THE RESOLVER

TURNING CONFLICT INTO RESOLUTION

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Message from the Section Chair: The Mediator as Liar?

by Jeff Kichaven

Lying is wrong, and mediators shouldn't do it.

Though it is remarkable that it must be stated, it must.

That's because, from time to time, some mediation group or other gets the bright idea that it's ok for mediators to lie to get people to make deals.

Like a bad penny, this idea turned up yet again earlier this year, in this notice I received from a significant mediation organization:

Lying for the Sake of the Deal (Ethics CLE)

Let's review what is a "bad" versus a "noble" lie and query whether a lie is different or distinguishable from partial truth, puffing, exaggeration, understatement or non-disclosure. Then let's review and remind ourselves about some of the ethical canons that are supposed to guide our actions and those of the attorneys who represent clients in mediation. Finally, let's work through some real-life examples and ask ourselves whether a lie has been committed or whether deception is in the air, and what the mediator's response should be and why. This is a highly interactive program that delves into: What is a lie? Is a lie a virtue or a vice? Are there ever circumstances where it's OK to lie?

If so, what are they? Are there times when the benefits of lying outweigh the consequences and visa (sic) versa? Ultimately, is it possible to define a standard of truthful-

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Message from the Editor: The Seven things you should know about this Edition of *The Resolver*

The Alternative Dispute Resolution (ADR) section of the FBA is delighted to present you with the spring 2016 edition of its newsletter. We are fortunate to have had submissions from across six (6) States, addressing multiple substantive areas of the law. In reviewing the 2015 ADR activities, we find that as a result of several high profile initiatives and actions, there has been a much broader public awareness of ADR. For example, the Consumer Financial Protection Bureau (CFPB) proposed increased protections for consumers involved in arbitration; the Supreme Court overruled several state court decisions refusing to arbitrate nursing home cases; the New York Times generated much buzz with its series on arbitration; storm insurance claims still were unresolved; police and community turned to mediation in the midst of the shootings across the U.S.; practitioners pondered ethics and confidentiality in mediation; and Tom Brady, the New England Patriots' quarterback, made arbitration news with deflated footballs.

The Resolver captures much more of the 2015 ADR conversation in the articles you are about to read. We have articles addressing patent, financing and international areas of law; and language, ethics, confidentiality and negotiations in ADR. Yet, as you read, there are only **seven things you need to know**.

1. **"Mind you language".** That is the cautionary note for users of the meditation process. **Theodore Cheng** tells us what a difference a word makes and how that word could undermine the success of a mediation.
2. When a business seeks more funds and a financer seeks more information, the tone and timing of the request has to be right or a bitter conflict could ensue. **Alexander Zimmer** explains the best approach to ensure continuity of good relations during these exchanges.
3. A 2015 industry report indicates that the costs of patent litigation could be as high as $2M for cases where the amount at risk is between $1M and $10M. **David Allgeyer and Steven Katz**, explain how it would be prudent to use a less expensive process to resolve patent disputes:

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ness to be abided for by all? If so, how does that standard get enforced? And by whom?

LUNCH TO BE PROVIDED FOLLOWING PROGRAM

The relativism and obfuscation in this notice obviously suggest that it is ok for mediators to lie, whenever the mediator thinks it is a good idea to do so. Otherwise, you wouldn't need a whole panel discussion. You'd need a sentence: "Mediators should not lie to people to get them to make deals."

In 2011, I wrote the following article for Law360 to warn lawyers of the ethical and practical problems they face when mediators lie to them, brag about it, and point with pride to reputations for doing so. As some mediators do. Since the advocates of deception do not rest, e reprint this article here to warn lawyers that they should screen for mediators who subscribe to this malignant philosophy, and reject those mediators.

Our Section, and the entire Federal Bar Association, stand for honesty and integrity in all areas of practice. Mediation included.

Use A Mediator, Get Disbarred

Law360, New York (July 26, 2011, 1:55 PM ET)—Can your mediator expose you to the risk of professional discipline for ethical misconduct? Yes.

Can you protect yourself from that risk? Yes. You are at risk because so many mediators are liars. Yes, liars. When you know that a mediator will even lie to your own client to bag a settlement, that lying is imputed to you, and lying to your own client can get you disbarred.

Fortunately, lying to your own client really isn't necessary to get cases settled. Honest mediators get cases settled too, and without exposing you to the risk of professional discipline. It takes only two questions to ferret out the liars and protect yourself from these risks.

Strange though it sounds, lying is a virtue in much of the mediation community. Its chief proponent is the late Judge John Cooley. He wrote an influential article in 2000, "Defining the Ethical Limits of Acceptable Deception in Mediation," www.mediate.com/articles/cooley1.cfm. Here's what he said:

> "That mediation's purpose is to resolve conflict says nothing of the means that may be used to accomplish resolution. And that brings into focus the second criteria for ethical rule design: The rule should not interfere in any significant way with the means by which the mediator or the mediation advocate can accomplish the purpose of mediation.
>
> "The question that must be addressed here is: May a good end justify any means? May truth be bent, colored, tinted, veneered, or hidden by a mediator or mediation advocate if the result is achieving a satisfactory resolution, or better yet, a win-win solution without harm to any party? In short, is there such a thing as a noble lie?
>
> "Our immediate instincts beckon us to answer 'no'; but the reality is that many of us lied to our children so long about Santa Claus — with no catastrophic results and no tinge of shame — that deep down we know that something like a 'noble lie' exists and it's okay. Thus, whatever truthfulness standard is adopted, it must accommodate, or at least acknowledge, the concept of the 'noble lie.'"

Thus ennobled, mediators believe they have the license to, well, to ... lie to your clients! As early as 2003, Max Factor III Esq. catalogued some of the flat-outs which have become "accepted deception" to many mediators:

1) "Defendant is so angry about your charge of Fraudulent Concealment, which he is prepared to spend on defense costs his entire self-liquidating insurance policy of $250,000, unless you drop the Fraud charge and publicly apologize for attacking his character!" [When — in fact — the defendant carrier has authorized the mediator to settle within policy limits, but implicitly promised the mediator that the insurance carrier uses mediators who can save it money.]

2) "I am authorized by plaintiff to give you my evaluation of the impeachment testimony I heard in a telephone call during the private caucus. I believe that, if true, defendant will not be found credible at trial! [When — in fact — the plaintiff's counsel has advised the mediator that plaintiff had just spoken to her strong impeachment witness, who now was wavering about testifying for fear of losing his job.]

3) "I believe the plaintiff is so emotionally outraged that unless he wins Big, he will carry on a dreadful program of adverse public attacks on your company's business practices! [When — in fact — plaintiff has advised the mediator in private caucus that he carries no grudge and will agree to make a confidentiality agreement in exchange for the defendant making a settlement offer in the dollar range the mediator has indicated privately is a reasonable compromise.]

Factor, "Thirty FAQ's for California Mediators on Ethical Minefields Involving Business, Construction, Employment and Real Estate Mediations," www.mediate.com/articles/factorM2.cfm

Many mediators aggressively hold themselves out as providing just this service. A simple Internet search will disclose just how many positively brag about it.

