THE RESOLVER

TURNING CONFLICT INTO RESOLUTION

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Message from the Section Chair

by Jeff Kichaven

What are we going to do about Opening Joint Sessions in mediations? Mediators love them, many lawyers have grown to avoid them at all costs. Can we reconcile this? Yes! Let's look at a page of history, learn from our experiences, and move forward productively.

Historically, mediation training for commercial cases grew out of "Community Mediation" training. While some of what is taught in "Community Mediation" is applicable to what commercial mediators do, some are not. The litigation community has rejected the conventional, community mediation-rooted Joint Sessions. We want to use techniques which are "tested and proven." With regard to Joint Sessions, though, we continue with techniques which are tested and disproven. We need to come up with something better.

In Community mediation-rooted trainings, the Joint Session is a plenary session, with an unrestricted agenda. I reached out to the organization from which I took my first mediation training, in the early 1990s, and asked how they train people to do Joint Sessions nowadays. It was exactly as I recall from over 20 years ago:

"This discussion is fairly open though the mediator should decide who goes first and enforce ground rules. With the parties' respective initial statements, the mediator will identify the key issues (typically 3-5) that will help inform setting the agenda.

"We encourage the mediator to check with the parties to ensure that the agenda is correct and

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Message from the Editor

The ADR Section of the FBA is delighted to present the Fall edition of *The Resolver*. Whether you are an advocate, a mediator or an arbitrator, you are bound to find something of interest in this edition. Section Chair, **Jeff Kichaven** (mediator) shares his experiences as a mediator conducting joint sessions. He strongly believes that despite the varied uses (or not) of joint sessions, despite the objections he has experienced, there still is a bright future for its use.

Simeon Baum (mediator) cautions us about rushing through the mediation process to an unresolved dispute. Patience! Mediation is not intuitive to the litigator and so these "Top 10 Things Not to Do in Mediation" are being provided to help foster a positive experience and a successful outcome in the mediation process. Using these ten tips, advocates will learn how to maximize the process and leave with a better understanding of the entire dispute as well as a resolution for the issues. Written primarily with the advocate in mind, this article also provides lessons for the mediator.

Roni Elias (litigator) is concerned about fairness in employee arbitration. He takes us on a journey through two decades of legislative work to address the fairness issue and concludes, despite his concerns, that the outcome of employee arbitration may not be that negative after all. So is employee arbitration fair? Read the article to find out Mr. Elias' point of view.

Theodore Cheng (attorney, mediator and arbitrator) presents a convincing case as to why ADR in the entertainment industry is a very viable option when compared to litigation. And if the scenarios he shares resonates with you and your clients, e.g. the company whose business is being eroded by the competitor's false advertising, you would be well-advised to read this article to gain insights as to the role of ADR in finding a resolution quickly and quietly.

Finally, **Marcia Adelson and I** co-author an article on vacating an arbitration award. What happens when you have prevailed in an arbitration? Does it get enforced as a matter of course? Is the dispute over? That depends on how aggrieved the other side is and how much he or she wants to derail the arbitration process. Fortunately, the courts support the promise of finality in arbitration and only vacates

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complete. By involving the parties in the agenda setting process, it helps the parties take ownership of resolving their dispute."

So we got the results we got. Unguided, unrestricted, plenary Joint Sessions. And lawyers did what they knew how to do: Deliver trial-style Opening Statements, with plenty of inflammatory and accusatory language. But the "agenda," in so many commercial cases, comes down essentially to this: "How much money does the defendant have to pay the plaintiff to get the plaintiff to sign a release?" While there are lots of aspects and angles to probe on the way to the answer to that question, that is the essential question in many, many of our cases. So, an unrestricted Opening Session for the purpose of setting an agenda, when the agenda could likely be predicted in advance, was not only unproductive, it backfired. When lawyers now routinely refuse to participate in these unrestricted Joint Sessions, they may well be wise to do so. We mediators, on the other hand, are foolish to persist in urging that which has been proven not to work.

So, what is better? What does "Joint Session 2.0" look like?

If we understand how the Joint Session fits into the overall mediation process in 2015, and how to prepare the lawyers (and, through them, their clients) to participate, we can create joint sessions which make sense.

The purpose of the Joint Session, in my view, is to set the stage for a meaningful Caucus afterwards. We need "the other lawyer" to put some stuff out there which we mediators can take into caucus and discuss with the caucusing lawyer and his client, with the goal of influencing that client's view of the terms on which the case should settle. In short, it is part of the process of "helping good lawyers break bad news to their own clients" and dealing with unrealistic expectations of what the litigation process can provide. This is the challenge which mediation is often designed to meet.

So, how do we manage Joint Sessions to set up good caucuses? Well, we can't let them go off with unrestricted agendas. We have to prepare each lawyer to put out the stuff that we can then take into the caucus with the other side, for productive conversation.

How do we do that? We get the briefs sufficiently before the mediation to read and absorb them. Then we have phone calls with the lawyers to ask questions, get clarifications, and learn the backstories and personal angles which are not part of the formal legal issues, but which are critical to understanding the dispute in 360 degrees. We work with the lawyers to determine the rubber-meets-the-road issues on which each lawyer needs to make progress with his own client. Then we make sure, as best we can, that "the other lawyer" is prepared to use the Joint Session to put out the stuff which is necessary to set the stage for productive conversation between the caucusing lawyer and his own client in the caucus which is to follow.

So, the Joint Session is not used for agenda-setting. The agenda is set before the mediation day, by the mediator working the phones with the lawyers. The Joint Session is used to discuss the items on that pre-set agenda, to set the stage for productive caucuses to follow.

With the collaboration of all involved, Joint Sessions have a bright future. ■

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an award under the narrowest of circumstances. This article provides the advocates with some useful tips.

We hope you enjoy these varied viewpoints, ideas, and thoughts and feel compelled to respond. While there is no forum for letters to the editor, we hope you will consider responding in your very own article for the Spring 2016 edition. In the interim, read on! ■

Joan Hogarth
Editor

Top 10 Things Not to Do in Mediation

by Simeon H. Baum

Avoid aborting the process and its possibilities.

