The parties could also consider setting aside extended time for ex parte communications with the mediator in order to help crystallize their positions and bring the parties closer to a resolution; placing restrictions on motion practice; and agreeing to limit the number of expert witnesses or even agreeing to retain joint expert witnesses.

Licensing disputes are essentially breach of contract actions, and, depending on the context, they may call for having a facilitator or decision maker who possesses sufficient subject matter knowledge and/or expertise to understand the true parameters of the dispute. That knowledge or expertise could be focused on the industry in which the licensing arrangement was consummated. It could also include substantive knowledge of the legal framework applicable to such arrangements. Unlike in a court proceeding, the parties can choose a neutral based upon relevant criteria such as patent, trademark, or copyright expertise; prior experience in or with the industry; reputation and temperament; prior arbitration or mediation experience; availability; and a host of other factors. Thus, selecting the appropriate mediator or arbitrator can oftentimes maximize the likelihood that a resolution can be achieved, in that that selection may be critical to being able to work with a neutral who can appreciate both the legal issues and the technical industry concepts involved.[1]

As a drafting matter, the parties can require in their licensing agreement that the neutral have specific subject matter and/or industry expertise. One place to look for potentially eligible neutrals is the Silicon Valley Arbitration and Mediation Center (www.svamc.org), which annually promulgates its "List of the World's Leading Technology Neutrals."[2] This free and publicly available list "is peer-vetted and limited to exceptionally qualified arbitrators and mediators known globally for their experience and skill in crafting business-practical legal solutions in the technology sector." It is an excellent resource for at least identifying arbitrators and mediators who have significant experience in intellectual property and technology disputes, many of whom also have substantive experience in specific industries, such as arts and entertainment, information technology and software, and retail goods and consumer products.

Although arbitration and mediation both involve engaging the services of a neutral third-party akin to a judge, unlike a court proceeding, both are also confidential processes. The neutral and any provider organization administering the proceedings are obligated to maintain the confidentiality of the proceedings and may not disclose any of the particulars to the general public. The parties themselves can also agree to maintain confidentiality over any arbitration or mediation proceeding. However, absent governing law, a court rule, or the parties' agreement, neither process is inherently confidential, and there are limitations on maintaining confidentiality.[3] Notwithstanding those limitations, the ability to maintain confidentiality in both arbitration and mediation proceedings is a significant distinguishing factor in selecting that dispute resolution mechanism. Thus, for example, avoiding the potential for unwanted publicity associated with filing a lawsuit – particularly one involving prominent celebrities or well-known corporations – can be agreed-to in the licensing agreement itself before any dispute has arisen. Moreover, because licensing arrangements, in many instances, contemplate an ongoing relationship of some kind once the dispute has been resolved, the confidentiality afforded by both arbitration and mediation can perhaps be modestly helpful in preserving that relationship.

Finally, when disputes arise in an international or cross-border context, being able to have an arbitration award recognized and enforced in most countries in the world through the operation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also known as the New York Convention) is a distinct advantage over pursuing litigation in any particular country's local courts.[4]

Choosing to use arbitration or mediation as alternatives to court litigation in the parties' licensing agreement is something that should be seriously considered. These processes have the potential to address many underlying concerns when a dispute arises, such as designing and tailoring the dispute resolution mechanism to better fit the dispute in question; ensuring that the neutral third-party who will be either be adjudicating the dispute or assisting the parties in facilitating a negotiated resolution has the appropriate level of knowledge and expertise with the subject matter of the dispute and/or the industry; and maintaining confidentiality over the proceedings. The two processes can even be combined in what is known as a "step" or "tiered" dispute resolution clause, which would typically require the parties to attempt good faith negotiations by themselves as a first step, followed by the initiation of a formal mediation proceeding if the parties need the assistance of a neutral, and then finally, the commencement of an arbitration proceeding only after the mediation has failed to achieve a facilitated resolution. In that way, the parties' shared interest in resolving the dispute cost-effectively and expeditiously can be better realized.

Theodore K. Cheng is an independent arbitrator and mediator, focusing on commercial, intellectual property, technology, entertainment, and labor/employment disputes. He has been appointed to the rosters of the American Arbitration Association, the CPR Institute, FINRA, Resolute Systems, the Silicon Valley Arbitration & Mediation Center's List of the World's Leading Technology Neutrals, and several federal and

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Traits Of A Mediator

by Sam Imperati, JD

Mediation is part science and part art. Although many mediation skills may be taught, the development of a skilled mediator requires experience in dealing with people in all conditions and under all circumstances. While there are many intangibles in the definition of "good" mediator, certain character traits are invaluable. Please read the "Author's Full Disclosure" before you stop reading this article, but don't read it now if you have time to read the whole piece!

Alertness. The mediator must be alert on several levels while mediating. She must concentrate on the information being provided by the source and constantly measure the information for both value and veracity. Simultaneously, she must be alert not only to what the party says but also to how it is said and the accompanying body language to assess the party's truthfulness, degree of cooperation, and current mood. She needs to know when to give the party, or parties, a break and when to press them harder. In addition, the Mediator constantly must be alert to her environment to ensure her personal security and that of the parties.

Patience and Tact. The Mediator must have patience and tact in creating and maintaining rapport between himself and the party, thereby enhancing the success of the process. Displaying impatience may:

• Encourage a difficult party to think that if he remains unresponsive for a little longer, the process will end.

• Cause the party to lose respect for the Mediator, thereby reducing the Mediator's effectiveness.