Here's the problem: A lawyer is not allowed to lie to her own client. California Business and Professions Code section 6106 provides: "The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension." Dishonesty with your own client is a fundamental violation of the duty of loyalty and extreme moral turpitude. No asterisk carves out dishonesty which is "noble."

When you know that a mediator will lie to your client to "close the deal," the mediator's lies become yours, too. The standard tort definition of "intent" includes both "purpose" and "knowing that the consequence is substantially certain to result." When you know that the mediator will lie and you select a mediator for the purpose of having that skill available, guess what happens when that mediator performs as advertised? You

have just, through the agency of the mediator, intentionally lied to your own client.

From an ethical perspective, it is no different than hiring an investigator to interview an opposing party who is represented by counsel. You can't contact the opposing party yourself. Rule 2-100, California Rules of Professional Conduct. You can't hire somebody to do it for you, either. Rule 1-120.

This deception strips resulting settlements of their integrity. Settlements are supposed to be based on the parties' honest assessments of the strengths and weaknesses of their claims and defenses; the risks and opportunities of litigation; and their interests, needs and values. You settle only if the available deal is superior to your Best Alternative to Negotiated Agreement (BATNA), as Roger Fisher and William Ury described in their 1981 landmark, "Getting to Yes." This is the benefit that mediation promises.

When a mediator lies in order to make you settle, you lose that benefit. There can be no honest assessment of a BATNA, no legitimate determination of whether an available deal is desirable. The lying mediator is neither facilitative nor evaluative. He is a despot, soviet, deceiving parties into settling on his terms, not yours. According to his view of fairness, not yours. His interests, needs and values. Not yours.

Can this seriously be described as a "win-win solution without harm to any party"? If the mediator was truly peddling incense and peppermints, why would he have to lie to get people to agree? Test this against your common sense: "This deal is so good, so right, so obviously wise, that we have to lie to you in order to get you to see its wisdom."

Clients have a constitutional right to a jury trial. Are we really satisfied with mediation that makes them forfeit that right through deception?

Do we really want mediators to make their own subjective judgments about settlements that are "right," "fair" or "good," and then lie, lie, lie to make those settlements happen? Outcomes will become arbitrary and unpredictable, and there won't be a thing you can do about it. After all, if your advice might stand in the way of closing the deal on the mediator's preferred terms, why shouldn't the mediator lie to you, too?

Fortunately, there is a better way. If a deal really is in a client's best interests, then we ought to be able to persuade the client by telling the truth. This is familiar terrain to litigating lawyers. You don't win a trial by lying to the jury. You win a trial by telling the jury the truth, and telling it in a way that makes sense and feels right to them. It's hard work, but lawyers do it all the time.

So it is with clients in mediation. If a deal really is in their interests, then we ought to be smart and insightful enough to figure out how to make the point honestly. Deceiving your own client is as practically unnecessary as it is ethically wrong.

How can you tell if you are at risk? It takes only two questions. Ask the mediator "Who is your client?" and "Do you use caucus-only mediation?"

"Who is your client?" If a mediator tells you that "his client is the deal," watch out. When the "ends" are an abstract idea such as "the deal," there is no limit on the "means" the mediator can use to achieve those ends. How could a lie, any lie, be taboo, if it helps seal the deal? In this perverse world, lying is not a betrayal, it is actually honorable.

It's far better if the mediator tells you that his clients are the lawyers, individuals, business entities and insurance companies who bring him their conflicts. In this world, it would be a profound betrayal of trust for a mediator to deceive people into making a deal.

"Do you use caucus-only mediation?" In caucus-only mediation, the sides never see each other. The mediator parks you at opposite ends of the hall and shuttles back and forth. When you never get to double-check things with the other side, it is much easier for the mediator to lie. While caucusing is one available and often helpful tool, the "caucus-only" model takes you from caucus to quarantine. That spells trouble.

The better approach is for the mediator to facilitate direct communications whenever possible, either through joint sessions with all hands present, or attorneys-only caucuses where you and opposing counsel can look into the whites of each other's eyes and make your own judgments about who is bluffing, who is telling the truth.

The quest to maintain ethical standards requires constant vigilance. Now is the time for lawyers to take a closer look at mediation, and make sure that what happens there starts to make them proud. ■

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David explains how to choose the right case and **Steven** explains how to carefully negotiate patent arbitration clauses.

4. As international arbitration continues to grow, the competition to become the U.S. arbitral seat of choice heats up. You may be surprised at which cities are vying for the number one spot. Read the article by **Messers Cashman and Lynch**.

5. Set the tone for a successful mediation by making a settlement demand early and reasonably. **Lisa Amato** shares her frustration when opportunities are lost because parties come unprepared to a mediation session.

6. A mediator should consider what ethical standards of conduct are being implicated when he uses any means necessary to reach an agreement in mediation. **Jeff Kichaven's** column is dedicated to this raging debate.

7. **"California confidentiality". Cameron Stout** explains the what, whys and wherefores of a development in ADR that is sure to affect the most predictable benefit of mediation – confidentiality.

Enjoy reading and if you have concerns, opposing views or you simply want to share your ideas, we have room for more articles. Simply respond to the next call for submissions. Happy reading! ■

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Mediating Troubled Financing Relationships

by Alexander J. Zimmer

Most financing relationships sometimes go smoothly and other times – not so much. When a client's financial needs or capabilities change, the consequences are bound to affect the client's relationship with its financing provider. In many cases, evolving needs and capabilities create stress on the existing relationship leading to uncertainty and conflict. How the client and the financer manage the rough spots, however long or short, affect the parties' long term relationship, each party's business operations, and ultimately its bottom line. An early intervention mediation is a conflict management tool that can save both the client and the financer time, stress and money before a difficult situation becomes intractable and hopelessly adversarial.

Mediation is a process that addresses trust and predictability in a business relationship, which are often the first casualties of continuing conflict between parties. Ordinarily, financers and clients respond to each other's requests for funds or information and adjust to each other's requirements. But, requests for more financial support or new and additional information can quickly disrupt a working relationship resulting in frustration and uncertainty. Advances to the client slow, or stop altogether, and the financer finds its window into the client growing increasingly opaque.

When conflict reaches this level, the client-financer relationship is at a tipping point. The account representative prepares to defend his now troubled situation, measuring reasonableness against the necessity of protecting the financer from loss. At the same time, the client begins to make plans to protect his business and provide for continuing operations. Both sides devote more and more attention to protecting and defending their positions at the expense of tending to the regular day-to-day business. Inevitably, anxiety and the tendency to assess blame grow.

While the goal is to find a workable solution which can be sustained over time, these circumstances make that goal very difficult to achieve. In haste to dispel concern about the future, either party may agree to proposals that are unrealistic or have little chance to succeed in redressing the mutual problems. Or, the parties may take the other extreme and propose solutions that will work for one but not the other. The costs of failure are high. The financer stands to lose:

- Time and productivity in its accounts management department;
- Time and productivity in its work-out group;
- Legal fees and expenses of both its internal legal department and outside counsel;

- Principal and profits on the financing;
- Reputation costs; and
- The relationship with the client.