MEDIATION is widely used these days. Federal court mediation programs have been in place since the 1990s; the Supreme Court's Commercial Division has a thriving Alternative Dispute Resolution (**ADR**) program; there are court-annexed mediation programs for specific areas — matrimonial, family, criminal court community disputes, landlord/tenant, and small claims court, to name a few. Agencies like the Equal Employment Opportunity Commission and quasi-governmental entities like the United States Postal Service have long standing mediation programs, as do self-regulating organizations like the National Association of Securities Dealers and the New York Stock Exchange. Beyond those programs, there is a growing use of private professional mediation. Corporations with pre-dispute ADR clauses, insurers with inter-company agreements, and attorneys with cases on an ad hoc basis are regularly turning to mediators to help them resolve their disputes and save their clients the cost, disruption and aggravation of protracted litigation. Given this burgeoning use of mediation, it is likely that most litigators, and many legal dealmakers, will find themselves representing clients in this process. It is thus imperative to understand the mediation process, its goals and possibilities, and to be effective in that process, understanding what works and what can abort the process and its positive possibilities. It is just as important to understand what not to do in the mediation process.

Here is a non-comprehensive list of 10 choices counsel or parties might make that reduce the likelihood of arriving at a mutually acceptable resolution through mediation.

1. Insult the Other Party

An agreement, which by its nature must be mutually acceptable, is the product of consent, not force. It is thus important to keep the other side willing and active participants in the dance of negotiation.

Offensive comments — such as calling the other party a liar, an incompetent, or a fool — are discouraging. They communicate a low likelihood of understanding the other. In the face of such comments, parties may conclude that there is no point in continuing because an offer based on so negative a point of view will be inadequate to the true value of what is at issue.

Offensive comments might gratify the speaker, but they anger the recipient. This can trigger primal responses — revenge (fight), defense, suppression, avoidance (flight), adding needless complexity to the other's communication.

At the core, the mediation process depends on communication. The mediator works to facilitate and enhance the quality of the parties' communication like a radio tuner. It is counterproductive to create static.

2. Give Up

Settlement opportunities are missed by quitting too soon. Often, the mediator, who has the chance to speak privately with each party, sees that a resolution is possible when the parties, having not been privy to all conversations, do not. Causes of premature departure include emotional reactions, frustrations with case assessment, and misreading of bargaining moves.

The converse of unwisely provoking a reaction through offensive remarks is succumbing to reactions to comments deemed offensive, and walking out. A good negotiator learns to sift negative remarks for the elements that might lead a party in good faith to make such remarks, and then addresses that content rather than reacting to the form.

Misunderstanding case assessment issues by either side may also prompt premature departure. One might be missing weaknesses that should be processed. If the other side does not appear to be getting it, the mediator should be given the time to work with that party in caucus to engage in reality testing. Time and gentle persistence can be the mediator's best tool; do not take it away. Confidentiality of caucuses prevents the mediator from reporting progress in the other party's case evaluation. Counsel should not conclude from silence that progress is not being made.

3. Focus Only on Dollars

Focusing only on dollars can mean missing integrative possibilities.

Mediation offers more than a settlement payment, and the mediation process is more than finding an acceptable number in a range formed by the extremes of low offer and high demand. While many settlements involve solely economic terms, there are times that openness to integrative possibilities, or a search for satisfaction of non-economic party interests, is key to reaching a resolution.

Mediators report business deals and new ventures emerging from the mediation of business cases. Employment dispute settlements can involve return to the workplace, reference letters, retirement or benefits packages, sensitivity training, and apologies. Even economic terms can be reworked to meet interests or party limitations through payment plans and contingent packages.

The ability to keep eyes open to non-economic interests produces surprising results. In one case involving the reduc-

tion in force of a large number of workers emerging from a plant closing, the attorneys had arrived at a possible resolution, which several of the plaintiffs, including a couple of management "tagalongs," were not ready to accept. Mediation permitted the strongest objector, one of the management plaintiffs, to hear for the first time an explanation of the company's actions.

That plaintiff particularly objected that certain plaintiffs, in particular a widow with children, should be receiving more. This opened the door for the mediator to explore whether the management plaintiff would prefer to have the funds earmarked for him to go to the widow. As a testament to the importance of not overlooking altruism as a component of human interests, the management plaintiff agreed, and the case settled. Plainly, a non-economic interest, between the parties, and, indeed, a sense of identity, broke that impasse.

4. Gag the Client

Prohibiting your client from speaking during a mediation session misses various opportunities unique to this process.

Having your client speak during the opening in joint session can showcase a strong witness, giving the other parties and their counsel a sense of what things might look like if the matter goes forward. More speaking in a non-trial mode lets the genuine story emerge naturally and efficiently, and can show the other party the real human impact of the issues in this mediation. It enables your client to go beyond marshalling the facts to present his or her core concerns and interests and make a genuine connection with the other party. This paves the way for real dialogue, which is impossible in a trial context.

Both in joint session and caucus,participation increases client "buy-in" for the eventual settlement. This can be more efficient than a double negotiation of attorneys, as agents for their clients, with each other and then the negotiation of attorney with client, in effect of agent and principal.

In addition, both in caucus and in joint session, the party's direct participation enhances brainstorming, i.e., the generation of ideas as possible options for settlement proposals. Brainstorming works best if the participants agree to refrain from critical judgment as ideas emerge, so that parties' creative efforts are not inhibited. A party is in a better position than his or her counsel to make suggestions that reflect business needs or might satisfy the party's interests.

Permitting the client to engage with the neutral in analyses of the risks and transaction costs of proceeding with litigation enhances the value that the neutral brings. While some clients might criticize their attorneys as being less than zealous for raising possible weaknesses, risks or costs, the client is not likely to fault the mediator for raising these issues and concerns.

Direct engagement of your client with the mediator increases the chance that "reality testing" by the mediator might have an impact on the client. This is helpful in facilitating change. Conversely, counsel can always correct any misimpressions formed by this discussion, either in or outside of the mediator's presence. On "BATNA" analyses, it is the client's values and interests that govern an analysis of the "best alternative to a negotiated agreement;" and thus, it makes sense for the client to discuss this directly.

5. Balk at Emotion

The informal and confidential nature of mediation communications creates an opportunity for parties to express emotion and share their perspectives in way that would be irrelevant or possibly transformation damaging in court. This results in greater satisfaction for the party and offers the chance of greater understanding settled between the parties. Advising your client not to speak may prevent critical comments, but the gain from a wholesale bar on emotional expression may be out weighed by the loss of client satisfaction and constructive impact of genuine emotion.

In one mediation, a broker, who had sat silently for an hour and a half, let loose his feelings of betrayal and frustration, communicating to a former customer that he had nothing to do with the losses in question and that this claim had a very negative impact on his reputation and career. The customer heard the message loud and clear, and a half hour later all claims against that broker were withdrawn.