Credibility. The Mediator must provide a clear, accurate, and professional product and an accurate assessment of her capabilities. She must be able to clearly articulate complex situations and concepts. The Mediator must also maintain credibility. She must present herself in a believable and consistent manner and follow through on any promises made as well as never to promise what cannot be delivered.

Objectivity and Self-control. The Mediator must also be objective in evaluating the information obtained. He must maintain an objective and dispassionate attitude regardless of the emotional reactions he may experience or simulate during a questioning session. Without objectivity, he may unconsciously distort the information acquired. He may also be unable to vary his questioning and approach techniques effectively. He must have exceptional self-control to avoid displays of genuine anger, irritation, sympathy, or weariness that may cause him to lose the initiative during questioning but be able to fake any of these emotions as necessary. He must not become emotionally involved with any party.

Adaptability. A Mediator must adapt to the many and varied personalities which she will encounter. She must also adapt to all types of locations, operational tempos, and operational environments. She should try to imagine herself in the party's position. By being adaptable, she can smoothly shift her questioning and approach techniques according to the operational environment and the personality of the party.

Perseverance. A tenacity of purpose can be the difference between a Mediator who is merely good and one who is superior. A Mediator who becomes easily discouraged by opposition, noncooperation, or other difficulties will not aggressively pursue the matter to a successful conclusion or exploit leads to other valuable information.

Appearance and Demeanor. The Mediator's personal appearance may greatly influence the conduct of any mediation and attitude of the party toward the Mediator. Usually an organized and professional appearance will favorably influence the parties. If the Mediator's manner reflects fairness, strength, and efficiency, the parties may prove more cooperative and more receptive to questioning.

Initiative. Achieving and maintaining the initiative are essential to a successful questioning session just as the offensive is the key to success in combat operations. The Mediator must grasp the initiative and maintain it throughout all questioning phases. This does not mean he has to dominate the parties; rather, it means that the Mediator knows his requirements and continues to direct the collection toward those requirements.

Author's Full Disclosure. Original article published by Mediate.com and the above excerpts were "cribbed" from Chapter 1, Field Manual 2-22.3 (FM 34-52) Human Intelligence Collector Operations Headquarters, Department of The Army, September 2006, which is now an unclassified document. It's Preface states, "This manual provides doctrinal guidance, techniques, and procedures governing the employment of human intelligence (HUMINT) collection and analytical assets in support of the commander's intelligence needs." Basically, I substitute the words "mediator" for "HUMINT collector," "party" for "source," and "mediation" for "HUMINT collection," along with a few other edits.

What do you think about these potential similarities, our role in other people's lives, and the mediator behaviors we use? Consider the sentence, "A Mediator who becomes easily discouraged by opposition, noncooperation, or other difficulties will not aggressively pursue

the matter to a successful conclusion or exploit leads to other valuable information?" Would your views change if it read, "… will not diligently assist the parties in exploring the options for a successful conclusion…?" Do the parties want us to "fully exploring options" or "exploit leads to other valuable options?" Is there a functional difference? Does your analysis change if you used another approach (transformative, facilitative or evaluative, etc.)? Does your intent ("get the damn thing settled" versus "help the parties explore their needs") matter? Are your answers consistent with our standards of practice? See, ABA Model Mediation Standards.)

I am respectfully challenging us to be more thoughtful about what we do in mediation, why, and how our actions are experienced by the parties. Restated, when does "helping" them become "manipulating" them? What say you? Please respond to SamImperati@ICMresolutions.com and I'll report the results.

Sam Imperati, JD. Sam is the Executive Director of ICMresolutions, a Pacific Northwest-based, national provider of mediation, facilitation, and training services. He has lectured nationally on mediation, negotiation, conflict resolution, and ethics. He was formerly Assistant Corporate Counsel with Nike, in private practice, and has handled litigation and mediated everything from "Admiralty" to "Zoning." 2006 – 2018 Best Lawyers in America. Martindale-Hubbell AV Preeminent. Oregon State Bar and the Oregon Mediation Association Lezak Awards for mediation excellence. Standup comedy winner!

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The Resolver. The articles have covered topics in (i) substantive areas of the law - Labor & Employment, Bankruptcy, Healthcare, Qui Tam, and Intellectual Property; and (ii) ADR processes and practice tips such as the impact of emotions on negotiations, discovery in arbitration, confidentiality in ADR and how thought leaders at the Pound Conference plan to advance ADR. As the Chair, I wanted to know them all, on a deeper level. A mammoth task even if I had tried. Instead, I was surrounded by local and national experts who freely shared their knowledge for the benefit of the Section. In the immediate circle was the Board of Directors. Thanks to Simeon Baum and Jeff Kichaven, two nationally known experts who played considerable roles before my tenure. Thanks to our other Board members and liaisons who knew exactly what was required to achieve the Section's underlying objectives of sustaining and engaging the membership: Lisa Brown, Alex Zimmer, Roni Elias, Amy Boyle, Ashley Akers and Charles Stone. They worked on webinars and articles and plans for outreach. Most importantly, thanks to those of the membership who were frequently contributing both by writing and presenting. The thing took care of itself.

For the past two years the Section provided you, the membership, with approximately 8 free webinars, some of which carried CLEs. There were about 26 articles in The Resolver, our award-winning newsletter. About nine opinions were published in Beyond Alternative, the frequent column of the Federal Lawyer. In an exclusive partnership with Lipscomb University, Pepperdine Law School and the Straus Institute for Dispute Resolution, the FBA's ADR and Labor & Employment Sections will be providing even more ADR content on October 18. 19 and 20 in Nashville, TN. I have no doubt that you gained just a bit more at the end than when you first started. The score took care of itself.