The client stands to lose:

- Time and productivity in responding to the financer's demands for information;
- Efficiency in operations due to diminished cash flow and attention diverted from operations;
- Profits from disrupted operations;
- Relationships with suppliers and customers from disrupted cash flow;
- Financial reputation; and
- Relationship with the financer.

A mediation conducted by a knowledgeable mediator can salvage the situation and help the parties reach an agreement that helps each of them. Here's how.

Simply put, mediation provides a neutral forum in which the client and the financer, each have an opportunity to describe their own view of the circumstances and to find a workable solution. The mediator facilitates the discussion and helps the parties explore options for resolving their common problem – the troubled financial relationship. While each party is able to present its own needs and concerns, an experienced mediator can help the parties evaluate solutions realistically without making judgments or assessing fault. The nature of the mediation process accommodates the difficult issues that characterize troubled financial relationships.

Before a financing relationship becomes non-performing or moves to "work out", mediation gives the parties a chance to pause, reassess and reach a workable agreement for resolving the situation. Although every troubled relationship is in some ways unique, four issues are always present: (1) Diminishing trust; (2) Growing uncertainty, loss of predictability; (3) Narrowing perception of common interests; and (4) Increasing conflict between freedom of action and cooperation. The mediation process ameliorates each of these issues by: (1) Fostering better communication between the parties; (2) Encouraging reciprocal understanding of each other's interests; and (3) Offering a neutral view of the situation and options.

Simply beginning mediation demonstrates a willingness to address a problem and helps repair the loss of trust. Typically, each party will describe what the other did that "caused" trust to erode. An experienced mediator can help the parties to communicate better the reasons they took actions and to see how they were perceived by each other. As communication becomes more precise, the parties have a greater chance of making themselves better understood and of understanding each other. Improved communication is the first step in articulating and identifying interests and reaching common ground.

Predictability is fundamental to a working financial relationship. The client needs to know that its needs will be met and the financer needs to know that the client will do what is expected. Neither party likes to be surprised. The unexpected is often the precipitating cause of conflict. One has only to look at the disruption caused by the recent Great Recession to see how businesses seemed compelled by events to act. The narrative of the mediation exposes the reasons for the actions behind the loss of predictability which characterizes a troubled financial relationship. By nurturing improved communication and articulation of each other's situation, the mediator can help the parties see how they share great concern over the issue of predictability.

The mediation dialogue will address the narrowing perception of common interests caused by the conflict. Loss of trust and predictability drive the parties into a defensive posture creating more and more distance from each other. From this perspective, vision of common interests diminishes. The mediator helps the parties see how poor communication, or outside events, may have contributed to the current conflict. Better understanding of each party's interests helps define the problem as mutual and creates motivation to find a shared solution.

Ultimately, the parties must confront the tension between the desire for freedom of action and the necessity of cooperation. A sustainable solution requires agreement on the balance of these competing drives. The mediation process will have provided the base from which agreement is possible. Improved communication and mutual understanding permit full exposition of the elements of the shared problem. Working with these tools the parties can explore options for resolving their conflict. As a neutral the mediator can help the parties test alternatives against considerations presented by the reality of the situation.

The benefits of adopting an early intervention mediation as suggested here are many. Experience shows that parties who reach agreement through mediation are likely to adhere to its terms. Both the client and the financer save time and avoid escalating risks inherent in fruitless "negotiations" between parties that are frozen in defensive positions. Both sides can save legal costs which invariably accompany a deteriorating financing relationship. The relationship is far more likely to be saved than if the conflict devolves into "work-out" or litigation. The benefits of implementing an early intervention mediation program far outweigh the risks of allowing troubled financing relationships to continue their costly, all too familiar course. ■

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The Growth and Acceptance of International Arbitration

by Michael Cashman and James Conlan Lynch

For over a decade, the use of international arbitration has experienced significant growth as an accepted practice in cross-border dispute resolution. Most impressive in this expansion and acceptance is that it has not been limited to a particular region, but rather spread across the world, both in countries of traditional acceptance, and now in new areas and regions. This fact is well illustrated by the increased caseloads of established arbitration institutions and the rise of new ones. From 2000 to 2012, statistics from nine major arbitration institutions showed an increase of 45.5% in case filings.[1] The International Centre for Dispute Resolution ("ICDR"), the international branch of the American Arbitration Association, reported 1,050 cases filed in 2014, more than doubling its filings in 2000.[2] Similarly, the International Chamber of Commerce ("ICC") reported a 37% increase of filings since 2000, with the institution reporting 791 international case filings in 2014.[3]

The use and acceptance of international arbitration in the United States accounts for a significant part of this new growth. Of the 2,120 parties to file cases with the ICC in 2013, a higher percentage of US companies were involved than any of the other 137 countries.[4] The United States, as well as the rest of North America, has experienced sustained growth in its rate of arbitration as a favored method for international dispute resolution. Significantly, this trend is projected to continue for at least the next five years.[5]

A New Trend Emerges Within The United States

As international arbitration rates experience exponential growth worldwide, a new trend has emerged within the United States. While New York City has long dominated as the most popular seat for international arbitration in North America, both Miami and Houston are now competing for the top spot.

As a seat of international arbitration, in recent years Miami has been host to significant, high-profile international arbitration matters and seen steadily increasing numbers of arbitration filings. Between 2010 and 2013, ICDR filings in Miami more than doubled.[6] In April 2014, the International Council for Commercial Arbitration's Congress (ICCA's Congress) chose Miami for the first time as its conference venue. The last time the ICCA met in North America was in New York City in 1986. Miami is being increasingly viewed as a top seat for Latin American disputes, for example, it was chosen as the location for a multi-billion dollar dispute over the expansion cost of the Panama Canal. Selecting Miami as the location for these high-profile events both reflects its capability to handle significant issues and signals that Miami has joined the ranks of cities like New York, London, Paris, and Hong Kong as an established venue.[7]

Similarly, Houston has experienced its own development as an important seat for international arbitration. Houston is now one of the most popular international arbitration seats in North America, particularly in construction and energy disputes. Among its credentials, Houston is considered to have unparalleled expertise for both gas and oil disputes.[8] Due to this growing recognition, Houston, like Miami, has become a major contender for dispute resolution in North America.