Emotional expression by the other party can also be useful. "Venting" emotion, particularly if validated, frees parties to move on to constructive problem solving. It also offers a window into the concerns of that party, which counsel and your client can then seek to satisfy in their advance towards a deal

6. Misread Late Demand or Offer

Mediation takes time, and each mediation proceeds at its own pace. Counsel should not expect mediation to occur at the pace of an in-court settlement conference, with numbers emerging within minutes from the meeting's inception.

There are times when development of facts, reality testing, and interest exploration may take hours. Sometimes the mediator may choose to work on adjusting expectations rather than communicate to the parties the extreme—and discouraging—number suggested in a caucus. And, there are times that a party's negotiation style compels that party to begin with an extreme offer and demand, regardless of whether it is already mid-afternoon.

On these occasions, patience is advised. If much work was done prior to the first and late offer or demand, then once the ball starts rolling, movement can be generated and resolutions can occur, despite the negative message that the extreme position seems to communicate. Trust the mediator, if he or she encourages counsel and parties to keep going.

7. Lack a Person With Authority

The mediation process works best when all parties are at the table and can be directly affected by the discussion; when their own participation generates the "buy-in" mentioned above; when their needs and interests can be fully and immediately expressed and explored; and, when decisions can be made on the spot.

Sometimes keeping the decision-maker apart from the negotiation creates the opportunity to renegotiate, to play "good cop, bad cop." This separation, however, can lead to bad feelings in the party that is present with full authority,

or to a strategic withholding of fulsome proposals by the other party in anticipation of renegotiation, thus stalling meaningful negotiations.

Beyond this aspect, mediation involves transformation. Information learned during the process leads to adjustment and accommodation, to compromise as well as collaboration. If the decision maker is absent, he or she will not be affected by the process. Missing the mediation gestalt, the absent decision maker might not fully appreciate the explanations of counsel or the on-site representative. Political factors might inhibit the on-site representative from giving a full blast of reasons to adjust the party's position. Presence of the decision maker eliminates these problems.

8. Overlook Information Need

Do not overlook the other party's need for information.

Mediating early in the life of a case, before discovery, increases the settlement pot and enhances cost savings. Yet, it is often predictable that certain parties will not settle without certain information.

Personal injury matters typically require development of medical information. Coverage claims require development of policy-related information, or possibly information relating to the application for coverage. Property damage claims require development of proof of loss. Customer-broker securities claims require development of the profits and losses on an account, and might also require information about prior trading experience, e.g., in a suitability claim. Employment discrimination claims require, inter alia, development of mitigation efforts, current employment status and past compensation. Breach of contract claims require development of the contract terms, information relating to the breach and damages assessment.

Settlements occur based on certain assumptions. The mediation of most matters in which counsel participate will likely require development of information in order to satisfy the need of the other party before those assumptions are accepted. Conversely, your own willingness to resolve a matter under a certain set of terms and conditions is also based upon assumptions. To the extent information can be developed prior to the mediation to address these assumptions, one enhances the speed and likelihood of a resolution.

9. Give an Ultimatum

Prior to arriving at the first mediation session, prepared counsel and parties might have discussed their communication strategy, developed their case analysis, analyzed their BATNA, set their aspiration (best deal within the realm of realistic possibility) and assessed their "walk away." It is always advisable to keep these goals flexible and provisional, with the understanding that new information or insights gained from mediation might affect your analysis.

With all this preparation, it is still advisable to avoid making a "take it or leave it" demand. Negative consequences of the ultimatum include: (a) it can produce a reflexive reaction, needlessly ending discussions; (b) it hardens your own thinking, when additional information might fairly lead to an adjustment; and (c) it puts the party making the demand in a bind. Having made an ultimatum, one fights a credibility loss if it is not taken and one wishes to continue in the negotiation. But, walking out to preserve credibility may literally be cutting off your nose to "save face."

10. Misunderstand Mediator's Role

The mediator is a tremendous resource — a neutral third party, with effective facilitation skills, usually motivated to help parties reach a resolution. It is advisable to take advantage of what the mediator has to offer, and not to misunderstand what that is. Following are several roles not played by the mediator.

Judge. To arrive at a deal, you must convince the other parties, not the mediator. Some attorneys work hard to "spin" the mediator. While there is utility in helping the mediator recognize valid issues in a case, to aid in reality testing, this has limited value. Sometimes directing remarks to the mediator in joint session can deflect tension. Often, though, it makes sense to address comments generally to all present, or to direct them to the other parties. At a minimum, one must recognize that they are the real audience.

Policeman. The mediator can help set ground rules for the discussion, e.g., no interruption. But the mediator is a facilitator, and party self-determination is at the heart of the process. The best assumption is that the participants are autonomous adults, and that the mediator is not busy keeping everyone in line.

Director. Along these lines, while the mediator may suggest that parties break for caucus, address or defer certain issues, or undergo certain processes, because this is a party-driven process, counsel and their clients are free to make suggestions on the process or to express a preference not to undertake action suggested by the mediator.

Dealmaker. While the mediator might "coach" parties in caucus on the timing of offers and other negotiation strategy to keep the negotiation moving constructively, ultimately, the offers are from parties. Do not blame unacceptable proposals on the mediator.

Adverse party. Parties and counsel may confide in the mediator and take advantage of his or her unique position of having access to information from all parties and having a modicum of trust from all parties. Holding information back from the mediator can be counterproductive.

Providing information enables the mediator to find solutions that defensive parties, not privy to information from the other party, might miss.

Don't Forget

Attorneys have the power to enhance the effectiveness of mediations. Awareness of what not to do may lead counsel to take approaches designed to elicit constructive responses leading to a resolution of the dispute.

1. Fisher and Ury popularized this concept in Getting to Yes and other writings. Understanding one's BATNA or "best alternative to a negotiated agreement" enables a party to have a basis for judging whether a proposal is worth taking, or

whether the party would do better without this agreement.

2. In the transformative mediation model, the mediator's purpose is not settlement or problem solving, but fostering empowerment and recognition in the parties. See, Bush & Folger, The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition (Jossey Bass, Inc. 1994). ■

Simeon H. Baum, *litigator and president of Resolve Mediation Services Inc. (www.mediators.com), is a member of the FBA Board of Directors and former chair of the FBA's ADR section and former president of the SDNY Chapter. He has successfully mediated more than 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, and Donald Trump's $1 billion suit over the West Side Hudson River development in New York. For 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. He was selected for the 2005–2015 Best Lawyers and New York Super Lawyers listings for ADR, and as the Best Lawyers' Lawyer of the Year for ADR in New York for 2011 and 2014. He teaches on the ADR faculty at Benjamin N. Cardozo School of Law and is a frequent speaker and trainer on ADR.*

Editor's Note: This article, first published in the New York Law Journal ten years ago, continues to be relevant today. The principles being presented are applicable nationwide. Note that the National Association of Securities Dealers (NASD) is now Financial Industry Regulatory Authority (FINRA).