This leads me to membership. I will characterize this as an area of opportunity. Increasing membership has been one of the most difficult challenges to date and is certainly an area of opportunity. Our Section membership has hovered just around 320 members give or take a few at any point in time. What can the ADR Section do to increase its membership and increase participation? Just a few weeks ago, I had a tentative inquiry from a member who wanted to be more active. To him and others who are questioning their readiness for ADR Section leadership, I say you must move away from the shallow end of the pool. No more dipping of the toes. Dive right into the deep end. The thing will take care of itself.

And so I close out my tenure in similar manner as I opened it in October 2016, urging you to become active in recruiting and participating. Unquestionably, this Section of the FBA is the best platform to hone your substantive and leadership skills as ADR crosses all areas of the law. I urge you to become an editor of any of the ADR writing vehicles; support the membership drive by chairing that committee; chair the CLE/Events committee; and do not hesitate to bring your own ideas. There is no requirement to be the all-round expert. As a member of the Section and as a member of the leadership of the Section, you will find that indeed, the thing takes care of itself and you end up with a depth of experience and knowledge that will serve you well.

Thank you for giving me this wonderful opportunity and I look forward to participating actively with my new knowledge and skills in continuing the work of the ADR Section and in other areas of the FBA.

The Importance of Trust in the Mediator

by Arthur L. Pressman

In franchise disputes, lawyers and parties who search for mediators drill down on mediators' professional backgrounds, often paying the most attention to whether potential mediators have previously represented franchisors or franchisees. Despite the fact that lawyers generally don't choose their clients – clients choose lawyers – everyone, or most everyone, wants to know if a lawyer being considered as a mediator in a franchise dispute has been identified with franchisors or franchisees. It's no different if you are a personal injury lawyer – who has represented plaintiffs or defendants. With respect and acknowledging my own past as frequently a lawyer for franchisors, this question misses the mark. A very successful mediator first taught me the fallacy in using past representation as a screening/elimination process when I was a Philadelphia lawyer more than 20 years ago. Tom Rutter, may he rest in peace, was one of the best plaintiffs' lawyers in town for 30 years and then became one of the best mediators in town for another 20. What Tom had was far more important than past affiliation with one side or the other. He had the trust of the parties and their lawyers. He showed that trustworthiness as an overriding characteristic is more useful as a predictor of success in a mediation than which side of the proverbial "V" a potential mediator happened to represent in a prior life. Put another way, can you and your client put your trust in the mediator to do all within his power to help the parties move to resolution? More importantly, how does the mediator earn your client's and your trust?

Mediation literature supports the importance of trust in the mediator as a decisive factor in the success of mediation. In an article published in 2009[1], Jean Poitras, an associate professor of conflict management, asked the question "What Makes Parties Trust Mediators?" Dr. Poitras knew that other academics had identified the importance of trust between mediators and parties as a key element of a successful mediation experience. What Poitras and his colleagues didn't know was why people trust mediators, or more to the point, what is it that mediators do, or don't do, that leads participants to place their trust in them.

What separates Poitras' work from other commentators on the role of trust in mediation is that he sought to identify empirically what parties value about mediators – not what mediators or lawyers believe makes a good mediator - but what the parties themselves identify as the factors that lead them to trust (or not trust) a mediator. Following his team's review of questionnaires of parties who had completed a total of 105 mediations with 36 trained, full-time mediators, he identified from the parties' perspective 5 key subject areas of interaction with the mediator that parties emphasized in answering why they trusted (or didn't trust) their mediator:

1. Degree of mastery over the process,
2. Explanation of the process,
3. Warmth and consideration,
4. Chemistry with the parties, and
5. Lack of bias toward any party.

Please note that Dr. Poitras' analysis was based on client interview – not lawyer interviews. So while a client may have some information from counsel about a mediator's history, the impressions that Dr. Poitras tracked were the clients' impressions of what was happening before their eyes. And for each client, those impressions were based on what he or she experienced during the entirety of the mediation process; that is, being present with all one's senses for the mediation's duration. For lawyers with prior mediations under their belts, they likely experience the time spent with a mediator much differently than their clients do. As I tell lawyers, they have many cases, usually the client only has one – this one. It's no different with mediations. Clients' perception of the fairness of the process is based on how they experience the mediator's treatment of them in what likely is the only mediation they will ever have – have they been heard, have they been treated with respect and understanding, does the mediator treat them as equals?

A word about Dr. Poitras' sample of participant responses from which he drew his conclusions. All of his mediations took place in Canada between employers and employees; all of them concerned employment disputes; 82 percent of them ended in settlements; and roughly half of his participants were associated with employers and the other half we associated with employees; almost 60 percent were college graduates (more 4 year universities than 2 year programs) and the rest were high school graduates; and roughly 70 percent were women, and the average age of all sampled participants was 40.

And another word about what degree of trust in the mediator Dr. Poitras' sample in fact had experienced – slightly more than half (about 56 percent) experienced what they considered "an above average level of trust" in the mediator, and the balance (about 44 percent) reported a "below average level of trust." Notwithstanding that division, approximately 82 percent of all cases ended in an agreed resolution.

It may be obvious that lawyers want their clients to have good experiences in mediation. What is surprising though is that a client's degree of satisfaction in mediation is not only measured by outcome. In fact, as Dr. Poitras' work points out, happiness with the process – was it fair for me? – is often ultimately more important to the client than the outcome. After all, any agreement is voluntary, so the mediator isn't usually responsible for the outcome, at least, in any direct way. But the mediator does have responsibility

for the process. In meeting that responsibility, the mediator serves the parties. For the lawyers who represent clients in the mediations, after all is said and done, isn't it often the client's degree of satisfaction with the mediation process, irrespective of outcome, that determines how happy the client is with his or her lawyer?