Recognizing the growing acceptance and popularity of international arbitration in the South and Southeast, the large metropolitan hubs of Atlanta and Charlotte have created international arbitration societies. Atlanta is poised to join the ranks of Miami and Houston, garnering seventeen ICDR filings in 2013 and has been ramping up its efforts to attract new business. In 2015, the city opened the Atlanta Center for International Arbitration and Mediation, a state-of-the-art arbitration facility constructed within the $82.5 million Georgia State University College of Law building. Additionally, Georgia has taken a page from Florida's book and aligned its state statutes with international commercial arbitration rules. Other factors that suggest Atlanta's future as a significant venue include its arbitration friendly infrastructure, its local support for international arbitration, and the fact that it is one of the world's most accessible cities. Likewise, Charlotte is a developing venue with the qualities of the top established locations for arbitration. In 2014, Charlotte founded the Charlotte International Arbitration Society ("CIAS") to provide cost effective access to international arbitration in a convenient location in order to accommodate the city's growing international trade. Founders of CIAS believe and anticipate that Charlotte companies, and other companies in the region, doing business overseas will welcome the chance to utilize Charlotte as a venue.[9] Moreover, with the growth of international business in the Carolinas, it is believed that CIAS will play an essential role in the integration of the Carolinas into the global economy.[10]

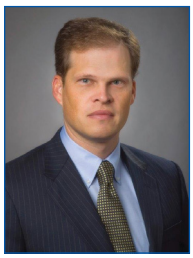
Implications of Southern Trend

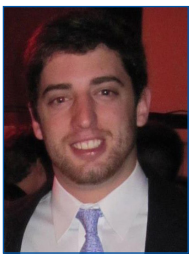
If this shift to South and Southeast forums holds, there will be significant development throughout those regions in the practice of international arbitration. Such development carries certain implications. International businesses throughout the South and Southeast unfamiliar with the advantages of international arbitration will need competent legal counsel to charter a course in these new waters. To stay competitive in such an environment, they will need counsel skilled in the drafting of international arbitration clauses, and familiar with their business, the rules and procedures of the major international arbitration forums, and the local laws of the seat of the arbitration. Consideration of these factors will assist them in selecting a venue that best suits their needs.

Conclusion

International arbitration can be complex, but yields many

benefits: efficiency, enforceability, flexibility, finality, and neutrality. For these reasons, it has sustained solid growth through the world, and more recently, substantial growth in South and Southeast United States. As the world becomes flatter, and foreign trade becomes more prevalent, we can expect to see a continued rise in these regions as businesses recognize they have growing options for resolving their international disputes. ■





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Endnotes

[1]Mark Bezant, James Nicholson, Howard Rosen, *Trends in International Arbitration: A New World Order*, FTI J. (Feb. 2015), http://www.fticonsulting.com/insights/fti-journal/trends-in-international-arbitration.

[2]*Compare* Dr. Markus Altenkirch and Nicolas Gremminger, *Parties Preferences in International Arbitration: The Latest Statistics of the Leading Arbitral Institutions*, GlobalArbitrationNews (Aug. 05, 2015, 9:00 AM), http://globalarbitrationnews.com/parties-preferences-in-international-arbitration-the-latest-statistics-of-the-leading-arbitral-institutions-20150805/, *with* Bezant, *supra* note 2.

[3]*Id.*

[4]Craig Tevendale and Daniel Waldek, *The ICC 2013 Statistics – Another Busy Year for International Arbitration*, Herbert Smith Freehills Arbitration Notes (Sept. 9, 2014, 3:02 PM), http://hsfnotes.com/arbitration/2014/09/09/the-icc-2013-statistics-another-busy-year-for-international-arbitration/.

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[6]*See* Jose M. Ferrer, *A New Destination for International Arbitration*, Law360 (April 3, 2014, 11:32 AM), http://www.law360.com/articles/524515/a-new-destination-for-international-arbitration.

[7]*Id.*

[8]Glenn P. Hendrix, *International Arbitration in the United States: The Atlanta Option,* at 1 (Nov. 4, 2014), *available at* http://arbitrateatlanta.org/wp-content/uploads/2014/11/International-Arbitration-in-US_The-Atlanta-Option.pdf.

[9]CIAS, *Charlotte Joins New York, Miami, and Atlanta As a Premier International Arbitration Venue with Creation of the Region's First International Arbitration Society*, Yahoo Finance, (Jan. 30, 2015, 1:20 PM), http://finance.yahoo.com/news/charlotte-joins-york-miami-atlanta-182000072.html (*quoting* Mica Nguyen Worthy, Secretary of the CIAS and litigation attorney with Cranfill Sumner & Hartzog LLP).

[10]*Id.*

Being Mindful of Language in Mediation

by Theodore K. Cheng

As is true in conducting mediations and generally in life, more often than not, how you say something is equally as important, if not more so, than what you say. Towards that end, mediators should develop, and counsel and their clients should expect from their mediators, a sensitivity to how language is used in the mediation process. In particular, all participants in a mediation should avoid the use of labels that diminish mediation as an alternative dispute resolution process.

To review, 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. Selecting the appropriate mediator – one who is well versed in mediation process skills, with perhaps some knowledge of, or prior experience with, the subject matter of the dispute – 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.[1]

Being mindful of the language that is used in this process can have a significant impact on the experiences of the participants who agree to undertake a mediation. For example, take the pre-mediation conference call. As the name suggests, this call typically takes place before, and in preparation for, the mediation session. One subject that is usually on the agenda for that call is whether there is any information or documents

that the participants believe would be helpful to exchange in order to have a more meaningful and productive session. How often have we heard either the mediator or counsel refer to this exchange as "limited discovery"? This likely happens more often during court-annexed mediations because the attorneys are already in a litigious mindset, thus tending to refer to apparent equivalents in that procedure when discussing the mediation process. Such nomenclature should be avoided in a mediation proceeding because the limited exchange of information and documents in connection with a mediation is quite unlike discovery as contemplated under the U.S. legal system. The purpose of full-blown discovery is to comprehensively request information and documents that might conceivably bear on the claims and defenses interposed in the dispute (and perhaps reveal previously unknown claims and defenses). By contrast, the exchange contemplated in connection with a mediation encourages counsel and their clients to work together cooperatively and share information and documents that will assist them in both conducting a more realistic assessment of the value of the dispute and helping to make the mediation session as productive as possible. Framing this part of the process as a "limited exchange" would help dispel the notion that it is anything like the discovery associated with a court proceeding.

Moreover, counsel often raise any number of objections to engaging in such a limited exchange such as burden, time, and confidentiality.[2] But it is more than likely that the specific information and documents in question will eventually be produced during the formal discovery process if the dispute ever finds its way into the court system. This, of course, is self-evident if the mediation is being conducted under a court-annexed program. Indeed, if the limited exchange of information and documents ultimately leads to a resolution, the clients will have saved themselves from having to engage in the almost assuredly more expensive and invasive full-blown discovery required under court procedure rules. Thus, declining to engage in this limited exchange only delays the inevitable.

Opportunities arise during the joint session as well. After the mediator handles introductory and welcoming remarks that set the tone and the ground rules, participants are typically afforded, in the first instance, the opportunity to direct comments at each other. More often than not, particularly in commercial mediations, this is handled by counsel representing the participants. In those cases, how often have we heard mediators or counsel refer to this as making an "opening statement"? Using that terminology reinforces the notion that the participants are locked into something that is akin to a trial in a courtroom – an adversarial setting where they (or, rather, their counsel) attempt to persuade the mediator of their positions. With that mindset, they are not likely to have much success persuading the other participant of their contentions, as that has usually been the tenor of the dialogue before they agreed to mediate the dispute. Moreover, referring to this opportunity as an "opening statement" largely mischaracterizes the (perhaps) unique chance to have one participant directly address the other(s) in hopes of communicating something meaningful and, thereby, contributing to the possible resolution of the dispute. Perhaps a more palatable term might be "opening remarks," thereby having this process naturally flow from and complement the introductory and welcoming words of the mediator.