Assuring Fairness in Employment Arbitration: Do Employees Really Need the Arbitration Fairness Act?

by Roni Adil Radi Elias

Introduction

As litigation in courts has become more costly and time-consuming, arbitration has become an increasingly popular means of dispute resolution. This is true in employment disputes, where, over the last twenty years, more employers have required their employees to arbitrate disputes arising from the employment relationship. Some have questioned the fairness of this trend towards privatizing justice, arguing that arbitration provides procedural advantages to employers and improperly hides unlawful employment practices from the public eye. But, despite these complaints, mandatory employment arbitration keeps gaining momentum, raising questions about how best to protect employees' rights. One persistent approach to providing such protection is to enact legislation that limits mandatory employment arbitration, but, even after twenty years of trying, such legislation has not made its way through Congress. This essay considers whether such proposed legislation is necessary to protect employees and assure that their rights are protected.

The Expanding Use of Arbitration in Employment Disputes

During the 1980s and 1990s, judicial decisions in numerous states eroded the power of the traditional "employment at will" doctrine and made it easier for employees to assert legal challenges to the termination of their employment.[1] A resultant surge of employment litigation prompted employers to seek alternatives to costly litigation.[2] More and more employers required employees to contract to arbitrate all future employment disputes, including disputes that arose from statutory rights.[3] Often, these pre-dispute arbitration agreements were a condition of employment.[4]

Criticism of Mandatory, Pre-Dispute Arbitration

The rise of mandatory arbitration in employment led to substantial criticism by proponents of employee rights. Some critics contended that requiring employees to arbitrate claims arising from statutory employment rights undermined both the employees' individual interests, and the public interest. When a significant civil rights claim is resolved in a private forum, the individual employee loses access to the procedural rights available in a judicial forum; and, often, these procedural rights can be as important as the substantive ones.[5] Some pointed out that employers might have an unfair advantage over individual employees in an arbitral forum because the employer was a "repeat player" whom arbitrators might favor – consciously or unconsciously – as a source of future business.[6] In addition, the privatization of employment dispute resolution means that a decision made in an arbitral

forum does not make binding case law.[7] This is a particular problem where the employment dispute involves a civil rights claim.[8] There were numerous calls for the outright prohibition of pre-dispute arbitration agreements in the employment context.[9]

The Arbitration Fairness Act and Persistent Efforts at Legislative Reform

These calls for reform inspired numerous legislative initiatives in Congress. Between 1995 and 2010, members of Congress introduced 139 bills that would have prohibited mandatory arbitration entirely or sharply restricted the circumstances under which it could be used in the employment context, the consumer context, and other areas.[10] In 2007, 110 Representatives and Senators supported a proposed "Arbitration Fairness Act," which would have limited the statutory rights that could be subject to mandatory arbitration.[11] It never got out of committee, however.[12] Similar legislation proposed two years later attracted 127 cosponsors in both houses, but it failed to get beyond committee consideration as well.[13] After the election of President Obama in 2008, some reform advocates became optimistic about the process for passing such legislation, but that optimism was not realized.[14]

Despite these unrealized efforts at reform, a version of the Arbitration Fairness Act is still garnering at least some support in Congress. In 2013, Senator Al Franken of Minnesota proposed yet another "Arbitration Fairness Act."[15] Under this proposed legislation, any pre-dispute agreement to arbitrate employment or civil rights claims, and other kinds of claims, would be presumptively unenforceable.[16]

Alternative Approaches to Reforming Mandatory Employment Arbitration

On a theoretical level, the criticisms of mandatory arbitration are persuasive, and it is therefore easy to understand the legislative efforts aiming to controlling the abuse of mandatory arbitration. But there is a difference between theory and practice; and the extensive history of mandatory employment arbitration over the last two decades begs whether the practice of mandatory arbitration in employment disputes is necessarily unfair to employees. Substantial evidence suggests that it is not, however. According to a study by the United States General Accounting Office, in the securities trading industry, in which all brokerage houses uniformly require pre-dispute arbitration agreements with the employees (plus their customers), employees prevailed in arbitrations 55% of the time.[17] By comparison, in employment litigation in courts, employees prevailed less than 20% of the time.[18] Other studies have shown less favorable results for employees in arbitration as compared to litigation, and nuanced studies suggest that the success rate for employees depends upon the issues raised the employee is a highly-paid executive or an hourly wage worker.[19] But no studies show that employees are at a significant disadvantage in arbitrations or that arbitral forums are not effective in vindicating statutory rights.[20]

The most effective means of making employment arbitration fairer for employees is to reform it, not to prohibit it. During the 1990s, as the arbitration wave was gathering, various groups suggested principles that should be adopted by all employment arbitration tribunals to assure fairness to employees.[21] These recommended procedural guarantees include: (1) an arbitrator jointly selected by the parties and who is familiar with legal issues in the field; (2) simple, adequate discovery; (3) cost-sharing to assure arbitrator neutrality; (4) assuring that the employee can be represented by a person of his or her choice; (5) remedies equivalent to those provided in judicial forum; (6) a written opinion by the arbitrator; and (7) meaningful judicial review that focuses on legal issues.[22] When such procedural protections are in place, an arbitration can provide a fair forum in which employees can adjudicate their rights, including those arising from statutes and those arising from the terms and conditions of employment.

Conclusion

Two decades of legislative action have failed to produce a statute that will restrict mandatory arbitration in employment disputes. Those who question the fairness of such arbitration may be better served by focusing their efforts on the promulgation of uniform procedural standards for arbitration. Empirical evidence shows that arbitration is not necessarily a hostile forum for employees, and, with the right procedural safeguards, it can provide the same protection for employees' rights as a judicial forum, with a lower cost and speedier results. ■

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Endnotes

[1]Theodore J. St. Antoine, *Mandatory Employment Arbitration: Keeping It Fair, Keeping It Lawful*, 60 Case W. Res. L. Rev. 629, 631-32 (2010).

[2]*Id.*

[3]*Id.* at 633.