For those of you who want to read more of Dr. Poitras' study, it is available at https://doi.org/10.1111/j.1571-9979.2009.00228.x. I intend to follow this article with additional ones that speak further to each of the subject areas that his paper identifies – degree of mastery over the process, explanation of the process, warmth and consideration, chemistry with the parties, and lack of bias toward any party—and what it is a trusted mediator can do to improve the mediation experience for the participants and with it improve the likelihood of a successful result.

Arthur Pressman *is a mediator and arbitrator of franchise disputes, an adjunct faculty member at Boston University School of Law where he teaches ADR, Negotiation and Professional Responsibility, an occasional expert witness in franchise-related legal issues, including lawyer malpractice, and senior counsel at Nixon Peabody LLP, resident in Boston, MA.*

Endnote:

[1]Poitras, Jean, What Makes Parties Trust Mediators?, Negotiation Journal, July, 9, 2009, John Wiley and Sons.

EDITOR *continued from page 1*

One of our authors bridges the two principal facets of ADR by looking at the use of arbitration or mediation in licensing disputes. Theodore Cheng sets the stage for his analysis by reminding the reader of the obvious disadvantages of traditional litigation as well as the sometimes-forgotten costs of traditional adversary proceedings. This article suggests that Arbitration and mediation, either alone or in tandem, are especially well suited to licensing controversies.

This issue includes three articles that provide practical considerations for neutrals and attorneys representing clients in mediation. Two federal court mediators Cynthia R. Mabry-King and Rebecca Price share their experience mediating controversies in federal court. Practitioners would be well-advised to pay attention to the qualities these mediators recognize in the most effective mediation professionals. From the other perspective, Arthur Pressman examines the importance of trust in the mediator as a starting point to effective mediations. This is the first a promised series of articles focusing on the mediation process. Finally, Sam Imperati also zeros in on the Traits of a Mediator with a unique and thought-provoking approach to this often talked about topic.

We hope that our readers will find this issue of The Resolver useful and stimulating. 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 Spring 2019.

Thank you for your support.
Alexander Zimmer, Editor

DISPUTES *continued from page 6*

state courts. Mr. Cheng also has over 20 years of experience as an intellectual property and commercial litigator. More information is available at www.theocheng.com, and he can be reached at tcheng@theocheng.com. An earlier version of this article appeared in the NYSBA Entertainment, Arts and Sports Law Journal, Vol. 29, No. 1 (Spring 2018).

Endnotes:

[1]See, e.g., Douglas Shontz, Fred Kipperman, and Vanessa Soma, "Business-to-Business Arbitration in the United States: Perceptions of Corporate Counsel," Rand Institute for Civil Justice, at 1-2, 32 (2011) (finding that a majority of respondents in a study reported that arbitrators are more likely to understand the subject matter of the arbitration than judges because they can be selected by the parties), available at www.rand.org/content/dam/rand/pubs/technical_reports/2011/RAND_TR781.pdf.

[2]See https://svamc.org/techlist. The author is proud to have been appointed to this distinguished list since 2016.

[3]See Theodore K. Cheng, "Maintaining Confidentiality in Arbitration," The Resolver (Spring 2018), at 5 (discussing parameters of confidentiality in arbitration proceedings, including some of the limitations).

[4]See Theodore K. Cheng, "Arbitration of Art and Cultural Heritage Disputes," NYSBA Entertainment, Arts and Sports L. J., Vol. 28, No. 3 (Fall/Winter 2017), at 32 (discussing the advantages of the New York Convention).

Two Federal Court Mediators Offer Tips for Mediation Advocates

by Cynthia R. Mabry-King and Rebecca Price[1]

Working as a mediator in federal court is an extraordinary privilege not least of which for the continuing opportunities to engage with attorneys and clients toward the goals of efficient, effective, and creative resolutions of litigated disputes. Having mediated many hundreds of cases and worked with thousands of lawyers, some common strategies arise that make it more or less likely for lawyers, parties, and mediators, to work effectively together to resolve disputes. This article provides tips for lawyers to enhance settlement possibilities in mediation. These tips originate from the premise that lawyers should approach mediation as though it were the most important aspect of their case because, given the rates of settlement, there is a good chance that it will be.

Prepare yourself. The most successful mediation processes include meaningful pre-session preparation.[2] Although it may sound obvious, prior to any mediation you should know the key issues, facts, and relevant law for all sides of the case. Where legal or factual questions remain unanswered, you should know that too. Make it a part of your practice to search for recent changes in the law that may affect your case. If you filed a motion, know the standard for granting or denying the motion. If you filed a Notice of Appeal, know the standard of review for the key issues. Consider the possible benefits of an opening presentation in the mediation during the joint session. Forecast what you will say about the case and what the other side will say. This is a rare opportunity to speak directly to the client on the other side. What might you say to convince that client? And how might you say it?