For the same reason, it is probably a better practice to avoid referring to the participants in the mediation – counsel or their clients – as "parties," "opposing parties," or even "sides." Again, using such labels only serves to heighten the conflict and reaffirm the mistaken premise that a mediation is somehow a combative environment. To the contrary, a mediation is meant to be a collaborative process where participants seek to engage in a dialogue – facilitated by the mediator – that will hopefully uncover areas of mutual gain and alternatives to the straightforward resolution of finding one participant in the "right" and the other(s) in the "wrong."

Much about resetting the mindset here falls upon the mediator, who, after all, is the one participant in the mediation who is not entrenched in the dispute itself or enamored of the contentions so as to be potentially blinded by them.[3] Two of the most powerful skills that a mediator brings to the table is the ability to listen, and then to reframe what she hears. When those opportunities arise, the mediator can assist the participants by avoiding the use of litigation-laden labels and mindfully using language that elevates and respects the process. Although beyond the scope of this article, the thoughtful use of language becomes even more paramount when the interactions between the participants and/or the mediator raise cross-cultural and implicit bias concerns. Those considerations strike at the heart of how participants in a mediation receive and process information and, more generally, communicate with each other and with the mediator. Mediators who either are alert to these issues or can anticipate them arising will be in a much better position to provide a meaningful and beneficial experience for the participants. Being mindful of language and avoiding unnecessary labels is something to which all participants in a mediation should aspire. ■

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Endnotes

[1]*See* Theodore K. Cheng, "Using Alternative Dispute Resolution to Address Your Entertainment Disputes," *The*

Resolver (Fall 2015), at 9, available at http://www.fedbar.org/Image-Library/Sections-and-Divisions/ADR/Resolver-Fall-2015.aspx. There are also a number of organizations that provide more information on mediation as a dispute resolution mechanism. *See also* New Jersey Courts (njcourts.judiciary.state.nj.us/web0/civil/medipol.htm); New York State Unified Courts System (nycourts.gov/ip/adr/What_Is_ADR.shtml); National Academy of Distinguished Neutrals (nadn.org/faq-adr.html); Mediate.com (mediate.com/about); International Mediation Institute (imimediation.org); American Arbitration Association's Mediation.org (mediation.org); JAMS (jamsadr.com/adr-mediation).

[2]Whatever confidentiality concerns the clients may have are usually addressed by the general principles of confidentiality that cloak mediation processes, along with any additional confidentiality and protective order agreements the clients choose to execute amongst themselves.

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

Using Arbitration to Resolve Patent Disputes: *The Right Thing for the Right Case*

by David A. Allgeyer

Patent litigation can be really expensive. The 2015 Report of the Economic Survey for 2015, for example, reports an average cost of $873,000 for patent cases with less than $1 million at risk and $2 million for cases with $1 to $10 million at risk. Many patent disputes cannot bear that sort of expense.

In many areas of commercial law, parties have turned to arbitration to save time and money. The same is true for the right sorts of patent-related disputes.

Statutory basis

Patent arbitration did not begin well, however. Some courts found patent issues were "inappropriate for arbitration proceedings and should be decided by a court of law, given the great public interest in challenging invalid patents."[1] But Congress enacted 35 U.S.C. § 294 to allow parties to save time and money by arbitrating any contractual dispute relating to patent validity or infringement.

The arbitration is governed by the Federal Arbitration Act. The arbitrator must consider defenses under 35 U.S.C. § 282. These include (1) non-infringement, (2) invalidity, (2) unenforceability, (3) failure to comply with 35 U.S.C. §112 – including, for example, failure to meet written description, definiteness, and enablement requirements, and (4) failure to comply with any requirement of 35 U.S.C. § 251, which among other things prohibits broadening the scope of re-issued patents.

Interestingly, the arbitration award binds only the parties, but the award is not enforceable until it is provided to the Director of the Patent Office.[2] It is noted as part of the prosecution record of the patent.[3]

What to arbitrate

Nothing prevents the parties from agreeing to submit any patent dispute to arbitration. But agreement is unlikely after a dispute has arisen. One party or the other is likely to see an advantage to a forum they like, want Federal Circuit review of a disputed claim construction, or see some other advantage to them in litigation. Thus, patent disputes arising from contractual arrangements like patent licenses, employment agreements, or development agreements are most likely to be arbitrated.

How to assure arbitration

To assure a patent dispute can be arbitrated, you will need to provide for arbitration in your contract. It is almost always better to have an arbitration provider named in your arbitration clause. While this means administrative fees, it also provides a comprehensive set of rules, case administration, resolution of questions concerning impartiality of the arbitrator, and related advantages.

To provide for AAA arbitration, for example, start with the AAA model commercial clause and then add a few basics. You will get this:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules and the AAA Supplementary Rules for the Resolution of Patent Disputes for any patent issues submitted. Judgment on the award rendered by the arbitrator[s] may be entered in any court having jurisdiction thereof. The arbitration shall be before a [single arbitrator] [panel of three arbitrators] in [insert city].

This will get you to arbitration without fail and give you

meaningful input into who the arbitrator will be. Usually you will provide for a single arbitrator to save money. But you may decide that if more than $1 million is in controversy, for example, you will provide for a panel. You can build that into the clause.

Because arbitration is a creature of contract, you can also include just about anything else in the clause to which you and the other side agree. This can include the qualifications of the arbitrator, a deadline for the hearing, or how much discovery will or won't be allowed.[4]

But be careful. Often you are better off with a fairly general clause, the AAA's (or other provider's) rules, and an experienced arbitrator who can help fit the process to the dispute. Whatever you do, don't just copy the last arbitration clause someone in your office used. An ill-conceived clause could lead you to court to resolve disputes about the arbitration itself. At that point you will have lost some of the time and money you hoped to save by arbitrating instead of litigating.

Embrace the flexibility

Arbitration is flexible. Working with an experienced arbitrator, you can craft a procedure for the specifics of your dispute that will save time and money, while providing a thoughtful and informed decision. Here are a couple of examples from recent cases.[5]

In a product licensing dispute, the key was how three claims of the licensed patent were to be construed. The licensor, of course, had broad constructions. The licensee had narrow constructions that would exclude its new, improved device. To save time and money, that was the only part of the dispute we initially addressed. Focused discovery was conducted, mostly about the specifics of the design of the new product. After briefing, a Markman presentation was made, and a decision was rendered construing the claims. That resolved the matter. The party whose construction was not adopted was undoubtedly unhappy with the result. But the amount spent to get to resolution was modest and in line with the amount at stake. The process fit the problem.

In another licensing matter involving a process for producing biologic material, the real dispute was not the construction of claims, but rather the specifics of the process the licensee used to make biologic material. If it infringed the claims of he involved patent, license payments were due. Thus, the focus was on exchange of information and, importantly, expert analysis of the process used as compared to the claimed process.

There were some disputes as to the scope of certain claims, but those were most readily determined in the context of the entire situation. There was also the issue of how many products subject to the royalty payments were produced, if any.

The parties exchanged critical documents and agreed to limit depositions to a total of 20 hours per side, which could be used for any witnesses they wanted to depose. They could come back to ask the arbitrator for more time if needed, but as I recall, they didn't. The depositions were efficient and focused.