[4]*Id.*; *see, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (holding that a pre-dispute agreement to arbitrate was enforceable because it did not involve a waiver of any substantive rights and only involved an agreement on the forum in which those rights would be adjudicated); *Rembert v. Ryan's Family Steak Houses, Inc.*, 235 Mich. App. 118; 596 N.W.2d 298 (1999) (holding that a pre-dispute arbitration agreement was enforceable when it was executed as part of an employment application and when it applied to all disputes, including those arising from federal and state civil rights statutes).

[5]St. Antoine, *supra* note 1, at 633.

[6]*Id.* at 633-34; *see also* Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 Emp. Rts. & Emp. Pol'y J. 189 (1997).

[7]Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 Hofstra Lab. L. J. 381, 429-31 (1996).

[8]*Id.*

[9]*See, e.g.,* Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of* Gilmer, 14 Hofstra Lab. L.J. 1, 2 (1996); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration,* 1997 Wis. L. Rev. 33, 37; Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s,* 73 Denv. U. L. Rev. 1017, 1020 (1996).

[10]Thomas V. Burch, *Regulating Mandatory Arbitration*, 2011 Utah L. Rev. 1309, 1332-37.

[11]Arbitration Fairness Act of 2007, S. 1782, 110th Cong. § 4 (2007); Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. § 4 (2007).

[12]Burch, *supra* note 10, at 1334.

[13]Arbitration Fairness Act of 2009, S. 931, 111th Cong. § 3 (2009); Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. § 4 (2009); *see also* Burch, *supra* note 10, at 1334.

[14]St. Antoine, *supra* note 1, at 629-30.

[15]S.878, Arbitration Fairness Act of 2013, available at: https://www.congress.gov/bill/113th-congress/senate-bill/878/text (last visited July 30, 2015).

[16]*Id.*

[17]Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 58 (1998); Hoyt N. Wheeler, et al., Workplace Justice Without Unions 48 (2004)

[18]Maltby, *supra* note 17, at 46.

[19]St. Antoine, *supra* note 1 at 637-40 (discussing numerous studies that analyze the results of employment arbitrations).

[20]*Id.*

[21]*Id.* at 641-43.

[22]*Id.*

Using Alternative Dispute Resolution to Address Your Entertainment Disputes[1]

by Theodore K. Cheng

It has always been the case that the onus of enforcing intellectual property rights falls principally on the shoulders of the holders of such rights. Thus, when a case of unauthorized use is discovered (or is looming), the intellectual property owner usually must act quickly to stop the offending conduct, regain control over the property, and secure adequate compensatory relief. This is nowhere better illustrated than in the entertainment field. Consider these all-too-common scenarios:

- An author is working with a motion picture studio for the film dramatization of her novel under an option agreement that contains a non-disclosure agreement. While the film was in development, a rival studio established by former executives of this same studio suddenly releases a film that appears to be based upon the same novel.
- A photographer signs a license for the limited use of certain of his photos in connection with a Broadway musical. Due to the popularity of the show, several of his photos become iconic, and the show's producers have decided to begin selling show-related merchandise incorporating the photos, which is arguably outside the scope of the license granted by the photographer.
- Due to internal squabbling, the members of a rock band with a string of popular recordings splinters into two different groups, each purporting to be the legitimate continuation of the original band. A dispute erupts over who owns and controls the rights to the name and other intellectual property of the original band.
- A beverage company claims that a competitor is making several false and misleading statements in print and a national television advertising campaign that have both just launched. Retail beverage sales for the company have plummeted as a result.

In each of the above examples, it will usually be second nature to a litigator to immediately think about commencing a lawsuit and perhaps seeking a preliminary injunction or some other form of provisional relief. But the litigation forum has certain limitations that make seeking emergency relief impracticable, including the lack of real flexibility in designing a dispute resolution mechanism tailored to the dispute in question; the additional expense (in time and legal fees) of appearing before a decision maker with possibly little to no expertise in the subject matter of the dispute; the inability to maintain true confidentiality because of the public nature of the proceedings; and, perhaps most poignantly, the frustrations of having no control over the timing of the process and when relief can be afforded.

One way to minimize or eliminate the drawbacks of a court proceeding is to consider using alternative dispute

resolution (ADR) mechanisms to address the dispute. For example, to avoid the unwanted publicity associated with filing a lawsuit – particularly one involving prominent entertainment figures or entities – the parties could agree to participate in a pre-suit mediation. Mediation is a confidential dispute resolution mechanism in which the parties engage a neutral, disinterested third-party who facilitates discussion amongst the parties to assist them in arriving at a mutually consensual resolution. It is well suited to entertainment disputes where the parties often contemplate an ongoing relationship of some kind once the dispute has been resolved. Selecting the appropriate mediator – one who is well versed in mediation process skills, with perhaps some knowledge of, or prior experience with, either intellectual property and entertainment law and/or the particular entertainment industry – is oftentimes necessary to maximize the likelihood that a resolution can be achieved.

Because mediation is a non-adjudicative process, there is no judge or other decision maker who will determine the merits of the dispute. Rather, the mediator's role is to try and 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 of their own making. Although a mediator may be asked to recommend possible solutions, a mediator is not authorized to impose a resolution, but, rather, provides an impartial perspective on the dispute to help the parties satisfy their best interests while uncovering areas of mutual gain. In that respect, mediation can be particularly helpful in those situations where the parties either are not effectively negotiating a resolution on their own or have arrived at an impasse in their dialogue. Mediation is also prospective, not retrospective, in nature. While a litigation looks to past events to find fault and impose appropriate relief, a mediation focuses on the future to determine how the parties can best resolve the pending dispute and move on. In that respect, a mediation tends to be more cooperative, rather than adversarial, in nature.