Prepare your client. For some clients, mediation will be their first exposure to "being in court," so your pre-mediation preparation should include preparing her for this experience. In addition to general information about mediation process and timing, clients should understand that, unlike a judge, mediators do not make decisions but rather will encourage and support the client's own decision making. Mediators may engage your client if she appears at the conference. Prepare your client to speak about her case. Do this even if you feel she should not speak and have advised her not to. A surprising number of clients want to talk in mediation – even if the attorney feels they should not. Consider conducting role plays with your client beforehand and include questions that the mediator or opposing counsel may ask. Forecast what she might hear from the other side. Prepare her for a lot of downtime. Confer with your client prior to the conference to ascertain her interests and needs for settlement purposes. Challenge her to develop a range of possible outcomes. Consider whether it could be useful for the mediator to speak with you and your client before a mediation session. These pre-mediation conversations can be used to orient a client to the mediator or mediation process, to explore demands or offers, and to provide information that may help the client make informed decisions about settlement possibilities.

Prepare the other side. Take seriously the task of preparing the other side since they are part of the decision-making team in the mediation process. Speak to the other lawyer before mediation. If you can establish a civil, respectful, and productive relationship before the mediation, it will help to carry you through the rough patches in the process. Consider sharing any pre-mediation submissions with the other side or designating only a portion of your submission for the mediator's eyes only. If you have a winning argument or defense, the other side should know that in advance of the session. Without compromising any advantages to your client, endeavor to be candid and to provide information to the other side that is relevant to the resolution of the dispute. In many circumstances, even one attorney with this approach gets the whole case on a good track for settlement.

Prepare your mediator. Assume that the mediator will familiarize herself with the existing record, then supplement that knowledge in whatever way the mediator directs, or you think most useful. If requested, pre-mediation statements should be timely and conform to the format required by the mediator or mediation program. In addition to general information about the case, include the history of negotiations among the lawyers or parties and any barriers to resolution. Consider an early conversation with the mediator if you have information about a client that may create barriers to settlement.[4] Take the time to prepare the mediator about your client's mental and emotional state and any needs in relation to the mediation itself including the need to encounter (or not) the other side, the need for breaks, and the need to include a support person who might make your client comfortable and/or to whom the client may feel accountable. If the litigation is so contentious that the lawyers have not been able to build rapport prior to the conference, share this with your mediator.

Take confidentiality rules very seriously. A cornerstone of any mediation process is confidentiality, whose roots lie in the notion that candid and open conversation is more conducive to settlement than obfuscation. All attorneys need to decide what information is best shared, and why. Among the considerations should be whether the information disclosed may or will be otherwise discoverable, the prospect of a strategic advantage, and the consequences of a material misrepresentation of fact. Note, however, that

if the mediator believes that information you have withheld may lead to settlement, the mediator may suggest that you reconsider. Most crucially, whether or not a mediation results in resolution of a dispute, do not disclose confidential mediation information or conversations. Such disclosures can undo settlement agreements, sour parties and attorneys to the process, and can discourage participation in future mediations.

Show up at the right time with the right people. Mediation typically only works when parties with settlement authority are present, and attorneys who know the case are present. Can cases settle without one or both? Yes, however, the absence of a necessary party or attorney may result in a feeling of bad will, or a report to a court or other program that parties have failed or refused to participate. Before the mediation, note whether your client's appearance or availability is necessary and ensure that your client, or a representative who has settlement authority, will be present. Alternatively, if you know that the right person will be unavailable, talk with the mediator and the opposing side well in advance of the session to determine the best way to proceed. It may be that you can discuss settlement possibilities prior to the mediation conference and have a range of options so that negotiations may take place in that person's absence. Accommodations also may be made so that the mediation can proceed with that person being available telephonically, through video conferencing, or electronic messaging. It may also be that the other side, or the mediator, feels it would be unproductive to meet and that the session should be rescheduled.

Have a flexible negotiation plan. In some rare instances, parties come to mediation with the same specific goal in mind. Most of the time, they do not. Think creatively and expansively and consider monetary and nonmonetary alternatives. Conduct a litigation risk analysis[5] to help your client understand some likely outcomes should you proceed through litigation, and the related risks and costs. Although the facts and legal issues in every case are different, do some research regarding case dispositions for similar matters in the jurisdiction where your case was filed.[6] To the extent that you contemplate that settlement will include a monetary payment, map out a negotiation plan to achieve your client's goal. What is your first proposal? What will you do next? Will you make incremental proposals in chunks of a certain amount? Will you make a best and final proposal for settlement? When will you walk away?[7] A flexible plan is recommended because at the conference, you may learn that the adverse party is willing to negotiate but within a different bracket or with different conditions than the one(s) that you and your client had discussed.

If your client is absolutely unwilling to move – let everyone know, as soon as possible. Although many civil disputes are resolved through alternative dispute resolution, not every case will be resolved without a court's opinion or a verdict. If you know that your client is unwilling or unable to make any move toward settlement, notify the mediator who may speak with everyone in the mediation to determine how to proceed. Many times, such conversations result in a softening of positions that allows mediation to proceed. As a last resort, if everyone agrees that a meeting under these circumstances may do more harm than good, the mediation might be adjourned or dispensed with entirely.

Use your mediator expansively and creatively. Mediators have strategies, tools, perspectives, and experiences that they bring to mediation. For example, mediators may facilitate the discussion and exchange of limited pre-mediation discovery and most mediators continue to be available to work with parties if disputes arise while drafting final documents. Some federal appellate mediators, with agreement of the parties, may recommend that the Court extend the filing time for a reasonable time to save you the time and expense of filing a motion to extend the filing time. In the session, once you begin to formulate settlement proposals, consider whether the mediator might have a sense of settlements in cases similar to yours that might be useful to consider.

Do not give up easily. Although time constraints may sometimes prevent long, protracted negotiations, do not lose sight of the fact that mediation is often a process. Some participants may resolve a dispute within a few hours while a resolution in another dispute will take several days or months. Stay at the negotiation table. When one proposal fails, try another one. A significant number of federal disputes are resolved through mediation even at the appellate stage.