The hearing took about four days, including testimony from knowledgeable experts on both sides. The evidence was presented to a decision-maker who was familiar with patent law and had years of experience learning about technical matters from experts and analyzing the results.

Contrast that to a jury trial that would have taken much longer to get to hearing, sprinkled with plenty of motions along the way. The hearing would have lasted twice as long. The decision would have been made by folks who did not have the background and experience to bring to bear that the arbitrator did. Then would come the post trial motions and appeal. Instead, the parties had a final decision in less than a year from the date filed.

Again, the losing party probably was not completely enamored with the arbitration. But any adjudicative process has to have a winner and a loser. Even the losing party would have to concede that it made a lot more sense to have a more efficient and affordable process, particularly given the amounts at stake.

Finality

Arbitration is efficient because the decision of the arbitrator is final. But this may also be a reason for concern. Arbitration awards are generally subject to being overturned or modified only if there is significant procedural unfairness or misconduct. The award is not reviewed to see if factual determinations were clearly erroneous or legal conclusions were in error.

But, if that is a concern, flexibility comes back into play. The major arbitration services allow the parties to agree to an arbitral appeal to provide review by a panel of appellate arbitrators. For AAA arbitrations, the award may be overturned for "(1) an error of law that is material and prejudicial; or (2) determinations of fact that are clearly erroneous."[6] Other providers offer a similar standard of review.

Note, however, that the parties must agree to the optional appeal process. So you must include that in your arbitration clause if you want an appeal.

The right case

Arbitration can be the perfect way to fit the process and cost with the amount at stake. But you'll need to plan ahead and put the right arbitration clause in your contract to take advantage of the flexibility arbitration can offer. ■

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Endnotes

[1]Beckman Instruments, Inc. v. Technical Developments Corp., 433 F.2d 55 (7th Cir. 1965).

[2]35 U.S.C. §§ 135(f), 294(d), and 294(e).

[3]35 U.S.C. §§ 135(f), 294(d).

[4]For a way to explore the possibilities, go to the AAA ClauseBuilderÒ tool at clausebuilder.org.

[5]Arbitrators must keep arbitrations confidential, so the descriptions of the cases are necessarily cryptic and lack identifying characteristics.

[6]AAA Optional Appellate Arbitration Rules. (Available at adr.org.)

Negotiating Arbitration Clauses For Patent Disputes

by Steven Katz

Patent litigation is expensive, typically ranging from $3 million to $5 million dollars for a typical single patent case with over $10 million at stake.[1] Therefore, arbitration would appear to be an attractive alternative given its promise to resolve disputes at lower cost. The problem is that the complexities of patent litigation can easily drive up costs, whether in court or in a private arbitration.

Patent litigation often involves multiple accused product and multiple patents, each with multiple patent claims and each presenting numerous "claim construction" disputes concerning the meaning and scope of the patents. Typically, a patent defendant may raise numerous potential defenses, including those related to non-infringement, invalidity, unenforceability, contractual defenses, and equitable defenses (such as estoppel). Patent cases often require numerous fact and expert witnesses, including technical experts and accountants, economists, and sometimes survey and market experts to address the issue of damages. If an arbitration were to address all these issues without significant constraints, the costs would likely rival that of a district court litigation.

For this reason, care must be taken when drafting arbitration agreements if the benefits of arbitration are to be realized.[2] Parties should be hesitant to accept boilerplate arbitration clauses that merely choose an arbitration rule set (e.g., the rules of the American Arbitration Association, JAMS, or CPR) and that merely state that all issues related to one or more patent disputes shall be arbitrated. Such a clause may very well provide all the downside of arbitration with little of the upside. This article discusses some of the issues that the parties should consider addressing in the arbitration clause.

Qualifications of the Arbitrator

The arbitration agreement may specify the qualifications of the arbitrator or panel of arbitrators to better ensure a reasoned and sensible resolution of a dispute. The parties may, for example, require the arbitrators to have some familiarity and expertise in the underlying technology, business, or market. That said, when deciding on the qualifications for the arbitrator, the parties should keep in mind the value of a judicial mindset and judicial temperament. A jurist who day in and day out must objectively determine which side in a dispute is right brings a different skill set than an advocate that zealously and unwaveringly represents a client's position. Thus, a retired judge with some experience and comfort in resolving patent disputes has much to offer even without the technical depth and breadth of a longtime patent practitioner. In addition, the required technical qualifications of an arbitrator should not be so exacting such that the arbitrator patent pool is too small to actually retain a desired arbitrator or arbitration panel.

The Scope of the Arbitration Award

Patent damages are typically in the form of a reasonable royalty based on a legal fiction, and are thus difficult to quantify and thus create a significant element of uncertainty. The royalty is based on a "hypothetical negotiation" between the parties that did not take place and, more significantly, would in many circumstances never have taken place in the real world. Many patent plaintiffs initially propose damages theories based on a tenuous economic underpinning or that rely on questionable factual inferences. An experienced arbitrator or arbitration panel may well be a significant improvement over a jury in resolving such an open-ended patent damages dispute. However, preparation of an open ended damages case will be expensive, whether for court or for arbitration, and the parties can increase predictability and reduce arbitration costs by placing parameters on the damages award in the arbitration agreement itself. For example, the parties can agree to a royalty rate or a formula for calculating damages should liability be found, thus dispensing with the damages dispute altogether. The parties may agree that damages will be based on certain forms of evidence, use particular benchmarks, or be based on a particular economic model to significantly narrow the dispute. Or, at the very least, the parties may agree to damages caps such that the maximum exposure (or exposure per unit of revenue) is known up front. This can be particularly comforting to a potential patent defendant who is giving up a right to appeal and thus encourage arbitration.

The arbitration agreement may also specify whether interim or equitable relief will or will not be available, including the availability of preliminary or permanent injunctions.

Claim Construction

The most significant event in any patent litigation is claim construction—the process by which the Court determines the meaning of disputed terms in the asserted patents. Two decades ago, the Supreme Court confirmed that in a patent litigation, claim construction is to be determined by the judge and not the jury.[3] Nonetheless, commentators as well as some judges have questioned whether the judiciary has the expertise to properly interpret patents.[4] That said, the parties give up significant procedural safeguards by turning to arbitration, and therefore the parties may wish to specify ground rules for claim construction and require a reasoned opinion from the arbitrator.

Patent Invalidity

In virtually every patent dispute, the party accused of infringement challenges the validity of the asserted patents. An invalidity challenge may be based on prior art, meaning that the patented invention is not new and non-obvious, but was disclosed in (or an obvious advance over) prior patents, technical publications, or actual devices. An invalidity challenge may also allege that a patent is invalid because the patent claims are indefinite or the patented invention not adequately or sufficiently described in the patent itself. Often, a validity challenge is used by an accused infringer to rein in the scope of the patent to support a non-infringement defense. The accused infringer proposes a narrow claim construction and further argues that if the patent were construed more broadly, it would be invalid over the prior art. If this is the likely strategy, the parties may wish to specify in the arbitration agreement that questions of infringement, validity, and claim construction should be decided together.