If the availability of preliminary remedies is a consideration in how to address the most immediate concern of either stopping the offending conduct or maintaining the status quo, arbitration might be a viable option in some cases. Arbitration is another confidential dispute resolution mechanism in which the parties engage a neutral, disinterested third-party. But unlike the mediator, the arbitrator is tasked with determining the merits of the dispute, in a final and binding manner, according to rules and procedures that are agreed-upon by the parties. Arbitration can also resolve a broad array of disputes and is well suited to addressing entertainment disputes where the parties anticipate requiring that the decision maker have specific subject matter and/or industry expertise.[2] Here again, the selection of the appropriate neutral – even more so than in a mediation – is critical to achieving a just result because the parties typically want an arbitrator who can appreciate both the legal issues and the technical industry concepts involved.[3] Moreover, if properly managed by the neutral, the parties, and their counsel, arbitration can result in a dispute resolution process that is fair, expeditious, and cost-effective.[4]

The ability to secure a preliminary injunction or other interim relief in an arbitration setting is a valuable attribute for selecting that method of dispute resolution. Under the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, which governs most entertainment-related disputes, courts have routinely held that arbitrators possess the power to issue non-monetary remedies, and, in particular, to issue preliminary remedies before a hearing on the merits.[5] The power to grant interim relief has also been expressly granted by statute in 18 states and the District of Columbia, all of which have adopted the 2000 Revised Uniform Arbitration Act (RUAA).[6]

Currently, all of the major arbitration providers – the London Court of International Arbitration (LCIA), the International Chamber of Commerce (ICC), the American Arbitration Association (AAA), the International Centre for Dispute Resolution (ICDR), and JAMS – have included emergency arbitrator provisions in their default rules (although they each expressly allow for the parties to opt-out of these provisions through their arbitration agreements). For example, the AAA's Commercial Arbitration Rules, which parties often designate as governing copyright and trademark disputes, expressly authorize arbitrators to afford interim relief, "including injunctive relief and other measures for the protection or conservation of property and disposition of perishable goods."[7] More specifically, for arbitrations conducted under clauses or agreements entered into on or after October 1, 2013, the rules explicitly create a default procedure for the issuance of emergency measures of protection before the arbitrator on the case is appointed (or the arbitration panel is constituted). Under that procedure, the AAA will appoint a single emergency arbitrator to rule solely on emergency applications within one business day of its receipt of a written notice identifying the nature of the relief sought and the reasons for why the relief is required on an emergency basis. Within two business days of the appointment, the arbitrator will set down a schedule for consideration of the application and is vested with the authority to enter an interim order or award granting the relief.[8]

This procedure was effectively utilized in a contract dispute between Microsoft and Yahoo! over the timing of the transfer of the Yahoo! search capabilities and ad services to Microsoft's Bing search engine, in which the arbitrator entered an injunction within 18 days after holding an evidentiary hearing, with a federal court confirming that decision one week later.[9] Moreover, as alluded to in that case, which involved certain work to be performed in Taiwan and Hong Kong, if the offending conduct has an international dimension, a U.S. arbitration procedure also has the salient feature of affording enforcement overseas. One of the primary advantages of international arbitration

over court proceedings to resolve cross-border disputes is the ability to have the award recognized and enforced in most other countries in the world through the operation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).[10]

Of course, all of this depends on whether the parties have previously contracted to use ADR mechanisms to resolve disputes or can now prospectively agree, in the face of the pending dispute, to use ADR. Thus, if the parties have a written agreement incorporating an emergency arbitrator process, either explicitly on its own or by reference to one of the provider rules, they will have availed themselves of a means outside of the court system to handle disputes requiring some form of preliminary relief. Moreover, due to the collaboration that is needed for a mediation to be productive, the parties can separately choose to engage in a mediation in parallel to an ongoing arbitration proceeding at virtually any time before the final award is issued, and, in certain circumstances, even afterwards. All it takes is for the parties to give their informed consent to utilize the mediation process to resolve the issues that remain outstanding between them.

The use of ADR in entertainment disputes should not be overlooked. It has the potential to address many of their underlying concerns, such as maintaining confidentiality and arriving at an outcome in an expeditious manner, including securing preliminary remedies. Thus, it should always be an option for entertainment practitioners and intellectual property owners when deciding how best to resolve their disputes. Whichever form of ADR is employed, the hope that the dispute will be resolved quickly and cost-effectively, thereby permitting the parties to respectively move forward, should be incentive enough to at least give ADR serious consideration. ■

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Endnotes

[1]An earlier version of this article was originally published in Volume 26, Number 1 of the *Entertainment, Arts and Sports Law Journal*, (Spring, 2015), a publication of the Entertainment, Arts and Sports Law Section of the New York State Bar Association.

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

[3]Unlike in a court proceeding, the parties to an arbitration proceeding can choose the arbitrator based upon relevant criteria such as copyright or trademark expertise, prior experience in or with the industry, reputation, temperament, prior arbitrator experience, availability, and a host of other factors. Additionally, the option to choose three arbitrators as opposed to resting the decision on a sole arbitrator, if done with attention to factors such as cognitive diversity, can help reach a better, more just outcome. *See, e.g.*, Laura A. Kaster, "Why and How Corporations Must Act Now to Improve ADR Diversity," *Corporate Disputes* (Jan.-Mar. 2015) at 37 ("We also know that judgment is improved when there are diverse decision-makers with different points of view."); Chris Guthrie, "Misjudging," 7 Nev. L.J. 420, 451-53 (2007) (concluding that three arbitrators are less likely to be influenced by unconscious biases than a single decision maker).

[4]There are an increasing number of resources that now exist to assist arbitrators, parties, and their counsel in maximizing the advantages of the arbitration process, such as the Commercial College of Arbitrators' *Guide to Best Practices in Commercial Arbitration* (3d ed. 2014) and its *Protocols for Cost-Effective and Expeditious Commercial Arbitration* (2010) and the New York State Bar Association's *Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic Commercial Arbitrations and Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of International Arbitrations* (2010).

[5]*See, e.g., CE Int'l Res. Holdings LLC v. S.A. Minerals Ltd. P'ship*, No. 12 Civ. 8087 (CM), 2012 U.S. Dist. LEXIS 176158, at *13-15 (S.D.N.Y. Dec. 10, 2012) (confirming and enforcing arbitrator's interim award that provided for pre-judgment security and a so-called *Mareva-style* injunction preventing respondent from transferring any assets, wherever located, up to the amount of $10 million until that security is posted); *On Time Staffing, LLC v. Nat'l Union Fire Ins. Co.*, 784 F. Supp. 2d 450, 455 (S.D.N.Y. 2011) ("Prior to the rendering of its final decision, the Panel, in the absence of language in the arbitration agreement expressly to the contrary, possesses the inherent authority to preserve the integrity of the arbitration process to which the parties have agreed by, if warranted, requiring the posting of pre-hearing security."); *see also British Ins. Co. of Cayman v. Water St. Ins. Co.*, 93 F. Supp. 2d 506, 516 (S.D.N.Y. 2000) ("Courts in this Circuit have firmly established the principle that arbitrators operating pursuant to [the FAA] have the authority to order interim relief in order to prevent their final award from becoming meaningless."); *accord Pac. Reins. Mgmt. Corp. v. Ohio Reins. Corp.*, 935 F.2d 1019, 1022-23 (9th Cir. 1991) (same).