Cynthia R. Mabry-King *is a Circuit Mediator for the United States Court of Appeals for the Fourth Circuit.* ***Rebecca Price*** *is the Director of the ADR Program for the United States District Court for the Southern District of New York.*

Endnotes:

[1]Price and Mabry-King previously collaborated on a continuing legal education seminar for federal mediators. Thanks to Krysta Hartley for her research assistance. Any opinions expressed in this article are those of the authors and should not be construed to be those of any Court or any particular mediation program.

[2]*See generally*, BRENDON ISHIKAWA AND DANA CURTIS, APPELLATE MEDIATION: A GUIDEBOOK FOR ATTORNEYS AND MEDIATORS 165-84 (2016), and HON. JAMES L. COTT, *The Dos and Don'ts of Settlement Conferences,* 42 No.2 Litigation 6 (2016).

[3]*See* ISHIKAWA AND CURTIS, *supra* note 2, at 179-81.

ADVOCATES *continued on page 16*

Strategizing a Case in Litigation Versus Arbitration

by Stuart Riback

In principle, every case should be decided according to the facts and the law, no matter who is making the decision or in which forum. In practice, the forum making the decision can make a huge difference. In particular, the differences between litigation in court and arbitration before a private panel can be dispositive because of the differences in procedures, the nature of the forum, opportunities to seek fees and costs, and the opportunities for review after the proceeding is over. Those differences may also be critical regarding certain preliminary aspects of the dispute, such as requests for injunctive relief. Each stage of the process presents different kinds of strategic decisions.

The first question a litigator should ask herself when a dispute arises is where the dispute should be heard. Is there an arbitration clause that might be applicable? If there is, does it in fact apply? To a large extent, whether the clause applies will depend on the language of the clause and how it relates to the facts, although the Eleventh Circuit has cautioned that "'[t]he case law yields no clear answer' to the question of how broadly to construe an arbitration clause."[1] For example, a clause that required arbitration of disputes that "arise out of or relate to" an agreement settling a dispute did not require arbitration of later conduct similar to what caused the settled dispute because that is a new dispute.[2] A clause calling for arbitration of "[a]ny dispute arising from the [fundraising] Activity" covered by the contract did require arbitration of a minimum wage claim by a fundraiser.[3] "'[A]rising under' language is narrower in scope than language, such as "relating to," under which a claim may be arbitrable if it has a "significant relationship" to the contract, regardless of whether it arises under the contract itself."[4] An arbitration clause covering disputes that "arise out of or in any way relate to" the services provided covers antitrust claims by customers.[5]

If the clause arguably does not apply, the attorney should ask herself whether it is worth trying to litigate the case in court. The other side may commence motion practice under section 3 of the Federal Arbitration Act to stay the action and have the dispute referred to arbitration. Even if that motion does not succeed, the exercise may take several months. Is the delay worth it? More to the point, what are the chances the case can stay in the court system? There is a strong policy in pretty much every court system in favor of arbitrating disputes. That means a party resisting arbitration needs a very strong argument as to why an arbitration clause does not apply.[6]

If there is no arbitration clause, should the parties consider whether to enter into a post-dispute arbitration submission agreement? Certain kinds of disputes might be well-suited for such a submission. For example, if the parties prefer not to have their dispute become a matter of public record, they might prefer to construct an appropriate arbitration procedure and panel for their dispute in order to avoid public scrutiny and press coverage. Alternatively, the nature of the dispute may require that it be heard in a court that is utterly unfamiliar with the type of case at issue; if the parties want a decision maker who has at least some clue about how to think about their dispute, they can agree to have their dispute arbitrated by a credentialed person.

There are limited opportunities to choose your judge if your case is in court. Most courts assign cases out of a wheel or similar random assignment system. It is easier to avoid a disfavored judge (by discontinuing under Rule 41(a)(1) and refiling) than to steer a case to a favored one. Arbitration affords greater opportunities for choosing the decision maker. The American Arbitration Association typically provides lists of proposed arbitrators and invites the parties to strike disfavored names. The arbitration agreement might provide procedures for selecting the arbitrator, set forth minimum qualifications, or name a specific person. In all events, the litigant should think hard about the characteristics of the person she wants deciding the case and plan the strikes and nominations with those goals in mind. One common procedure calls for each side to name one arbitrator and then the two named arbitrators pick the third. For this type procedure it is necessary to consider how persuasive your named arbitrator can be in order to keep the selection of the third arbitrator within acceptable bounds.

Choosing your decision maker should be part of your decision about what your overall approach to the dispute should be. In court the tools are well known: motions to dismiss to narrow the issues, discovery to learn the facts and lock the other side into their story, and motion for summary judgment to win the case or get as much of it decided in your favor as possible ahead of trial. Which tools you use and how, and which grounds you will raise at which stage of the proceeding, will vary from case to case, of course.

Arbitration presents a different set of challenges because you have fewer tools readily available. In most arbitrations, motions to dismiss are not contemplated. Discovery is more limited - typically there are no interrogatories or depositions. Specific types of arbitration might vary, such as FINRA arbitrations, and parties can always agree to additional procedures, but it is never advisable to rely on the other side's agreeing to your preferred procedure.