On the other hand, if the invalidity challenge is expected to be an independent attack on the asserted patents, the parties may agree that invalidity based on prior art will be submitted to the Patent Office through its post-grant proceedings, such as *Inter Partes* Review proceedings (IPR) before the Patent Trial and Appeal Board. Such an agreement would greatly simplify the arbitration (and thus reduce costs and increase predictability) and leave the question of patent invalidity to the experts at the Patent Office. Another option would be to stage resolution, deciding the question of infringement first, and only if infringement is found, proceeding with an arbitration on the question of invalidity.

These are just some of the issues parties should consider when drafting an arbitration agreement. Careful thought up front will avoid an arbitration free-for-all and thus provide a relatively inexpensive dispute resolution process for patent disputes. ■

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Endnotes

[1]AIPLA 2015 Report of the Economic Survey

[2]Parties are generally free to craft their own arbitration agreements for patent disputes, which will be fully enforceable in Federal Court. *See, e.g.,* 9 U.S.C. § 9.

[3]*Markman* v. *Westview Instruments, Inc.*, 517 U. S. 370, 372 (1996) ("the construction of a patent, including terms of art within its claim," is "exclusively" for "the court" to determine).

[4]*See, e.g.*, Kimberly A. Moore, "Are District Court Judges Equipped To Resolve Patent Cases?," Harvard Journal of Law and Technology, Vol. 15, No. 1 (2001) (now Judge Moore, sitting on the Court of Appeals for the Federal Circuit).

Step Out of the Zone of Comfort: Make a Reasonable Aggressive Settlement Offer in Mediation

by Lisa A. Amato

Let's state the obvious. Mediation is a concentrated process in a continuation of negotiations. In a negotiation, parties that reach an agreement have succeeded in delicately engaging in and reasonably managing competitiveness and cooperation for the sole benefit of achieving their goals. Mediation provides a unique moment in the negotiation process where the attention of the parties and legal counsel are focused on the case without distraction.

When mediating business disputes, I see a critical opportunity that parties sadly fail to seize - the strategic advantage of anchoring the negotiation by making a reasonably aggressive initial settlement offer based on relevant numbers. This opportunity exists regardless of which party made the last settlement offer or demand, or when that last offer or demand was made.

The negotiation strategy of anchoring has been thoroughly analyzed and discussed as a psychological tool.[1] Studies have produced overwhelming evidence that there is much to gain by making a reasonably aggressive initial settlement offer. A reasonably aggressive settlement offer based on relevant numbers creates a strong pull throughout the negotiation to such an

extent that it influences the other party's judgment even when that party desperately tries to discount it.[2]

Time and again, parties in mediation struggle with identifying their initial settlement offer that day which is unfortunate because it is a wonderful opportunity to anchor the settlement negotiations in that party's interest. This opportunity exists regardless of whether the parties have been negotiating in advance of the mediation or whether one party has yet to respond to a party's initial settlement demand. The mediation process provides a prime opportunity for any party to set the stage for its best possible negotiated outcome regardless of the earlier negotiation strategies used, assuming of course that the parties have maintained professionally respectful adversarial roles.

A lot has been written, discussed, taught, and analyzed about the anchoring effect of numbers, yet, few parties seize upon the opportunity to effectively focus the mediation around their settlement goals. Making a reasonably aggressive settlement offer based on relevant numbers can establish the parameters of the settlement zone by managing the other party's expectations and guiding the terms of the ensuing settlement discussion. While the other party may dismiss the initial settlement offer, she will be forced to think within the parameters that have been set by it. An unreasonably aggressive settlement offer, not based on relevant numbers, fails to harness the full power of anchoring the settlement negotiations.

In litigation, the plaintiff makes a settlement demand, either in the form of a demand letter, or by filing a complaint. Frequently, that initial demand is beyond the bounds of what could be considered a reasonably aggressive settlement demand based on relevant numbers. Such an aggressive settlement demand is unproductive to negotiations while perhaps being necessary to allow for the determination of damages during discovery.

An unreasonably aggressive settlement offer or demand not based on relevant numbers is not helpful to the negotiation. Unreasonably aggressive settlement offers tend to teeter toward absurdity. They cross a line of plausibility and trigger the other party to shut down the negotiations resulting in the loss of valuable time during the concentrated negotiation opportunity available in mediation. This is not news to anyone. It occurs when one party makes a settlement offer to which the other party has no desire and sometimes no motivation to respond. That absurdly aggressive offer is a non-starter, a negotiation killer. Unfortunately, all too often this scenario plays in mediation regardless of how extensively the parties have been negotiating in advance of the mediation.

Experienced litigators and negotiators know that there is no substitute for being very well prepared for the mediation. That means having command of the facts and an understanding of how the rules of evidence impact the case facts. Inadequate preparation leaves a party unprepared and disadvantaged when valuing settlement offer. It is essential to make realistic assessments of the possibilities of success of all parties and to identify settlement terms that are important to all parties. A reasonably aggressive initial settlement offer should be structured based on the strength of all parties BATNA (the best alternative to a negotiated agreement) and WATNA (the worst alternative to a negotiated agreement), the target at which the goals would be fulfilled (also known as the "aspiration base"), and the bottom line beyond which BATNA is triggered (also known as the "real base"). Thoughtful evaluation allows a party to structure an initial settlement offer designed to test how much or how little the other party may be willing to accept.

There are certainly times, despite legal counsel and clients arriving prepared to a mediation, well-informed about the facts and the law, and having identified flexible step offers to make throughout the mediation, that the other party's initial settlement offer is absurdly aggressive setting the well-prepared party into an unnecessary tailspin. In this situation, the most effective negotiation strategy is to circle back to the preparation that was done, focus on the desired outcome for the mediation, and seize the opportunity to anchor the negotiation with a reasonably aggressive settlement offer.

Conclusion

The opportunity to anchor settlement negotiations frequently exists for any party during the initial settlement offers in mediation, regardless of who made the first settlement offer. The effectiveness of the anchor is wholly dependent on the party's preparation and commitment to its settlement strategy. A reasonable settlement offer based on relevant numbers is far better suited to guide the negotiations on a successful negotiation trajectory rather than a knee jerk reaction to the other party's settlement offer for the sole purpose of "sending a message." ■

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Endnotes

[1]Adam D. Galinsky studies and writings on the anchoring effect of numbers in negotiations are foundation for anyone desiring more information about this negotiation strategy. Adam D. Galinsky, *Should You Make the First Offer?* (Harvard Business Review, Negotiation, Decision-Making and Communication Strategies that Deliver), July 1, 2004.

[2]"People tend to irrationally fixate on the first number put forth in a negotiation—the anchor—no matter how arbitrary it may be. Even when we know the anchor has limited relevance, we fail to sufficiently adjust our judgments away from it." PON staff, *Integrative Negotiation Examples: Effective Anchors as First Offers*, December 22nd, 2015, accessed on January 20, 2016, http://www.pon.harvard.edu/daily/negotiation-skills-daily/effective-anchors-as-first-offers.