[6]*See* RUAA, § 8(b)(1) ("[T]he arbitrator may issue such

orders for provisional remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy, to the same extent and under the same conditions as if the controversy were the subject of a civil action.") (available at www.uniformlaws.org/shared/docs/arbitration/arbitration_final_00.pdf); *see also* Uniform Law Commission Legislative Fact Sheet – Arbitration Act (2000) (available at www.uniformlaws.org/LegislativeFactSheet.aspx?title=Arbitration%20Act%20%282000%29).

[7]AAA Commercial Arbitration Rule R-37(a) (Oct. 1, 2013).

[8]*See id.*, Rule R-38(b)-(e).

[9]*See Yahoo! Inc. v. Microsoft Corp.*, 983 F. Supp. 2d 310 (S.D.N.Y. 2013); *see also* Kim Landsman, "Microsoft Case Is Great Example of Emergency Arbitration," *Law360* (Dec. 13, 2013) (available at www.law360.com/articles/495144/microsoft-case-is-great-example-of-emergency-arbitration).

[10]*See* United Nations Commission on International Trade Law (UNCITRAL) (www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html); *see also* New York Arbitration Convention (www.newyorkconvention.org).

Vacatur: Some Practical Tips on Surviving the Finality of an Arbitral Award

by Marcia Adelson, Esq. and Joan D. Hogarth, Esq.

Independent studies demonstrate that the success rate of vacating an arbitration award is small. Courts prefer to take a "hands-off" approach to the arbitration process and often refuse to disturb the award.[1] One study shows that of the 277 legal challenges made to vacate awards over 10 months in 2004, only 14% of them were overturned. The study, updated in 2012 similarly reflected dismal numbers of successful vacatur ranging between 4% on the grounds of "manifest disregard" to 20% for arbitrators "exceeding authority". Arbitration is a contractual agreement to privately resolve a dispute by using a third party or neutral person(s) of the parties' choosing (the arbitrator) in a private hearing (the arbitration). The courts are loathe to meddle in a process the parties have agreed to use to resolve a dispute. "Courts are reluctant to disturb arbitration awards, lest the value of the arbitration method of resolving controversies is undermined." (*Matter of Goldfinger v. Lisker,* 68 NY2d 225(1986).

Arbitration "is now favorably recognized as an efficacious procedure whereby the parties can select their own non judicial forum for the 'private and practical' resolution of their dispute with maximum dispatch and at minimum expense." *Sprinzen, Matter of,* 415 N.Y.S. 2d 974 (1979). Thus, parties choose to use arbitration to resolve their disputes because they want expediency, confidentiality, cost efficiency and finality. The parties' expectation is not to have the dispute extended indefinitely post award as that would undermine the purpose of choosing arbitration over litigation. "The role of arbitration as a mechanism for speedy dispute resolution disfavors delayed challenges to the validity of an award" (Florasynth, Inc., v. Pickholz; 750 F 2d 171 (C.A.2 (NY) (1984) *citing Sheet Metal Workers Int'l v. Standard Sheet Metal,* 699 F.2d 48(9th Cir. (1983)). Courts support the benefits of arbitration and thus their decisions to refuse to vacate in all but a limited number of cases.[2] The process of overturning the award is known as vacatur. Vacatur is defined in Black's Law Dictionary as "a rule or order by which a proceeding is vacated."

The Narrow Federal and State Grounds for Vacatur

Courts refuse to undertake an expansive review of arbitral decisions and generally will uphold an award so long as the arbitrator "offers a barely colorable justification for the outcome reached." *(Jock v. Sterling Jewelers Inc. 646 F.3d 113 (*2011)).

The Federal Arbitration Act (FAA) section 10[3] provides the narrow grounds for vacating an award if the award was procured by corruption, fraud, or undue means; if there was evident partiality or corruption in the arbitrators; 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 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.

New York's Civil Practice Law and Rules (CPLR) provide similar grounds for vacating arbitral awards in cases that are purely New York state-based, e.g. collective bargaining agreement cases in labor arbitration. The CPLR section 7511 provides, in part, that the courts will vacate an award if the courts find that the rights of that party were prejudiced by the arbitrator's corruption, fraud or misconduct in procuring the award; or partiality; or exceeding his power or so imperfectly executing it that a final and definite award upon the subject matter submitted was not made; or failure to follow the procedure of this article.

Likewise, other states such as Texas with its Civil Practice and Remedies Code (CPRC) section 171.088, allow for the overturning of an arbitration award when the award is procured through corruption, fraud, or other undue means; the rights of a party were prejudiced by evident partiality by an

arbitrator, corruption in an arbitrator, or misconduct or willful misbehavior of an arbitrator; or where the arbitrators exceeded their powers; refused to postpone the hearing after a showing of sufficient cause for the postponement; refused to hear evidence material to the controversy.

"The FAA supports a strong presumption in favor of enforcing arbitration awards…the policy of the FAA requires that the award be enforced unless one of those grounds is affirmatively shown to exist." (*Wall St Assocs. L.P. v. Becker Paribas, Inc.27 F. 3d 845, 849 (2d Cir. 1994)).* Thus arbitration awards are rarely overturned. The court presumes that arbitration awards will be confirmed as a matter of formality. "[T]he confirmation of an arbitration award is a summary proceeding that merely makes what is already a final arbitration award a judgment of the court." (*Florasynth*).

Practice Tips for Advocates

So, should the advocate continue to seek to overturn an award in the face of national policy favoring arbitration? To answer categorically "No" is to ignore the fact that sometimes there are bad arbitrators applying bad principles and making bad decisions. Parties are entitled to recourse and are not compelled to accept a bad award as final. For example, an arbitrator assigned to a case with multiple issues, multiple rules, multiple venues and multiple parties, made a decision to join all parties and to hear the case under one set of rules in a single venue. The court ruled that the arbitrator had exceeded the authority given to him under the parties' arbitration agreement. The court vacated the award.[4] But the court remanded a case for confirmation at the lower court where the rules governing the arbitration called for delivery of the award within a time certain. Even though the parties "waited more than two years for a final decision", the court ruled that there was no showing of harm from the late award but that there would be harm if the case was not remanded to the lower court for enforcement of the arbitral award. The outcome, the court felt, would be the same regardless of when the decision was delivered.[5] It was in the interest of fairness and equity and under the respective vacatur statutes that the courts arrived at these decisions.