In at least some federal courts, there is no third-party discovery in arbitration: third-party evidence either is before the arbitrators or not at all.[7] See, for example,). The Sixth and 8th Circuits disagree.[8] This doesn't necessarily mean the third party has to show up and testify; the arbitrator may and often will facilitate third-party discovery by directing that documents be produced before him or her at an interim hearing called for the sole purpose of having the third party produce documents. Often the adversary will see which way the wind is blowing and consent to having

the production done without the arbitrator present. But a good litigator must bear in mind the relative ease of access to third-party proof.

The likelihood in arbitration is that you are going to trial. That means arbitration may provide you with tools that may not be available in court. Bear in mind the grounds on which arbitration awards can be vacated. They are set forth in section 10(a) of the Federal Arbitration Act:

1. where the award was procured by corruption, fraud, or undue means;

2. where there was evident partiality or corruption in the arbitrators, or either of them;

3. where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

4. where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

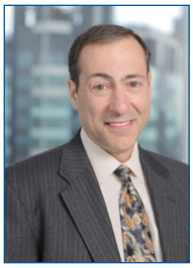
Although these grounds are narrow, they are real, and arbitrators don't like being overturned any more than judges do. So they are likely to run the hearing in a way that will keep them far away from any of these. The ones that give parties the most scope for affecting the proceeding are subsection 3 and 4.

Defendants in particular can—and often do—use the prospect of a post-award vacatur proceeding under subsection 3 as a tool to obtain adjournments and to keep the record open for all kinds of evidence that in court might be viewed as cumulative or of limited probative force or questionable admissibility. Of course, it is possible to overdo it, and a good arbitrator will see through the more egregious misuses of this strategy.

Similarly, the parties may wrangle over the scope of the arbitrator's power and how it is exercised because subsection 4 permits challenges on those grounds. These arguments will turn on the language of the contract that empowered the arbitrators in the first place (which may or may not be idiosyncratic, unclear, or debatable). In court, though, such issues typically are pitched in terms of jurisdiction, finality, or scope of discretion, and there is usually a wealth of case law to inform the parties' arguments.

Courts, especially federal courts, have much more rigid guidelines for the procedures to be followed, well-defined evidentiary rules, and, in the main, a case-management ethic that expects judges to keep cases moving along smartly. Although the number of tools is greater (motions, discovery), the opportunities for delay in each part of the proceeding are far fewer. Unlike arbitrators, whose decisions are highly insulated from substantive review, judges can be reversed on appeal. Although appellate courts reverse trial courts in only a small percentage of cases,[9] the prospect of a reversal on appeal can occasionally be a useful tool for a litigant.

The bottom line: no matter which forum you are in, each stage of the proceeding requires that you keep in mind the rules of the forum so that you can construct your strategy to fit the forum and maximize your client's chances.



As a business litigator with more than 30 years of experience, ***Stuart Riback*** *brings to his clients a practical sense of how to achieve the client's business goals in the most businesslike way — without litigation if possible, but by winning when litigation is necessary. Stuart has handled a wide range of complex commercial, securities, intellectual property and creditors' rights disputes. He has been named a New York "Super Lawyer" every year since 2007. Stuart has been named a Fellow of the American Bar Foundation.*

Endnotes:

[1]*Hemispherx Biopharma, Inc. v. Johannesburg Consol. Invs.,* 553 F.3d 1351, 1366 (11th Cir. 2008) (*quoting Telecom Italia, SpA v. Wholesale Telecom Corp.,* 248 F.3d 1109, 1114 (11th Cir. 2001)).

[2]*Zetor N. Am., Inc. v. Rozeboom*, 861 F.3d 807, 810 (8th Cir. 2017).

[3]*Leonard v. Delaware N. Am. Cos. Sports Serv., Inc.,* 861 F.3d 727, 729 (8th Cir. 2017).

[4]*Evans v. Building Materials Corp. of Am.,* 858 F.3d 1377, 1381 (Fed. Cir. 2017).

[5]*In re Cox Enters., Inc. Set-top Television Box Antitrust Litig.*, 835 F.3d 1195, 1202 (10th Cir. 2016).

[6]See, for example, *Chassen v. Fidelity Nat'l Fin., Inc.,* 836 F.3d 291, 304 (3d Cir. 2016) ("[I]f the language of the contract is ambiguous, the presumption of arbitrability applies because we must resolve any doubts concerning the scope of arbitrable issues in favor of arbitration." (internal quotations and alterations omitted)).

[7]See, for example, *Life Receivables Tr. v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210 (2d Cir. 2008); Hay Group, Inc. f. E.B.S. Acquisition Corp.,360 F. 3rd 404 (3rd Cir. 2004).

[8]*See, In re Sec. Life Ins. Co. of Am.,* 228 F.3d 865, 870-71 (8th Cir. 2000); *American. Fed'n. of Television and Radio Artists, AFL–CIO v. WJBK–TV* (New World Commc'ns of Detroit, Inc.), 164 F.3d 1004, 1009 (6th Cir. 1999)

[9]*see, e.g., Just the Facts,* (Dec. 20, 2016) (fewer than 9% of federal appeals resulted in reversals in 2015); National Center for State Courts, Caseload Highlights(March 2007) (of appeals prosecuted to decision, 70% were affirmed),

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District Court Judges at 189 (2013) (hereinafter cited as "FJC Benchbook"), available at www.fjc.gov.

[9]*See* Ronald J. Hedges, Barbara J. Rothstein & Elizabeth C. Wiggins, *Managing Discovery Of Electronic Information* at 19 (2017), available at www.fjc.gov (noting factors affecting proportionality); see generally The Sedona Conference Commentary On Proportionality In Electronic Discovery, 14 Sedona Conf. J. 155 (2013) (hereinafter cited as the "Sedona Proportionality Commentary"), available at www.thesedonaconference.org.