The Best Laid Plans of Legislators and Mediators: The Case for Broadening the Scope of Mediation Confidentiality

by Cameron G. Stout

I. Introduction

The past three decades have seen the explosive growth of mediation. In California alone, hundreds of thousands of cases that otherwise would have clogged its Courts have resolved through mediation[1]. Confidentiality is a central pillar of the mediation process. California currently provides one of the most ironclad mediation confidentiality protections ("Protections") in the country. It renders mediation communications inadmissible in any civil legal proceeding. Unfortunately, the California Law Revision Commission ("CLRC") is considering exceptions which, If passed, would be, in certain important respects, nearly as porous as those codified in the Uniform Mediation Act ("UMA").[2]

The prospects of (1) weakening California's mediation confidentiality, and (2) maintaining the overbreadth of the UMA's confidentiality exceptions, threaten the viability of mediation as an alternative to litigation. The author submits that the objections of highly experienced California mediators[3], judges and lawyers to the proposed California confidentiality exceptions are well-placed, and should also inspire an overhaul of certain of the UMA's confidentiality exceptions.

II. California's Current Confidentiality Protection

California's narrow confidentiality exceptions are codified in California Evidence Code sections 703.5 and 1115-1128. Subparts (a) & (b) of section 1119 provide that,

"No evidence of anything said, or any admission made [or writing prepared] for the purpose of, in the course of, or pursuant to, a mediation [collectively, "Mediation Communications"] is admissible or subject to discovery" in any non-criminal proceeding.

With several narrow exceptions not pertinent here, section 703.5 renders mediators incompetent to testify in any civil proceeding about any Mediation Communication.

The California Supreme Court has characterized the Protection as "clear and absolute," and affirmed that it "broadly provid[es] for the confidentiality of things spoken or written in connection with a mediation proceeding." *See*, *Cassel v. Superior Court*, 51 Cal. 4th 113, 117-118 (2011). Nothing could be more definitive, and yet….

III. The State of Play in California

In early 2012, a threat to the Protection's "clear and absolute" nature materialized when California Assembly Bill 2025 was proposed to create a new mediation exception: Mediation Communications between a party and his or her attorney would be ***admissible*** in a legal malpractice, breach of fiduciary duty or State Bar disciplinary action in which the client's claims against the lawyer arise out of professional negligence or misconduct. (The "Attorney Misconduct Exception.")

In the face of vehement objections, studies such as the CLRC's "Study K-402" were undertaken. Yet, on August 7, 2015 the CLRC voted to draft legislation that would allow admission of Mediation Communications relevant to a party's allegation of his or her lawyer's misconduct at mediation. Objections to the CLRC's decision reached a crescendo.

In response, the CLRC, to its credit, voted on October 8 to narrow its proposed Attorney Misconduct Exception in several ways:

- Keep Code section 730.5 intact. Mediators would remain incompetent to testify in Attorney Misconduct cases (other than in State Bar disciplinary proceedings).
- Maintain the Protection in any mediator misconduct case.
- Retain the finality of mediation settlements.
- Only allow the admission of Mediation Communications in Attorney Misconduct Actions but not in other related matters.
- Provide for an *in camera* review before subpoenas may issue.

Despite these restrictions, however, a real possibility still exists that the Attorney Misconduct Exception will become law in California. If this happens, mediation confidentiality will be compromised, and the viability of the process could be significantly thwarted. For the same reasons, serious thought should be given to narrowing the UMA's similar confidentiality exceptions, as explained in the next section.

IV. *The UMA's Broad Exceptions to Confidentiality*

As the situation in California sorts itself out, it is also important to analyze the UMA's exceptions to the Protection through the California lens. UMA section 4 does provide that, absent waiver or an applicable exception (enumerated in Section 6), Mediation Communications are generally inadmissible. Parties, the mediator and non-party participants also may refuse to disclose them. It is in the details of confidentiality exceptions 5 and 6, however, that we encounter the legislative Devil[4]. Those sections may be summarized as follows:

- A Mediation Communication is not protected if it is introduced in a subsequent proceeding against the ***mediator*** involving his or her alleged professional mis-

conduct or malpractice.

- None of the people listed in exception 6 can invoke the Protection if a Mediation Communication is used in a later claim of professional misconduct/malpractice during the mediation against a party to it, her representative, or a non-party participant.[5]
- As set forth in Section IV *infra*, the UMA's overbroad exceptions, particularly those requiring the mediator's later testimony (California does not have such an exception) erode mediation confidentiality, and the effectiveness of the process itself.

V. **Why an Attorney Misconduct Exception is Counter-productive**

For a mediation to be effective, ***all*** participants must be free to discuss the case's strengths and weaknesses with unvarnished candor, confident that "what is communicated in mediation stays in mediation." If this protective shield is compromised, however, the parties and their counsel will continually be looking over their metaphorical shoulders, focused more on how the admission of evidence of their frank comments could affect them later, and less on working to resolve the case.

California's proposed exception (and the UMA) also hobble the mediator's effectiveness. For example, if this exception becomes law in California, could a mediator truthfully tell the participants that all Mediation Communications are confidential, and inadmissible in another civil legal matter? Must a mediator proactively advise that confidentiality has important exceptions? How do mediators in states that have adopted the UMA address these issues?

While the CLRC's goal of protecting legal service consumers during mediations is well-intended, the author is not aware of any reliable evidence that a significant number of clients have sued their attorneys based on mediation conduct. Concerns about this relatively insignificant issue pale in comparison to the deleterious effect that carving out this proposed exception to the Protection would have.

Mediation confidentiality does represent a policy choice. As here, evidence exclusion is often necessary. It allows participants in a mediation to determine the best available settlement, and, should they choose, to settle the dispute accordingly. If that Protection is abrogated, however, and the client files a claim against his or her lawyer for tortious advice or other mediation misconduct (*e.g., Cassel, supra*), that lawyer will undoubtedly seek admission of ***all*** relevant Mediation Communications to rebut the client's claims. This would pose a grave threat to the crucially important benefit of predictable confidentiality concerning Mediation Communications.

VI. Conclusion

The CLRC should be persuaded to abandon the proposed Attorney Misconduct Exception to California's Protection. Moreover, if the UMA's exceptions are not tightened, other states considering the UMA should adopt it, if at all, without its broad exceptions. Mediation is by far the most effective way to manage the overwhelming volume of litigation in this country; it must be nurtured, not dismantled. ■

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Endnotes

[1]Even the *Bible* urges swift settlement: "Come to terms quickly with your accuser while you are going with him to court, lest your accuser hand you over to the judge, and the judge to the guard, and you be put in prison." *Matthew,* 5:25 (ESV).

[2]A number of states (*excluding* California) have either adopted the UMA or are considering it. Although beyond this article's scope, the UMA's broad confidentiality exceptions may well have been a reason for California's decision not to adopt the UMA.

[3]The author is indebted to Ron Kelly, a highly regarded California mediator and leading commentator on the broad changes that are under consideration to California's confidentiality exceptions. Those with an interest may contact Mr. Kelly via his website, www.ronkelly.com, to be included on his mailing list for updates on this vital issue.

[4]While many family law experts undoubtedly object to the UMA's seventh exception involving issues arising in the family law/child abuse context, this exception is also outside this article's ambit.

[5]Thank goodness for small favors: mediators cannot be compelled to give testimony relating to such claims. (*See*, UMA section 6(c).)

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