Therefore, the advocate who attempts to overturn an award is faced with (i) public policy that favors arbitration; (ii) very narrow statutes that increase the probability that vacatur will not be easy; and (iii) statistics that demonstrate that the percentage of successful challenges are extremely low. The advocate must be guided less by her zealousness to win a case for the client and more by the reasons arbitration was chosen in the first place. Moreover, she is now aware of how disfavored the request for vacatur is in the courts.

Historically, the goal of commercial arbitration was to quietly and privately resolve disputes among business colleagues who desired to foster and maintain their business relationships. They did not want to take their disputes to the public forum where it possibly could take years to be resolved and trade secrets being divulged. Attempting to vacate the award would bring the case back to the forum the parties chose not to use in the first place, i.e. the courts. The parties, thus, opted for independent third parties who knew the business and who would listen to the issues in dispute and render a fair and final decision.

The advocate should know that "the burden to show invalidity of any arbitral award is upon the party who brings a proceeding to set it aside." (*Caso v. Coffey*, 41 N.Y.2d 153, 391 N.Y.S.2d 88, 359 N.E.2d 683 (N.Y., 1976)) See also *Brown v. ITT Consumer Financial Corp*. How should she prepare to meet the challenges of the final award?

We offer these practice tips on how to identify and preserve legitimate objections thereby sparing the expense and exposure of a court hearing brought about by the failed attempt at vacatur.

1. Prepare a guideline detailing the arbitration procedures. Be as detailed as possible indicating, like any other contract, the venue, rule of law that applies, the scope of the arbitration, the issues to be arbitrated, the type of award and fees that would be covered and whether or not there are essential deadlines.
2. Include an appellate review process much like the one that is offered by some arbitration providers such as the American Arbitration Association (AAA). This preserves the right of the parties to obtain a review from the arbitrator's decisions before attempting vacatur in the courts.
3. Outline, with specificity, the qualifications or general nature of the arbitrator(s); skills and expertise; number of arbitrators to hear the case; etc. Advocates should be careful to avoid being too specific since many disputes may not take place for several years after an arbitration agreement has been drafted. By then, circumstances may have changed thereby making the guidelines defunct.
4. Be vigilant during the arbitration process and especially at the hearings in the unlikely event you desire to challenge the award. Know your case, know your client and get to know your opponents and the arbitrator.
5. Object to any departure from the rules of the agreed to process. For example if there is a belief that the opposing counsel or a party concealed evidence or new evidence is found subsequent to the rendering of an award, there must be some record to demonstrate that the concealed evidence was such that the arbitrator would have reached a different result if the evidence had been presented to the arbitrator. But discovery of new evidence is not normally grounds for vacatur. (*Sorrentino v. Weinman*, 2007 NY Slip Op 34423(U) (N.Y. Sup. Ct. 1/8/2007), 2007 NY Slip Op 34423 (N.Y. Sup. Ct., 2007))
6. Object, on the record, to the arbitrator's inclusion of issues that are not presented before him. A party to an arbitration waives his right to a vacatur of the award based on arbitrator misconduct where he had actual or constructive knowledge of the misconduct, and an opportunity to object, but failed to do so until after the award was rendered (Lindenhurst Fabricators v. Iron Workers Local 580, 206 AD2d 282 [1st Dept. 1994]). In this case, counsel was

VACATUR *continued on page 15*

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VACATUR *continued from page 12*

party to a discussion between the "fraternizing" discussions between the arbitrator and the opposing counsel. She failed to raise the issue then or even later when the hearing resumed. Counsel only did so after an unfavorable award.

7. Be ever cognizant of disclosures or failure to disclose. If you have actual or constructive knowledge of these disclosures or conflicts of interests, the advocate should immediately bring this to the attention of the arbitrator or the service provider. Do not wait or risk an award in your opponent's favor. If a party goes forward with arbitration and the party has knowledge of the arbitrator's bias, or facts that reasonably should have prompted further limited inquiry, it may not later claim bias based upon the failure to disclose such facts. (*Matter of Stevens & Co.[Rytex]* 34 NY2d 123, 129 [1974]). Additionally, arbitrators are under a continuous obligation to make disclosures. But the courts will not set aside an award for failure of an arbitrator to do so.
8. Object in a timely manner if the arbitrator is late in rendering the award and the parties had established deadlines indicating that time was of the essence.

Conclusion

"[C]ourts are obligated to give deference to the decision of the arbitrator".[6] Therefore, obtaining a vacatur of an arbitration award is very difficult. The odds of having the award vacated are very small and that is because the courts do not want to interfere in a private mutually agreed upon process to resolve a dispute – a process designed to be faster, less expensive and confidential. In the end, a zealous attorney is ethically obligated to advise her clients that the risks associated with vacatur are high. The client must be advised that he will have to live with the decision because it is highly unlikely that the award will not be confirmed. The conversation should be part of the initial case strategy and a conversation that is repeated throughout the process. To the extent that there are indeed prejudicial and harmful effects to an award because of how it was procured or the unethical inappropriate behavior of the arbitrator, parties seek vacatur on of those narrow grounds provided under the state and federal arbitration statutes. ■

Marcia Adelson, www.marciadelson-law.com, provides independent arbitration and mediation services specializing in commercial and employment disputes. She was a 2014 American Arbitration Association Higginbotham Fellow and is on the AAA Commercial, FINRA, NFA, NY Supreme Court Commercial Division, SDNY and NJ Superior Court panels.

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Endnotes

[1]*Vacating Arbitration Awards* by Lawrence R. Mills et al (2005); '*Exceeded Powers': Exploring Recent Trends in Cases Challenging Tribunal* Authority by Lawrence R. Mills and Thomas J. Brewer (2014). But see also, *A Model to Predict why Courts Vacate Arbitration Awards in Labor and Employment Disputes, by Helen L. Van Ph.D., Michael Jedel, D.B.A. and Robert Perkovish, J.D.* indicating that there is a rise in successful vacaturs for labor arbitration awards.

[2]In *Florasynth,* the Court in discussing the status of an arbitral award, noted that: "The award need not actually be confirmed by a court to be valid. An unconfirmed award is a contract right that may be used as the basis for a cause of action."

[3]Federal Arbitration Act 9 U.S.C sections 1-16 governs arbitration in Federal and State courts.

[4]*PoolRe Ins. Corp. v. Organizational Strategies, Inc.* No. 14-20433, slip op. (5th Cir. April 7, 2015)

[5]*Hasbro Inc. v. Catalyst USAA, Inc,* 367 F.3d 689 (US Court of Appeals, 7th Cir. (2004))

[6]*Goldstein v. Gross,* 2014 NY Slip Op 31125 (NY Sup. Ct. 2014)

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