[10]*See, e.g.*, AAA Commercial Rules, R-22(b)(iv).

[11]*See* Steven C. Bennett, *E-Discovery: Reasonable Search, Proportionality, Cooperation, And Advancing Technology*, 30 J. Marshall J. Info. Tech. & Privacy L. 433, 439 & n.25 (2014).

[12]Craig B. Shaffer, *The "Burdens" Of Applying Proportionality*, 16 Sedona Conf. J. 52, 122 (2015) (hereinafter cited as "Shaffer").

[13]*See* FJC Benchbook, Sec. 6.01.

[14]*See* Lee H. Rosenthal & Steven Gensler, *From Rule Text To Reality: Achieving Proportionality In Practice*, 99 Judicature 43, 44 (2015); Martha Dawson & Bree Kelly, *The Next Generation: Upgrading Proportionality For A New Paradigm*, 82 Def. Counsel J. 434, 435, 437 (2015).

[15]*See* Thomas J. Stipanowich, *Soft Law In The Organization And General Conduct Of Commercial Arbitration Proceedings*, Chapter II in Lawrence W. Newman & Michael J. Radine (eds.), *Soft Law In International Arbitration* (2014).

[16]*See* Duke Law School Center for Judicial Studies, *Guidelines And Practices For Implementing The 2015 Discovery Amendments To Achieve Proportionality*, 99 Judicature 50 (Winter 2015).

[17]*See* Steven C. Bennett, *Tiered Discovery: An Efficient Proportionality Solution?*, ABA Pretrial Practice & Discovery Newsletter (2018), available at www.apps.americanbar.org.

[18]*See* www.cpradr.org/resource-center (hereinafter cited as the "CPR Protocol").

[19]CPR also offers a model form of "Economical Litigation Agreement," meant to be incorporated into contracts between business partners, suppliers and others, at the start of a business relationship.

[20]*See* JAMS Arbitration Discovery Protocols (2010), available at www.jamsadr.com .

[21]C. Northcote Parkinson, *Parkinson's Law: Or, The Pursuit of Progress*, The Economist (Nov. 19, 1955), available at www.economist.com/node/14116121.

[22]*See* R. Wayne Thorpe, *Case Management And Cost Control For Commercial Arbitration* at 3 (2012), available at www.jamsadr.com .

[23]*See* CPR Protocol (rejecting the "leave no stone unturned" approach to discovery); CCA Protocols (encouraging arbitrators to "enforce contractual deadlines and timetables" in arbitration agreements).

[24]*See* John H. Wilkinson, *Arbitration Contract Clauses* (2010), available at www.americanbar.org.

[25]*See* Alison A. Grounds & Kenneth C. Gibbs, *An Arbitrator's Guide To Successfully Resolving eDiscovery Disputes* at 2 (Spr. 2013), available at www.americanbar.org.

[26]*See* International Chamber of Commerce, T*echniques For Managing Electronic Document Production When It Is Permitted Or Required In International Arbitration* (2012), available at www.library.iccwbo.org.

[27]*See* Chartered Institute of Arbitrators, *Protocol For E-Disclosure In Arbitration* (2008), available at www.ciarb.org.

[28]*See* CPR Protocol.

[29]*See* Sedona Proportionality Commentary at 151.

[30]*See generally* Sedona Conference Commentary On Legal Holds: The Trigger And The Process, 11 Sedona Conf. J. 265 (2010).

[31]*See* Rand/Institute For Civil Justice, *Where The Money Goes: Understanding Litigant Expenditures For Producing Electronic Discovery* at 91 (2012), available at www.rand.org .

[32]*See* Fed. R. Civ. P. 26(a).

[33]*See* Elizabeth D. Laporte & Jonathan M. Redgrave, *A Practical Guide To Achieving Proportionality Under New Federal Rule Of Civil Procedure* 26, 9 Fed. Cts. L. Rev. 19, 50 n.110 (2015).

[34]*See* Federal Circuit Advisory Council, Model E-Discovery Order, available at www.cafc.uscourts.gov.

[35]*See* Local Civil Rules for the Southern District of New York, Rule 32.2, available at www.nysd.uscourts.gov.

[36]*See* Federal Judicial Center, Report On Pilot Project Regarding Initial Discovery Protocols For Employment Cases Alleging Adverse Action (2011), available at www.fjc.gov .

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See also SUSAN L. PODZIBA, CIVIC FUSION: MEDIATING POLARIZED PUBLIC DISPUTES 202-04 (2012) (suggesting questions for reality testing) and WILLIAM URY, GETTING PAST NO 134-36 (2007).

[4]JOHN BURWELL GARVEY AND CHARLES B. CRAVER, ALTERNATIVE DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, COLLABORATIVE LAW, AND ARBITRATION 138 (2013).

[4]Michaela Keet, *Informed Decision-Making in Judicial Mediation and the Assessment of Litigation Risk,* 33 OHIO ST. J. ON DISP. RESOL. 65 (2018).

[5]*See, e.g.,* West's Jury Verdicts and Settlements, Jackson v. United States of America, 2018 WL 2949243 (D. S.C. 2018) (noting a substantial jury verdict) and EEOC v. J.C. Witherspoon Jr., Inc., 2018 WL 3217089 (D. S.C. 2018) (reporting settlement of a religious discrimination claim).

[6]J. ANDERSON LITTLE, MAKING MONEY TALK 76-83 (2007) (suggesting development of a "plan for movement").

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.

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